



*The evolving structure
of Collective Bargaining in Europe
1990-2004*

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National Report
Belgium

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EXECUTIVE SUMMARY

Preliminary Remarks

Belgium has evolved into a federal State. There are three Regions endowed with competences in social and economic matters: The Flemish Region, the Walloon region and the Region of Brussels – Capital. The Regions have a well-defined territory that is under their jurisdiction. Furthermore, there are three communities: the Flemish Community, the French Community and the German speaking Community. These communities have competences in cultural matters and in n matters of well being and personal development. It is important to note that the communities have no well defined territory as such, seen the fact that some parts of the country have a bilingual status.

These remarks on Belgian federalism are important, while the federal structure has an influence on industrial relations.

Labour law and also social security law constitute a competence of the federal authorities. Since the regions are competent to develop an employment policy in their own right , it is easily understood that friction and tensions are possible.

In Belgium there are al least three “labour relations systems” : one for the private sector, one for the public sector and one for the semi-public sector.

This study is primarily concerned with the private sector.

Characteristics of the Belgian industrial relations system

The industrial relations system of each country is influenced by many factors. The historical dimension, influence of the legal system, the structure of the State and cultural factors, social concepts and ideas are paramount.

The following report sticks to the traditional use of the terminology “industrial relations”¹.

The focus of “industrial relations” is on the regulation (control, adaptation and adjustment) of the employment relationship which is shaped by legal, political, economic, social and historical contexts². In continental Europe “industrial relations” embraces also issues of economic and financial policy as far as related to general social policy. Employers from services and non-profit organisations and their workers are fall under that scope.

1. There are no formal tripartite social dialogue bodies in Belgium

This is a first important characteristic of the Belgian industrial relations system. The main reason is an historical one. Indeed there was an attempt to establish tripartite bodies during the Second World War. So at the top level in the social dialogue machinery there are two important bipartite bodies: a social council (National Labour Council) and an economic council (Central Economic Council). The State is not represented.

In many other continental European countries, Social and Economic Councils have been instituted, though often with a tripartite structure.

Since Belgium became a federal state, it could be observed that in the constituent parts of the federation, social and economic councils have been created³. But again, these councils have a bipartite composition; the regional authorities are not represented.

¹ While others specialists use “labour relations system” or nowadays also “employment relations system.

² SALAMON, Michael, *Industrial Relations. Theory and Practise*, Harlow, Pearson Education, 4th ed., 2000, 5.

³ In the Flemish Region, the Walloon Region and in the Region of Brussels

As time goes on, the employer's side is no longer opposed to bodies that treat social and economic matters. This former opposition was the main reason for the establishment of two separate bodies after WWII.

2. Tradition of informal tripartism

Even if there are no tripartite bodies, there is a long-standing tradition of informal tripartite social dialogue in the Belgian industrial relations system.

So very frequently, representatives of the peak organisations of employers and of trade unions⁴, have meetings with members of the Inner Cabinet⁵.

So Belgium is in full compliance with the principles of ILO-C144 Tripartite Consultation (International Labour Standards) Convention, 1976.

At the same time this practise is also an illustration of another characteristic of Belgian industrial relations, i.e. the "autonomy of social partners".

3. The "autonomy of social partners"

The principle of the autonomy of social partners, is a crucial element in the application of important international instruments:

ILO-C87 Freedom of Association and Protection of the Right to Organise Convention, 1948

ILO-C98 Right to Organise and Collective Bargaining Convention, 1949

⁴ Known as the «Group of Ten», five representatives of the peak organisations of employers and five representatives of the peak organisations of labour

⁵ Prime Minister, Deputy Prime Ministers and some other senior members of the Federal Government, e.g. the Minister of Labour.

ILO-C154 Collective Bargaining Convention, 1981

There is no interference of the state in matters that concerns the organisation and action of employers' organisations and trade unions. An important example is that in Belgium trade unions have no full legal capacity, that is to say they have no corporate personality. However in some cases the legislator has attributed specific rights (e.g. the right to represent members in proceeding before a labour court).

This principle is at the same time closely linked to the "principle of subsidiarity".

4. The "principle of subsidiarity"

The idea of subsidiarity and the tradition of voluntarism are of a major importance in Belgian industrial relations.

The principle of subsidiarity implies that all matters that can be settled by interested parties are indeed settled by them, without any direct interference of the political authorities.

The Belgian political world generally respects the principle of subsidiarity concerning social matters. Still, the principle does not exclude any governmental intervention. Thus, during the period 1980-1986, an attempt was made by the Belgian Government to pursue a policy of wages restraint. Public authorities imposed a margin for wages negotiations between employers and workers.

An Act on Promotion of Employment and Maintaining Competitiveness⁶ was introduced in 1996. The aim is again the introduction of a policy of wage restraint. For the first general negotiations round, after the new law came into effect, Government

⁶ Loi du 26 juillet 1996 relative à la promotion de l'emploi et à la sauvegarde préventive de la compétitivité, (Moniteur belge, 01/08/1996)

made a formal decision to limit the increase of labour costs during the negotiations for the years 1997-1998.

For the negotiations covering the years 1999-2000 and 2001-2002, Government accepted the engagement of social partners to comply with a maximum increase in labour costs as recommended by the top-level social partners. This is an example of the wide acceptance of the principle of voluntarism. The latter does not imply that the political authorities are not safeguarding the public interest.

More than once Government is introducing new legislation in absence of a consensus between political decision-makers and social partners.

On the other hand Government is stimulating collective bargaining by linking benefits for employers and employees to circumstance that Collective Agreements will be concluded.

5. The Belgian industrial relations system is an example of a “co-ordinated” system

The last decades there has been a wide scientific discussion about some elements of industrial relations systems. Industrial relations in some countries have been described as “centralised” and other as “decentralised”. The most important indicator was the level where key collective bargaining takes place: at the national level or at enterprise level. But, as always, there are intermediate types. So Belgium is an example of the last case: there is a co-ordinated system of collective bargaining.

There is a kind of “division of labour” between the national level, the level of branches of industry (sectoral level) and enterprise level.

6. The Belgian industrial relations system is a “dynamic” system

One can distinguish two kinds of collective bargaining systems., or even better two types of bargaining procedures.⁷

Both procedures can be distinguished, though not separated. Indeed, many overlaps and hybrid forms exist. One is sometimes referred to as the institutional or dynamic, the other as the contractual or static method.

The *institutional method* “ (dynamic system) consists in the creation of one or more permanent bilateral bodies. They are known as a joint industrial council, a conciliation board, or a joint committee, on which both sides are represented by an equal number of members, sometimes (in a minority of cases) with an independent chairman presiding”.⁸

The institutional method was said to be widespread in the United Kingdom, Belgium being the country that is (was) most similar to Britain.

On the other hand, *the contractual method*, the actors gather, negotiate, arrive at an agreement and then disperse. From time to time they meet as the need arises, i.e. when the agreement is coming to an end and they wish to renew the agreement.

7. The importance of collective bargaining in Belgian industrial relations

Collective bargaining as a “rule-making process” is of paramount importance in Belgian industrial relations. Collective agreements can be concluded at different levels (national and intersectoral, sectoral and at the level of enterprise)

⁷ KAHN-FREUND, Otto, *Labour and the Law*, ed. by Paul DAVIES and Mark FREEDLAND, 3th ed., London, Stevens and Sons, 1983, 70-74.

⁸ *Ibid.*, 70.

Collective agreements concluded within the legal framework (joint bodies) that is set up by Government and with the consent of social partners have a quasi-automatic extension. So all employers and workers are bound by the collective agreement (for normative individual rights). The binding of such collective agreements can even become more pressing, when they are declared to be binding “erga omnes” at the request of social partners. The non-observance of their clauses becomes a criminal offence.

One could say that from time to time there is some friction or some kind of concurrence between social partners and Government in the field of law making concerning labour matters.

A complex conciliation-mediation machinery has been set up. As labour and management see themselves as lawmakers, they are strongly engaged in the settlement of labour disputes through the process of conciliation and mediation.) Social partners actively participate in the machinery of conciliation boards, while a labour conciliator-mediator (from the Ministry of Labour) chairs the proceedings.

8. The evolving structure of collective bargaining (1993-2003)

The period between the years 1993-2003 has been characterised by the well-known general discussion about the “decentralisation” of collective bargaining and the growing importance of plant-level bargaining. The economic situation and Government policy to stimulate plant level bargaining, reducing the role of sectoral collective bargaining has revealed the true nature of the Belgian industrial relations system. As could be observed, there is a change in the articulation between the different levels of bargaining (intersectoral, sectoral and plant level). Nowadays, sectoral collective bargaining tends to be “steering ” collective bargaining at the level of enterprise, instead of deciding about compulsory norms. This means more promotion of good practises and the proposal of solutions that are acceptable for sectoral negotiators.

It is fair to say that the Belgian industrial relations system had become even more an example of a “co-ordinated” system.

The influence of European integration has put some pressure on Belgian industrial relations. There was already the start of a tradition of transposing European Directives into Belgian law by means of (intersectoral) collective agreements concluded within the National Labour Council, but more and more a joint action of social partners and Government is necessary. This implicates a true “policy-concertation”.

European law has an influence on existing rules and practises that were laid down in sectoral collective agreements. In any case the European dimension has become present in collective bargaining.

1. Constitutional Principles and Statutory Regulation of Collective Bargaining

The **1993 Constitutional** Reform gave rise to the “guarantee of economic, social and cultural rights”. A non-exhaustive list of economic, social and cultural rights was added. Article 23 Belgian Constitution contains a reference to the principle of freedom of collective bargaining (‘droit de négociation collective’). The article is silent about the identity of the holder of that right (worker, works council or trade union?). It doesn’t regulate basic principles regarding the binding of collective agreements either.

The constitutional *Travaux préparatoires* indicate that the recognition of freedom of collective bargaining was construed to be compatible with the granting of prerogatives to organisations deemed representative. The legal distinction between ‘ordinary’ unions and representative unions was considered to safeguard the stability of the bargaining process. The French language version can be construed as an argument in favour of the thesis that the Constitution does not grant an enforceable right to participation at the bargaining table for any trade union, let alone a right to the conclusion of an agreement. The Constitution grants a “droit de négociation”, rather than a “droit à la négociation”.

The Constitution recognises the freedom of collective bargaining, rather than a right to bargaining.

The Constitutional recognition of that principle was preceded by the elaboration of a legislative framework regarding the binding and the enforcement of collective agreements. The **Belgian Act of 5 December 1968** (on collective labour agreements and Joint Committees (Collective Labour Agreement- Act, *C.L.A.-Act*) provides a detailed legal status for collective labour agreements in the *private* sector concluded between employers, or **representative** employers' organisations and **representative** workers' organisations. The act constitutes the 'authorised version' of collective bargaining in Belgium.

Prior to the Act of 5 December 1968 attempts had been made to provide a legal status for collective agreements. The **Décret-Loi of 9 July 1945** provided a nuclear framework.

The law introduced the mechanism of the extension *erga omnes* of collective agreements concluded at branch level. It did not guarantee that collective agreements *not* declared to be generally binding were applicable to the non-unionised employees of a signatory employer or to an employer who was a member of a signatory organisation. Furthermore, Belgian case law did not unambiguously clarify whether a collective agreement which was not declared to be generally binding was binding *vis à vis* unionised workers or an affiliated employer.

In **1954** a legal intervention provided that collective agreements concluded at sectoral level not declared to be generally binding had a supplementary effect ("effet supplétif"). The collective agreements concluded at sectoral level became a relevant source of law, for the employers (even those not affiliated to a signatory organisation) which fell within the scope of a Joint Committee and their employees (even those not unionised). However, the agreement would cease to have an "effet supplétif", if the

individual employment contract or the working rules (“règlement d’atelier”) provided otherwise⁹.

Collective Agreements, which do not fall within the scope of the C.L.A.-Act can be considered to have a legal effect in accordance with *ius commune* principles. In practice, these agreements are rarely concluded. Furthermore, in the hierarchy of laws, they will be overruled by formal collective agreements. The *ius commune* binding will play as well, when collective agreements concluded between the representative social partners have not been registered properly.

The Belgian legislator has omitted to codify the labour legislation in a comprehensive Labour Code.

As a rule, the employees (civil servants as well as those under contract) of the public sector fall outside the scope of collective bargaining. These workers are covered by the *Act of 19 December 1974* regarding the relations between the Government and the trade unions organising its staff.

The Act guarantees a social dialogue, which does not amount to genuine collective agreements. The Social Dialogue amounts to a unilateral regulation of labour conditions, which is made subject to a process of prior information and consultation. The government has to pursue the dialogue process in good faith.

2. Legally recognised actors of Collective Bargaining

According to the Belgian C.L.A.-Act, collective agreements can be concluded between one or more employers or representative employers’ organisations *and* between one or more representative workers’ organisations. The Belgian Law regarding the

⁹ See for the legal status of collective agreements prior to the C.L.A.-Act: R Blanpain, *De collectieve arbeidsovereenkomst en de bedrijfstak naar Belgisch recht*, Leuven, 1961, 238p.

functioning of the Works Council (1948) (*Conseil d'entreprise*) does **not** provide for any genuine bargaining power for the workers' representatives of the Works Council.

An institute similar to the German *Betriebsvereinbarung* does not exist. The "Conseil d'entreprise" is a mixed organ composed of workers' representatives and presided over by the head of the enterprise (*chef d'entreprise*). For that reason, it cannot conclude an agreement with the employer. It does constitute a *forum* for "social dialogue" between the employer and the workers. In practice, the Works Council is engaged in a process of information and consultation, rather than of collective bargaining.

The Works Council is competent to adopt the shop rules (Cf. *règlement de travail*.) The *règlement de travail* is adopted on the basis of consensus (between the employer and the workers' representatives). The 'legislative' power of the Works Council cannot truly interfere with collective agreements. In the hierarchy of rules established by the C.L.A.-Act, a collective agreement will always prevail over a *règlement de travail* (Cf. Article 51).

At plant level, the *Comité pour la Prévention et la Protection au Travail* is specialised in matters regarding safety and health. The mixed body is presided over by the head of the enterprise. It is not a forum for genuine collective bargaining at plant level. At plant level, a collective agreement will be negotiated by the *délégué syndical* (union delegate) and it will be signed by the union's secretary or by the *délégué syndical* being properly mandated for that purpose. The *délégué syndical* is a worker of the plant who is appointed by the union or elected by the workers (after a candidature supported by the union) to represent the workers affiliated to the union.

Collective agreements at branch level and at intersectoral national level will be concluded in joint organs (formal bodies with representatives of both sides of industry) created by the Government.

At **branch level**, the *Commissions Paritaires* (Joint Committees) have been created. The representative workers' and employers' organisations represented in that committee conclude collective agreement at branch level. The agreement is not construed as a legal act of the committee. At national and intersectoral level, the *Conseil National du Travail* (1952) serves in a similar way as a *forum* for the conclusion of collective agreements.

Other organs have been created by the State, such as the *Conseil Central de l'Economie*. It is a forum for dialogue between national employers' and workers' organisations on matters of economic policy.

The conclusion of collective agreements covered by the C.L.A.-Act constitutes a prerogative of **representative** workers' organisations and employers' organisations. Article 4, *juncto* article 42 of the C.L.A.-Act delineate the concept of representativity.

Representative workers' organisations are the interprofessional workers' organisations organised at national level, which are represented within the *Conseil National du Travail* as well as in the *Conseil Central de l'Economie* and which have at least 50.000 members. The workers' organisations (at branch level) which are affiliated to the first, are deemed to be representative as well.

Representative employers' organisations are the interprofessional employers' organisations organised at national level, which are represented within the *Conseil National du Travail* as well as in the *Conseil Central de l'Economie*. The employers' organisations (at branch level) which are affiliated to the first, are deemed to be representative as well. Furthermore, the C.L.A.-Act allows the Government to recognise employers' organisations to be representative at branch level, which are not affiliated to the representative national and interprofessional employers' organisations.

Furthermore, the C.L.A. -Act recognises the representative status of an employer's organisation representing small and medium size enterprises.

Article 42 specifies that the presumption of representativity based on the affiliation will not automatically generate a seat in the *Commission Paritaire* at branch level. The affiliated organisations will have to provide evidence of their representative status.

The Belgian system of representativity has met severe critique from the ILO supervisory bodies. The determination of the representative character is not based on objective, pre-established criteria.

Indeed, the crucial condition, that of membership of the *Conseil National du Travail* and of the *Conseil Central de l'Economie* will depend upon the discretion (i.e. political choice) of the Government.

The ILO has never convincingly demonstrated in what way the rule of objective and pre-established criteria (Cf. Collective bargaining Recommendation nr. 163 of 3 June 1981) can be deduced from the freedom of collective bargaining and the freedom of trade union association. The system of representativity has been challenged before the *Cour européenne des Droits de l'homme* (11 April 1975, *Affaire Syndicat National de la Police belge, Série B*, nr. 17) on the basis of an alleged violation of the Freedom of Association and before the Belgian constitutional *Cour d'Arbitrage* (18 November 1992; 18 April 2002 and 19 November 2003). Both Courts have argued that the privileges granted to the national and interprofessional organisations as well to their affiliates serve a legitimate purpose. The distinction made between representative and non-representative organisations was not construed to be disproportionate. Furthermore, the ILO's criticism lacks credibility. The notion of representativity stems from the ILO's Constitution. It is not based on objective and pre-established criteria, but on the subjective choice of the Member States.

3. Levels of collective bargaining according to the C.L.A.-Act

Collective agreements can be concluded at the level of the company. Collective agreements at company level are concluded between the corporate employer and the representative trade union.

The definition of a collective labour agreement in the .C.L.A-Act (Cf. Article 5) provides scope for multi-employer agreements. In practice, this *figura* is near to non-existing. It is a blind spot, in case law or legal doctrine.

Collective agreements can be concluded at sectoral or professional level. Collective agreements at sectoral or professional level are concluded *within* Joint Committees (*Commissions Paritaires*).

These Joint Committees are established by Royal Order. They are being presided over by a civil servant of the Ministry of Labour and Employment. The Chairman can serve as a mediator in case of a conflict between employers' and workers' organisations. The oldest *commissions paritaires* date back to the *interbellum*. Collective agreements are not construed as instruments adopted *by* the Joint Committee. In view of the binding of these instruments, the question was raised in a procedure before the *Conseil d'Etat* whether collective agreements can be considered to be administrative decisions in spite of their contractual *genesis*. An affirmative answer would have paved the way for the *Conseil d'Etat* to decide in cases brought before this administrative jurisdiction to annul the collective agreements as such. An *ad hoc* legislative intervention (1991) (Cf. article 26 *in fine* C.L.A.-Act) has blocked such an intervention, without clarifying the yet academic question of the nature of these instruments.¹⁰

Furthermore, collective agreements can be concluded at national and interprofessional level by representative workers' and employers' organisations within

¹⁰ Conseil d'Etat, nr. 32.348, 2 April 1989, *Revue Critique de Jurisprudence belge*, 1991, 651-653; F. DORSSEMONT, "De 'natuur' van de collectieve arbeidsovereenkomst: een poging tot een juridisch pluralistische herbronning", *Tijdschrift voor Wetgeving*, 2001, 107-126 ; M. LEROYE, "Un revirement attendu : la nature des conventions collectives", *Revue Critique de Jurisprudence belge*, 1991, 653-680 and M.RIGAUX, " CAO: overeenkomst of onderhandeld reglement", *Rechtskundig weekblad*, 1992-93, p. 421-430

the *Conseil National du Travail*. The *Conseil d'entreprise*¹¹, as well as the *Joint Committees* and the *Conseil National du Travail* are part of the so called *Organisation de droit public de l'Economie*.

The wording is indebted to the neo-corporatist idea that the functioning of these organs transcends the particular group interest of the trade unions and employers' organisations concerned.

Contrary to other historical (Cf. the Italian *Corporazioni* in the era of the *Leggi fascistissime*) or actual experiences (cf. the Dutch 'bedrijfsschappen'), the *Commissions Paritaires* as well as the *Conseil National du Travail* as such are deprived of genuine *normative powers*.

4. Legal Binding of Collective Agreements according to the C.L.A.-Act

The C.L.A-Act provides that the King (i.e. the Federal Government) can declare collective agreements concluded within the *Commissions paritaires* or the *Conseil National du Travail* to be "generally binding". The expression "generally binding" is disturbing. In fact, collective agreements that are concluded within the *Commissions paritaires* or the *Conseil National du Travail* have a broad, indeed general binding nature in their own right.

Collective agreements thus concluded at professional or intersectoral level will be binding:

- for the signatory representative trade unions and employers' organisations
- for the employers affiliated to the signatory employers' organisations
- and *last but not least* for the workers employed by a bound employer. The C.L.A.

Act does not make any distinction whatsoever between unionised and non-unionised members of a trade union (Cf. Article 19).

¹¹ As opposed to the Dutch Legal System.

Furthermore, collective agreements concluded within the *Commissions Paritaires* or the *Conseil National du Travail* have a supplementary binding (*effet supplétif*) for the labour contracts of employers (and their employees) who have *not* acceded to these agreements and are neither signatory parties. This will be the case of course as long as they fall within the *scope ratione personae et loci* of the *Commissions paritaires* or of the *Conseil National du Travail* (Cf. Article 26).

In sum, a collective agreement concluded in a joint committee or subcommittee extends automatically, after an administrative procedure, to all employers and workers within the jurisdiction of the joint committee or subcommittee. The procedure is very simple. This extension will operate fifteen days after the publication in the Belgian Official Gazette¹² of the notice that a collective agreement has been concluded in a joint body, and that its *registration* has been accepted. From that moment, all clauses of the agreement giving individual rights to workers become effective for all persons under the jurisdiction of the joint committee or subcommittee. The clauses of an agreement that regulate relations between signatory organisations are, of course omitted from the extension.

At this stage, the legal effect of the extension is governed by **private law**. This means that in case of dispute; the case has to be brought before the Labour Court.

A collective agreement concluded in a joint committee or subcommittee may even be made **generally binding** by Royal Order. The result of that decision is that the agreement will be binding in a **mandatory way** for all employers and their employees which fall within the *scope ratione personae, loci et materiae* of the *Commissions paritaires* or the *Conseil National du Travail*, despite the content of the individual labour contract.

This means, in legal terms, that there is an *erga omnes*- effect, and non-compliance with the collective agreement is liable to penal sanctions. The legal effect of

¹² Moniteur belge – Belgisch Staatsblad.

this kind of “extension” is indeed governed by **public law**.

A dispute can still be brought before a Labour Court, but if the Public Prosecutor or a plaintiff has filed a complaint, the Labour Court has to wait until the verdict of the Criminal Court is final¹³.

This procedure allows the sectoral social partners to enact rules that, in co-operation with the government, become legal instruments with nearly the same effects as government regulations.

The Royal Order and the collective agreement are in that case published *in extenso* in the Belgian Official Gazette. The decision is construed to be an administrative decision, which can be annulled by the *Conseil d’Etat*. The binding *erga omnes* effect can only be given to a sectoral or intersectoral collective agreement after a request is done by at least one of the signatory parties or by the sectoral joint committee or the *Conseil National du Travail*.

Government¹⁴ has the discretion to decide if a draft-Royal Order is to be prepared, but its powers are limited. The terms of the sectoral collective agreement cannot be amended. It is only possible to decide to give a binding “*erga omnes*” effect, or to refuse to give it. In the latter case the Minister of Labour is under the obligation to give the detailed reasons to the sectoral joint committee or to the *Conseil National du Travail*. The agreement is also indivisible, so it is the whole agreement or a refusal.

The Royal Order will follow the life cycle of the collective agreement in question. If the collective agreement has been concluded for a definite period, it will end *de iure* after termination of the collective agreement. If the collective agreement concluded for an indefinite period has been terminated unilaterally, the Government has a legal duty to withdraw the decision at the time of termination of the collective agreement. (Article 33 C.L.A.-Act).

¹³ Cfr the legal adagium: «Le Criminel tient le Civil en Etat»

¹⁴ *De facto* the Minister of Labour; in a very limited number of cases the decision was made by the Cabinet.

Another aspect related to the binding of the collective agreement is the option of the Belgian legislator to integrate the contract of employment and the legal order of collective agreements. There is no clear-cut separation (*étanchéité*) between both of them. The C.L.A.-Act provides that the individual normative part of a collective agreement will be incorporated within the individual contract of employment. Clauses, which are contrary to the collective agreement, are null and void. Unless the collective agreement provides otherwise, the “incorporation” will continue to produce its effects after the termination of the collective agreement. (Cf. Article 11 and 23 of the C.L.A.-Act)

Since a few years, there is a tendency to consider the system whereby the binding *erga omnes* effect is given, as contrary to the Belgian Constitution¹⁵. There are of course also contrary views¹⁶.

5. Institutional Framework for Collective Agreements

In Belgium the following bodies for social dialogue that amounts to collective agreements can be discerned:

At national and interprofessional level: *Conseil National du Travail*.

The *Conseil National du Travail* has been established by Law of **29 May 1952**. It is composed of a President and representatives of the “most representative” employers’ and workers’ organisations. It is a *forum* for the conclusion of collective agreements.

¹⁵ P. POPELIER «Algemeen verbindend verklaring van de C.A.O.’s», in: P. HUMBLET, B. MERGITS, M. RIGAUX and J. ROMBOUTS (eds.), *C.A.O.-Recht*, Antwerpen, Kluwer rechtswetenschappen, 2001, C.S.-1.7/1-C.S.-1.7/11 and P. POPELIER, “Vlaamse C.A.O.’s”, *Rechtskundig Weekblad*, 2002-2003, 154-157.

¹⁶ DORSSEMONT, Filip, «De ‘natuur’ van de collectieve arbeidsovereenkomst: een poging tot een juridisch-pluralistische herbronning», *Tijdschrift voor Wetgeving*, 2001/4, 107-126; DORSSEMONT, Filip, “Sire, laat de staat de straat respecteren! Over fundamentele werknemersrechten en democratie”, in: HUBEAU, Bernard and Michiel ELST (ed.), *Democratie in ademnood? Over legitimiteit, legitimatie en verfijning van de democratie*, Brugge, Die Keure, 2002, 305-338 and M. JAMOULLE, “Conclusions”, in M. STROOBANT, M. DE SAMBLANX en P. VAN GEYT, *Bedrijfsorganisatie aan de vooravond van de 21^{ste} eeuw*, Antwerpen, Intersentia, 292.

Furthermore, it has a general competence to give its opinion on “matters of a social concern” to the Government or to Parliament. (See www.nar-cnt.be)

At professional level (sectoral level – level of branches of industry): *Commissions Paritaires*. (See *supra*)

At enterprise level:

The *Conseil d'entreprise* is a body for dialogue between management and labour at the level of the “unité technique de production” (the establishment), which is erroneously qualified as the “enterprise”. The dialogue within the *Conseil d'entreprise* does not amount to collective agreements. Collective agreements at company level are concluded outside ‘institutionalised bodies’. In practice, they are concluded by the secretary of a trade union, or by a worker-*délégué syndical*, though properly mandated and by an employer.

6. Content of Collective Agreements

The C.L.A.-Act defines the object of a collective agreement in a broad way as an agreement regulating individual and collective relations between employers and employees in enterprises or in a branch of industry as well as regulating the rights and duties of the *contracting parties* (Article 5).

Legal doctrine tends to reiterate the classic distinction between the normative and the obligatory part. The law does not require that collective agreements *have* to contain an obligatory part.

Contrary to other legal orders, the C.L.A.-Act does not prescribe a mandatory obligatory part. (Like e.g. a social peace clause or a duty to influence the members of trade unions).

An inherent restriction regarding the definition surrounds the scope *ratione personae* of collective agreements. The definition precludes the collective agreements to regulate rights and duties of third parties, i.e. people who cannot be qualified as employers or as employees. The question arises whether social partners can regulate rights and duties of *future* or *candidate* workers or of *past* workers. Legal doctrine tends to be divided. The C.L.A. -Act refers to workers. It defines the term “workers” as persons who are bound by a contract of employment. Some scholars have argued that in a more dynamic perspective, the wording “workers” refers to persons who offer their services at the labour market, irrespective whether they are actually bound *hic et nunc* by a contract of employment

At sectoral level any aspect of industrial relations can be a subject for collective bargaining. Of course negotiators have to bear in mind the rules of Article 51 of the C.L.A.-Act (1968).

Wages, indexation of wages, reduction of working time, bonuses and supplementary schemes in case of illness, unemployment, early retirement and pensions are typical subjects. This is also the case for job classification, special rules concerning dismissals (redundancy) and the protection of employment, flexibility in the organisation of work, remedies against stress at work; specific trade union rights at company level are other examples.

It is no exaggeration to state that the variety of subjects is overwhelming¹⁷.

Defining the status of ‘**trade union representatives**’ in the enterprise is also of major importance, given that in many cases these union delegates have an important role at that level. Trade union representation at company level is instituted by collective agreements. The rights and duties of trade union representatives are thus not found in Acts of Parliament or in government regulations, but only in collective agreements.

A collective agreement concluded in the *Conseil National du Travail*, outlines the

¹⁷ At this moment the Labour Relations Office follows data in collective agreements in 40 subject classes and 273 descriptors.

basic principles related to the establishment and the role, rights and duties of trade union representatives.¹⁸ But every joint committee has the power to lay down more elaborate rules about trade union representatives in their branch of industry. Trade union representatives can be elected by unionised workers at enterprise level, or can be appointed by representative trade unions. They represent unionised workers in discussions with management.

Apart from the bipartite Health and Safety Committees (*Comités pour la Prévention et la Protection au Travail*) and the Works Councils in enterprises with a given number of workers, the trade union representatives have a typical role in the collective bargaining process. Whereas Health and Safety Committees and the Works Councils are information and consultative bodies, the trade union representatives also have a role in the presentation of union demands, as well as in handling workers' grievances and acting as frontline mediators. They have the right to verify the proper application of labour law and collective agreements. Finally, they are also the frontline negotiators for company level collective agreements. However, the formal conclusion of collective agreements at enterprise level needs the approval of trade union officials, as their signature of the agreement is required.

In Belgium *national minimum wages* have been regulated and are being regulated by collective agreements.

Belgian social partners decided in 1975 to regulate the issue of minimum wages through a collective agreement, concluded in the *Conseil National du Travail*.¹⁹ Until then, from a legal point of view, social partners at central level only had the possibility to promote fixation and review of general minimum wages through non-binding recommendations. It was the responsibility of sectoral negotiators to realise in each case a satisfying solution by a sectoral collective agreement.

¹⁸ ILO-C135 Workers' Representatives Convention, 1971.

¹⁹ Collective Agreement N° 21 / NLC of 15 May 1975; there was no request for a general binding effect introduced.

The C.L.A.-Act (1968) has created an option for an economy wide collective agreements. At the national level negotiators took this opportunity and they made up a programme to regulate this issue. First, they concluded an inter-sectoral Collective Agreement N° 21 / NLC of 15 May 1975, which gave a directive to the sectoral joint committees, to realise the principle of a “guarantee of a minimum monthly income” before 31 July 1975. The Collective Agreement N° 23 / NLC of 25 July 1975 realised this principle for all sectors who had not taken the necessary measures in time. The system that was introduced is somewhat more sophisticated than a simple minimum wage as it takes into account all elements of remuneration. It should of course be seen in relation to the agreements that foresee a full month’s pay for all workers with a labour contract, other than a contract for temporary work.

Collective Agreement N° 43 / NLC of 2 May 1988²⁰ made a codification of the former two agreements and raised the amount of the guaranteed minimum monthly income. This amount was subsequently raised by later agreements²¹

The general principle of Collective Agreement N° 43 /NLC of 2 May 1988 is as follows. The clauses of the collective agreement have to be applied in the case of an employee of the age of 21 (full time occupation) or more, when the sectoral joint committee concerned, has not itself concluded a sectoral collective agreement covering the matter of minimum wages.

When the Conseil National du Travail fixes the minimum wage, e.g at index 100, there are all varieties possible at sectoral level and in a given period the Banking and Insurance sectors had minimum wages as high as index 150.

Social partners have also special attention for particular situations.

²⁰ Arrêté royal du 29 juillet 1988, *Moniteur belge*, 26 août 1988.

²¹ Most recently by Collective Agreement N° 43octies / NLC of 23 November 1998, Arrêté royal du 22 novembre 1998 (*Moniteur belge*, 9 février 1999)

The Collective Agreement N° 26 /NLC of 15 October 1975²² regulates the minimum wage of disabled workers who are occupied in a full time work system. For part time workers, the issue is regulated by Collective Agreement N° 35 / NLC of 27 February 1981²³

Finally a Collective Agreement N° 50 / NLC ²⁴ has been concluded to fix minimum wages for workers under the age of 21 which are not covered by a collective agreement, while there is no joint committee which has jurisdiction over the activities, or the sectoral joint committee does not work properly

In view of the clear-cut hierarchy concluded within the C.L.A.-Act (Cf. Article 51), collective agreements in principle can not specify working conditions *below (in pejus)* the law. However, in recent decades, the legislator on an *ad hoc* basis has allowed social partners to derogate *in pejus* from labour standards defined by law. Examples are *legion*.

- Contracts of Employment Act of 3 July 1978 (e.g. Article 11 bis; Article 18, 23)
- Labour Standards Act of 16 March 1971 (Working Time) (e.g. 20 bis, 21; 38ter)
- Act of March 1987 regarding the introduction of new working time arrangements in enterprises .

Appendix 1 Working Time and Collective Agreements

Working Time is mainly regulated by the Labour Standards Act (*Loi sur le Travail*) of 16 March 1971. However, national and interprofessional collective agreements declared to be generally binding do constitute an important supplementary source for the regulation of working time.²⁵ They cover the entire private sector.

²² Arrêté royal du 11 mars 1987 (*Moniteur belge*, 23 avril 1977)

²³ Arrêté royal du 21 septembre 1981 (*Moniteur belge*, 6 octobre 1981)

²⁴ Collective Agreement N° 50 / NLC of 29 October 1991, Arrêté royal du 17 décembre 1991 (*Moniteur belge*, 10 janvier 1991)

²⁵ In this respect : Collective Agreement nr. 29, 29 November 1976 (procedure regarding the registration of overtime) ; nr. 42, 2 June 1987 (procedure for bargaining complementing the Act of 17 March 1987) ; nr. 76, 18

National and interprofessional collective agreements do *not* constitute an example of bargaining *in pejus* vis à vis the level granted by statutory legislation.

Both the Labour Standards Act Law (*Loi sur le Travail*) and the more recent Act of March 1987 regarding the introduction of new working time arrangements in enterprises authorise bargaining *in pejus*.

The most striking examples of this phenomenon in the Labour Law concern:

- Article 20 *bis* (derogations of the maximum daily and weekly working hours)

The Article allows derogations through collective agreements as well as through the working rules (*règlement de travail*). The possibility to derogate dates back to 1994

Due to the hierarchy of legal norms, collective conventions concluded at branch level will always prevail over those at enterprise level, which prevail over the working rules..

- Article 21 (regarding the minimum working period of three hours). Derogations are allowed through a Royal Order or through a collective convention at any level. The article preceeds the period under review
- Article 26 § 1 3°. In exceptional cases of *vis major*, an agreement between the *délégué syndical* and the employer can derogate from the daily and weekly maxima .The article preceeds the period under review.

July 2000 (The Collective Agreement in fact restricts the possibilities to deviate from the statutory regulation, in order to protect night workers) and nr. 80 , 27 November 2001 (breaks for *lactatio*)

- Article 29 § 4 allows for derogations through collective agreements (at any level) in order to substitute the statutory financial compensation for overtime by a supplementary rest period. The article dates back to 1993
- Articles 37 and 39 of the Labour Standards Act allow social partners to authorise night work under certain conditions. This constitute a derogation: as in principle night work is prohibited. Social Partners can only authorise night work through collective bargaining at enterprise level, if the Government has failed to elaborate a regulation. All the representative unions represented in the *délégation syndicale* have to agree. If no *délégation syndicale* is established at plant level, the employer is able to introduce night work. The regulation dates back to 1997.
- Article 38 *ter* (minimum rest period of eleven consecutive hours). The provision allows derogations through collective agreements declared generally binding (*ergo*: interprofessional level or branch level). The article dates back to 1998.

The Act of March 17 March 1987 regarding the introduction of new working time arrangements in enterprises authorises derogations. The law establishes a complicated system of *in pejus* bargaining derogating from statutory provisions regarding the prohibition of Sunday work, nightwork and regarding the regulation of daily and weekly working time.

The bargaining process describes a “cascade”. In principle derogations stem from a collective agreement at branch level. In absence of such an agreement, derogations can be authorised through a collective agreement at plant level concluded with all the representative trade unions which are part of the *délégation syndicale*. In absence of such an agreement, derogations are allowed through the working rules (*règlement de travail*). The law precedes the period under review.

No data nor research exist regarding the content of collective agreements at enterprise level regarding working time

Appendix 2 Agency Work and Collective Bargaining

The relation between “collective bargaining and agency work” is twofold. The specific structure of the agency relation has forced the legislator to adopt the structure of collective bargaining at branch level. The employers-delegation at the “Commission paritaire” for the Agency sector has a twofold structure. It consists of representative employers’ organisations representing the agencies and of representative organisations of the user enterprises. (cf. Article 27 of the Law of 24 July 1987).

On the other hand, the phenomenon of agency work is regarded with suspicion in other branches. The *Conseil National du Travail* has regulated some aspects of Agency Works prior and posterior to statutory intervention of the Law of 24 July 1987 regarding Agency Work²⁶. Between 1981 and 1987, these national collective agreements have overcome a *vacuum iuris*. Ever since, the law of 1987 the meaning of the national collective agreements has diminished. Some principles of the latter law have been elaborated in the Collective agreement nr. 58 of 7 July 1994.

This convention contains precise provisions regarding the maximum duration of the temporary replacement of a core worker by an agency worker (six months) Furthermore, the collective agreement provides strong procedural restrictions to recourse at agency work in the case of a temporary replacement of a core worker (whose contract is terminated) or in case of a *temporary increase of work*. In practice, employers can have recourse to agency workers in both hypotheses on the sole condition that they have the consent of the *délégation syndicale*. The law indicates the procedure to be followed in case no *délégation syndicale* is established.

²⁶ See <http://www.cnt-nar.be/FCCT-thème.htm#TRAVAIL%20INTERIMAIRE>

Collective Agreement nr. 58 is important as well, since it precludes a recourse to agency workers to substitute workers on strike or being subject to lock out.

At the branch level of many Joint Committees (*Commissions* paritaires) agreements have been concluded to restrict the recourse to agency workers through procedural and substantial provisions.

The collective agreements concluded within the Commission Paritaire nr. 322 for the Agency sector deal with a variety of subjects.

Collective agreement of 14 May 1997 (Royal Order 22. 02. 1998) prohibits the use of agency workers to substitute core workers being temporarily unemployed.

Collective agreement of 30 October 1997 provided an obligation for the Agency company to communicate the use of an agency workers by a client /user to the Social Fund for Agency Workers prior to their use. This agreement was terminated by the representative organisation of the Agency Companies on 16 December 1998.

A Collective Agreement of 11 May 1999 provides an obligation for Agency Companies to finance additional training for agency workers by funding 0, 30 percent of their salary to the Social Fund.

Other collective agreements registered regulate wages and have granted complementary social benefits to interim workers or regulate reimbursement of specific costs.

The overall impression is that collective bargaining has been *in melius* rather than *in pejus*.

The *Conseil National du Travail* has elaborated various collective agreements prior to the actual establishment of the Joint Committee nr. 322.

Substantial and Procedural restriction regarding the recourse to agency workers have been included within collective agreements concluded within a variety of Joint Committees and/or their subcommittees. See the following committees' nr. 102, 104, 105, 106, 111, 112, 113, 114, 115, 116, 118, 120, 121, 12, 125, 126, 129, 130, 133, 134, 139, 140, 142n, 149, 207, 220, 222, 224, 302, 315, 317, 325 and 327²⁷.

The following provisions are customary. Sometimes, these provisions are just part of the obligatory part of the collective agreement. .

- Commitment to respect statutory legislation
- Approval of the representative trade union represented in the *Commission paritaire* to maintain an agency worker after a certain period has evolved or an obligation to recruit an agency worker after a certain period. The period under scrutiny can differ from one Committee to another (15 days, 20 days, 3 months, 6 months, 9 months or 'limited period')
- Necessity to inform the works councils, representative trade unions or the *délégation syndicale*
- Duty for the agency company to apply collective agreements applicable to the user (wages and working conditions) or the "wages and working conditions" applicable to the core workers as such
 - Prohibition to recruit agency workers in cases of temporary unemployment
 - Prohibition to recruit retired workers
 - Global restriction to recruit agency workers to 10 percent of the total amount of working hours
 - Obligation to provide information to agency workers analogous to the information provided to newly recruited core workers
 - Right of the agency workers to be represented by the union delegation of the user company
 - Obligation to use an agency worker for at least one week or at least more than one day

²⁷ For an identification of the branches covered by these Joint Committees : <http://www.meta.gov.be/paa/paa/framesetfrkg01.htm>

- Obligation to give preference to agency workers having worked within the user company, who were made redundant due to restructuring
- Obligation for the agency worker to follow a safety training
- Restriction of the use of agency workers to cases of incapacity of a core worker or to cases of exceptional or temporary increase in work or in cases of technical assistance

7. Sociological Picture of the main actors of Collective Bargaining

7.1. Trade unions

At present, only three *central trade unions* are considered to have the status of representative organisations under the Collective Agreements Act (1968). The latter and their affiliated industry-level unions have the sole capacity to conclude legally binding collective agreements on the employee side. Belgium has a rather high union density degree. In an authoritative study it is rated between 48 en 53 percent, but mention is also made of other studies which give a higher union density as 82 percent for blue-collar workers, 68 percent for workers in the public sector and 32 percent for white-collar workers.²⁸ PRICE mentions other data, 67.1 percent in 1970 and 75.8 percent in 1985.²⁹ The EU gives a rate of union membership of nearly 70 percent.³⁰

These three peak organisations are:

The *ACV-CSC*, which has its roots in the Belgian Christian Democrat movement³¹.

It is composed of several federations at sectoral (or multi-sectoral) level and also

²⁸ B. EBBINGHAUS, and J. VISSER, *The Societies of Europe. Trade Unions in Western Europe since 1945*, Basingstoke, Macmillan, 2000, 122.

²⁹R. PRICE, «The comparative analysis of union growth», in: ADAMS, Roy J., *Comparative Industrial Relations. Contemporary Research and Theory*. London, Harper Collins Academic, 1991, 40.

³⁰ EUROPEAN COMMISSION, *Industrial Relations in Europe 2000*, Luxembourg, 2000, 9.

³¹ X., *Introducing the CSC, The confederation of Christian Trade Unions in Belgium*, Brussels, ACV-CSC, 1998.

inter-occupational sub-regional associations.

The industry unions include food, services, construction, metal industry, textiles and clothing, chemicals, energy, transportation, diamonds, white-collar workers and the civil service.

At European level, the CSC is a member of the ETUC, while internationally it is affiliated with the World Confederation of Labour.

The **ABVV-FGTB** has its roots in the Belgian socialist movement³².

In a similar way, it is composed of several federations at sectoral (or multi-sectoral) level and also inter-occupational sub-regional associations.

The industry-level unions cover general industrial workers, the metal industry, textiles, clothing, diamonds, transport, food, the association of employees, technicians and managerial staff and the public services.

In recent years there have been some important mergers between union federations as a consequence of changes in the economy.

At European level, the FGTB is a member of the ETUC, while internationally it is a member of the ICFTU.

The **ACLVB-CGSLB** grew out of the Belgian liberal tradition. From the outset, it was a 'general union', organised at national level, with sub-regional divisions but no industry-specific unions.

At European level, the CGSLB is a member ETUC and participates in the activities of the Trade Union Advisory Committee. Recently CGLSB became a member of the ICFTU.

The **membership** and achievements of the three main unions are not easy to

³² X., *The international action of the FGTB. In the frontline against globalisation*, Brussels, FGTB, 2000.

measure

Generally, speaking, there are two methods of gauging the representativeness of worker organisations: the amount of members and the social elections in the private sector.

There is member count based representativeness: these member counts, on the basis of information from the organisations themselves were interpreted and corrected by international and national researchers. This was in order to off-set any “political” exaggerations in the information provided by the organisations and to allow for possible international comparisons.

The results of social elections give some indication of their strength overall and at industry level.

Social elections are held every four years, in the private sector only, to elect the members of works councils (in companies with at least 100 employees) and Health and Safety Committees (*Comités pour la Prévention et la Protection au Travail*) (in companies with at least 50 employees). The last elections –in the period under review– were held in 2000. Health and Safety Committees and Works Councils play a key role in social dialogue at enterprise level. Indirectly, therefore, these social elections can influence the distribution of seats on the sectoral joint committees.

The overall results published by the Federal Ministry of Employment and Labour give the following picture:

Table 3. Social Elections 2000 – Overall Results

Organisation	Works Councils	Safety and Health Committees
ACV-CSC	51 %	53 %
ABVV-FGTB	38 %	39 %
ACLVB-CGSLB	8 %	8 %
Others	3 %	

More detailed results about the social elections (breakdown - regional and kind of sector) give a more clear idea of the “rapport de forces” between trade unions.

For the Health and Safety Committees, the results where as follows:

Table 4. - Social Elections 2000 – Results Health and Safety Committees

Organisati- on	Votes Brussels	Seats Brussels	Votes Flanders	Seats Flanders	Votes Wallonia	Seats Wallonia
CSC	45,81	44,19	52,16	57,91	41,5	42,15
FGTB	40,53	44,52	37,2	34,95	53,48	54,18
CGSLB	13,67	10,58	10,37	7,14	5,02	3,68

The results for the Works Councils (Economic and Non Economic Sectors) where as follows:

Table 5. - Social Elections 2000 – Results Work Councils

Organisati- on	Votes Econ. Sector	Votes Non- Econ. Sector	Total Votes	Seats Econ. Sector	Seats Non- Econ Sector	Total Seats
CSC	47,31	71,75	51,99	51,12	75,7	56,58
FGTB	40,63	21,31	36,93	39,2	20,12	34,97
CGSLB	9,50	6,37	8,9	6,83	3,73	6,14
CNC-NCK	1,16	0,25	0,99	1,49	0,33	1,23

As far as **membership** is concerned, we wish to refer to a series of international figures.

The first source is the ILO, which, in its 1997-98 World Labour Report entitled “Industrial relations, democracy and social stability” gives the following “trade union density” percentage for all “wage and salary earners”.

In 1995: 51.9%, this is a relative decrease of 0.2% with respect to 1985 (5.8% absolute member count increase in same period). By way of comparison, please find below some “trade union density” 1995 figures for other countries in this ILO study:

US	14.2 %	(-21.1 %)	GERMANY	28.9 %	- 17.6 %
JAPAN	24 %	(-16.7 %)	ITALY	44.1 %	- 7.4 %
AUSTRIA	14.2 %	-19.2 %	NETHERLANDS	25.6 %	- 11 %
DENMARK	80.1 %	+ 2.3 %	NORWAY	57.7 %	+ 3.6 %
FINLAND	79.3 %	+ 16.1 %	SPAIN	18.6 %	+ 62.1%
FRANCE	9.1 %	-37.2 %	SWEDEN	91.1 %	+ 8.7 %
			UK	32.9 %	- 27.7 %
			BELGIUM	51.9 %	- 0.2 %

In its 1991 “Employment Outlook”, the OECD mentioned a contribution by J. VISSER containing admittedly somewhat dated series of figures, but that nevertheless facilitates international comparison. Nevertheless, no trend can be traced for after 1990.

The trade union density among those “working” is examined during the 1970-1989 period. In the case of Belgium (and some other countries) in this study, the figure was corrected abstracting from the 80% unemployed that are trade union members.

The OECD has the following figures for Belgium for 1988 (only those working) and some other OECD countries.

B	53 %
U.S.	16.4 %
JAPAN	(26.8) %
AUSTRIA	45.7 %
DENMARK	73.2 %

FINLAND	71.2 %
FRANCE	12 %
GERMANY (W)	33.8 %
ITALY	39.6 %
NETHERLANDS	25 %
NORWAY	57.1 %
SPAIN	(16 %=1985)
SWEDEN	85.3 %
UK	41.5 %
EU (weighted average)	38 %

According to this study, Belgium had a 22.8% relative increase in trade union density among working people between 1970 and 1998. This decreased by 6.2% between 1980 and 1988. From 1970 to 1988, Belgium was ranked from 10th to 6th positions for trade union density among the OECD countries, with only the 5 Scandinavian countries ahead of it.

The respective 1988 trade union density rates that J. VISSER gives in some economic sectors are as follows for Belgium:

Manufacturing	95 %
Finances and services to companies	23 %
Services and people	27 %
Construction	65 %
Trade	36 %
Transport	60 %

According to this study, the share of all Belgian trade union members that were not working was 31.7% in 1988 (1970: 16.2 %). The figures were adjusted on the basis of this correction factor.

A third international, or at least European, comparison is possible thanks to the EIRO³³ studies (the European Industrial Relations Observatory of the European Foundation for the Improvement of Living and Working Conditions).

³³ EIRO, Trade Union Membership 1993-2003 2004/03
EIRO, Industrial Relations in the EU Member States and candidate countries

EIRO has a trade union density of 69.2% for Belgium in 2000, as compared to a weighted average of 30.4% for the “old” European Member States. Only the three Scandinavian States that are a member of the EU only precede Belgium.

In the study, it is stated that a correction must be made for trade union members that are not in employment.

In the case of Belgium, reference is made to J. VAN RUYSEVELDT’s study (*The importance of Bargaining; Collective Agreements in Belgium*, Leuven, Acco, 2000), which sets the correction factor at 17.5%. EIRO also sets this correction factor at 15% or more for, among others, Denmark and Finland and above 5% for Sweden.

In addition to this international comparison, there are two national studies that have mapped out the evolution of trade union density well.

The most recent study is by K. VANDAELE from the University of Ghent and is dated 2003.³⁴

The author applies three corrections in order to reach a net trade union density figure from the “politicised” membership figures reported by the organisations.

Firstly, the figures reported must be reduced because the organisations increase the actual figures by 14.7 to 14.9% for political reasons.

In so doing the author makes use of the theory that has already been developed by J. VISSER and B. EBBINGHAUS (see, among others, the OECD study above).

The author still calls this corrected figure a gross figure, from which first the passive members (students, pensioners, those in early retirement) have to be deducted (17.5% on the basis of the J. VAN RUYSEVELDT study) followed by the unemployed (for instance 19.8 % in 1995).

The author then reaches a net trade union density rate of 50.2% in 1990, rising to 58.1% in 2000.

EIRO, Industrial Relations in the EU, Japan and USA, 2000
³⁴ K. VANDAELE, *Een schatting van de syndicalisatiegraad in België, 1990-2000*, Intern werkdocument, september 2002, Universiteit Gent (“An Assessment of the Trade Union Density Rate in Belgium, 1999-2000, Internal Working Document, September 2002, University of Ghent”).

The author does not deny the major interest of trade union organisations to count those not active (unemployed, pensioners, those in early retirement, etc.) as members. This reinforces their legitimacy and their possibility to influence Government policy. But according to the author, the balance of power vis-à-vis employers is not affected by those not active. What is more, by including the unemployed an international comparison is distorted,^s since in Belgium the overwhelming majority of unemployed members remain in the trade union on account of the fact that the representative worker organisations are authorised by Government to pay out unemployment benefits (as well as a public dole office). Such a system does not exist in every country.

Given that each series of figures plays an important role, please find the complete table of this author's study below:

Gross and net trade union density rate, 1990-2000

	I	II	III	IV
1990	79.6	69.3	56.7	50.2
1991	80.0	69.6	57.3	51.8
1992	80.8	70.4	57.6	53.2
1993	82.0	71.4	58.6	53.7
1994	82.1	71.5	58.7	53.5
1995	83.3	72.5	59.5	53.6
1996	83.4	72.6	59.6	54.2
1997	83.6	72.8	59.8	54.5
1998	83.6	72.8	59.8	55.0
1999	84.2	73.3	60.0	55.7
2000	86.1	74.9	61.1	58.1

- I. Gross trade union density rate on the basis of reported member figures.
- II. Gross trade union density rate on the basis of corrected member figures.
- III. Net trade union density rate (excluding passive trade union members)
- IV. Net trade union density rate (excluding passive and unemployed trade union members)

A second, recent national study concerns an updating of the CRISP study from 1993, which described the development of the trade union density rate from 1982 to 1991³⁵.

³⁵ E. ARCQ and M. AUSSEMS, *Implantation syndicale et taux de syndicalisation (1992-2000)*, ("Trade Union Presence and Density Rate"), COURRIER HEBDOMADAIRE, CRISP, 2002, n° 1781.

The authors state that they are aware of a possible margin of error in the figures reported by the organisations. But on the one hand they are convinced that this political overestimation has gradually diminished in the course of the years. On the other hand, all organisations are to the same extent to blame for this.

Furthermore, they calculate the trade union density rate on the basis of a broader group of “potentially unionised”, whereby for instance unionised unemployed are tabulated.

In their study, the total trade union density rate progressed from 74.9% in 1992 to 76.16% in 2000, remaining stable from 1998.

The particular merit of the CRISP study is that it traces the changes in the balance of power among the different, representative trade union organisations, the relative evolution of the different professional categories (employers/office employees), the relations among sectors, the public sector, etc.

The CRISP findings generally confirm the K. VANDAELE’s conclusions, which are as follows:

In the nineties, there were a greater number of trade union members in each of the three representative trade union confederations. Moreover, the shifts among these confederations were insignificant.

In the relevant period, the share of ABVV fluctuated between 39.6 % in 1990 and 39 % in 2000 (max. = 39.6 % in 1990 and in 1995; min = 38.4 % in 1994).

The share of ACV fluctuated between 52.6 % in 1990 and 53.8 % in 2000 (max. = 53.9% in 1990).

The ACLVB ranged from 7.8 % in 1990 and 7.2 % in 2000 (max = 7.8 % in 1990; min = 7.2 % between 1997 and 2000).

One can see the share of workers, office employees and civil servants among the members, given the structure of the ABVV and ACV confederations in trade union

federations. It is not possible to do so in the case of the ACLVB since this worker organisation is in principle not split up into federations.

The share of workers, office employees and civil servants affiliated to the ACV and the ABVV evolved as follows:

Percentage share according to professional category (ABVV and ACV) 1990-2000

		1990	1993	1995	1997	2000
ABVV	WORKERS	60.6	59.5	56.5	55.1	55.6
	OFFICE EMPLOYEES	19.5	19.7	20.2	21.2	23.4
	CIVIL SERVANTS	19.8	20.8	23.3	23.7	21.0
ACV	WORKERS	59.5	58.0	57.3	56.3	55.3
	OFFICE EMPLOYEES	24.5	26.1	26.7	27.5	28.2
	CIVIL SERVANTS	16.0	15.9	16.0	16.2	16.5

Source: K. VAN DAELE

The relation between the regions for the ACV and the ABVV is as follows:

Percentage share by Region (ABVV and ACV) 1990-2000

		1990	1993	1995	1997	2000
ABVV	BRUSSELS	15.3	11.7	12.3	12.7	12.9
	FLANDERS	43.1	47.5	47.9	47.3	47.5
	WALLONIA	41.6	40.8	39.9	10.0	39.7
ACV	BRUSSEL	10.8	11.8	11.1	11.3	11.4
	FLANDERS	68.8	67.1	66.9	66.4	66.1
	WALLONIA	20.3	21.1	22.0	22.3	22.5

Source: K. VAN DAELE

In the CRISP study an estimate is also made for the trade union density rate of employers vis-à-vis office employees and civil servants. These figures are only available for the 1992-2000 period.

In addition to this, one needs to recall that this are figures that have not been corrected. For employers, the figures vary from 96.5% (1992) to 95.5% (2000), with the highest figure almost reaching 100% (1993 and 1994).

As far as office employees are concerned, the trade union density rate increased from almost 39% in 1992 to approximately 44% in 2000; a 4.8% increase, with this share only increased by 0.38% from 1982 to 1991.

The trade union density rate of civil servants in Government went from 52.66% in 1992 to 61.51% in 1996; it dipped to 58.6% in 1998 and 1999 and went back up slightly to 59.38% in 2000.

Hence, globally speaking one can state that in the period considered the amount of trade union members continued to rise and that the trade union density rate also increased, even when one only takes working union members into account.

Belgium remains highly ranked on the list of European (or OECD) countries; only the Scandinavian countries have a greater number of trade union affiliates.

In Belgium there has been trade union pluralism for a long time, which consists in the fact that the three representative worker organisations are politically/philosophically in line with the three main social ideologies underpinning the democratic parties. Despite these ideological ties these three organisations are very attached to their structural autonomy.

The ABVV has an historic tie with socialist parties and considers this party to be the preferred discussion partner allowing it to implement some demands politically. This dialogue with the socialist parties – translated into practice by the presence of trade union leaders in the bureaus of socialist parties – does not prevent the ABVV from positioning itself as independent from these parties and from being open to co-operation with other progressive political parties. This has led to concrete collaboration initiatives in the last few years.

7.2. Employers' organisations

In the private sector there are various central employers' organisations, notably:

- Federation of Belgian Enterprises (VBO-FEB)
- Organisations of Small and Medium-Size Enterprises
- Organisations of Employers in Agriculture
- Confederation of Employers in the Non-Profit Sector

The Federation of Belgian Enterprises (VBO-FEB) (a member of UNICE) is by far the largest employers' organisation in Belgium.

In fact, it is an umbrella organisation for several sectoral employers' organisations and organisations for specific occupations or services, making some 50 federations representing around 30,000 Belgian companies.

The VBO-FEB's membership consists of full members, applicant members and associate members.

Full members include organisations representing the banking and credit institutions, chemicals, clothing, construction, distribution, energy, food, glass, insurance, international trade, iron and steel, oil, textiles and tobacco. Applicant members include organisations representing building materials, diamonds, footwear and others. The National Federation of Chambers of Industry in Belgium is an important associate member.

Special legislation has been passed to reflect the position of small and medium-size enterprises (SMEs), to allow their representatives to take part in the process of social dialogue in the various spheres of social and economic life.

Among the most important are:

- UNIZO, representing some 70 SME organisations. Claiming to represent 80,000 members. The membership is mainly in the Flemish Region and in Brussels;
- UCM, representing mainly organisations and members in the Walloon Region and in Brussels.

These organisations are also affiliated to confederations at EU level.

7.3. Government

The idea of **subsidiarity** and the tradition of **voluntarism** are of major importance in Belgian industrial relations, despite its highly institutionalised character.

The principle of subsidiarity³⁶ means that all matters that can be settled by the parties concerned are indeed settled by them, without any direct interference by the political authorities. Voluntarism means that wherever possible, common goals are reached through the autonomous action of the social partners and not through governmental regulations.

There are no formal tripartite bodies in Belgium³⁷. However, there is a strong tradition of tripartite consultation and negotiation between the Federal Government, employers' organisations and trade unions.

Meetings between members of the Cabinet³⁸ and leaders from both sides of industry are of paramount importance for the effectiveness of Belgium's system of industrial relations.

The Federal Minister of Employment and Labour³⁹ is responsible for the organisation and support of social dialogue at all levels (national, sectoral, enterprise), as well as for social peace.

³⁶ The «principle of subsidiarity» is not only a key notion in corporatism, but also in the Belgian industrial relations system and in EU-policy. See V° «Subsidiarity» in: T. BAINBRIDGE, *The Penguin Companion to European Union*, London, Penguin Books, 3rd Ed., 2002, 491-494 and S. DOUGLAS-SCOTT, *Constitutional Law of the European Union*, Harlow, Pearson Education, 2002, 173-183.

³⁷ By Royal Order of 25 November 1960, a «National Committee for Economic Development» was created. It has a formal tripartite composition. The Committee has not been called together since the 1970's. It is unclear if the Committee still exists from a formal legal point of view. (Arrêté royal du 25 novembre 1960 portant création d'un Comité national d'expansion économique, (*Moniteur belge* , 3 novembre 1960)

³⁸ Prime Minister, the Deputy Prime Ministers and other leading members of the Government (e.g. Labour, Social Security).

³⁹ Now the Minister of Employment

In the Federal Ministry of Employment and Labour the Labour Relations Office, established in 1969⁴⁰, is responsible for all administrative procedures concerning collective agreements, that is, the organisation and support of social dialogue at sectoral (and sub-sectoral) level, and conciliation and mediation services at sectoral, sub-sectoral and enterprise level.

Since the Federal Ministry of Employment and Labour was reorganised on April 1st of 2003 into the Federal Public Service Employment, Labour and Social Dialogue, the duties of the Labour Relations Office were transferred to the Directorate General of Collective Labour Relations⁴¹.

Last but not least, the Government plays a crucial role in administering the registration of collective agreements.

All collective agreements must be registered^{42 43} with the Labour Relations Office. Of course, registration of sectoral collective agreements is even more important in view of the extension of these agreements.

The Director General of the Office (or his delegate) decides if the collective agreement meets all the formal conditions imposed by law. If he approves registration, the collective agreement has the protection of the law.

These conditions are:

- The collective agreement must be a written document, in one or more of the

⁴⁰ Arrêté royal du 23 juillet 1969 créant un Service des relations collectives de travail et fixant le statut du personnel de ce service, *Moniteur belge* du 30 juillet 1969.

⁴¹ After general elections on May 18, 2003, the Head of State appointed a new Federal Government on 12 July 2003. For the time being it is unclear in which direction the reform of the Federal Administration will go.

⁴² See ILO-R91 Collective Agreements Recommendation, 1951, point 8, c, Registration or deposit of collective agreements.

⁴³ Arrêté royal du 7 novembre 1969 fixant les modalités de dépôt des conventions collectives de travail (*Moniteur belge*, 22 novembre 1969)

official languages, as the law requires⁴⁴.

- Persons who are by law authorised to conclude a collective agreement should sign the collective agreement. Their identity and capacity should be clearly stated.

- The collective agreement should mention the date on which it is signed and on which date it starts to have legal effect. It should also be mentioned if the collective agreement is concluded:

- for a fixed term;
- for a fixed term, and renewable;
- for an indefinite period, in which case it should contain a termination clause.

- Employer(s) and workers to be covered by the terms of the agreement should always be clearly indicated.

- The collective agreement should mention, where applicable, that it was concluded in a joint body.

It is difficult to identify general practice in terms of the duration of collective agreements. In most cases, when the social partners agree to set up a sectoral social fund, the collective agreement is almost always concluded for an indefinite period. This is also mostly the case of collective agreements concerning the basic rules of trade union representatives at enterprise level.

On the other hand, it is increasingly becoming the norm in Belgian industrial relations to make wage agreements for a term of two years. It should be underlined, however, that a wage agreement for two years does not mean that after the end of the formal duration of the agreement the legal situation does not return to the status quo ante. Quite the reverse, as in Belgian industrial relations the clauses of collective

⁴⁴ As the case may be, Dutch, French, German, Dutch and French, Dutch and French and German

agreements are by law deemed to be integrated into individual employment contracts. Thus even after the end of the collective agreement, most clauses remain in effect for all workers employed while the agreement was in force.

Other reasons for registering collective agreements include:

- the organisation of a form of publicity for collective agreements, so that every person who might be subject to this agreement can have a copy of it. Thus from early 2002, all sectoral collective agreements are published on the web site of the Federal Ministry of Employment and Labour (www.meta.fgov.be);

- certifying to the Courts that a collective agreement exists;

- making it possible to study contents of and trends in collective agreements.

7.4 Other Actors

The relation between the Works Council and the Trade Unions in the field of collective bargaining has been described above. In practice relations between Works Councils and Trade Union have been deprived of conflicts. Fierce competition between trade unions and works councils is excluded by the fact that workers can only be elected as representatives, if they have been supported as candidates by a representative trade union. Furthermore, *pendente mandatu* trade unions continue to have means to put pressure on workers' representatives. They can or demand the withdrawal of the mandate of their elected candidate before the *Tribunal de Travail* or they can expel the workers' representative from the union. In the latter scenario, the mandate will terminate *de iure* without jurisdictional control (See Articles 20ter and 21 of the Law on Works Councils).

The major problem for trade unions engaged in collective bargaining touches upon information. The Works Councils will often gather information, which is indispensable for the conduct of the bargaining process. There is no enforceable right for

trade unions to receive information necessary for the bargaining process. In practice, good contacts between trade unions and Works Councils will enable a union to acquire information. During the recent collective redundancy at *Sabena* an open conflict occurred between the Works Council exercising its right to information and consultation and the trade unions which were engaged in a process of collective bargaining regarding a social plan.

In a summary proceeding, a member of a Works Council demanded that a negative injunction would be imposed on the employer to conclude a collective agreement regarding a social plan, as long as the process of information and consultation in order, *inter alia*, to find means to avoid the collective redundancy, was running. The conclusion of such an agreement implying the collective redundancy to be an accomplished fact was suggested to be a violation of the prerogatives of the Works Councils. The President of the Tribunal considered the claim to be inadmissible. (See Dorssemont F.- *Als het regent in Parijs, druppelt het in Brussel.*- in: *Sociaalrechtelijke Kronieken*, (2002), p. 223-227.- annotation to Summary Proceedings, Tribunal de Travail de Bruxelles, 21 September 2001)

Temporary Agencies: The *sui generis* character of the employment relationship between a temporary agency worker working at the premises of a user-enterprise has forced the legislator to adopt the structure of collective bargaining at branch level. The employers-delegation at the “Commission paritaire” for the Agency sector has a twofold structure. It consists of representative employers’ organisations representing the agencies and of representative organisations of the user enterprises. (cf. Article 27 of the Law of 24 July 1987)

There is no evidence of a *de facto involvement* of European Trade Unions in Belgian collective bargaining. The role of the European Trade Unions has been legally institutionalised on one important occasion in the implementational collective agreement nr. 62 (See *infra* nr. 8-). Article 4 of the EWC-Collective Labour Agreement has specified the identity of the *gremium* which is competent to conclude an ‘article 13

agreement' regarding information and consultation within Community scale groups or undertakings. In this respect, agreements concluded by European representative trade unions having acquired consent from Trade Unions represented at plant or group level are recognised as valid agreements.

8. Belgian Industrial Relations as a Co-ordinated System

It should be stressed that in the Belgian industrial relations system, there is a pragmatic linkage between the different levels of collective bargaining. It is not, as some observers seem to think, that in every sector there is only one way to proceed in the bargaining process.⁴⁵

Each sector has its traditions and one must look deep into the bargaining process of various sectors to understand how the system works.

Bargaining at national level, resulting in collective agreements concluded in the *Conseil National du Travail* is of great importance. But national negotiators know exactly what they should regulate and what should be left to sectoral negotiators. Likewise, sectoral negotiators are conscious of the fact that some matters are perhaps best decided at company level. So in some cases they suggest 'good practice', rather than trying to impose it.

The Belgian industrial relations system is thus a co-ordinated system rather than a centralised one, especially since, some years ago, a tradition was established that general bargaining rounds should take place every two years. A general social policy agreement⁴⁶, which is best known under the French language name: "***Accord interprofessionnel***" negotiated at central level between national employers'

⁴⁵ J. ROMBOUITS and H. BOCKSTEINS, "La formation des salaires et le système des relations collectives de travail en pratique", *Revue du Travail*, 1996, 30-44, J. VAN RUYSEVELDT, *Het belang van overleg. CAO-onderhandelingen in België*, Leuven, ACCO, 2000, 239-246.

⁴⁶ H. DELEECK, *De architectuur van de welvaartstaat opnieuw bekeken*, Leuven, ACCO, 2001, 247-251 gives an overview of these agreements.

organisations and trade unions initiates this process.

This general social policy agreement (Accord interprofessionnel) is not a collective agreement under the law, but an understanding between actors. The nature is a political one. The spokesmen of the central peak organisations of management and labour⁴⁷ are likely to consult with government during their talks. In some cases government will agree to take part in the implementation of this general social policy agreement. Draft-legislation or draft-regulations will then be prepared. This way of working can be labelled as “policy concertation”.

Later on, the social partners ‘translate’ the general principles of this policy agreement into one or more collective agreements concluded in the *Conseil National du Travail* and in collective agreements in nearly all of the joint committees. Government will prepare the measures to which it engaged itself.

The *Conseil National du Travail* monitors the results of the sectoral negotiations, with the assistance of the Labour Relations Office.

A screening of the contents of these inter-trade agreements reveals the following survey:

CONTENTS of these *Accords interprofessionnels* 1999-2000

1991-1992

Freedom of collective bargaining within the limits of the preservation of competitiveness, guaranteed by means of a minimum monthly wage, increased unemployment benefit, increased employer contributions for education, the training of workers in risk groups, conventional early retirement, holiday pay, maternity leave, transport costs, industrial peace.

⁴⁷ Known as the «Group of Ten», five representatives of the peak organisations of employers and five representatives of the peak organisations of labour. *De facto* an employers’ representative chairs their meetings.

1993-1994

Freedom of collective bargaining within the limits of the preservation of competitiveness, guaranteed by means of a minimum monthly wage, increased unemployment benefit, guidance plan for the unemployed, organisation of work and additional credit hours to be further negotiated in the joint committees, yearly holiday, paid educational leave, transport costs for employees, request to the government not to intervene in the subjects agreed upon and to approve the negotiated proposals, industrial peace.

1995-1996

Employment and unemployment: risk groups, childcare, career break, part-time work, retirement, and night work.

1997-1998

Wage freeze; no agreement for 1997-1998.

1999-2000

Labour costs evolution with preservation of competitiveness, continuous training, concluding employment agreements within the sectors, reduction of employer contributions, employment of risk groups, full early retirement, better working conditions and circumstances (stress in the workplace), trade union presence in SMEs, yearly leave, worker notice period, employment, disabled people, gender equality, part-time work, working time, making manpower available.

2001-2002

Wage policy (Cf. preservation of competitiveness), spending power, wage costs, permanent training, functioning of the labour market, mobility, equalisation of the legal regime of blue and white collar workers, arrangements regarding holiday, stress at work, gender equality,

2003-2004-11-03

Wage policy, equalisation of the legal regime of blue and white collar workers, increase of social benefits in case of temporary unemployment, availability of unemployed elder for the labour market.

To avoid misunderstanding it should be said that in other countries, instead of a “general social policy agreement” (*Accord interprofessionnel*) this kind of understandings with a political nature is often called “social pacts”⁴⁸.

In Belgium however there is only one social pact, seen the fact that according to tradition, this pact is seen like a “social constitution” and as thus is not reviewed every two years or so.

In the framework of European social policy⁴⁹ the Belgian government took the initiative for discussions about a “Multi-annual Plan for Employment” (1995) and a “Future Contract for Employment” (1996)⁵⁰. In both cases the tentative failed, as Belgian trade unions are not willing to go into a long-term planning because of the uncertainty of the economic development.

To fully understand the structure of sectoral collective bargaining, it should be mentioned that Belgian labour law still makes a distinction between ‘blue-collar’ and ‘white-collar workers’. Hence there are also two different types of individual employment contract.

In practical terms, this distinction has over time lost much of its significance. Indeed, through the collective bargaining process, the two kinds of contract have more or less been harmonised in many branches of industry. Nevertheless, there are still some

⁴⁸ M. RHODES, «The Political Economy of Social Pacts: ‘Competitive Corporatism’ and European Welfare Reform», in: P. PIERSON (ed.) *The New Politics of the Welfare State*, Oxford, Oxford University Press, with examples as Ireland, Spain, Portugal, Italy and The Netherlands, 181

⁴⁹ EUROPEAN FOUNDATION for the Improvement of Living and Working Conditions, *Pacts for Employment and Competitiveness*, Luxembourg, Office for Official Publications of the European Communities, s.d., 8 p.

⁵⁰ E. ARCQ, «Collective labour relations and social pacts in Belgium», in: FAJERTAG, Giuseppe and Philippe POCHET, *Social Pacts in Europe*, Brussels, ETUI, 1997, 101.

differences, even though they are probably no longer justified.

The distinction between white- and blue-collar workers has had an important influence on the development and growth of trade unions, but also on that of collective bargaining institutions.

Some joint committees have jurisdiction only over employers and their blue-collar workers; others have jurisdiction only over employers and their white-collar workers. In more recent times a number of joint committees have been set up that have jurisdiction over employers and all of their workers.

The OECD has always deemed these institutionalised consultation systems as one of the least productive in the area of economic and employment results, especially because in the Belgian system the emphasis is on the intermediary, sectoral level.

According to the “CALMFORS and DRIFFILL”’s 1998 thesis, results in the area of employment, unemployment and the economy are most patent where bargaining is either very centralised or very decentralised and the least patent in the intermediary systems of wage fixing.

The standard argument for the effectiveness of centralised wage bargaining is the fact that central collective labour agreements are so comprehensive that the social partners have to “internalise” external factors such as inflation and unemployment in the labour costs and that way devise a “sound” wage policy.

Furthermore, bargaining at company level is considered productive because competition from other companies really has to be taken into account. This too is said to result in a sound method of fixing wages.

Bargaining that is concentrated on the intermediary “trade branch level” is not meant to be as effective because the social partners experience less direct competition there and can partially externalise labour costs.

The OECD upheld this position for a long time.

However since then other researchers, among which F. TRAXLER, have challenged its validity.⁵¹

For a statistical survey regarding collective bargaining; see annex 2

9. Incidence and coverage of collective agreements

The incidence and coverage of collective agreements in Belgium is extremely high, due to the technicalities of the binding force of collective agreements.

The system of binding has been explained *supra* under 1.

The following factors are crucial:

a) The Belgian legal systems provide for national and interprofessional collective agreements which –in principle- cover the entire private sector.

b) The binding of employees is independent from the fact that they are unionised or not. All employees of a signatory employer or of an employer affiliated to a signatory organisation will be bound.

c) Collective agreements signed within a *Commission Paritaire* at branch level will be binding in a “supplementary” way to employers who are not affiliated to a signatory organisation or who have not acceded to the collective agreement, unless the individual contract of employment provides otherwise.

d) Last but not least, the frequent use made of a Royal Order declaring the convention binding *erga omnes* will transform the collective agreement into a mandatory law of the branch, covering all employees falling within the scope *ratione personae et loci* of the *Commission Paritaire*.

⁵¹ F. TRAXLER, F. and B. KITTEL (2000), “The Bargaining System and Performance: A Comparison of 18 OECD Countries”, *Comparative Political Studies* 33: 1154 –1190.

In view of the highly institutionalised character of collective bargaining, the nature of the main sectors of the economy is of no relevance for a proper understanding of the problem. As far as the public sector is concerned, there is no scope for genuine collective bargaining.

10. Collective bargaining and restructuring of enterprises

The Transfer Directive as opposed to the Collective Redundancy Directive has regulated *some* of the consequences of the transfer of enterprise on the role of collective bargaining. The Collective Redundancy Directive is silent about the impact of collective redundancies on collective bargaining.

The general outlook of Belgian Labour Law corresponds with the impression of EC Labour Law. **Collective redundancies** tend to give rise to the conclusion of a social plan mitigating the consequences of a restructuring. In practice, this will take the form of a collective agreement at company level. No specific legal provisions have been elaborated regarding that instrument.

Case Law regarding the social plan is near to non-existing. In the past, the articulation or *concordantia* between the information and consultation procedure *vis à vis* the Works Council and the bargaining process regarding the social plan between trade unions and the employer gave rise to *one* summary procedure which has led to a judgement of non admissibility.⁵²

The implementation of the EC Directive 2000/78 establishing a General Framework for Equal Treatment in Employment and Occupation has amounted to one proceeding. The criteria for the selection of workers to be made collectively redundant

⁵² F. Dorssemont, “Als het regent in Parijs, druppelt het in Brussel”, *Sociaalrechtelijke kronieken*, (2002), p. 223-227 - Noot onder Kort Ged. Arbrb. Brussel, 21 september 2001.

will be challenged as discriminatory. At the time of conclusion, the case is still *sub iudice*.

As far as **Transfer of Enterprise** is concerned, the ‘implementation’ of Article 3 (3) of the EC Directive 98/50⁵³ has been operated by a pre-existing article 20 of the C.L.A.-Act.

This article provides:

“En cas de cession totale ou partielle de l’entreprise, le nouvel employeur est tenu de respecter la convention qui liait l’ancien employeur, jusqu’à ce qu’elle cesse de produire ses effets”.

Furthermore, the *incorporation* of the individual normative part of a collective agreement within the individual contract of employment guarantees that the transferee has to respect the terms and the conditions agreed in the collective agreement applicable to the transferor (Cf. Article 23 C.L.A.-Act). It is doubtful whether this article constitutes a *sufficient* implementation of article 3.3. of the EC Directive 98.50. Indeed the nature of the *obligatio* of the transferee is essentially different from that of the transferor. The transferor is obliged to respect the obligations stemming from the collective agreement as a collective agreement, whereas the transferee has to respect the content of those obligations as a part of the individual labour contract. A *mutuus consensus* between employer and employee might therefore be sufficient to dissolve the binding. The EC Directive prescribes an obligation pending on the transferee to continue to observe the terms and conditions agreed in any collective agreement *on the same terms*.

⁵³ "Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year."

Belgium did not opt for the possibility ex article 3.3 *in fine* of the Directive to limit the obligation to continue to observe the terms and conditions agreed in a collective agreement.

The Belgian case-law and the legal doctrine is fiercely divided about the exact interpretation of Article 20 C.L.A.-Act in the light of the Directive 98/50. The quintessence of this hermeneutical problem is due to the unclear scope of article 3.3. of the Directive, which has not yet been elucidated by the Court of Justice.

The hermeneutical problem is especially relevant if an enterprise or a part of it was performing an economic activity that is distinct from the main economic activity of the transferee. In such a hypothesis, the transferee will be confronted with sectoral agreements stemming from a different *Commission Paritaire* than that of the *Commission Paritaire* to which he is subject. The exact scope of article 20 C.L.A.-Act in the light of article 3.3. of the EC Directive is debated⁵⁴.

According to a *first* current, the mere fact that the transferee is able to produce a “collective agreement” applicable to his enterprise, would be sufficient to exclude the obligation to respect the collective agreement applicable to the transferor. In this view, the exception of the Directive would be met (i.e. “*entry into force or application of another collective agreement*”). In such a scenario, the collective agreements applicable to the transferor can be deemed to “cease their effects” in the sense of article 20 C.L.A.-Act. Furthermore, it is argued that the incorporation of the individual normative part constitutes a sufficient means to implement article 3.3. of the EC Directive

According to a *second* current, the mere fact that the transferee is able to produce a “collective agreement” applicable to his enterprise, is immaterial. The mere existence

⁵⁴ See : M. DE VOS, “Overgang van Onderneming en verandering van Paritair Comité”, *Nieuw Juridisch Weekblad* 2003, 660-662. F. DORSSEMONT, “Naar een extensieve interpretatie van restricties op sociale bescherming? Ook wel: een pleidooi voor de eerbiediging van het vertrouwensbeginsel in arbeidsverhoudingen.”- *Sociaalrechtelijke kronieken*, 2000, 20-22.- Noot onder Arbh. Antwerpen, 19 april 1999 and C. ENGELS, *Overdracht van onderneming en outsourcing*, Brussel, Larcier, 2000, 55-70.

and applicability of such a collective agreement, does not imply that the older agreement ceases to have effect in the sense of article 20 C.L.A.-Act. A collective agreement ceases to have effect;

- when it is terminated unilaterally (in a case of an agreement concluded for an indefinite period);

- when the term expires (in a case of an agreement concluded for a definite period) or when the collective agreement is amended or even dissolved by mutual consent between the *original* signatory parties (*mutuus consensus* or *mutuus dissensus*).

Article 3.3. is supposed to refer to these three classic hypotheses of the life cycle of a collective agreement

The *ratio legis* behind this interpretation is obvious. The system of the Directive seeks to provide a job security *in concreto* of the transferred employees. They are not only granted “any job whatsoever ” or the application of “any collective agreement whatsoever”. The directive tends to secure their job under the same conditions, as they would have continued to enjoy, if the transfer had not taken place.

11. The impact of European Community and Collective Bargaining

11.1. The European Community as a restriction for collective bargaining

In some cases Belgian sectoral collective bargaining was considered contrary to European law. These problems have been found in the Construction Industry and in the Metalworking Industry. In both cases the system of complementary social security benefits, where considered as being contrary to principle of free movement of workers. A series of collective agreements in both sectors has been amended to comply with European legislation.

Adoption of the Maastricht criteria has led to the adoption by Parliament of a specific legislation which makes it possible that the Government intervenes in collective bargaining, when the results of the collective bargaining process could endanger the

competitiveness of Belgian industry. When macro-economic comparisons are made with the neighbour countries of Belgium (France, Germany and The Netherlands) and there is an indication that the evolution of wages in Belgium could lead to problems with the Maastricht criteria, Government is authorised to intervene. However, in stead of a direct intervention of Government, peak organisations of social partners are offered the possibility to determine themselves the maximum acceptable latitude in wage negotiations. Therefore, they take into account of the results of a biannual survey that is carried out jointly by the *Conseil National du Travail* and the *Conseil Central de l'Economie* with respect to the economic performance of the Belgian economy.

The introduction of the single currency has had as a result that Belgian social partners have revised all collective agreements containing reference to the Belgian franc. In some cases this was done with some necessary adaptations. Furthermore, it has stimulated trade unions of Belgium, the Netherlands, Germany, France and Luxembourg to co-ordinate collective bargaining regarding wages. (The “Doorn”-initiative) Thus, in order to assess the wage increases that were revindicated in those countries, the inflation and the increase of productivity has been taken into account.

The process corresponds to similar initiatives undertaken by the ETUC since November 2002.

(Cf. recommendations of its Executive Committee) in order to avoid wage dumping.

Last but not least, the social partners have been involved in the development of the Belgian Action Plans in the framework of the European Employment strategy. The Broad Economic Policy Guidelines of the European Union have forced the State to intervene in the process of Collective bargaining.

In some sectors of the economy, the perspective of enlargement has led to discussions concerning measures that could become necessary to maintain a fair competition between companies, banning unfair labour practises.

The European integration process has also inspired social partners to have more international contacts with the aim of setting up networks to co-ordinate their action.

11.2. Implementational bargaining

The implementation of European Directives is a deeply rooted practice of Belgian Industrial Relations. The practice **precedes** the recognition of implementational bargaining in primary⁵⁵ and secondary EC Law⁵⁶ as well as within the Case law of the Court of Justice⁵⁷. In view of the highly institutionalised character of its bargaining system, the *Conseil National du Travail* constitutes an appropriate *forum* for the conclusion of collective agreements with a national and interprofessional character. If declared to be generally binding, their scope is comparable to that of genuine Acts of Parliament. The Commission has never contested the adequate character of Belgian collective agreements as a means to implement collective agreements.⁵⁸

In practice, complementary legislation might reveal to be necessary in order to compensate the restricted competence of social partners. Belgian Social Partners can only regulate employers' and employees' rights and duties. They are unable to alter the State *apparatus* in order to guarantee enforcement of the collective agreement. However, as far as their enforceability is concerned, a national collective agreement declared to be generally binding is sanctioned by penal law. Special provisions aimed at penalising certain conduct in a more specific way (for example a violation of a vow of secrecy) will have to be elaborated by a legislator.

⁵⁵ See the Agreement on Social Policy

⁵⁶ See A. OJEDA AVILLES, "European Collective Bargaining: A triumph of the Will?", *IJCLLIR* 1003, 287-288. See Directives 91/533; 92/56 and 92/84

⁵⁷ Court of Justice 30 January 1985, *Commission v. Denmark*, Case 143/83, Consideration nr. 8., *European Court Reports*, 1985, 427.

⁵⁸ See for example A. ADINOLFI, "The implementation of Social Policy Directives through collective agreements?", *Common Market Law Review* 1988, 304. The author refers to Case C 215/83 28 March 1985, *Commission v. Belgium* (The Commission assigning Belgium in non compliance for full implementation of the Collective Redundancies Directive did not contest the option to implement that directive through the means of a national and interprofessional collective agreement, which was declared generally binding through a Royal Order.

Two structural problems of Belgian collective agreements are seldom raised.

First, the scope *ratione personae* of the Belgian C.L.A- Act precludes that agreements are applied to the enterprises which ‘organically’ belong to the public sector. Directives might be applicable to these enterprises, if the latter operate at a Common Market. At present, no complementary legislation has been elaborated to fill that gap.

Furthermore, collective agreements tend to be concluded for an indefinite or a definite period. Collective Agreements that serve to implement EC Directives are concluded for an indefinite period. Theoretically, they can be terminated in a unilateral way. The law does not provide for a mechanism to guarantee their continuity, as long as no other implementational instrument has been adopted. The *extension erga omnes* does not solve the problem. Theoretically, the Government is forced to withdraw the extension, if the collective agreement is being terminated. Though the problems have never been resolved, they have not led to any procedure by the Commission against Belgium yet.

Examples of EC Labour Law implemented through collective agreements concluded at national level are *legion*

- The Collective Agreement **nr. 24** of 2 October 1975 was concluded to implement the Collective Redundancy Directive 75/129. It has been modified by Collective Agreement (Convention) n° 24 ter of 8 October 1985 in order to adjust it to the Judgement of the Court of Justice of 28 March 1985 (C 215/83) after a procedure in non compliance by the Commission. It was modified by a collective agreement nr. 24 quarter of 21 December 1993 in order to implement Community Directive 92/56 of 6 December 1983.

- Collective Agreement **nr. 25** of 15 October 1975 consecrated the principle of Equal remuneration between men and women. Reference was made to article 119 of the TEC. No reference was made to Equal Pay Council Directive 75/117/EEC of 10 February 1975. The collective agreement did guarantee the

principle of Equal Pay. The agreement preceded a legislative intervention (Law of 4 August 1978) intended to implement Community Directives 75/117 and 76/207.

It was the second time that in the Belgian context, a European Directive was implemented into national legislation by means of a collective agreement. It became at that time very clear for many observers that Social Partners are able to act as “quasi-legislators”, as far as in a next stage the Government approves the regulations by issuing a Royal Order. It should be remembered that Government could only reject or approve the request to give an effect *erga omnes*.

However not everyone was satisfied with this method of working. Activists in female organisations objected that a collective agreement, even if it is concluded for an indefinite period, (as in this case), always could be terminated. Such a termination clause in a collective agreement concluded for an indefinite period is even mandatory. Social partners answered that this was a pure theoretical statement.

A more fundamental problem is that Article 119 TEC and the 1975 Directive have a general scope of application, which follows from the nature of the principle of equal treatment, and thus apply to the private sector as well as the public sector and to the self-employed.⁵⁹

The *Conseil National du Travail* is, in any case, not competent to conclude collective agreements that would apply to the public sector.⁶⁰

The *Conseil National du Travail* can (from a strict theoretical point of view) be competent; in a very limited number of cases, to give an opinion for a

⁵⁹ R. BLANPAIN, *Labour Law and Industrial Relations of the European Community*, Deventer, Kluwer, 2nd rev. Ed., 1985. 116-117 and the case law that is cited.

⁶⁰ The Collective agreements of the *Conseil National du Travail* only apply to the private sector.

question that is common for both the private and the public sectors. From the employers' side there would probably be a refusal to even consider such a question.

The conclusion is clear: at the time when the Collective Agreement N° 62 / NLC came into effect, the public sector was not covered as were neither the self-employed.

The situation was later solved in an indirect way. Indeed the next Directive of the European Economic Community in this field⁶¹, this time relating to the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and workings conditions, was implemented into Belgian law by an Act of Parliament. More correctly, a separate chapter in an Act of Parliament constitutes the implementing legal instrument⁶². The intervention by Parliament in this case, "repaired" so to say the existing loose ends

A new Act of Parliament⁶³ on equal treatment of men and women that was approved in 1999, takes into account the modifications that are the consequence of the "federalisation" of Belgium. The subject of equal treatment is since the revision of the Belgian Constitution an issue where both Federal and Regional authorities are competent.

In the context of the essay, we ought to underline that trade unions refused that associations from the larger civil society should receive authority to represent or assist plaintiffs during court proceedings

⁶¹ Directive N° 76/207/EEC of 9 February 1976, O.J. 14 February 1976, L.39, 40.

⁶² Titre V de la loi du 4 août 1978 de réorientation économique, *Moniteur belge*, 17 août 1976.

⁶³ Loi du 5 mai 1999 sur l'égalité de traitement entre hommes et femmes en ce qui concerne les conditions de travail, l'accès à l'emploi et aux possibilités de promotion, l'accès à une profession indépendante et les régimes complémentaires de sécurité sociale (*Moniteur belge*, 19 juin 1999)

- Collective Agreement **nr. 32** of 28 February 1978 was concluded to implement the Transfer of Enterprise Directive 77/178 of 14 February 1978. It was modified by Collective Agreement 32 *quinquies* of 13 March 2000 to adapt to the new Directive 98/50.
- Collective Agreement **nr 35 bis** of 9 February 2000 has amended the Collective Convention nr 35 of February 1981 regarding Temporary Work in order to implement the principle of Equal Treatment as guaranteed by Directive 97/81 of 15 December 1997. The Directive serves to implement the European Agreement between UNICE, ETUC and CEEP regarding Temporary Work
- Collective Agreement **nr. 62** of 6 February 1996 implements the European Works Councils Directive 94/45

When the Council Directive 94/95/EEC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees had to be transposed in Belgian law, the choice was made to opt for the possibility as mentioned in Article 14 of the Directive.

Article 14, 1., states that:

“Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than two years after the adoption of this Directive or shall ensure by that date at the latest that management and labour introduce the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them at all times to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof“

So in the framework of the *Conseil National du Travail*, the Collective Agreement N° 62 /NLC of 6 February 1996 was concluded⁶⁴. But this was not enough to realise the

⁶⁴ Convention collective n° 62 du 6 février 1996 concernant l'institution d'un comité d'entreprise européen ou d'une procédure dans les entreprises de dimension communautaire et les groupes d'entreprises de dimension

aims set foreword by the EEC. Belgian Parliament had to adopt legislative measures. Now seen the fact that Belgium has become a federal state, even two Acts of Parliament where necessary, one to adapt the “Code Judiciaire” and a second one to adapt for example the legislation about the protection of special categories of workers⁶⁵. Acts of Parliament that regulates matters regarding the Judiciary need approval of both Chamber of Representative and the Senate, which is not necessarily the case in other matters.⁶⁶

It is one the one hand a good indication that Belgian management and labour fully support the objectives that are laid down at European level.

These are clearly issues that engage the responsibility, both of government and of social partners. It could be seen as an example of not so good a co-ordination between the actors and it is perhaps an indication that a formal tri-partite body could have stimulated a better common action.

But apparently also in France, the legislator and social partners seem to have transposed the Directive without resisting to the temptation to take into account the existing national legislation⁶⁷.

- The Collective Agreement **nr. 64** of 29 April 1997 implements the Directive 96/34 of 3 June 1996, which implements the European Framework Agreement on Parental Leave (UNICE CEEP and CES)

communautaire en vue d'informer et de consulter les travailleurs, Arrêté royal du 22 mars 1996, *Moniteur belge* du 11 avril 1996, modifié par la Convention collective n° 62bis, Arrêté royal du 27 novembre 1998 (*Moniteur belge*, 6 décembre 1998).

⁶⁵ Loi du 23 mars 1998 (1) portant les dispositions diverses en ce qui concerne l'institution d'un comité d'entreprise européen ou d'une procédure dans les entreprises de dimension communautaire et les groupes d'entreprises de dimension communautaire en vue d'informer et de consulter les travailleurs (*Moniteur belge*, 21 mai 1988) and Loi du 23 mars 1998 (2) portant des mesures d'accompagnement en ce qui concerne l'institution d'un comité d'entreprise européen ou d'une procédure dans les entreprises de dimension communautaire et les groupes d'entreprises de dimension communautaire en vue d'informer et de consulter les travailleurs (*Moniteur belge*, 21 mai 1988)

⁶⁶ Articles 77 and 78 Belgian Constitution, www.fed-parl.be/constitution_uk.html

⁶⁷ B. TEYSSIE, Bernard, *Droit européen du travail*, Paris, Editions Juris-Classeur, 2nd ed., 2003, 313.

The conclusion of the European Agreement on Tele Work has not amounted to a dialogue within the *Conseil National du Travail*, neither within the *Commissions Paritaires* with a view to reaching a collective agreement

- At the time of the conclusion of the Report, a national and interprofessional collective agreement was concluded within the *Conseil National du Travail*, the C.A.O. nr. 84 of 6 October 2004 with the aim to implement the EC Directive 2001/86 regarding the role of workers in the European Company.

12. Developments in collective bargaining (1993-2003)

As was the case in other European countries, the Federal Government in Belgium has endeavoured a medium / long term understanding with management and labour about wages and employment policy. Those attempts have not been successful. In 1994 the Federal Government initiated by statutory instrument a strategy for the establishment of so-called “company schemes for redistribution of work”. The political message was clear: a special effort was to be made to create more jobs. The level of the undertaking was considered to be the most appropriate level for such a policy.

The policy was *contrary* to the existing traditions as far as collective bargaining is concerned. Social partners had already agreed about the necessity to make important efforts to create more jobs, also if this meant lesser wage increases. But until then it was at **sectoral** level that collective bargaining about this issue took place. Foreign observers in many cases had the opinion that the Belgian method of collective bargaining was not flexible enough, as they were convinced that in all cases there had to be bargaining at national (intersectoral) level, at sectoral level and at company level.

The policy of the Federal government initiated in 1994, reveals the intention to intensify collective bargaining at **company level**. Bargaining about jobs at the level of the undertaking was considered to be a more effective means to reach an agreement. However traditions are not easily changed. Social partners at sectoral level wished to

maintain collective bargaining. Furthermore, many employers were not keen to engage in complicated negotiations at company level.

Federal government had to agree that co-ordination of “company schemes for redistribution of work” could be necessary at sectoral level, in order to maximise policy efficiency. Furthermore, the Federal Government had to concede that a “framework for redistribution of work” could be decided at sectoral level.

This technique enabled the conclusion at sectoral level of a kind of framework-agreements. These agreements contained non-compulsory measures for the undertakings in the sector concerned. The framework-agreement could clearly indicate which policies were promoted by social partners and they could assist and support the setting up of schemes at company level. At the level of the undertaking, the employer was forced to engage in a process of negotiating “company schemes for redistribution of work”. However, he always had the choice between policies and practises that were promoted at sectoral level. So negotiations at company level could be focused on the implementation and support of one or more schemes.

For the period 1995-1996 there were successful negotiations leading to a general social policy agreement (*accord interprofessionnel*). This agreement led to the conclusion of a Collective Agreement in the National Labour Council (Collective Agreement nr. 60) and to the acceptance by Government and Parliament of a series of measures aimed to support the objectives of the general social policy agreement.

This has been a ‘good practice’ of tripartite co-operation in favour of employment policy.

During the years 1995-1996, in a first stage, priority in the collective bargaining process was given to the sectoral level (Joint Committees and Joint Subcommittees). Negotiations were exclusively oriented towards employment policy.

For the first six months of the year 1995 sectoral social partners were granted time to study the options in their sector, eventually to conclude a collective agreement. There were several options possible:

a) The sectoral collective agreement could establish a scheme that had a direct impact on employers and workers of the sector.

b) The sectoral collective agreement could establish a scheme that was considered as a best practise, leaving it to negotiators at company level to join the scheme or not.

c) The sectoral collective agreement could establish a scheme that had to be completed at company level.

d) At sectoral level no collective agreement could be reached.

In hypothesis b) c) and d) a company agreement needed the “approval” of the sectoral Joint Committee.

The implementation of an “employment promotion agreement” entitled the employer to benefit from a reduction of social security contributions for newly recruited workers.

This special attention for employment policy has been maintained in the years after.

The question arises whether the Belgian industrial relations system had changed over the last decade. At first glance, one is inclined to answer the question in an affirmative way. However, it is our firm belief that the *basics* of the industrial relations system have not changed. The articulation between collective bargaining at the three levels, intersectoral, sectoral and company level has been refined. The opportunities of bargaining at company level have been accentuated. However, at the same time the paramount importance of sectoral collective bargaining has been confirmed.

The experiences in the years 1993-2003 have proven beyond reasonable doubt that the Belgian industrial relations system does constitute a “dynamic-institutional” system⁶⁸. Indeed, it is a truly co-ordinated system. It was a very busy and demanding period for negotiators, as well as a very instructive era for policy makers.

Three annexes are added to the Report

1° The Collective Labour Agreements Act 1968 (Loi sur les conventions collectives et les commissions paritaires) (**see hyperlink**)

2° Statistic regarding the amount of collective agreements at interprofessional level, professional level and the company level

3° Bibliography

1° The Loi sur les conventions collectives et les commissions paritaires (1968)

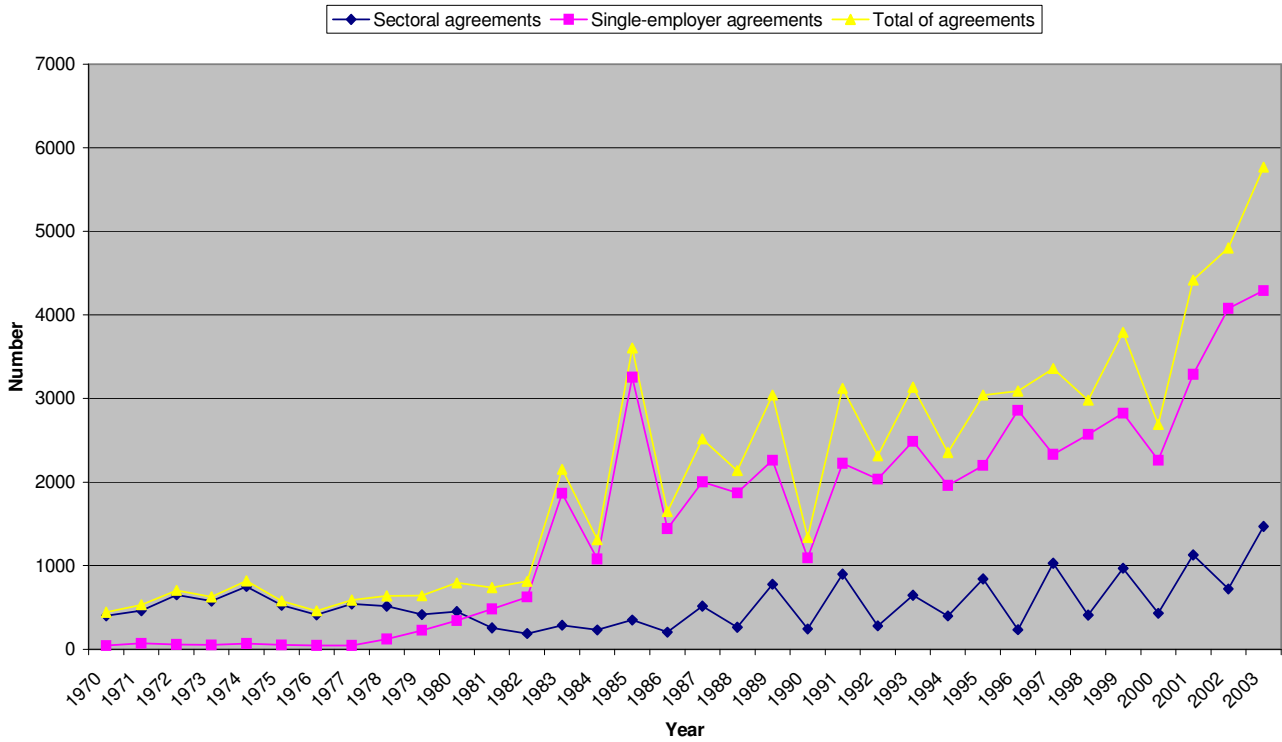
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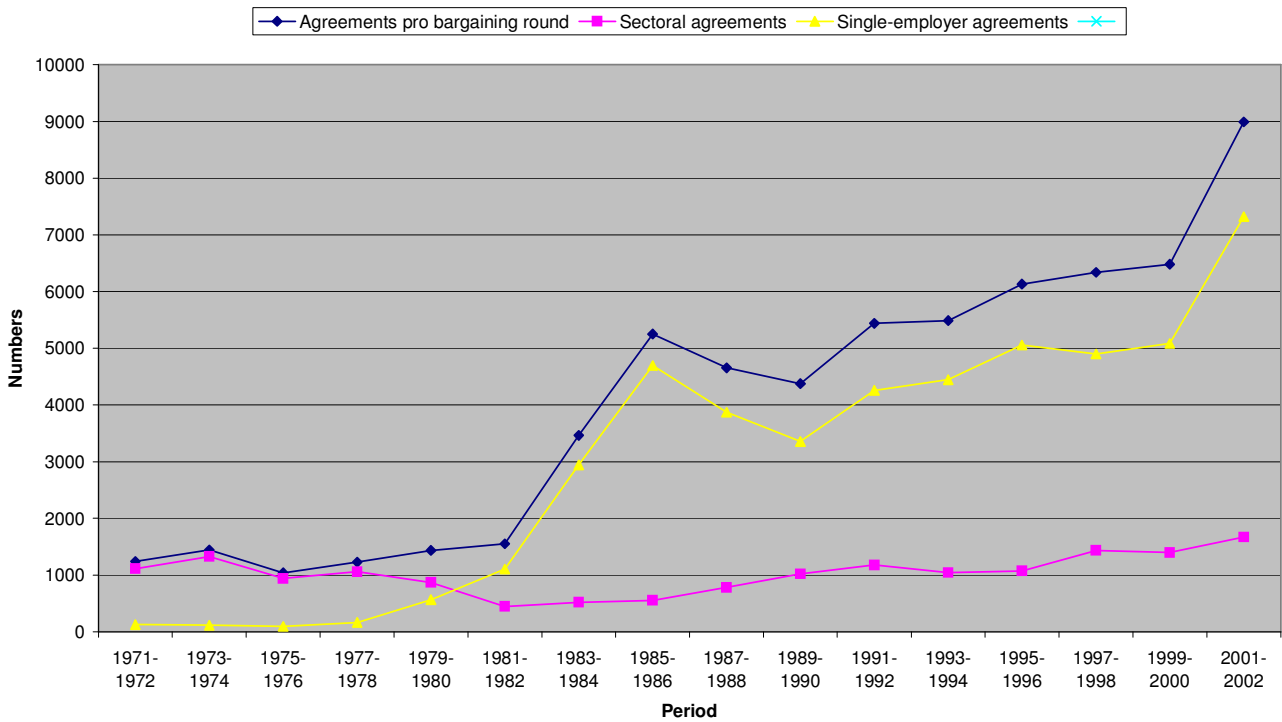
2° Statistic regarding the amount of collective agreements at interprofessional level, professional level and the company level

⁶⁸ KAHN-FREUND, O., Labour and the Law, London, 1993

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