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The future of extension of collective agreements in Estonia

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15 January 2009

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Executive summary

This is a report on extension of collective agreements in Estonia, how the current regulation works and how it could be improved in the future. It is the result of research carried out by two independent experts commissioned by the Ministry of the Social Affairs of the Republic of Estonia, who have evaluated the Estonian system in the light of relevant international labour standards and the various practices in the European Union and its member states. The researchers visited Tallinn twice in order to collect material and conduct interviews with the social partners and the Ministry of Social Affairs. A study of the systems for extension in five EU/EEA Member States was made, as well as an analysis of the impact of international instruments and EU regulation on the issues of relevance for Estonia.

Against this background, the authors conclude that there are especially three features in the present Estonian system that are problematic from the fundamental rights aspect.

One is the seemingly unconditioned possibility for enlargement of a collective agreement by any social partners, the second one is the lack of any real representativeness criterion for those organisations that can decide to enlarge or extend their agreement and the third is the lack of any possibility for outside employers who will be affected to express their view in any form of consultation before a collective agreement is extended.

However, according to the authors, these problems can be addressed in a way that takes into consideration the interests of all parties concerned. To this end they suggest:

- The future system should be further developed in line with the present tradition, where the social partners play the decisive role for the extension of collective agreements.
- A requirement of representativeness should be introduced, so that only the most representative organisations for employers and employees will be able to extend their collective agreements.
- The possibility to enlarge collective agreements outside their actual scope should not be retained. However, if necessary, the confederations that are representative for tripartite consultations at national level could be given “a social mandate” and acknowledged as representative for concluding collective agreements that can be extended to cover the whole labour market.
- Another prerequisite in order for a collective agreement to be extended should be that the scope of application is clear and transparent (so that third parties know whether they are bound or not).
- The types of provisions that can be extended, today restricted to provisions on wages and working time, should include provisions on annual holidays.
- Certain procedural requirements should be introduced which will give third parties a possibility to submit their observations and in order to establish a legality control of the extended agreements.

1. Background and structure of the report

1.1 *The expert mission*

In September 2008 the Authors of this report were commissioned by the Ministry of the Social Affairs of the Republic of Estonia to conduct research on the extension of collective agreements in Estonia. The research contract specified that the object of the research was to present an evaluation from the point of view of independent experts on international labour law of the Estonian current regulation of extension of collective agreements, and to present suggestions for improvements.

The research should take into consideration all the relevant national and international provisions and practices as a whole, and point out positive and negative sides of the current regulation in Estonia. It should also include a comparison between different countries' extension mechanisms and practices. The research should suggest the best solution for extending the collective agreements, taking into account Estonian peculiarities (especially geographical dimension, mass of micro and small enterprises, low trade union membership).

It was explicitly agreed that the research should address the following questions:

1. Is the Estonian current regulation on extension the collective agreements in accordance with the international labour standards, including International Labour Organization Convention No 98 and Recommendation No 91?
2. Does the current regulation disproportionately affect the freedom to engage in business and is it therefore to be regarded to be contrary to the Constitution of the Republic of Estonia?
3. What kind of shortcomings and risks are hidden in the current regulation?
4. Who and how should decide the matter of extension taken into account that the international practice acknowledges extension decisions made by judicial authorities or tripartite bodies.
5. Can the matter of extension be one of the subjects of collective bargaining and the source of a collective labour dispute?
6. Should there be established some kind of preconditions for the extension? If yes, please specify.
7. Which is the best model for extension of collective agreements in Estonia? International labour law acknowledges extension, enlargement and combined models.
8. Description of the rules on procedure of an optimum extension.

The research was to be conducted by 15 December 2008, but on mutual agreement the dead-line was extended to 15 January 2009. The researchers visited Tallinn twice during the project in order to collect material and conduct interviews with the representatives of the social partners and the Ministry of Social Affairs. During the first trip (19.9.2008) they interviewed representatives of the Confederation of Estonian Trade Unions (Harri Taliga and Tiia E. Tammeleht) and the Ministry (Thea Treier and Marko Talur). Due to unfortunate circumstances, during the first trip they were not able to meet with

representatives of the Estonian Employers Confederation, but professor Niklas Bruun conducted, following the advice given by its chairman Tarmo Kriis, an interview by telephone with the lawyer Heddi Lutterus. During the second trip (12.12.2008) a draft report was discussed with the representatives of the Ministry and separately in a tripartite meeting.

1.2 The structure of the report

The report is structured in the following way. The introductory chapter is followed by a comparative chapter in which we present the main features of the systems for extension of collective agreements in Finland, Germany, France, Belgium and Norway. On the basis of this presentation we also draw some general conclusions concerning the functioning of an extension system.

In chapter 3 we shortly present the main features of the present Estonian system for extension of collective agreements. In chapter 4 we analyse the impact of international instruments and EU-regulation on the issue of extension and in chapter 5 we give our recommendations and conclusions.

1.3 Definitions

When we use the expression “extension” we refer to a mechanism that makes a collective agreement generally applicable on all employment relationships within its own scope, irrespective of whether the employer or its employees are members of the parties to the agreement.

With the expression “enlargement” we refer to a mechanism that provides for a collective agreement to apply outside its own actual scope, for example in another geographical or sectoral area.

Collective agreements that are extended or enlarged can also be described as being “generally applicable”.

2. Extension of collective agreements in the EU/EEA Member States – comparative aspects

A large majority of EU/EEA Member States, 21 of 30, have systems for extension of collective agreements, including eight of the twelve countries that joined the EU in the two latest rounds. Actually, there is a similar mechanism even at EU level, where agreements concluded between labour and management are implemented by Council decisions in the form of Directives (art. 139(2) EC), which is described in chapter 4 of this report.

In the younger Member States, the experiences of these mechanisms are still rather new. For example even though it exists in Poland, it seems as if the competent authorities have never made use of this possibility. However, in the older market economies there is a long tradition of extension of collective agreements. Thus, there is a large fund of

empirical experience of how different solutions function in differing national contexts. This chapter describes some examples that represent different approaches to the issues at stake in Estonia, and that may be of relevance for the debate over the reform of the Estonian system for extension of collective agreements. Thus it does not describe all systems for extension within EU/EEA.

If it nevertheless seems long, it is because it would be meaningless if it does not contain enough information for the reader to get some sort of understanding of how the systems described function.

2.1 Finland

In Finland, like in the other Nordic countries, trade union density is high: 77,8 % in 2001 according to the OECD. The trade union movement is unified and there is little competition between individual trade unions. Thus the representativeness of the organisations as such has never been an issue in Finland.

Consequently, the coverage of collective agreements is also high, even counted except those who are covered through the extension mechanism that Finland has. According to the Ministry of Labour 87 % of the workers in Finland have collectively agreed employment conditions. Only 5 – 7 % of these are covered thanks to extension. With its very broad coverage, this system in practice serves as a kind of minimum wage regulation.¹. This being so, Finland has no statutory minimum wage.

When the system of extension was introduced in Finnish legislation in the beginning of the 1970s, there were some worries on the trade union side that this would lead to a falling rate of organisation. Why would people join a trade union if they could get all the benefits without paying the membership dues? This fear turned out to be unfounded. Membership has increased considerably since then.

2.1.1 The collective agreement and its extension

The Finnish system for extension of collective agreements resembles that in Estonia from the aspect that it depends on the social partners' own strength whether a collective agreement will be generally applicable or not. However, unlike in Estonia the state has a controlling function.

According to Chapter 2 Section 7 of the Employment Contracts Act of 2001, employers who are not bound by a collective agreement as members of a signatory employers' organisation must guarantee its employees at least those working and employment conditions that are laid down in national collective agreements considered representative for the sector in question ("generally applicable collective agreement"). This means that all nation wide collective agreements deemed to be representative are generally binding. This cannot be questioned. However, the general applicability does not come into force until a special Government committee has established that the collective agreement is representative for the sector.

¹ Ahlberg & Bruun p. 121

Prerequisites for extension

What can be questioned though is whether a collective agreement fulfils the criteria for being extended. The criteria are

- that its scope is nation wide
- and that it is considered to be representative for the sector.

Before the reform of the Employment Contracts Act in 2001, decisive for establishing whether a collective agreement was generally applicable or not was how many employees worked for employers belonging to the relevant employers' organisation. At least around 50 % of the employees must be covered by the agreement if it should be deemed as generally binding.² With the new Act, these criteria are made more flexible. Still, the basis for assessing if a collective agreement is representative for the sector is statistical data on its coverage. However, additional criteria will be taken into account, such as the levels of trade union membership and if there is an established practice of collective agreements in the sector.³

As a representative collective agreement is by definition generally applicable, its extension cannot, as for example in France, be made with reservation for parts of its content. Neither can it be extended to another sector. However, within the sector its personal scope is extended, since the employer must apply the provisions of the collective agreement not only on employees who perform work covered by the agreement, but also to those who perform comparable work.

The procedure

At the same time, a Government committee was set up within the Ministry responsible for health and safety issues, with the task of confirming which collective agreements should be considered representative and thereby generally applicable. No application or proposal for extension is required; the Committee makes its investigations *ex officio*. However, the employers must submit all collective agreements to the Ministry within one month after their conclusion, and the signatory employers' organisations and trade unions are required to give in different kinds of statistics, which enables the Committee to evaluate the representativeness of the collective agreement.

When the Committee confirms that a collective agreement is generally applicable, it also decides from which date it is to be applied by employers who are covered by the extension. Normally this date coincides with the date when the agreement itself enters into force. The decision is published in the Government's official publications. According to the Act all generally applicable agreements must be available free of charge on a public web site.

² Op.cit. p. 125

³ *Dispute over Employment Contracts Act resolved*

The parties to the agreement as well as any employer or employee that would be affected by the extension may lodge an appeal before the Labour court against the decision, whether it is positive or negative. The only thing that can be subject to the Court's trial is whether the legal criteria for representativeness are fulfilled or not.

Effects of the extension

Chapter 2 Section 7 of the Employment contracts act imposes a unilateral obligation on the employer to give its employees at least the employment and working conditions laid down in the generally binding collective agreement. There is no corresponding obligation on the employee to conform to its provisions.

Extension of collective agreements in practice

There was considerable disagreement before the new criteria for representativeness could be adopted. After the first year of their existence, the Committee had examined the representativeness of a number of collective agreements whose status was unclear. In the vast majority of cases the decision could be made simply with reference to the 50 % coverage criterion. Only in three cases it had applied the new, additional criteria.⁴

In 2006, a federation of small and medium sized companies, Federation of Finnish Enterprises, lodged a collective complaint to the Council of Europe claiming that their negative freedom of association according to the European Social Charter was violated by the way the Finnish system for extension of collective agreements is framed. However, the European Committee on Social Rights held that the negative freedom of association had not been infringed (see chapter 4 in this report).

2.2 Germany

In Germany, around one fourth of the workers, 23,2 % in 2002 according to OECD, are organised in trade unions. The rate of organisation is higher on the employers' side than on the trade union side, 65 % in 2000. This explains why the collective agreements coverage is still rather high (63 % in 2000 according to OECD) in spite of the fact that extension of collective agreements is used only in exceptional cases.

As a general rule, both employers and trade unions in Germany have long favoured the idea that wages are to be regulated by themselves, without state intervention. For example, Germany has no statutory minimum wage and until recently there has been quite a broad consensus that there should not be one. However, since the mid 1990s, collective wage formation has been eroding⁵. As a consequence, the Government has step by step relaxed the conditions for extending the provisions of collective agreements, and in 2008 it proposed new legislation which would enable it to lay down minimum wages for sectors where the prerequisites for extending a collective agreement do not exist.

⁴ *Committee completes examination of "general validity" of collective agreements*

⁵ Blanke & Rose p.5 et seq.

Today, a large majority of the trade unions – together with some of the employers’ organisations – are in favour of a statutory minimum wage.⁶

2.2.1 Organisations and negotiations

The vast majority of trade unions are affiliated to the same confederation, *Deutsche Gewerkschaftsbund* (DGB), and do not compete with each other. On the employers’ side, the dominant confederation is *Bundesvereinigung der Deutschen Arbeitgeberverbände* (BDA). Some of the largest companies are not organised and consequently not covered by the sectoral collective agreements, but they conclude their own collective agreements with unions affiliated to the DGB.

Due to this organisational unity, the representativeness of trade unions and employers’ organisations has never been a big issue in Germany. The only situation where some kind of representativeness criterion is applied is when a collective agreement is declared generally binding, and in that case the representativeness is linked to the agreement, rather than to the organisations *per se*.

Also, there is no legal framework for the bargaining procedure. The social partners are free to decide when, how and with what organisations they are to negotiate.

2.2.2 The collective agreement

According to section 3 of the Act on collective agreements (*Tarifvertragsgesetz, TVG*) the collective agreement is binding on the signatory parties and their members. Thus, the employer is not obliged to apply its normative provisions to the contracts of non-organised workers. However, virtually all employers who are bound by a collective agreement prefer to treat their non-unionised employees equal to the trade unions members.⁷

2.2.3 Extension of collective agreements

Germany’s rules on the extension of collective agreements (*Allgemeinverbindlicherklärung*) are rather restrictive compared to the law of other EU/EEA Member States. The present Act on collective agreements dates back to 1949 and its provisions are heavily influenced by the military administration of the allies which almost dictated the final wording of the § 4 on extension of collective agreements. The British and, even more, the US officers, were against the extension mechanism in the first place.⁸ When they could not stop it, at least they would restrict its use as much as possible.

In Germany, extension of collective agreements is not primarily intended as a means to guarantee a certain level of social protection, but as a means to prevent the undermining of the collective agreements system as such, which is seen as a suitable means of securing both decent working conditions and industrial peace. Consequently, the state intervenes

⁶ Schulzen

⁷ Ahlberg & Bruun p. 23; Blanke & Rose p. 11

⁸ Ahlberg & Bruun p. 25 et seq.

when the situation is such as it may appear more advantageous to workers and employers not to join or to even leave the trade unions and employers' organisations, which could happen when unemployment is high and people may be ready to accept inferior working conditions just in order to get a job.

Prerequisites for extension

Extension of collective agreements is decided by the Minister for labour and social affairs. Normally, the most important prerequisites that must be fulfilled are:

1. At least one of the parties to the agreement must propose that it should be declared generally binding. Thus if none of them is interested, the collective agreement cannot be extended.
2. The employers already bound by the collective agreement must employ at least 50 % of the workers within its scope.
3. Extension of the collective agreement must be deemed to be in the public interest.
4. A majority in a committee with equal representation for the confederations of employers and trade unions (*Tarifausschuss*) must support extension. This means that either side can block it.

The minister has a rather wide margin of appreciation when he or she decides whether extension is in the public interest or not. The Minister's judgment can be challenged only if the decision is clearly indefensible and disproportionate in relation to the aim of the extension mechanism and the public and private interests that the minister has to take into consideration – including the interests of the parties to the agreement.⁹

If the *Tarifausschuss* supports extension the Minister normally deems that it is in the public interest. But it has no means of forcing the Minister to decide in favour of extension, as he/she acts under official responsibility.

The decision must extend the collective agreement as it is, i.e. the Minister cannot change any of its provisions or extend its scope. Thus in Germany it is not possible to extend the binding force of a collective agreement outside the scope agreed by the parties (enlargement). On the contrary, sometimes the minister abstains from extending it to all employment relations within its scope, in order to avoid objections from trade unions or employers that are bound by other collective agreements. This is not controversial.

The prerequisites described above apply in all normal cases. However, in exceptional cases two of them will not apply. If extension of a collective agreement is required in order to raise a state of social emergency, the Minister may declare the collective agreement generally binding even if it does not cover 50 % of the workers concerned. And if there is a social emergency, the Minister does not have to consider whether extension would be in the public interest – this is a matter of course.

⁹ Op. cit. p. 30

The procedure

When an application for extension is filed by one or both signatories to the collective agreement, the application is published in the official publication *Der Bundesanzeiger* after which employers and workers as well as trade unions and employers' organisations that may be affected have at least three weeks to submit their written comments.

After this period has elapsed, the *Tarifausschuss* is convened. The date and place of this meeting is also announced in *Der Bundesanzeiger* and any interested party is invited to attend the hearing and give their oral comments. All this forces the ministry to refute all objections and carefully examine if the prerequisites for extension are at hand. It especially controls that the requirement of 50% coverage is fulfilled, as this can be tried in full in court.

The decision to extend the collective agreement is also published in *Der Bundesanzeiger*, whereby it comes into force. The decision may have retroactive effect.

Effect of the extension

The effect of the extension is that the normative provisions of the collective agreement binds all employers and employees within its scope in the same way as it binds those directly covered.¹⁰ The contractual provisions will, as before, only bind the contracting employers' organisations and trade unions. Among other things this means that employers and employees covered through the extension are not bound by the peace obligation that the collective agreement involves, as this is seen as a contractual obligation.

Extension according to the Posted workers Act

From the beginning of the 1990s the German employers' confederation has been increasingly unwilling to support extension of collective agreements in the *Tarifausschuss*, sometimes even in opposition to the employers' organisation that is party to the agreement, like the building industry employers.¹¹ As a consequence the legislator changed the Posted Workers Act (*Arbeitnehmer-Entsendegesetz*) in December 1998, making it possible to extend provisions on wage, annual holidays and holiday funds in collective agreements by Decree without consulting the *Tarifausschuss*. As in the procedure according to the TVG, any interested party will be invited to submit its written observations before the Ministry takes its decision, but there will be no public hearing.

Even though this simplified procedure is regulated in the Posted workers act, the extended provisions are equally binding on foreign and domestic employers. Originally it could be used for the building industry only, but in 2006 the Act was amended again to include industrial cleaning and from 2007 also collective agreements for mail delivery services can be extended according to the Posted workers act.

¹⁰ Op. cit p. 34 et seq.

¹¹ *Dispute over extension of collective agreements in the building industry*

Extension of collective agreements in practice

Compared to in Finland and in France (see below), where the presumption is that every collective agreement that fulfils the legal criteria should be extended, only a small proportion of German collective agreements are declared generally binding. In spite of its small incidence, extension of collective agreements has been questioned both from legal and economic point of view.

Several cases have been brought before Germany's Constitutional court, where the applicants have claimed that the system of declaring collective agreements generally binding conflicts with the Constitution. Some have argued that as the Constitution lays down very strict rules for how the state can exert its law making powers, there simply is no room for another type of state norm setting besides this. Others have claimed that it infringes the negative freedom of association. A third line of reasoning has been that the procedure is not transparent enough. However, the Court has consistently held that the system is in conformity with the Constitution.¹²

On a small scale even from the beginning, today the share of extended collective agreements is decreasing further. In 1991, 5,4 % of the collective agreements were extended, in 2007 the figure was only 1,5 %.¹³ This is due not only to the employers' increased resistance to using the extension mechanism, but also to the fact that they are more and more leaving the collective agreement system as such. As a consequence, fewer and fewer collective agreements fulfil the condition of 50 % coverage.¹⁴

This occasioned the Government coalition in 2008 to propose additional changes to the Posted Workers Act that would enable the Ministry or the Federal Government to extend the provisions on wages in collective agreements for any sector.¹⁵ Also, it proposed amendments to the Act on minimum working conditions from 1952 (*Mindestarbeitsbedingengesetz*) which would relax the conditions for laying down minimum working conditions (here wages) in sectors where there are no collective agreements at all, or where their coverage is so low that they do not fulfil the conditions for being declared generally applicable.¹⁶

If both these proposals are adopted, the German Government will have instruments for laying down statutory minimum wages for all sectors of the economy. The Government has justified this deviation from the traditional German approach to how wages are to be decided with the shrinking coverage of collective agreements. If someone is to "blame", it is those who for 25 years have argued that there must be an end to "social partnership" and that collective agreements are a bad thing. When wages are not left to self regulation

¹² Ahlberg & Bruun p.37 et seq.

¹³ Schulten

¹⁴ Blanke & Rose p. 16 et seq.

¹⁵ *Regierungsentwurf Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen*

¹⁶ *Regierungsentwurf Erstes Gesetz zur Änderung des Gesetzes über die Festsetzung von Minderarbeitsbedingungen*

by the social partners, you will get protection by the state instead, the competent Minister declared before the Bundestag.¹⁷

2.3 France

In France, similar to in Estonia, trade union density is not very high: 9,6 % in 2001¹⁸. Nevertheless, collective agreements cover 90 – 95 % of the workers in France. This is explained partly by the unusually high degree of organisation on the employers' side, 73 % in 2000 according to OECD, partly by the fact that the French Government makes much use of the possibility to extend collective agreements and giving them *erga omnes* effect. There is a comprehensive and detailed legislation on almost every aspect of individual and collective labour relations, *Code du Travail*, but since the beginning of the 1980s, Governments of varying political colour have put much effort in encouraging the social partners at all levels to negotiate collective agreements. Another characteristic is that in France, the employers have favoured extension of collective agreements to the same extent as the trade unions have – sometimes even more.

Behind this lies an ideal image of the collective agreement as “the negotiated law of the profession” signed by all representative trade unions and employers' organisations and regulating all aspects of the employment relationship.¹⁹) Due to the fragmentation of the trade union movement this ideal has not been easy to uphold. Therefore, at the same time as the state favours bipartite collective bargaining, it pursues the French tradition of state intervention in the relations between management and labour - in order to promote collective bargaining.²⁰ Thus the realities are a little separated from the ideal picture.

2.3.1 Representative organisations

In addition to the low rate of organisation, workers in France are divided in many competing trade unions which often question each others' representativeness. Being acknowledged as representative is very important, as, according to Article L.2231-1 C. trav., only representative trade unions are able to conclude collective agreements in the legal sense²¹. In 1966 five major trade union confederations were declared representative by a decree, which meant that all their affiliate trade unions were assumed to be representative as well. Thus, ever since then they have had the authority to conclude collective agreements everywhere and at all levels, and their representativeness was irrefutable. However, in 2008 *Code du Travail* was subject to a thorough reform, and completely new rules on representativeness were introduced.

From now on, the trade unions' representativeness will be established for each level of negotiations and according to the following criteria (L.2121-1 C.trav.):

¹⁷ 1. Lesung Arbeitnehmer-Entsendegesetz und Mindestarbeitsbedingungengesetz – BMAS

¹⁸ According to OECD

¹⁹ Ahlberg & Bruun p.53

²⁰ Op. cit. p. 42 et seq; Vigneau & Sobczak, p.31 et seq

²¹ However, since 2004 the trade unions no longer have a monopoly on concluding collective agreements at company level. In companies where there is no trade union representation, collective agreements can be signed by elected representatives of the employees and workers empowered by representative trade unions. In order to be valid, such agreements must be ratified. See Vigneau & Sobczak p.34

1. respect for “republican values”
2. independence
3. financial transparency
4. at least two years experience within the professional and geographical scope at the bargaining level in question
5. the results in the elections of works councils and workers representatives
6. influence, primarily characterised by activity and experience
7. number of members and membership dues.

Even though these criteria are said to be cumulative, the most decisive is No. 5, which is further specified:

- In order to be representative at company level a trade union must obtain at least 10 % of the votes in the workplace elections (L.2122-1)
- Representative at sectoral level are trade unions that have a territorially balanced support in the sector and obtain at least 8 % of the votes in the workplace elections calculated at sector level (L.2122-5).
- Representative at national level are trade unions that obtain at least 8 % of the votes in the work place elections calculated at sector level, and that are representative in manufacturing as well as in the construction, commerce and services sectors (L.2122-9).

This means that the trade unions’ representativeness will be reviewed regularly.

Employers’ organisations do not have to be recognised as representative to be able to conclude collective agreements – unless they want the collective agreement to be extended which they very often do. For some reason, *Code du Travail* does not say anything about what criteria should determine the representativeness of employers’ organisations in these cases.

2.3.2 The negotiations

All trade unions that meet the criteria for representativeness are to be treated equally by the employers. None is more representative than another in the legal sense. This means that the employer or employers’ organisation has to invite all of them to collective bargaining. Trade unions and employers’ organisations that are bound by a collective agreement are obliged to negotiate over wages at least once a year (art. L2241-1).

When the social partners bargain at sector or multi-industry level they may aim at an agreement that can be declared generally binding for all employers and employees within the scope defined in the agreement. If they do, the negotiations and the conclusion of the agreement must take place within a commission which is composed in a specific manner. It must be either a *commission paritaire*, i.e. a commission with equal representation for representative trade unions and employers’ organisations, or a *commission mixte*, which is composed in the same way but chaired by a government official.

A *commission paritaire* will be convened by the bargaining parties themselves, and they have to be able to prove that all representative organisations have been invited and that no part of the negotiations – or the conclusion of the collective agreement – has taken place outside the *commission paritaire*.

A *commission mixte* will be convened by the competent administrative authority on the authority's own initiative or at the request of one or more social partner organisations. The role of the impartial chair is to facilitate the negotiations by giving the parties technical advice and draw their attention to problems that may arise when the project agreement will be applied. But he or she is not allowed to try to impose anything on them. The state lends it helping hand to the social partners, but must respect their autonomy. Therefore, they are the sole masters of the agreement, if there is one.

It often happens that one or more of the social partner organisations, mostly on the trade union side, do not want to participate in the negotiations, or that they take part in the negotiations but are not willing to agree to the conditions that their colleagues are. If this is the case, the employer or employers' organisation has no means to force this organisation to come to the negotiating table. It must be invited, but it is free to abstain. In particular, it is under no obligation to enter into an agreement. On the other hand, as long as it has been invited in due order, it cannot block the negotiations by failing to appear. The employer is free to bargain and enter into an agreement with the others, or even with only one of them.

2.3.3 The collective agreement

All collective agreements must be submitted to the Ministry of Labour or its regional office and to the competent labour tribunal (Art. D2231-2 – D2231-4).²²

An employer which is bound by a collective agreement is obliged by law to apply the agreement on all its employees irrespective of if, or in which trade union, they are organised (Art. L-2254-1). This has been the cause of much tension on the trade union side as some are more inclined to compromise than the others are. And as soon as one of them has signed a valid collective agreement with the employer(s) this agreement applies to all workers within its scope. Until 2004, any representative trade union, irrespective of its membership, could conclude a valid collective agreement. Thus it was often the smallest and less representative union that decided the terms and conditions for the majority. In 2004 the law was amended, so that the validity of such a collective agreement could be challenged by the majority, according to a complicated set of rules.²³ In 2008, again new rules were introduced. Thus today, it may still be sufficient that one single trade union signs the collective agreement. However, its validity is dependent both on the signatory union's representativeness and the absence of opposition from the majority (Art. L2232-2 – L2232-12).

²² Collective agreements for the agricultural sector should be submitted to the Ministry of Agriculture

²³ Vigneau & Sobczak p. 32 et seq ; Rojot p.115 et seq.

- The basic criterion is that the union or unions that have signed the agreement must have obtained at least 30 % of the votes in the workplace elections. If not, it cannot under any circumstances be valid.
- Second, even if the first criterion is fulfilled, the agreement will not be valid if it is contested by other trade unions which represent a majority of the votes in the workplace elections.

2.3.4 Extension and enlargement of collective agreements

In France there are two types of extension of the binding effect of collective agreements:

- *extension*, which is in general use, and which means that the provisions of the agreement is extended to all employers and employees within the scope specified by the agreement itself;
- *élargissement* (enlargement), which means that the collective agreement will be binding on employers and employees in another sector or another geographic area than that decided by the parties to the agreement. *Élargissement* can be used in exceptional cases only.

Prerequisites for extension and enlargement (Art. L2261-15 – L2261-23)

Extension and enlargement is decided by the minister in charge of labour issues. In order to be extended or enlarged the collective agreement must fulfil certain basic prerequisites:

- It must have a wider scope than a company agreement.
- It must be concluded between representative organisations on both sides.
- It must be negotiated and concluded in a *commission paritaire* or a *commission mixte*.

If the collective agreement is to be enlarged outside its original scope, three additional prerequisites must be fulfilled:

- Due to the absence of trade unions or employers' organisations, or due to their inability, it is persistently impossible to conclude a collective agreement for the sector/profession/geographical area. A situation where it has been impossible to change or complement an existing agreement for at least five years equals to a persistent impossibility.
- Only those collective agreements can be subject to enlargement which are before that extended to all employers and employees within its scope.
- The conditions in the geographical area or sector to which the agreement is to be enlarged must be similar to those in the area or sector covered by the extended agreement.

The starting point is that the collective agreement is to be extended in its entirety. However, art.L2261-25 explicitly allows the minister to exclude provisions that would be contrary to legislation. The minister may also exclude from extension “clauses that do not

respond to the situation of the sector or sectors”, if they can be excluded without changing the economy of the agreement. If it is debatable whether a provision is in conformity with legislation, the collective agreement can be extended without prejudice to the legislative provisions, which are to be applied instead of the agreement on these specific points.

The procedure (L2261-24 – 2261-31)

The extension procedure can be initiated by any of the parties to the agreement or by the minister in charge of labour issues. The minister is obliged to comply with a request to open the procedure.

First, in preparation of the minister’s decision, the ministry’s officials starts an investigation. They check whether the agreement has been negotiated and concluded in the right manner by the right organisations and if its scope is clearly defined. Also, they check every clause to make sure that it is not contrary to any legislative provisions.

Having finished the investigation, the ministry forwards a report to a subcommittee of the National Commission on Collective Bargaining (*Commission Nationale de la Négociation Collective*). It is composed by representatives from trade unions and employers’ organisations and chaired by a government official. The committee gives a reasoned opinion where it recommends the minister to extend or not to extend the collective agreement.

However, the minister is always free to decide. The committee can neither force through nor prevent extension.

If the collective agreement regulates wages only and nothing else, a simplified procedure is applied. In these cases, the ministry submits the agreement to the members of the committee, which will not convene unless one or more of its members asks for it (art. R2261-5).

But there is one more moment before the minister is able to take the final decision to extend the collective agreement. The proposal is published in the French Official Journal and all interested organisations and persons are invited to submit their comments within 15 days (art. D2261-3).

When the 15 days have passed, the minister completes the procedure. The decision is published in the Official Journal together with the text of the collective agreement.

As said earlier, only an already extended collective agreement can be subject to the wider form of extension, enlargement. The enlargement procedure can be initiated by any interested and representative social partner organisation as well as by the minister. With one exception, the procedure is the same as for extension. The exception is that the National Commission on Collective Bargaining is able to prevent the enlargement of the agreement, if a majority vote against.

Effects of the extension

The effect of the extension/enlargement is that the normative provisions of the collective agreement will be binding on all employers and employees within the scope decided by the minister. The obligatory provisions are, as before, only binding on the trade unions and employers' organisations that have concluded the agreement.

The appropriateness of a decision to extend or enlarge a collective agreement is a political judgment which cannot be challenged by legal means. Here the minister is sovereign. However, legal proceedings can be instituted if the minister has misjudged the facts of the case, for example if clauses are excluded with the justification that they do not respond to the situation of the sector, if the collective agreement does not fulfil the basic requirements for being extended or if the extension/enlargement procedure has not been fully complied with.

2.3.5 Statutory minimum wage

Since 1950, France also has a statutory minimum wage. Its level depends on prices and economic growth. On 1 July each year the minimum wage is revised and raised by at least half of the increase in workers' purchasing power. In addition, when consumer prices grow 2 % or more, it will automatically be raised.

The French minimum wage is comparably high. Actually, it is often higher than the lowest wages in the collective agreements, as the latter are not renegotiated as frequently as the minimum wage. The worker always has the right to the highest of these wages.

2.4 Belgium

At a quick glance, Belgium's system for collective bargaining and extension of collective agreements looks very similar to the French. In reality however, there are considerable differences.

In Belgium, trade union density is considerable, 55,8 % in 2001 according to the OECD, and unlike in France and most of the other EU/EEA countries it is not decreasing, but has been rather stable the last ten – fifteen years. The trade union movement is divided along political and religious lines, but normally the unions take concerted action in negotiations with the employers. Due to strong collective organisation on the employers' side as well, the coverage of collective agreements is estimated to nearly 70 % – before extension.

Thus, the social partners are to a great extent capable of regulating the labour market themselves. This does not mean that the state does not intervene, on the contrary, but state intervention has another character than in France. In Belgium, the state provides the social partners with an institutional structure for bipartite negotiations that enables them to conclude collective agreements for the whole private labour market. It also often encourages them to bargain on given issues "in the shadow of law", i.e. telling them that the Government will draft legislation – which they may not like – if they do not regulate the matter themselves. Another form of intervention that has been rather frequent is when the Government sets a framework for the coming round of bargaining on wages.

2.4.1 Representative organisations

Only trade unions acknowledged as representative can conclude legally binding collective agreements.

In Belgium, collective agreements concluded at intersectoral level play an important role. In order for a trade union confederation to be representative at intersectoral level it must have at least 50 000 members. Three such confederations are acknowledged as representative.

In order for a single trade union to be acknowledged as representative, it must be affiliated to one of those three confederations. No other criteria for representativeness are applied at this level.

Properly speaking employers and their organisations can conclude collective agreements without being as representative. However, only representative employers' organisations can participate in collective bargaining in the very special institutional structure that we will describe below, which is necessary if they want their collective agreements to have *erga omnes* effect.

2.4.2 Collective bargaining and collective agreements

For historical reasons, industrial relations in Belgium after World war II have been characterised by a spirit of consensus.²⁴ This has led to the establishment of a very special institutional framework for collective bargaining.

Most of the collective bargaining at sectoral and intersectoral level takes place in sectoral committees, *commissions paritaires*, or in the National Labour Council, where trade unions and employers' organisations have equal representation and which are chaired by a Government official. What distinguishes these committees from the French *commissions paritaires* is that they are permanent and established by the state, and that their members, although nominated by the social partners, are designated by the king of Belgium. Thereby they are given "a social mandate" to bargain for the whole sector/all sectors.

All organisations represented in the committee/the National Labour Council must sign the agreement if they want it to be extended.

In the first place, all collective agreements are binding on the employers affiliated to the signatory employers' organisations and all their employees, whether they are organised or not.

Second, as soon as it is registered by the competent authority, an agreement concluded in a *commission paritaire* or in the National Labour Council also binds all employers and employees within its scope. Still, unorganised employers are formally allowed to agree on other conditions with individual employees, but in practice this possibility is very

²⁴ Ahlberg & Bruun p. 71 et seq.

difficult to apply. Thus, even if there is a procedure for extension of the collective agreement, this does not add very much to the binding effect that it already has.

2.4.3 Extension of collective agreements

The possibility to extend collective agreements was introduced directly after the war. It had two aims: to encourage workers to organise and to prevent indecent competition.

Prerequisites for extension

Three conditions must be fulfilled:

- The collective agreement must be concluded in a *commission paritaire* or in the National Labour Council.
- The institution or one of the parties to the agreement must ask for its extension.
- It must not be in conflict with legislation.

Procedure

The competent Ministry examines the agreement to verify that it is not unlawful. As the representative organisations are presumed to consider the interests of third parties, there are no rules on communication with the public before it is extended. The Royal decree on extension is published in Belgium's official journal.

Effect of extension

After the extension, all employers and employees within the scope of the agreement are bound in an imperative way. Thus, the non-organised employers' formal, but in practice almost useless, possibility to agree with individual employees on less advantageous terms and conditions is now finally closed.

Extension of collective agreements in practice

Almost every sector and geographical area in Belgium is covered by a *commission paritaire*, and it is normal practice that they want to have their collective agreements extended. Therefore, if you include the effects of extension, collective agreements' coverage is around 90 %.

2.4.4 Minimum wage

Belgium has a statutory minimum wage for the whole private sector. As in Estonia, it is based on a collective agreement that is extended. Given the high coverage of the sectoral collective agreements, it has very little importance, which may be the reason why it was not raised once between 1993 and 2007.²⁵

²⁵ Social partners conclude intersectoral agreement for 2007–2008

2.5 Norway

Trade union density in Norway is considerable even if it is lower than in the other Nordic countries. In 2001 it was 53,6 % according to the OECD. The coverage of collective agreements too is high.

Norway has no statutory minimum wage. Also, it had no system for extension of collective agreements until it prepared itself for joining the European Economic Area and adopted the Act relating to the general application of wage agreements in 1993 (*Lov om allmenngjøring av tariffavtaler mv*). However, it took more than ten years, till after the EU enlargement in 2004, until the possibility to extend a collective agreement was used for the first time.²⁶

2.5.1 Extension of collective agreements

The Norwegian system for extension of collective agreements is very different from the corresponding systems in the other EU/EEA countries. The aim of the Act relating to the general application of wage agreements is to guarantee foreign workers wages and working conditions that are equal to the conditions of Norwegian workers, and to prevent that workers are given conditions that are verifiably inferior to those laid down in the relevant collective agreement or to those which are otherwise normal at the place or in the profession in question (1-1 §).

Prerequisites for extension

Extension of collective agreements is decided by a special committee, the Tariff Board. It has five permanent members, three of which are independent experts while one represents the employers' interest and another the workers' interest. In individual cases one representative for each of the signatories to the agreement will be added to the Board.(2§)

Two conditions must be fulfilled

- An application for extension must be filed by a trade union that is party to the agreement and that has at least 10 000 members and/or by an employers' organisation that is party to the agreement and has at least 100 members employing at least 10 000 workers.
- Given the explicit aim of protecting foreign workers, it must be verified that foreign workers are employed at substandard pay and other employment conditions in the field covered by the collective agreement. Thus it will not be extended if there are only Norwegian workers in a sector, irrespective of what employment conditions they have. And the Tariff Board will not even consider the application if the organisation asking for extension cannot prove at least that there is a substantial probability that foreign workers' conditions are inferior to those of Norwegian workers.

²⁶ *Tariff Board votes to extend collective agreements to petroleum installations*

The first condition may be disregarded in exceptional cases. The Tariff Board may extend an agreement on its own initiative if it is required with consideration to the public interest.

All provisions that regulate individual workers' wage and other employment conditions can be extended, but this is not mandatory. The Board may just as well extend only part of the collective agreement. In specific cases it may also lay down other wages and working conditions than those regulated in the agreement.

The procedure

In order to be able to decide the Tariff Board must collect information from different sources. Employers and managers who lead their businesses as well as their employees and all other persons who are engaged in the company are obliged to provide the Board with any information on wages and employment conditions that it needs (7§). The Board may arrange public hearings for this purpose (6§). As it can be difficult to establish the facts of the case, it sometimes takes a year until the decision is made.

Effects of the extension

The wages and employment conditions that the Tariff Board has extended are mandatory minimum conditions in the employment relation between all employees, whether foreign or Norwegian, who are covered by the extension and their employers.

Entrepreneurs are responsible for informing their subcontractors of their obligations under extended collective agreements and also for monitoring that they observe these obligations.

Extension of collective agreements in practice

So far, only very few collective agreements have been extended. And even if it is possible to make all normative provisions of the collective agreement generally applicable, the Tariff Board has only extended provisions on wages and working time. The Norwegian Trade union confederation does not want the whole agreement to be extended, fearing that this might make workers less inclined to organise. Why pay for something that you can get for free?

In one case though, the Tariff Board changed the maximum working time from 37,5 hours to 40 hours a week which meant that it lowered the hourly wage. Not surprisingly, the trade unions criticised this decision.

Except for the employers in the building industry, the Confederation of Norwegian Business and Industry NHO is opposed to the whole system. Early in 2008, one of its member organisations complained to the EFTA Surveillance Authority that the Act relating to the general application of wage agreements puts up unlawful restrictions to the

free movement of services. And the NHO itself is right now doing what it can to stop the projected extension of the collective agreement for the shipbuilding industry.

2.6 Conclusions

The European social model is based on the idea that the labour market must to some extent be regulated, and that, in principle, it is preferable if this is done through self-regulation by the social partners, as they are in the better position than the state to strike a balance between the interests of management and labour. However, as we have seen above, the Member States' institutional frameworks for collective bargaining and collective agreements and the degree of state intervention differ considerably. This is due to different historical experiences and societal contexts. But one factor seems to be the most decisive for what solutions a Member State has to rely on. That factor is to what extent workers and employers are organised, and if the trade union movement is united or fragmented. At the same time, there is no simple cause – effect relation; the legal solutions may in turn affect the rate of organisation and the behaviour of the organisations – which may occasion new legal solutions.

2.6.1 Degree of state intervention

In Finland, with its high rate of organisation on both sides, the state relies on the social partners' ability to initiate and pursue collective bargaining on their own initiative and under conditions decided by themselves. Given the high coverage of their collective agreements, it also relies on trade unions' and employers' organisations' ability to represent the interests of a whole sector. The role of the state as regards extension is restricted to checking whether the legal prerequisites for general applicability are fulfilled.

At the other end of the scale are France and Belgium. At a first glance, Belgium may seem to be out of the character, as there, trade union density is considerable. However, at the time when Belgium's industrial relations system was built up, the rate of organisation was lower. Thus, in both countries, the state intervenes in different forms in order to encourage bipartite collective bargaining and establishes procedures and institutions for this bargaining.

Somewhere in between is Germany. The German legislation's restrictive approach to state intervention was dictated by the allies. At the same time, trade union density in Germany was higher immediately after the war than it is today, and the employers' rate of organisation has traditionally been high. Thus for many years, Governments saw no need to deviate from the understanding that collective agreements should not be extended but in exceptional cases. Also, it was not problematic that extension was possible only in cases where both trade unions and employers' organisations were in favour of extension. However, with falling rates of organisation on both sides and the employers' confederation's decreasing support for extending collective agreements, German Governments have felt an increased need for state intervention in the last couple of years.

2.6.2 Representativeness

What criteria for representativeness countries apply seem to be dependent both of the rate of organisation and if the trade union movement is unified or not.

Countries with a unified trade union movement, like Finland and Germany, can do without rules on representativeness of the *organisations*. Instead a criterion of representativeness is applied to *the collective agreement*, where the main rule is that it has to cover around 50 % of the workers of the sector if it is to be extended. Of course, this is an indirect measure on the organisations' representativeness, but as the German example shows, here a low rate of organisation on the workers' side can be remedied by a high rate of organisation among the employers.

Belgium and France, where the trade union movements are divided along political and religious lines, have rules on the representativeness of the organisations that can take part in collective bargaining and conclude collective agreements that can be subject to extension.

In addition, in France, the collective agreement as well must be representative in order to be valid and extended, but representativeness is not (as in Finland) measured by its coverage but by what support the contracting trade union(s) gain in the workplace elections (minimum 30 %). The design of the criteria for the representativeness obviously serves the purpose of preventing a minority from dictating the conditions for the majority, at the same time as it does not require an absolute majority in order for the agreement to be valid – which might be an insurmountable obstacle to the conclusion of any valid collective agreements at all. Belgium does not have the same problems, as there the trade unions act concertedly in collective bargaining.

2.6.3 The extension procedure

In all countries described above, certain administrative procedures apply before the *erga omnes* effect can come into force. The relative influence of the social partners on the one hand and the authorities on the other over the outcome of this procedure varies, as does the possibility for third parties to make their voices heard.

In Finland, the social partners themselves control the outcome altogether as long as they conclude collective agreements that fulfil the legal criteria for representativeness. In Belgium too, the social partners are very much in control of the outcome. If they conclude their collective agreement in one of the institutionalised committees, it will have almost the same effect as an extended collective agreement. However, they cannot impose a formal extension. In Germany, trade unions and employer's organisations only have the power to prevent extension according to the normal procedure in the Collective Agreements Act, both because they have the sole right of initiative and because they can block extension by voting against it in the *Tarifausschuss*. Apart from that, in Germany as well as in France and Norway, the authorities have a wide margin of appreciation when they decide whether or not to extend a collective agreement.

As regards the interests of third parties, the procedure in Finland and Belgium is based on the assumption that the representative organisations for workers and employers are capable of looking after these interests as well as the interests of their own members. On the contrary, both in France and Germany, third parties are given the opportunity to file their written observations on the projected extension. In Germany they have the right to attend an oral hearing as well. The Norwegian Tariff Board has the option of arranging a public hearing. In cases where this option has been used, it seems as if it has led to a very protracted procedure.

2.6.4 Other issues

Traditionally no advocate of state intervention in wage formation, the German Government is now preparing the introduction of a minimum wage to complement the collective agreement system. But even in Belgium and France, where the coverage of collective agreements is over 90 % due to frequent use of the extension mechanism, the Government sees a need for a statutory minimum wage.

As in Estonia, trade unions in Finland and Norway have been afraid that extension of collective agreements will make workers less inclined to organise, as they could get all the advantages of trade union membership without paying the membership dues. However, as the examples from Finland and Belgium show, this is not necessarily so. In Finland, trade union density has increased from around 60 % in the beginning of the 1970s when the extension mechanism was introduced to nearly 80 % today. In Belgium, the rate of organisation increased each year from 1960 to 1993, after which it has been stable at around 55 %. Obviously there are more factors that influence the rate of organisation. Evidence from France suggests that the use of extension of collective agreements has furthered organisation on the employers' side. As members of the employers' organisation they are able to influence the collective agreements that they will under any circumstances be obliged to apply.

3. Main features of the current Estonian system for extension of collective agreements and the criticism against it

The Estonian system for extension of collective agreements has many specific features of its own, but it also has some characteristics in common with the Finnish system described above, above all that the social partners themselves have a decisive role in the system. The main differences between them are related to the fact that the rate of organisation in Estonia is considerably lower on both sides. Different sources give different figures, but according to estimations from Estonia's Ministry for Social Affairs, trade union density was less than 8 % in 2007. There is no reliable statistics on the rate of organisation on the employers' side, but obviously it is low. The consequence is that most of the collective bargaining takes place at company level.

3.1 The legal regulation

The Collective Agreements Act was passed by Estonia's Parliament in 1993. In its original wording, it did not include any provisions on extension of collective agreements. The motives for introducing the extension mechanism are hard to reconstruct today, as they are not very elaborated in the preparatory works. It was not included in the Act on the Government's initiative, but added by the Parliament itself in 2000. Very briefly, three explanations were given:

- Since most collective agreements are bargained at company level, extension gives an opportunity to extend agreements to non-unionised workers;
- Extension of collective agreements helps to equal working conditions and protect workers from improper competition;
- Extension can offer better working conditions to all non trade union workers.

The relevant provision is clause 4 (4) of the Collective Agreements Act, which states:

A collective agreement entered into between an association or federation of employers and a union or a federation of employees and a collective agreement entered into between the central federation of employers and the central federation of employees may be extended by agreement of the parties in respect of the conditions determined in clauses 6 (1) 1) and 3) of this Act. The scope of extension shall be determined in the collective agreement.

This means, first, that only collective agreements with a wider scope than company agreements can be extended (since party to the agreement on the employers' side must be at least an association or federation of employers).

Secondly, the reference to clause 6(1) 1) and 3) of the Act means that only conditions on wages and on working time and rest time can be extended.

Third, and most important in this context, is that the only precondition for extension is that the parties to the agreement themselves want it to be extended. The only procedural condition is that the extended provisions must be published in the publication Official Notices, before they can come into force. If, on the other hand, the parties should not agree that their collective agreement should be extended, the state can do nothing to that effect. Thus, the Ministry of Social Affairs describes its own role in the procedure as restricted to "acting as a post office", forwarding the text of the agreement to the printing office at the request of the social partners.

Simultaneously as the amendments to the Collective Agreements Act, the Parliament adopted the Trade Unions Act. It follows from section 7(1) in the Trade Unions Act that a trade union may be founded by five employees. A federation of trade unions may be founded by five trade unions and a central federation by five national trade unions or federations of trade unions.

In conjunction with the provisions on extension of collective agreements in the Collective Agreements Act, this means that a trade union with only five members is allowed to conclude a collective agreement which is generally applicable in a whole sector. What size an employers' association must have for the same purposes is, as far as we understand, not in any way defined by law, but only a couple of employers are needed in order to form an association.

To sum up, in fact there are no legal requirements on representativeness for those organisations who decide to extend their agreement, as far as the agreement concerned is not a single employer agreement.

This also has another consequence. The Collective Agreements Act does not explicitly mention enlargement of collective agreements (in addition to extension). However, as there is no requirement of representativeness and "the scope of extension shall be determined in the collective agreement" it seems as if there are no formal obstacles for enlarging a collective agreement and making it applicable in another sector or geographical area than that for which it has been concluded.

3.2 Extension of collective agreements in practice

In practice, the lack of any requirements on representativeness in Estonian law has not been used by non representative actors on the labour market. There are no precedents of marginal organisations claiming extension of their collective agreement. However, the mere fact that such a possibility exists has caused some concern.

In practice, extension has been used for two purposes: for extending the collective agreements for two sectors and for determining the national minimum wage (although formally, the latter is not made through the extension procedure foreseen in the Collective Agreements Act, see below).

Compared to in other sectors, social dialogue in the road transport sector is well developed at sectoral as well as at enterprise level. The Union of Estonian Automobile Enterprises and the Estonian Transport and Road Workers' Trade Union concluded their first sectoral agreement in 1992. Also, they have extended their collective agreements regularly since this possibility was introduced. In practice, the minimum wages laid down in these agreements affect primarily the wages paid to drivers employed outside Tallinn, as wages are higher in Tallinn.

The second sector where extension has been used, although not as regularly as in the transport sector, is the healthcare sector. Here, the first sectoral collective agreement was concluded in 1996 between the Estonian Hospitals Association and four trade unions, namely the Estonian Medical Association, the Trade Union Association of Health Officers of Estonia, the Federation of Estonian Health Care Professionals and the Estonian Nurses Union. A factor that complicates collective bargaining in this sector is that the employers do not control their own budget, as the sector is funded by the Government.

In 2008, extended collective agreements are in force in both these sectors.

3.3 Statutory minimum wage

Estonia has a national minimum wage since 1992. Until 1994, when the Wage Act was adopted, the minimum wage was determined by tripartite agreement. According to the Wage Act, the national minimum wage is established by a Government regulation. However, its level is determined in bipartite negotiations between the confederations on both sides, after which the Government issues a decree which simply confirms the contents of this agreement. Thus in practice, it has the same effect as an extension of a collective agreement.

The minimum wage is raised yearly, according to principles agreed between the social partners in 2001.

3.4 The challenge to the present system for extension

After the collective agreement for the transport sector had been extended in 2005, a small company complained to Estonia's Chancellor of Justice that it had been forced to close down some of its activities, as it could not afford to give its employees the conditions in the extended agreement. Having investigated the case, the Chancellor concluded that the extension mechanism disproportionately restricts the freedom to engage in enterprise and to form commercial undertakings as protected by Section 31 of the Estonian Constitution.

He based his conclusion primarily on the following:

- The employers' association that had concluded the collective agreement represented only a minority of the companies in the sector.
- Neither the parties to the collective agreement nor any other institution had considered that the standards that might be acceptable for companies in Tallinn may be too high for companies in smaller cities.
- Section 13 and 14 of the Constitution obliges the state to protect a company from other companies.
- There are no procedural requirements that protect third parties and guarantees that they are allowed to submit their observations and comments before the collective agreement is extended. Also, no authority controls that the extended conditions are reasonable.

Consequently, the Chancellor urged the Government to propose amendments that would modify the system.

The Ministry for Social Affairs, that answered for the Government, on the whole agreed with the Chancellor. According to the Ministry, the biggest problem is that those who will be affected have no right to take part in the procedure. Also, a criterion of representativeness should be introduced. Extension should be decided by a third party, for example the Ministry or a tripartite organ. Also, there should be a possibility to lodge a complaint against a decision to extend an agreement.

The Employers' confederation ETTK also agrees with the Chancellor that the system, as it is at present, is in conflict with the Constitution. According to ETTK, a criterion of representativeness should be introduced, for example a requirement that the signatory trade unions should represent a majority of the employees in the sector in order for the collective agreement to be extended. In addition, there should be a procedure that enables all employers that would be covered by the extension to give their opinions. Finally, the decision to extend the agreement should not be taken by the signatory organisations but by their confederations, that should assess whether the conditions of the agreement are reasonable, and control that the representativeness criterion is fulfilled and the scope of extension is clearly defined.

On the contrary, the trade union confederation EAKL does not agree with the Chancellor. It means that extension of collective agreements should be a public interest, which is more important than the interests of individual employers. Also, the extension mechanism encourages employers to organise, and it is their own problem if they do not. EAKL is absolutely opposed to introducing a criterion of representativeness that is based on a majority requirement, as this would be the same as making extension of collective agreements virtually impossible. According to EAKL, every trade union that is affiliated to the confederation is representative enough. However, it is prepared to consider a procedure that would give those who would be concerned an opportunity to comment on the projected extension. Finally, in its opinion, it is unthinkable that anyone would have the right to file a complaint over a decision to extend a collective agreement.

To summarise, neither of these actors advocate a complete abolition of the extension mechanism, only that it should be modified. Ministry officials explicitly underline that it could be useful for implementing framework agreements, such as those on telework or stress at work, concluded by the social partners at EU level. EAKL for its part would like conditions on annual holiday to be added to the list of conditions that could be extended, but generally does not see any major problems in the present system. Regarding the "extension" of the minimum wage agreements there has not – to our knowledge – been much criticism. On the contrary, the social partners on both sides see the minimum wage regulation as a way of reducing the share of undeclared wages paid to the employees.

4. International instruments, extension and issues of relevance for Estonia

As have been showed above different kinds of extension systems are common in Europe. It therefore does not come as a surprise that also the international instruments recognise this kind of arrangements. In the following we shortly investigate how the ILO, the Council of Europe and the EU have treated this kind of mechanism both as such and in relation to fundamental social rights. We do not intend to cover all the topics related to these instruments, but we focus on the issues we regard as essential for the development of the Estonian system.

4.1. ILO

In the ILO system there is no detailed Convention that addresses the issue of extension. The general framework for collective bargaining in the ILO is set by the Conventions on freedom of association (No 87 and No 98) and the Convention No 144 on the Tripartite Consultation.

These ILO Conventions define the general principles regarding the freedom of association and collective bargaining and also give a framework in which the extension of collective bargaining must operate.

Extension of collective agreements beyond the members of the organisations of employers and trade unions, which are parties to the agreements, aims to secure the widespread application of collectively determined wages, hours and working conditions. It means that employers not belonging to the employers' organisation that have signed a collective agreement have to apply the minimum standard prescribed by that agreement. Such an obligation implies necessarily some level of interference with the employers' negative freedom of association, in other words his right to remain outside the employers' association, since the effects of the agreement are extended to the non-organised employer.

However, the ILO surveillance bodies have accepted the extension as such, since it is justified by overriding public interests and also does not – at least when it functions properly – interfere with the substance of the freedom of association. It is rather comparable to a situation where the legislator sets certain minimum standard in law in order to protect workers.

The Committee of Freedom of Association (CFA) has however drawn up certain limits to such a system. It has stressed that the extension of an agreement to an entire sector of activity contrary to the views of the organisation representing most of the workers in the category covered by the extended agreement is liable to limit the right to free collective bargaining by that majority organisation.²⁷ It has also stressed that any extension of collective agreements should take place subject to tripartite analysis of the consequences that it would have on the sector to which it is applied.²⁸ These CFA cases relate to specific situations and must be understood in their context. If a state has introduced legislation on extension, it is not necessarily so that a separate tripartite assessment has to be made every time an agreement is extended. The requirements may be fulfilled if tripartite consultation has taken place when the legislation once was introduced.

Article 1 of the ILO Convention 144 also clearly defines the term representative organisations for the purpose of national tripartite consultations concerning labour standards. The concept means “the most representative organisations of employers and workers enjoying the right of freedom of association”. These organisations enjoy a special status and position within the ILO system. However that does not mean that other

²⁷ CFA Digest, Para 1053

²⁸ CFA Digest, Para 1050

competing organisations do not enjoy fundamental trade union rights under ILO conventions 87 and 98. Generally, though, it is not regarded as discrimination towards minority organisations to give special rights and entitlements to the most representative organisations.

Article 5 of the ILO Collective Agreements Recommendation (1951) contains provisions on Extension of Collective Agreements.

Article 5.

(1) Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.

(2) National laws or regulations may make the extension of a collective agreement subject to the following, among other, conditions;

(a) that the collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative;

(b) that, as a general rule, the request for extension of the agreement shall be made by one or more organisations of workers or employers who are parties to the agreement;

(c) that, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.

These criteria are only options. The recommendation underlines the fact that an extension procedure is compatible with the principles of Freedom of Association, but also that the state may prescribe certain conditions for this kind of procedure, without breaking the borders for acceptable state intervention on the labour market. However, the Recommendation does not pose any restrictions as such on national extension procedures. Certain limits can however, as explained above, be derived from Conventions 87, 98 and 144.

The ILO norm setting has not dealt with enlargement of collective agreements, but it seems obvious that, as a minimum, the same general principles apply to enlargement as to extension. The problem with enlargement is that it covers employers beyond the scope of application of the agreement. Typical examples are when a regional collective agreement is declared applicable in another region or when a branch agreement is made applicable in another sector. In both cases, there is an evident risk that free collective bargaining in

the region or sector concerned is restricted by the enlargement, which might be problematic from the point of view of the principles of ILO Convention 98.

From the point of view of the ILO Conventions, it seems that the features in Estonian legislation that might create problems relate to the fact that it contains no representativeness requirement for the parties extending the collective agreement. It may also be problematic that there is no opportunity for third parties to submit observations prior to the extension and that there seem to be no limits on the parties' possibilities to enlarge a collective agreement.

4.2 The Council of Europe

The Council of Europe has two instruments that can be of relevance when assessing the extension of collective agreements. Article 11.1 of European Convention for Protection of Human Rights and Fundamental Freedoms (1950) states that "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests". Furthermore, Articles 5 and 6 of the European Social Charter (1961), protect the right to organise and the right to bargain collectively. Article 6 creates an obligation for the contracting parties to promote collective bargaining between employers and employers' organisations on the one hand and workers' organisation on the other, and an obligation to recognise the right to undertake collective action.

The freedom of association of employers has been addressed in a few cases within the Council of Europe. Article 11 of the Convention was interpreted in the case *Gustafsson v. Sweden* (1996), where an employer argued that industrial action against him in order to make him sign a collective agreement was restricting his negative freedom of association. Since, in this case, the industrial action was not actually forcing the employer to join the employers' organisation; the Swedish State had not failed to fulfil its obligation in accordance with the Convention by allowing such action.

In 2006, the Federation of Finnish Enterprises made a collective complaint, claiming that Finland violates Article 5 of the Revised European Social Charter as Finnish legislation allows employers who are members of national employers' organisations to derogate from certain provisions of labour legislation in local collective agreements, thus disadvantaging employers who are not members of national employers' organisations and who are bound by the terms and conditions in nationwide sectoral collective agreements by legislation on extension of these agreements.²⁹

In this case the European Committee of Social Rights stressed that it "is legitimate in principle that the legal rules applicable to working conditions be the result of collective bargaining. Such a system implies that employers may be treated differently depending on whether or not they are members of an organisation". The Committee referred to the *Gustafsson Case* and continued: "Such a conclusion may of course lead to an incompatibility with Article 5 but only if it were to affect the very substance of the

²⁹ *Federation of Finnish Enterprises v. Finland* (2007) Complaint No. 35/2006

freedom of association”. In this case it had not been demonstrated that this freedom is affected in a manner that is more serious than what is necessary for the effectiveness and coherence of a system of collective bargaining.

4.3 The European Union

In European Union law, extension of collective agreements is commonly used on several levels. It is generally regarded as a legitimate tool in labour law in order to create a level playing field for employers and a minimum protection for employees.

When assessing the limits of extension of collective agreements in EU law a good starting point are the values integrated in the EU Charter of Fundamental Rights, which is integrated in the so called Lisbon Treaty, already ratified by most Member States.

Article 28 of the Charter confirms that the right to negotiate and conclude collective agreements at the appropriate levels is a fundamental right for workers, employers and their respective organisations in the EU. In addition, it confirms the worker’s right to fair and just working conditions (Article 31), but on the other hand also recognises the freedom to conduct a business in accordance with law (Article 16) and the right to property (Article 17).

It is clear that from a conceptual point of view, extension implies some interference with the employers’ negative freedom of association as well as with the freedom to conduct a business. Therefore both the extension as such as well as its procedure must be justified by social reasons or public interest in order to pass the proportionality test of fundamental rights.

There are at least four different forms of extension in the European Union.

1. Extension (by law) of social partners’ agreements at European Union level (lawmaking by social dialogue)
2. Extension as a means for implementing EU Directives by collective agreements at national level in the Member States
3. Extension as a means of implementing EU level social partners’ agreements at national level
4. Setting minimum standards at national level by extension mechanisms (many EU-documents relate to this) in order to meet specific, individual requirements requirements of a European Union instrument (Directive)

4.3.1 Extension of EU social partners’ agreements³⁰

The implementation of agreements resulting from European social dialogue is laid down in Article 139(2) of the EC Treaty: ‘Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 137, at

³⁰ The following text is based on Bercusson & Bruun, (text in the not printed, dictionary part).

the joint request of the signatory parties, by a Council decision on a proposal from the Commission.’

The second option leads in practice to implementation of the European collective agreement by a Council Directive. This option is only open ‘in matters covered by Article 137’, i.e. in social matters for which the EC has regulatory competence.

The European social partners who signed the agreement will ask the Commission to propose to the Council the implementation of the agreement. The Commission provides an explanatory memorandum on any proposal presented to the Council, giving its comments and assessment of the agreement concluded by the social partners. On this basis, the Council – by qualified majority voting, or by unanimity, according to its legislative competence provided in Article 137 – will decide to incorporate the collective agreement into a Council Directive. The Council can still decide not to implement the agreement by directive. Yet, it is unable to change the content of the agreement. In order to respect the autonomy of the social partners, the Commission has stated that it would withdraw the proposal for implementation in case the Council intended to change the content.

If the collective agreement is implemented by Council Directive, its effects will be extended *erga omnes* and the Member States will have to ensure the implementation of the directive.

The Court of First Instance has formulated a specific view of the legal nature of the EU social dialogue, in a case where an organisation for small and medium sized companies challenged the Directive on the Framework Agreement on parental leave concluded by UNICE, CEEP and ETUC (96/34/EC).³¹

The Court of First Instance equates the implementation of framework agreements by Council Directive with the normal legislative process. This vision has important constitutional implications. According to the Court of First Instance, ‘the principle of democracy on which the Union is founded requires – in the absence of the participation of the European Parliament in the legislative process [as is the case when implementing collective agreements by Council Directive on the basis of Article 139 (2)] – that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement’. In order to make sure that that requirement is complied with, the Commission and the Council are ‘under a duty to verify that the signatories to the agreement are truly representative.’ Thus, while the Court of First Instance identifies the social partners as bearing the representative value ensuring respect of the democratic principle, it also stresses the importance of the EU institutions in scrutinising the European social partners and the legitimacy of agreements in order to be implemented by Council Directive.

³¹ Union Européenne de l’Artisanat et des Petites et Moyennes Entreprises (UEAPME) v. Council of the European Union, Case T-135/96 [1998] ECR II-2335.

4.3.2 Collective agreements as tools for implementation of Directives

Collective agreements at national level are a mechanism for implementing EU directives in the field of employment and industrial relations. Article 249 EC stipulates that, 'A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

The role of collective agreements in implementing Directives is established in EC law by Article 137(3) EC:

A Member State may entrust management and labour, at their joint request, with the implementation of Directives adopted pursuant to paragraph 2.

In that case, it shall ensure that, no later than the date on which a Directive must be transposed in accordance with Article 249, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that Directive.

4.3.3 Implementing EU social dialogue agreements

The social partners may undertake a dialogue at European level, which may lead to contractual relations, including agreements. These agreements can be implemented not only by using the legal machinery of the European Union, but also in accordance with the procedures and practices specific to management and labour in the Member States. In this way so called voluntary or autonomous agreements on telework and on work-related stress have been concluded and implemented on national level by the use of national mechanisms for extending collective agreements.³²

It is clear that the existence of a national mechanism for extension may make it easier to implement such agreements that are not intended to be implemented by issuing EU legislation.

4.3.4 Setting minimum standards

According to the Directive on posted workers³³ the Member States shall ensure that, whatever the law applicable to the employment relationship, workers posted to their territory are guaranteed the terms and conditions of employment covering certain matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or

³² See Bercusson & Bruun (2005).23.

³³ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Official Journal L 018 , 21/01/1997 p. 1 PP

- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8.

In para 8 is stated that “‘Collective agreements or arbitration awards which have been declared universally applicable` means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.’”

This example clearly shows how an *erga omnes* or extension mechanism can be a useful tool in order to establish a minimum standard in accordance with EU law.

4.4 Conclusions

There is no doubt that systems for *extension of collective agreements* are in principle accepted by the human rights bodies and courts within the Council of Europe, the European Union and the ILO. When designing the system, however, the fundamental issue of the representativeness of the parties to the collective agreement that will be extended has to be addressed. Also the issue of the legal position of the non-organised employers that have to apply the agreement has to be analysed. It seems that, generally, these employers at least have a right either to be heard before the decision on the extension is made, or to have some kind of legal remedies by which they can challenge for instance whether or not they are within the scope of application of the agreement. When it comes to *enlargement of collective agreements* such a procedure is in practice quite uncommon, and, to our knowledge, it has not been dealt with by the human right bodies. We will discuss these issues in more detail in relation to the Estonian system when we assess how to further develop the system.

5. Conclusions and recommendations

5.1 Introduction

Among social partners and legal and political authorities in Estonia there has been serious doubts of whether the present system – as presented above in chapter 3 of the report – fulfils necessary legal preconditions and requirements laid down in the Estonian Constitution and in different international instruments.

It has especially been questioned whether the extension of collective agreements might lead to burdensome terms and conditions for single employers and whether such a system is in accordance with the Estonian constitution and existing ILO instruments. Furthermore explicit criticism has been presented for the lack of criteria on representativeness in the Estonian Collective Agreements Act and the lack of any obligatory consultation procedures with other trade unions or non-organised employers concerned before the extension of any collective agreement.

In this concluding chapter we give answers to the eight questions referred to in chapter 1. The three first questions concern an evaluation of the present Estonian system and are dealt with immediately below, and questions 4–8, that are related to the design of a future

system, are answered in paragraph 5.3 (in an order chosen by us). All our proposals taken together can be regarded as a package reform that we recommend for the Estonian labour market.

Question 1. Is the Estonian current legislation on extension of collective agreements in accordance with the international labour standards, including ILO Convention No 98 and Recommendation No 91?

From the point of view of international labour standards, including ILO Convention No 98 and Recommendation No 91, the critical voices that have been raised in Estonia regarding the issue of representativeness and the lack of any possibility for outside employers to express their view on the collective agreement in some form of consultation procedure are well founded as explained above in chapter 4. As we see it, the current legislation does not fully meet the requirements set up by international labour standards, but these problems can be addressed in a way that takes into consideration the interests of all parties concerned.

Question 2. Does the current legislation disproportionately effect the freedom to engage in business and is it therefore contrary to the Constitution of the Republic of Estonia?

It is definitely not for the undersigned to give any in depth recommendations or interpretations concerning the Estonian Constitution. It must however be stated that, in its constitutional practice, Estonia has to follow the interpretations made by different human rights bodies within the European Council and the ILO. In the light of this practice the mere fact that an employer will be bound by an extension to apply certain terms and conditions in a given collective agreement will not as such be seen as a violation of any fundamental right of the employer.

However, it is also clear that a decision to extend a collective agreement to an unorganised employer will have an effect of conceptually restricting the negative right of association of this employer as well as his contractual freedom and freedom to conduct his business. As long as the extension can be justified with social or public interests, such a restriction has been accepted by the human rights bodies, since in practice it has been regarded not to affect the very substance of these rights of the employers.

In the present Estonian system there are especially two features that seem to go beyond what can be reasonably justified by social and public interest considerations within a proportionality test: The first one is the seemingly unconditioned possibility for enlargement of a collective agreement by any social partners, and the second one is the lack of any real representativeness criterion for those organisations that can decide to enlarge or extend their agreement.

Question 3. What kind of shortcomings and risks are hidden in the current regulation?

In the light of what has been said above it is clear that the current legislation runs a risk of not passing the *legality* test. In a democratic state based on the rule of law it is clear

that such a situation cannot be sustainable. The problem with legality encompasses here both the fact that the material content of the regulation does not fully meet the requirements of international labour standards and the fact that there are not appropriate legal means available for a third party who wants to challenge the agreement because its parties are not representative for the sector or profession.

Furthermore there might be *transparency problems* for single employers to know whether they are covered by a certain agreement or not. As we understand it, there is no procedure in which unorganised employers or their employees can address such problems in a manageable way.

The lack of representativeness criteria might also lead to a *fragmentation of the already weak trade union structure* in Estonia. Since, in theory, a very small minority organisation can have its agreement extended, this may encourage the establishment of small unions outside the central confederations.

5.2 Purposes of an extension system

A discussion of how to further develop a system for extension of collective agreements has to take as a starting point what functions such a system is intended to fulfil. What do we want to achieve with extension of collective agreements?

The general starting point is that it is intended to strengthen the national collective bargaining system by making it obligatory for employers to apply a certain collective agreement or certain terms and conditions in a collective agreement. Especially such a procedure aims at restricting low-wage competition and so called social dumping. It makes it easier for employers to accept improved standards for the employees, because they know that also their competitors have to apply the same standard. The extension will give increased power to the organised labour market parties and promote the social dialogue on national level.

At the same time, extension of collective agreements increases the responsibilities given to the parties since they must take responsibility for the development in their sector as a whole, when they engage in collective bargaining. Therefore, of course, very small organisations and non representative organisations are not well suited for playing a decisive role in the extension procedure. Also, it is vital that the system guarantees the legal protection of individual employers. They must get clear information on what obligations they have, and which terms and conditions to apply.

5.3 Designing a reform of the present Estonian legislation

Question 4. Who and how should decide the matter of extension taking into account that the international practice acknowledges extension decisions made by judicial authorities or tripartite bodies?

As seen above in chapter 2, international practice concerning the procedure of extension differs very much, and no solution can be regarded as superior to the other. They are designed to fit into the specific industrial relations contexts and traditions of each

country. We therefore think that Estonia should build further on its own specific traditions. This means that the decisive role in the extension procedure should remain with the social partners, but that it should include some criteria of representativeness, state control and legal remedies for third parties.

5.3.1 The optimal model

Question 7. Which is the best model for extension of collective agreements in Estonia? International labour law acknowledges extension, enlargement and both.

Extension can be described as the normal model for the state legislator to make unorganised employers bound by the collective agreement within its scope of application as defined by the parties. The typical situation is that a sectoral agreement will cover unorganised employers in that sector. Enlargement is quite uncommon and it usually has very strict conditions attached to it. For example, we are not aware of any other country where the social partners themselves can decide to enlarge their agreement.

The issue of extension versus enlargement is linked to the issue of representativeness of the bargaining organisations. An organisation is representative to conclude collective agreements for such types of employers or professions that it has as members. If there are representative organisations capable of collective bargaining in the sector or area concerned, there is normally no need for enlargement. Thus in practice, enlargement of a collective agreement is synonymous to extension of a collective agreement concluded by parties who are not representative for the sector or area.

Considering the risk that enlargement hampers the evolution of free collective bargaining in the sector/area as described in chapter 4, we do not advocate that Estonia retains the general possibility of enlarging collective agreements.

Nevertheless, in Estonia where the rate of organisation on both sides is still low, we see a possible need for the central confederations to be able to make an agreement between them generally applicable on the whole Estonian labour market, even if they do not have members in every sector or profession. Especially, we think of agreements on national minimum wages, but it might also be a way of implementing a framework agreement between the social partners on European level, as suggested by the Ministry.

Evidently, this would de facto be a kind of enlargement. However, if they are given this opportunity, one might also see it as if a special criterion of representativeness is applied for these specific situations. The confederations that are representative for tripartite consultations at national level could be given “a social mandate” by the Government (as in Belgium) and thereby be acknowledged as representative for concluding collective agreements that can be extended to cover the whole labour market.

If it is needed at all, irrespective of how it is designated, this opportunity should be a privilege for the central confederations only. In that case however, the material restrictions that apply for the extension of other collective agreements (only provision on wages etc.) should not apply to the central confederations.

In the following we discuss only the model of extension because we think that it is possible to eliminate the enlargement mechanism from the Estonian labour market toolbox.

5.3.2 Representativeness

Question 6. Should there be established some kind of preconditions for the extension? If yes, please specify.

We think that three preconditions or requirements are needed:

- First, there should be a requirement of representativeness.
- Second, the scope of application of the extended agreement must be clear and transparent (so that third parties know whether they are bound or not).
- Third, we suggest that certain procedural requirements are introduced in order to establish a legality control of the extended agreements.

The most evident problem with the Estonian legislation is that there are no restrictions whatsoever on which parties can extend or enlarge their collective agreement. As soon as an organisation on each side (a trade union and a federation of employers) have entered into a collective agreement they can, at least in theory and according to the wording of the law, extend it to cover third parties. The competence is however explicitly restricted to wage conditions and working time and rest time conditions.

Although we are not aware of any grave misuses of the Estonian system, we think that the law should introduce some requirements on representativeness for trade unions and employers' organisations in order to be extended.

The evident realistic solution for a representativeness criterion in Estonia is the established ILO-concept of "the most representative organisations". Usually in the ILO-context that means the organisation with the highest number of members in the sector, but it might also – especially when two organisations are of almost the same size – mean the sectoral organisation that belong to the most representative national federation (of employers or employees).

Thus we suggest that the Collective Agreements Act in Estonia should be amended so that only collective agreements concluded by the most representative organisations in a certain sector can be subject to extension. In the first place, the organisation that has the highest number of members in the sector or profession in question should be acknowledged as the most representative. The basis for comparison should be the organisations' own statistics. However, in the extension procedure that we propose (see 5.3.5), the Ministry has to check the reliability of this statistics. If there are two organisations of almost the same size, the organisation that belongs to the most representative confederation should be acknowledged as most representative. In the unlikely case that two equally large organisations organising the same types of employers or professions are affiliated to the same confederation, it should be a matter for the confederation itself to decide which of them should be deemed as the most representative

organisation for concluding collective agreements that could be extended. It can be mentioned that similar solutions are used by the confederations in the Nordic countries in order to avoid disputes over what collective agreement to apply to a certain type of work.

In the Estonian context we do not think that any additional representativeness criteria are needed. The need for protection of non-organised employers can be safeguarded within the framework of such a system. It may also be a good solution from the view of the social partners themselves, as it would hopefully further unity and prevent fragmentation, especially on the trade union side. The French experiences illustrate that division on the trade union side may almost paralyse the collective bargaining system.

As before, only collective agreements concluded by federations on the employers' side should be subject to extension. Thus, we see no reason for introducing a possibility to extend collective agreements concluded by a single employer only, even if this employer is so big that it could be regarded as representative for the whole sector.

5.3.3 Scope of extension

The second issue is the material and personal scope of the extension. The first concerns which terms and conditions (or benefits) in the collective agreement that are covered by the extension. The second concerns what groups of employees that have to get the benefits of the extended agreement and which employers have to apply it.

We generally do think that terms and conditions on wages and working time are the most important in collective bargaining and if we want to extend a minimum of core terms and conditions, the present choice of the Estonian legislator is well founded. However, one can argue that terms and conditions on annual holidays should belong to the same category, since nowadays regulation on annual holiday is generally regarded as a connected issue. Flexible rules on annual holiday might have a direct impact on working time and both working time and holiday are regulated in the Working Time Directive (2003/88/EC) of the European Union. We therefore recommend that the list of provisions that can be extended in the future could amount to three, with the inclusion of terms and conditions on annual holidays.

When it comes to an extension procedure initiated by the central confederations there should be a possibility for a justified reason to extend also agreements concerning other issues than wages, working time and holiday. It should be possible – when the parties so wish – to implement a European wide framework agreement like for instance those on telework or work-related stress, by extending it to the whole labour market.

Regarding the personal scope of the extension the present regulation seems to be reasonable, demanding that it should be specified in the agreement. When a criterion of representativeness is introduced, the extension cannot go beyond the scope of normal application of the agreement in the sector concerned. However, as argued above under 5.3.1, when the central confederations are parties to the agreement all sectors can, in our opinion, be regarded as being covered.

5.3.4 Collective labour disputes

Question 5. Can the matter of extension be one of the subjects of collective bargaining and the source of a collective labour dispute?

In a system built on extension initiated jointly by the parties to the collective agreement one cannot, in our opinion, eliminate the fact that the future prospect of making the agreement generally applicable will be one important aspect that is taken into account and discussed during the negotiations, and in practice it is very difficult to make a clear distinction between different elements on the negotiating table.

The question here seems to relate to the interpretation of the Collective Labour Disputes Act. Should a dispute that arises after the collective agreement is concluded and that relates solely to whether the parties should initiate its extension or not be regarded as a lawful demand for strike action or lock-out? Such a demand is certainly different than one concerning material terms and conditions in the agreement, but this is an issue where no clear guidance is given by international law or practice and where national traditions can be continued.

A reasonable answer to this question could be that the parties themselves could decide – in each individual case and in the spirit of autonomy of collective bargaining – whether they make the request for extension a part of the collective agreement or exclude it from the bargaining process and make a separate decision on this issue.

5.3.5 The extension procedure

Question 10. Description of the rules of procedure of an optimum extension.

The last issue we have to deal with regards the procedure for extending a collective agreement or declaring it generally applicable. Here the international comparison showed that there exists several different models, and that the degree of state involvement in the procedure too may differ significantly.

There are three presumable decision makers:

- the parties to the collective agreement (as in Estonia today)
- the central labour market organisations, i.e. the confederations
- the state (Ministry of Social affairs)

If, again, you look at the examples from other Member States, it is common use that all these parties are involved in one way or another in the procedure, irrespective of which one of them plays the decisive role.

As we already have pointed out several times in our opinion the strength of Estonia's present system is that it is based on bipartite agreement. However, we also think that the bipartite procedure has to be complemented with a possibility for the outsiders to make their voices heard and also with a check on the representativeness of the parties. And as we see it, the central labour market organisations cannot be regarded to represent the

interests of non-organised employers in this procedure. Consequently, the procedure should at least to some extent be controlled by the Ministry.

At the same time, it is vital that the procedure respects the autonomy of the social partners. This means that they are still the sole masters of the agreement, and that the Ministry cannot require them to change or amend it, or introduce any amendments on its own initiative. Its only role is to accept or reject the application for extension – nothing more and nothing less.

The following procedure would, in our opinion, meet the necessary requirements:

The most representative organisations decide that they want their agreement to be made generally applicable. They notify the Ministry of Social Affairs of their agreement and of their wish to have it extended.

One might also consider including a provision whereby the Ministry could initiate the extension procedure at the request of one of the parties only, in exceptional cases when there is a state of social emergency.

The Ministry then publishes the agreement that is proposed for extension (*notification*) and invites everyone in the projected scope of application (employers or employees) to come up with any comments and views regarding the agreement and its possible extension. The object of this consultation is to provide both the Ministry and the parties to the collective agreement with information that they may need in order to verify whether the legal requirements for extending the agreement, i.e. that it is concluded by the most representative organisations and that the scope of extension is clear, are at hand. Thus, all comments and views submitted to the Ministry should immediately be forwarded to the parties to the collective agreement.

As the procedure should be quick and effective in order not to delay a possible extension, we suggest that the consultation period should be restricted to 15 days (as in France). During this period, the Ministry has to check that the parties to the agreement fulfil the representativeness requirements and that the personal scope of application is defined in a clear and transparent way in the text of the agreement. The requirement that the scope of application must be clear and transparent indicates that there is a common understanding between the parties to the agreement, the Ministry and all those employers that may be bound by it, what the personal scope of application will be after the extension of the agreement. If necessary, the Ministry cannot only ask the parties to present evidence of their representativeness, but also suggest that they clarify the scope of application of the agreement, so that the employers concerned know that they are obliged to fulfil the extended conditions.

Depending on the outcome of the consultations, the parties to the agreement may decide to reconsider the details of their agreement and make changes and amendments before it is extended. However, this is their own choice. In our view, the Ministry should not be allowed to alter, exclude or add anything to the agreement before it is extended. If the

Ministry considers that it does not fulfill the legal requirements it can reject extension, but if the agreement is extended, its provisions should be extended exactly as they are agreed by the parties. If not, the whole idea behind the extension mechanism would be bungled.

When the Ministry of Social Affairs has checked and confirmed that the proposed requirements on representativeness and transparency are fulfilled and the 15 days of consultation have passed, it must without delay declare the relevant provisions (in a sectoral agreement only provisions on pay, working time and annual holiday) of the collective agreement generally applicable in the form of a ministerial decision. Thus, the only ground for refusing extension is that the legal requirements are not fulfilled. From then on, the collective agreement should be available on a public website so that the single employers and employees easily can obtain information concerning its content.

The most appropriate way to publish and disseminate the collective agreement that is extended must be figured out in tripartite consultations before the new system is introduced.

The same procedure should apply if the projected extension considers a collective agreement between the central confederations that is to cover the whole labour market.

5.3.6 Legal proceedings?

We think that the procedure described above can take care of the concerns raised in Estonia. The relevant sector is consulted and third parties can make their voices heard, it respects the content of the agreement and the autonomy of the parties and it introduces a representativeness criterion as well as formal requirements of transparency and openness. In order to guarantee legal security one may also open a possibility for an employer or a trade union which is affected by the extension to initiate court proceedings in order to challenge the decision made by the Ministry, on either the ground that the parties or one of them are not representative, or that the scope of application of the agreement is not transparent and clear. Thus, only the legality of the decision can be challenged, not its appropriateness. Such a challenge could not, however, have any suspending effect on the applicant's legal obligation to implement the decision. But if the court finds that the legal grounds for extension were not there in the first place, for instance because of lack of representativeness of the parties, the Court can declare the decision by the Ministry null and void. Such a legal procedure should be handled as an urgent matter.

The question of which court in Estonia is best suited to handle such a dispute is outside our expertise, and international practice shows a wide variety of options. Important requirements are that the legal decision-making should be in the hands of judges with at least some expertise on labour market issues and that the procedure should be fast.

6. References

Ahlberg, K & Bruun, N: *Kollektivavtal i EU om allmängiltiga avtal och social dumping*, Skriftserien nr 52, Juristförlaget Stockholm 1996

Bercusson, B & Bruun, N: *European Industrial Relations Dictionary*, European Foundation for the Improvement of Living and Working Conditions, Dublin 2005, <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/index.htm>

Blanke, Thomas & Rose, Edgar: Erosion or renewal? The crisis of collective wage formation in Germany. In Blanpain, Blanke & Rose (eds) *Collective bargaining and wages in comparative perspective Germany, France, the Netherlands, Sweden and the United Kingdom*, Kluwer Law International 2005

Committee completes examination of "general validity" of collective agreements
<http://www.eurofound.europa.eu/eiro/1999/09/inbrief/fi0212109n.htm>

Dispute over Employment Contracts Act resolved
<http://www.eurofound.europa.eu/eiro/2000/09/feature/fi0009161f.htm>

Dispute over extension of collective agreements in the building industry,
<http://www.eurofound.europa.eu/eiro/1999/09/feature/de9909117f.htm>

Freedom of association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition, International Labour Office, Geneva 2006

Rojot, Jacques: Collective agreements in France. In A. Ojeda Avilés (ed) *Collective Bargaining in Europe*, Comisión Consultiva Nacional de Convenios Colectivos, Ministerio de Trabajo y Asuntos Sociales, Madrid 2005

Schulten, Thorsten: *Minimum wage protection Current German and European Debates*, lecture at Fafo Østforum's conference 3 June 2008

Social partners conclude intersectoral agreement for 2007–2008
<http://www.eurofound.europa.eu/eiro/2007/01/articles/be0701019i.htm>

Tariff Board votes to extend collective agreements to petroleum installations
<http://www.eurofound.europa.eu/eiro/2004/11/feature/no0411103f.htm>

Vigneau, Christophe & Sobczak, André: France: The helping hand of the state. In Blanpain, Blanke & Rose (eds) *Collective bargaining and wages in comparative perspective Germany, France, the Netherlands, Sweden and the United Kingdom*, Kluwer Law International 2005