Foreword

This volume of the *Scandinavian Studies in Law* (Sc.St.L.) series is prepared in order to be published at the *VII European Regional Congress of the International Society for Labour Law and Social Security*, which will take place in *Stockholm* on 4-6 September 2002.

It is only natural to start this issue by paying homage to *Folke Schmidt*. Professor Schmidt was not only an expert in labour law with an international reputation, but also the founder of Scandinavian Studies in Law. He was editor of the series from 1957 until his death in 1980. Folke Schmidt was also President of the *International Society for Labour Law and Social Security* from 1966 to 1974.

In a lecture given on his retirement in 1976, Professor Schmidt argued that Swedish labour legislation had moved into a new era. Industrial relations were no longer a matter solely for the social partners. The legislator had entered the scene, with the claim of safeguarding essential public interests, in particular the maintenance of production and full employment (see *From Socialism to Labourism*, Sc.St.L, vol. 21 (1977) 241–256). The description of the 1970s as a new era of labour law in Sweden fits in well with the development in the other Scandinavian countries, but there are differences in the direction and range of the changes that took place.

This volume can be said to resume where Folke Schmidt's lecture left off. Its aim is to provide a broad, albeit not comprehensive, comparative analysis of the development of Scandinavian labour law over the last decades. The picture of development given by the different contributors is one of both stability and change. The institutional framework of Nordic labour relations has remained largely unchanged; employers' organisations and trade unions still hold a strong position, and the collective agreement continues to be the principal instrument for regulation of the labour market. But, in other aspects, extensive changes have occurred. Labour law in the Nordic countries is no longer solely the concern of national legislators and social partners. International influences, especially from the European Community, are important. Further, this volume covers several topics – such as equal treatment, employee privacy and temporary-work agencies – that would not have been regarded as relevant to a presentation of Nordic labour law some thirty years ago.

A majority of the contributions in this volume were presented to, and discussed at, a conference in January 2002, held at *Steningevik* just outside Stockholm. We would like to express our gratitude to *The Nordic Council*

of Ministers, which not only funded the conference but also provided financial support for the publishing of this volume. Financial support for this work has also been generously provided by *The Association for the Publishing of Svensk Juristtidning*, *The Emil Heijne Foundation* and *The Swedish Reseach Council*.

Associate Professor *Jonas Malmberg*, at the *National Institute for Working Life* in Stockholm, has been the scientific co-ordinator of this volume.

In addition to the articles on labour law this volume also contains a comprehensive list of legal abbreviations, as they have been used in Sc.St.L. volumes 1-43.

The editorial board of Sc.St.L. is attached to *The Law Faculty* at *Stockholm University*. The overall objective of the series is to present Scandinavian law and legal theory to a wide readership in the English language.

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The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions

Jonas Malmberg

1 Introduction

The collective agreement exists, and has existed, in various historical, economic and societal surroundings. It is also possible to point to different functions of collective agreements.[1] This article deals with the collective agreement as an instrument for the regulation of wages and other employment conditions – that is, the normative function of the collective agreement – and the surrounding is the Nordic countries at the turn of the millennium.

The collective agreement is without doubt the most important source of norms for the regulation of wages and employment conditions in the Nordic countries.[2] The coverage of collective agreements is very high – approximately 70% in Norway, 83% in Denmark, 94% in Sweden, and 95% in Finland.[3] In the public sector, collective agreements cover almost all wage earners, white and blue-collar workers alike.[4] In the private sector, coverage of collective agreements is generally lower, but varies significantly between different branches and categories of employees. Further, collective agreements usually contain virtually comprehensive regulation of the employment relationship, including aspects that, in other countries, are regulated by statute or even constitutionally. It should be stressed that the importance of the social partners is not limited to the formulation of wage and employment conditions. Just as important is their role in the supervision and application of the law. In practise it is often impossible for an individual employee to realise his/her contractual rights without support of a trade union.[5]

In the Nordic countries, except Finland, the collective agreement grew steadily as a form of uniform regulation of wages and employment conditions in the late 19th and early 20th centuries. The first collective agreements were restricted to offering a "price list" for different kinds of work. Later, they became more comprehensive – containing rules not only on wages but also concerning working time, work rules, recognition of freedom of association, peace obligations, and so on. At the beginning, collective agreements were concluded on a local basis, covering only one or a couple of enterprises in the same district. During the first years of the 20th century, national collective agreements were concluded at sector level in Denmark, Norway and Sweden. At that time, the concept of collective agreement was not integrated into the legal system. There was no clear notion of the legal status and effects of any such agreement.[6] In the Nordic countries, rules applying to collective agreement were first developed during the early decades of the 20th century. The basics of this regulatory system are still in force.

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1 *See especially* Kahn-Freund (1977), Schmidt & Neal (1984) *and* Fahlbeck (1987).

2 *See*, *for instance*, Fahlbeck (1995).

3 Norges offentlige utredninger 2001:15 p 67. The figures refer to the situation in the late 1990s.

4 The special situation of collective agreements in the public sector will not be dealt with in this article.

5 Bruun et al (1992) 36.

6 Adlercreutz (1958) *and* Fransson (2000).

In *Denmark* there is no legislation on collective agreements. Instead, rules have been developed through the case law of the Permanent Arbitration Court *(den faste Voldgiftsret),* established in 1910 on the recommendation of the "August Committee".[7]

The first act on collective agreements in the Nordic countries, the Labour Disputes Act (*arbeidstvistloven*), was adopted in *Norway* in 1915. The act contained, inter alia, rules concerning the conclusion of collective agreements and mediation. A labour court was established for the handling of disputes regarding breaches of collective agreements and industrial actions. The basic features of this act still apply. A revised Labour Disputes Act was approved in 1927, and remains in force in amended form.

In *Finland* the first act concerning collective agreements was adopted in 1924.[8] At that time – just a couple of years after the Finnish civil war – collective agreements in fact were rare. Denmark at that time might be said to have had a system of industrial relations but no legislation; by contrast, Finland had legislation but no industrial relations. Only after World War II was a regular system of industrial relations established. A new act regulating collective agreements was adopted in 1946, and is still in force.

In *Sweden* an act on collective agreements was adopted in 1928. The act provided no more than a regulatory skeleton with regard to legal effect. This skeleton was filled out through the case law of the Labour Court, which had been established in the same year. The Court, in its first years, actively acted as a norm-maker, elaborating many of the principles of collective agreement, which to a large extent are still in force.[9] The rules of the Collective Agreements Act of 1928 were inserted into the Co-Determination Act without any major alterations.

This short overview shows that collective agreement as an instrument for the regulation of wages and employment conditions was already established in the first decades of the 20th century, and that regulations have remained relatively unchanged since then. Although the legal basis for the normative functioning of collective agreements remains the same, the ways in which collective agreements are concluded and the substance of the agreements have changed. In the following section a short orientation will be given concerning the development of collective agreements in the Nordic Countries in recent decades (Section 2).

The legal effects of collective agreements on wages and other employment conditions will be presented in sections 3–6. When analysing the collective agreement as an instrument for the regulation of wages and employment conditions it is possible to point to different aims. From the point of view of the employer, the collective agreement – as well as being a peace document – serves the function of establishing uniform regulation of employment conditions and making staff costs predictable. Further, the collective agreement enables the employer to change the conditions of work of all employees through

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7 *See* Hasselbalch above in this volume.

8 This act was based on a draft by the German Ministry of Labour from 1921, which was never adopted in Germany. The German proposal was based on a private proposal written by Hugo Sinzhiemer, *See* Schmidt & Neal (1984) 51.

9 Sigeman (1978).

negotiations with one or a few trade unions, thereby reducing transaction costs (i.e. the costs of planning, adapting and monitoring the production of goods and services). From the perspective of the trade union, the primary purpose of collective agreement is to protect its members against pressure from employers. This is the main theme of Section 4, which deals with the situation where both employers and employees are bound by such an agreement. However, the purpose of a collective agreement might reach beyond an immediate interest in protecting trade union members in the short term. It might also be to establish a floor of rights for all employees – trade union members and outsiders alike. In this way, the collective agreement functions as an alternative to a statute. Then, the aim – from the point of view of the trade union – is to control conditions for the supply of labour and prevent social dumping. This function of the collective agreement is at the forefront when analysing the situation where either employee or employer is not a member of the organisation concluding the agreement (or, in the case where the employer has not signed one). The situation where the employer but not the employee is bound by the collective agreement is discussed in Section 5. Section 6 deals with the case where the employer is not bound by any such agreement.

2 Development of Collective Agreements since the 1970s

2.1 Introduction

Collective agreements are, with what might be regarded as harsh simplification, concluded mainly at three levels:

- National intersectoral level;
- National sector level;
- Local (or company) level.

At *national intersectoral level* there are collective agreements concluded between associations of employers' organisations and confederations of trade unions or cartels of trade unions. Collective agreements at *national sectoral level* are normally concluded by national employers' organisations, representing a certain sector or industry, and the corresponding national trade unions. In Sweden, Norway and Finland trade unions have largely been organised on an industry basis (the so-called "branch-of-industry" principle). In Denmark, trade unions have been structured according to craft to a larger extent than in the other Nordic countries. However, in recent decades, Danish employers have rather successfully promoted the idea of "one enterprise – one collective agreement". In this respect, it seems that Denmark has come closer to the other Nordic countries. Further, there are collective agreements concluded at local (company) level, i.e. collective agreements signed by individual employers.

The structure of collective bargaining and the content of collective agreements have undergone major changes in the Nordic countries in recent

decades.[10] One prominent feature of these changes is the decentralisation of collective bargaining. Such decentralisation manifests itself in two ways. First, the importance of collective bargaining at national intersectoral level has decreased. Second, the substance of collective agreements concluded at national sectoral level has shifted from detailed regulation to framework agreement, leaving generous leeway for negotiations at company level.

2.2 Collective Agreements at National Intersectoral Level

In all the Nordic countries there are basic agreements concluded at national intersectoral level. These agreements contain the provisions that are considered to be of central importance, and constitute a framework for the conclusion of regular agreements on pay and employment conditions. Basic agreements often contain rules on the right to take industrial action, freedom of association, negotiation, etc. In Denmark, Finland and Sweden, such agreements are designed to remain in force for a lengthy period of time, and are often concluded for an indefinite period. In Norway, basic agreements are usually concluded for a period of two or four years. At this level, there are also collective agreements concerning specific topics, such as insurance schemes and co-determination.

Earlier, the national intersectoral level was also important for *wage determination*. In *Sweden* in the 1950s and 1960s industrial relations were dominated by private-sector confederations, namely the Swedish Trade Union Confederation *(LO)* and the Swedish Employers' Organisation (*SAF*, from 2001 known as the Confederation of Swedish Enterprise). From 1956 to 1981 LO and SAF co-ordinated bargaining at national level. The levels of wage increases laid down in the agreements reached between LO and SAF were to a large extent regarded as guidelines for other sectors of the labour market, i.e. private white-collar workers and the public sector. However, since the early 1980s wage agreements in Sweden have no longer been concluded at inter-sectoral level. The breakdown of centralised wage setting might be explained by several factors, for instance that LO and SAF lost their dominant position on the labour market as a consequence of the growth of the private and public service sectors.

A trend towards decentralisation of wage bargaining has also been observed in *Denmark*. From the 1950s through to the end of the 1970s the confederations on both sides – the Danish Trade Union Confederation *(LO)* and the Danish Employers' Organisation *(DA)* – played a prominent role in the wage-setting process. The position of the confederations was mainly based on affiliated organisations giving the confederations a mandate to bargain on an ad hoc basis. During the 1970s the social partners experienced great difficulties in reaching agreement, and the Danish Parliament passed legislation several times to stop industrial conflicts. Since the 1980s wage bargaining has largely taken place at sector level. Bargaining in different sectors was until recently highly synchronised. However, in recent years, wage bargaining in different sectors

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10 For the following, *See* Adlercreutz (1990), De Geer (1992), Dølvik & Stokke (1998), Eklund (1998-99), Elvander & Holmlund (1997), Kjellberg (1998), Lind (2001), Lilja (1998), Longva (2001), Martin (1995), Scheuer (1998), Thörnqvist (1999) *and* Visser (1996).

has, at least to some extent, been out of time. Whether or not this phenomenon is temporary remains to be seen. Further, collective agreements concluded by trade unions and employers' organisations in certain sectors, especially the metal industry, serve as role models for other sectors. Accordingly, decentralisation of collective bargaining in Denmark was in 1998 described as decentralisation of process rather than outcome.[11]

In *Finland* the confederations of employers' organisations and trade unions have, since 1968, concluded agreements on wage policy with the Government and Finland's central bank (the Bank of Finland). These agreements cover not only pay, but also tax and other matters. The agreements are considered as "gentlemen's agreements" or framework agreements for bargaining at sector level. But, in practise, the content of these agreements has to some extent been diluted. Now, it is not unusual for trade unions to withdraw from an agreement in order to achieve a better agreement at sector level. On the other hand, these trade unions have usually not been successful in reaching better agreements.

In *Norway* wage bargaining over the last 50 years has alternated between intersectoral and sector level. For example, bargaining took place at sector level in 1998, but was "re-centralised" in 2000. The key organisations in the private sector – the Norwegian Confederation of Trade Unions (LO) and the Confederation of Norwegian Business and Industry (NHO) – usually agree on a limited average pay increase. Further, the agreement at peak level contains rather strict guidelines, stipulating that wage increase must be based on companies' financial situation, productivity, prospects, and so on. Within this framework, actual pay is determined via bargaining at sector and company level.

In sum, there has been a tendency, since the 1980s, for the centre of wage bargaining to move from national intersectoral level to national sector level. This tendency has been clearer in Denmark and Sweden than in Norway and Finland.

2.3 Collective Agreements at National Sector Level and their Implementation at Local Level

The most important collective agreements concerning pay and other employment conditions are now concluded at *national sector level*. In fact, when talking about *the* collective agreement in a certain sector or at a certain company, the agreement at sector level is usually the one in question. The primary purpose of collective agreements concluded at sector level is to regulate employment conditions in the workplace. Collective agreements at sector level usually contain fairly comprehensive regulation of the relationship between the employer and the employee – covering most of the questions that may arise, such as pay, working hours, holidays, periods of notice, leave, travelling costs, and so on.

The shift in level for wage bargaining – from intersectoral to sectoral – has certainly had important macro-economic implications. However, from the perspective of individual employers, the most interesting question is not whether

11 Scheuer (1998) 163.

the overarching collective agreement is signed at intersectoral or sector level, but the extent to which any such agreement provides leeway for solutions tailored at company level. With regard to the content of collective agreements concluded at sector level, it is clear that they have become less detailed and also allow greater scope for derogation (through agreements between companies and local workplace organisations).

Such changes in the essential content of national collective agreements, which have made local level more important, are in harmony with the idea, promoted by employers, that wage setting should be effected at company level. In Denmark this trend, at least to some extent, might be a consequence of the fusion between crafts-based trade unions and unions with an industrial or sectoral base. At the same time as the collective agreement has come to cover a wider variety of workers, the content of such agreements has developed away from detailed regulation towards framework agreement.

In *Denmark* collective agreements based on the standard-wage (*normalløn*) system – where wage scales are established at sector level and may not be supplemented at local level – have increasingly been replaced by the minimum-pay (*mindsteløn*) system. In the latter, only a minimum level – in the form of an hourly rate that must be paid under all circumstances – is established at sector level. Actual pay is negotiated at local level in accordance with what the parties there judge to be most appropriate. The same changes are apparent in *Sweden.* The rigid tariff-wage systems previously used in broad areas of the labour market have now been largely abandoned. Collective agreements at sector level usually contain provisions for rather modest minimum wages. Further, the agreements provide a minimum "pot" for wage increases at local level. Such a trend – although less pronounced – is also reported in *Norway* and *Finland*.

Virtually all collective agreements at national sector level contain regulations on *working hours*. Traditionally, such agreements have contained rather detailed regulations on working hours per week, maximum overtime, rates for overtime payment, and so on. One feature of current Swedish collective agreements is that they leave it to local partners, i.e. the employer and the union workplace organisation, to determine the allocation of working hours. During 1998 several agreements on the shortening of working hours were concluded in the industrial sector. According to these agreements, it is a matter for local partners to decide weather or not working hours should be reduced. Also from Denmark, it is reported that the regulation of working time in collective agreements at sector level has diminished. Again, questions are left open to be settled in the workplace. However, flexible working-time arrangements are said to be less developed in Norway.

It is also common that bargaining at local level covers topics not dealt with in sector agreements. For instance, it has become increasingly common to introduce *profit sharing* and other alternative pay systems designed to increase employees' commitment to their company. Such systems are usually not regulated by national collective agreement, but are introduced at company level – either as a local collective agreement or simply as an employer-imposed directive.

In the Nordic countries mandatory labour law statutes offer an opportunity for derogation through collective agreement, providing even less favourable terms

for employees. This kind of legislation is described as *semi-mandatory*. In *Sweden* a considerable amount of legislation is semi-mandatory, including the Working Time Act, the Annual Holidays Act, and the large parts of the Employment Protection Act. In *Finland* such provisions are found in legislation regarding holidays and working time. Also, parts of the Finnish Employment Contracts Act are semi-mandatory. Semi-mandatory legislation is also found in *Denmark* and *Norway*. Such statutory provisions only allow for derogation through collective agreement concluded by trade unions at sector level. The main reason why the derogation power is located in the hands of nation-wide sector-based trade unions is to ensure a strong counterpart to employers during negotiations. Such statutory provisions are likely to preserve the position of the collective agreement at national sector level.[12] However, in Sweden there are tendencies for derogation from mandatory legislation also to be allowed at company level. First, it is rather frequent that collective agreements delegate the power to derogate to local parties. Second, an amendment to Sweden's Employment Protection Act in 1997 opened the way for derogation by local parties, even if they are bound by collective agreement at sector level on other matters.

These examples show that, in all the Nordic countries, much of the regulation of wages and other employment conditions is moving from sector to company level. It should be stressed, however, that bargaining at local level described above takes place within the framework of sector-based collective agreements, and is thereby usually conducted under a peace obligation.

2.4 Other Collective Agreements Concluded at Local Level

There are basically three kinds of collective agreements at local or company level. In the previous section, I referred to local agreements concluded within the framework of collective agreements at sector level, i.e. agreements between the local branch of a trade union and a member of an employers' organisation (both bound by an agreement at sector level).

In all the Nordic countries, it is also common that trade unions conclude collective agreements directly with individual employers (not members of an employers' organisation). These collective agreements usually take the form of an *accession agreement,*[13] which only contains a reference to the collective agreement that the trade union has concluded with the employers' organisation at national sector level. In Denmark there are examples of collective agreements at national level that proscribe any trade union from concluding accession agreements with lower levels of pay or standards of protection than the national collective agreement. Such clauses are rather frequent in branches with a high percentage of unorganised employers, such as the restaurant industry. It has been common for closed shop clauses (i.e. clauses obliging employers to employ only union members, or give them preference) to be added to accession agreements.

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12 Bruun (2000) 109.

13 *Tilltrædelsesoverenskomst* (De), *hengavtale* (No) and *hängavtal* (Swe).

However, the use of closed shop clauses seems, at least in Sweden, to be coming to an end.

Accession agreements are usually signed on a "take-it-or-leave-it" basis, and without negotiation on the content of the agreement. However, is not unusual for collective agreements to be tailored to fit a certain large enterprise. Such agreements exist either where an enterprise, for whatever reason, does not want to belong to any employers' organisation or where it is a member but its business is of such a specific kind that its inclusion in a sector agreement has not been considered appropriate. For example, such tailored local collective agreements are concluded with national broadcasting companies in Denmark and Finland.

3 The Legal Regulation of Collective Agreements – Introduction

The definitions of a collective agreement in the *Finnish*, *Swedish* and *Norwegian* acts are almost identical. According to these acts, a collective agreement is an agreement concluded by an employers' organisation or an employer, on the one hand, and a trade union on the other. The agreement shall be in writing and concern "the conditions of employment and otherwise the relationship between employer and the employee".[14] The wording is chosen to indicate that a collective agreement can include both a *contractual part* and a *normative part*. The contractual part contains provisions that regulate the relation between the organisations or signatory parties, and the *normative part* contains provisions concerning rights and obligations of the employer and the employee *vis-à-vis* each other. In *Denmark* there is no statutory definition of a collective agreement. Nevertheless, the definitions used in the legal literature, which are based on case law, are similar to the one used in the other Nordic countries. One difference is that there is no requirement for a written document in Denmark.[15]

The normative competence of the social partners is rather wide. According to the *travaux préparatoires* to the Norwegian act a collective agreement can cover any matter about which a trade union and an employers' orgainsation might dispute. The basic idea, expressed in the Swedish *travaux préparatoires*, is that employees – just like employers – are dependent on the development of the relevant undertaking. Thus, any question that might effect the relationship between an undertaking or public authority and its employees can be subject to negotiation and collective agreement. The matter does not need to have a direct or immediate impact on the employee. It is enough that it *might* have an influence on the future development of the undertaking.[16]

When discussing the effect of collective agreements on wages and other employment conditions distinctions have to be made between three situations:

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14 Section 23 Co-Determination Act (Sweden). *See also* Section 1 of the Collective Agreements Act (Finland) and Section 1 of the Labour Disputs Act (Norway).

15 Hasselbalch & Jacobsen (1999) 37.

16 Government bill *Proposition* 1975/76:105 bil 1, at 209. *See also*, *for instance*, Malmberg (2001) 194 f.

1. Both employer and employee are bound by the collective agreement (see Section 4);
2. The employer but not the employee is bound by the collective agreement (see Section 5);
3. The employer is not bound by the collective agreement (see Section 6).

4 Signatory Parties and Members of the Organisations

4.1 The Normative Effect of Collective Agreements

Nordic laws are, like German law, based on the principle that collective agreements are, within their areas of application, not only binding on the signatory parties, but also on members of their organisations.

In *Finland*, *Norway* and *Sweden*, organisation members, according to statutory provisions, are *automatically* bound by the collective agreements concluded by their organisations (which applies to affiliated associations as well as individual employers and employees). However, the signatory parties to any collective agreement may specify that members are not automatically bound by that agreement. Such arrangements are common in Norway. For example, according to collective agreements in the LO-NHO sector, a trade union may demand enforcement of a collective agreement with a member of an employers' organisation if 10% of the workforce covered by the agreement are unionised. In Sweden, there is a similar regulation in collective agreements for white-collar workers in the private service sector. An agreement shall be applied at a certain enterprise only at the request of one of its signatories. The reason for this procedure is that the agreement is signed jointly by several trade unions, and – in many of the enterprises covered by the agreement – only a few of the trade unions have members in the workplace.

In *Denmark*, where there are no statutory regulations concerning the effects of collective agreement, the same result is achieved via another line of reasoning. The employer, through entering into a collective agreement, promises the trade union to apply the provisions of the agreement to his/her employees. This promise will, at an individual level, create a presumption that the provisions of the collective agreement are included in the individual's employment contract.

Members of an organisation are bound by a collective agreement regardless of whether they have entered into the organisation after or before the agreement was concluded (if they were not already bound by another agreement). Nor does it matter whether the employer or employee had concluded the employment contract before or after the collective agreement was signed.

Further, an employer or an employee member of an organisation withdrawing or having being expelled from an organisation bound by a collective agreement will, at least in Finland, Norway and Sweden, remain bound by the agreement as long as it is in force. The idea behind this rule is that members of organisations shall not, following the conclusion of a collective agreement, be able to evaluate the result of negotiations and on that basis avoid any legal effects of that agreement. In Sweden and Norway the same rule applies if an affiliated

organisation leaves its parent organisation. In *Denmark* an employer leaving the parent organisation will still be bound by the collective agreement, while an individual employee will no longer be bound. However, if a group of employees leaves the trade union in order to join another union or form a new one, its members will continue to be bound by the agreement.[17]

Another question is which of the provisions of the collective agreement that give rise to rights for the individual employee. In Finland a distinction is made between individual benefits (individual norms), such as pay, sick-leave and working hours, and common benefits to workers (solidarity norms), such as canteens, safety and health measures. This distinction was adopted from Germany.[18] Whereas individual norms can create counteracting obligations for employer and employee, solidarity norms only create obligations for the employer. It is usually only trade unions that make claims regarding breaches of a solidarity norm. This dividing-line is also established in the other Nordic countries, although it is conceptualised somewhat differently. Some provisions in a collective agreement will entitle individual employees, while the effects of other provisions are exclusively at organisational level. However, the question of what effect a certain provision might have depends on what was the intention of the parties to the collective agreement, and is not primarily a question of the subject matter addressed by the provision.[19]

4.2 The Mandatory Effect of Collective Agreements

Collective agreements in the Nordic countries may be said to have *mandatory effect*; that is, employers and employees bound by a collective agreement may not reach individual agreements that conflict with that collective agreement. This is also referred to as the inderogability of collective agreements.[20] In Finland, Norway and Sweden the mandatory effect follows directly from statute,[21] but in Denmark a similar rule follows from case law. The mandatory effect of a collective agreement need not prevent individual agreements on matters such as higher pay than that specified in the agreement. A clause in a collective agreement can be framed so as to permit variations, in which case a divergent individual agreement would not conflict with it. The choice as to whether a clause in a collective agreement is mandatory or default by nature is made by the parties concerned at the time of the agreement. Thus, in doubtful cases, the question of whether or not a clause in an individual contract is in conflict with a collective agreement has to be solved in each particular case, in accordance with the general rules on interpretation of collective agreements.

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17 Hasselbalch & Jacobsen (1999) 251 et seq.

18 *See*, *for instance*, Weiss & Schmidt (2000) 154.

19 Neal & Schmidt (1984) 57.

20 Wedderburn (1992).

21 Section 6 of Act on Collective Agreements (Finland), Section 3.3 of the Act on Labour Disputes (Norway) *and* Section 27 of the Co-Determination Act (Sweden).

Nonetheless, there are in case law some standard interpretations[22] as to what approach to take where it is unclear whether the clause is mandatory or of a default character. The main function of collective agreement is to protect employees against pressure from their employer. Thus, the provisions in collective agreements are seen as minimum standards in the sense that lower levels of protection are regarded as conflicting with the agreement. Paying a lower salary than that provided for in the collective agreement is, in dubio, not allowed, and this rule also applies to provisions other than pay. In a case before the Danish Permanent Arbitration Court *(den faste Voldgiftsret)* in 1922 the matter was whether an individual agreement on a mutual three-month period of notice conflicted with the one-week period stipulated in the collective agreement. The Court stated that the employer was allowed to commit himself to a longer period of notice. However, a longer period of notice for the employee, would diminish his rights according to the collective agreement. Thus, the provision should, with respect to the period of notice for the employee, be regarded as conflicting with the collective agreement.[23]

According to an older opinion, the collective agreement was seen as an instrument solely designed to protect employees. As a consequence, it was natural to see the collective agreement as only providing a minimum standard. Later, the collective agreement came to be accepted by employers, and – to some extent – was also regarded as an instrument to prevent competition on labour between employers. Against this background, it might be asked if the provisions of collective agreements, in dubio, allow for better conditions. In other words, does the collective agreement provide only a floor or does it also erect a ceiling? As was illustrated in the case just mentioned, the *Danish* position is that collective agreement, in dubio, allows application of provisions more favourable for the employee (unless the provision is adopted in order to undermine a union). A similar rule is upheld in *Finland*. In these countries collective agreements are not seen as an instrument for protecting employers from competition on the labour market. By contrast, the *Norwegian* Labour Court has, at least in older cases, taken the position that higher pay is, in dubio, not allowed.[24] Given that the trend in Norwegian collective agreements is explicitly towards the setting of a minimum standard, it might be asked whether this case law still reflects *lege lata*. The *Swedish* labour court has not elaborated any standard interpretation concerning whether, in dubio, paying higher wages is permissible or not. Instead, every collective agreement has to be individually interpreted in this respect. Collective agreements providing for a maximum wage level are typically found among groups of employees that easily move from one employer to another, such as construction workers and chimney sweeps.[25]

Further, in Sweden it is, in dubio, not permitted to use other methods for working out wage levels than those provided for by the collective agreement – even where these do not result in a salary being set at a lower level. The reason

22 Sigeman (1978) 182.

23 AR 621.

24 ARD 1945–48 at 73 *and* ARD 1954 at 111.

25 Labour Court judgement AD 1989 no. 108 *and* AD 1992 no. 141.

for this strict approach is the risk that parties to a collective agreement, especially the trade union involved, would experience greater difficulty in monitoring compliance with the agreement. The regulation is similar in *Denmark*.

4.3 Remedies for Breaches of Terms of a Collective Agreement

Above I have described the automatic mandatory normative effect of the collective agreement. The situation to be discussed in what follows is where an employer breaches a collective agreement by not applying the conditions of employment laid down in that agreement. What remedies are available in such a situation? To answer this question it is necessary to consider both substantives rules and rules concerning *locus standi*.

An employer's breach of a collective agreement may, in the first instance, be remedied at *collective level*, i.e. by the trade union. In *Denmark*, *Finland* and *Sweden* the main remedy for breaches of collective agreements is punitive damages. The significance of punitive damages is that courts, in assessing quantum of damages, must pay attention to non-financial loss, such as the parties' interest that the provisions of the agreement are applied. This kind of damage award is in Denmark called *bod*,[26] in Finland *plikt*,[27] and in Sweden *allmänt skadestånd*.[28] In Finland punitive damages is only awarded for conscious or obvious breaches of the agreement and the maximum amount of punitive damages for employers is FIM 140,000 (about EUR 24,000). There is no upper limit prescribed in the Swedish and Danish statutes. Punitive damages have been described as a hybrid between damages and a penal sanction.[29] In *Norway* a breach of a collective agreement is not remedied through punitive damages. Only compensation for financial loss will be awarded.

It is primarily trade unions that are entitled to make claims for (punitive) damages for breaches of collective agreements. In all the four Scandinavian countries disputes concerning (punitive) damages for breach of a collective agreement are handled by the labour courts. This gives trade unions a strong position in the enforcement process, which in Norway is described as a monopoly in litigation *(prosessmonopolet)*.

To what extent is it possible for individual employees to enforce the provisions of a collective agreement? In *Sweden*, employees (members of a trade union) have a subsidiary right to engage in court action. If the trade union does not wish to proceed, a member may choose to initiate a summons, but in this case to the District Court (with the Labour Court as the court of appeal). Further, punitive damages may be awarded to individual employees (members of the trade union that has concluded the agreement) for breaches of provisions in the agreement intended to create rights for individual employees.

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26 Section 12 of the Labour Court Act.

27 Sections 7, 9–10 of the Act on Collective Agreements.

28 Sections 54–55 of the Co-Determination Act.

29 Sigeman (1985).

In *Finland* individual employees may institute proceedings with the consent of their trade union, or if their union explicitly refuses to institute proceedings. Punitive damages may in principle be awarded directly to the employees. However, this possibility is not used in practice, since trade unions do not refuse to litigate were there is a conscious or obvious breach of the collective agreement.

In *Denmark* it is the Labour Court, not the ordinary courts, that may award punitive damages. Only the trade union – and not the employee – has *locus standi* before the Labour Court regarding breaches of collective agreements. If a trade union, for some reason, does not submit a case to the Labour Court, then any of its members has the right to apply to the ordinary courts. Such subsidiary *locus standi* for individual employees was confirmed in an amendment to the Labour Court Act in 1997. However, the ordinary court may not award punitive damages. Thus, in Denmark the sanction available for the employee is less effective than the one available for the trade union.

In *Norway* parties to a collective agreement are the only parties with *locus standi* in the Labour Court in disputes concerning collective agreements or claims based on a collective agreement. Individual employees have no standing in the Norwegian Labour Court.[30] On the other hand, such "monopoly of litigation" does not apply to cases concerning claims based on statute or an individual employment contract. Such claims are brought before ordinary courts privately by the individual. This does not mean that individual employees are excluded from rights in accordance with the provisions of the collective agreement. According to a dogmatic construction recognised in Norwegian labour law – the so-called doctrine of dualism[31] – the normative provisions of any collective agreement are automatically incorporated into an individual employment contract. Thus, an individual employee may, in an ordinary court, put forward claims concerning his/her individual contract even if the content of that contract is based on a collective agreement. In this way, not only the Labour Court but also an ordinary court can interpret a collective agreement.[32] It follows from this that the *locus standi* of individual employees are not subsidiary (as in the other Nordic countries), but are in fact parallel. In Norway, this is described as a "double-track" process. Like in Sweden the same sanctions are available for trade unions and individual employees.

In *Finland*, *Norway* and *Sweden* it follows from statutory provisions that employment contracts conflicting with a collective agreement are *void*.[33] The fact that a clause in an individual agreement conflicts with a collective agreement does not mean that the employment contract totally ceases to apply. The result is that the applicable conditions of the collective agreement have

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30 However a suit may be filed against members. In such case the relevant member must be sued and then obtain status of defendant alongside with the defendant organisation. Evju (1998/99) 258.

31 Schmidt (1977) 221.

32 *See further* Evju (1998/99).

33 Section 6 of the Collective Agreements Act (Finland), Section 3.3 of the Labour Disputes Act (Norway) and Section 27 of the Co-Determination Act (Sweden).

precedence over the divergent provisions of the individual agreement. That is, the latter are regarded as separable from the employment agreement as a whole.

It is not necessary to institute court proceedings to effect an outcome of this kind. As regards future contractual relationships, the parties involved are always free to invoke the terms of the collective agreement rather than those of the individual agreement. As regards claims based on work already carried out, the point of departure is that both parties are free to invoke the terms of the collective agreement. For example, an employee who, as a consequence of an individual agreement, has received a lower wage than that to which he is entitled under a collective agreement is entitled to the difference. Nonetheless, there are some restrictions as regards such claims. In Sweden the most important of these concerns the rules on time limits for negotiation and for instituting court proceedings for damages and/or performance of a collective agreement. These rules provide that trade unions must initiate negotiations with the employer and bring claims within a relatively short period of time.[34]

In *Denmark* the situation is more complicated. The only statutory regulated remedy for breach of a collective agreement is the award of punitive damages ("*bod*", see above). According to case law from the Labour Court provisions in employment contracts that conflict with collective agreements are void. However, this case law has concerned cases where a trade union has claimed "*bod*". Since 1997 individual members have a subsidiary *locus standi* regarding breaches of collective agreement. Against this background it has been argued that an individual member, in an ordinary court, may claim the rights derived from a collective agreement (regarding, for example, pay or period of notice) even if such rights are in conflict with an individual agreement.[35] However, there is as yet no case law to confirm this point.

5 Outside Employees

5.1 Introduction

Let us now turn to the case of employees, working for an employer who is bound by collective agreement with a trade union and performing work covered by the agreement, but where the employees are not members of that trade union. Such "outside employees" may be members of another trade union, or not members of any trade union at all.

The basic assumption in the Nordic countries is that collective agreements only have normative mandatory effects in relations between employers who have signed an agreement or are members of an organisation (party to an agreement) and employees who are members of the trade union party to the same agreement. However, this does not mean that collective agreements lack any significance for outside employees. When discussing the effects of collective agreements on outside employees, it is essential to distinguish

34 Sections 64–68 of the Co-Determination Act.

35 Kristiansen (1999) 304, *compare* Hasselbalch (2000) 272 et seq.

between employers' duties in relation to the trade union on the one hand and the outside employee on the other.

5.2 Employers' Duties in Relation to Signatory Trade Unions

The issue of the employment conditions of outside employees is sensitive to trade unions. On the one hand, it is important for a trade union that an employer does not undercut the collective agreement by employing outside employees with lower pay. On the other hand, it is regarded as a problem if outside employees receive all the benefits of the collective agreement without making any financial contribution to the union. This is known as the "free-rider" problem. Thus, it may be in the interests of a trade union to reserve the benefits of its collective agreements for the their own members. Historically, the policy of the Nordic trade-union movement has been that the terms of collective agreement should apply to outside employees. This opinion has also been accepted in law.

The Finnish Collective Agreements Act explicitly states that an employer – in relation to the trade union – has a duty not to conclude individual agreements with outside employees that conflict with any collective agreement (Article 4). In the other Nordic countries, the same rule is upheld in case law as an implied term in collective agreements. Thus, an employer who does not apply the collective agreement to outside employees will breach any agreement with the trade union itself. This rule does not apply if the collective agreement explicitly states that whole or parts of it shall only be applied to members of the signatory trade union. Such agreements exist to some extent, especially where two trade unions have concluded collective agreements that are partly overlapping.

The employer's duty to apply a collective agreement to outside employees does not mean that a court, on the application of a trade union, will declare the disputed contract between the employer and the outside employee void. As described above, breaches of collective agreement in *Denmark*, *Finland* and *Sweden* are mainly remedied through the award of punitive damages. However, sanctions for this kind of breach of collective agreement are rather weak in Norway. The available remedy is compensation for (financial) damage, and the trade union will usually not suffer any financial loss if the employer does not apply the collective agreement to outside employees.[36]

It should also be mentioned that it might be regarded as illegal for an employer to pay outside employees better than members of the trade union. In Denmark this might, depending on the circumstances, be regarded as an anti-union behaviour and constitute a breach of collective agreement. In Sweden the same behaviour might be considered as a violation of the freedom of association.

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36 *See*, *for instance*, the Labour Court judgement ARD 1995 at 228.

5.3 Employers' Duties in Relation to Outside Employees

There are several ways in which the normative provisions of a collective agreement can have legal effects in relation to outside employees.

First, the provision can be incorporated into an individual employment contract through explicit reference to the collective agreement. In practice, such reference clauses are frequent. According to Article 2 of the Written Statement Directive,[37] an employer shall, where appropriate, inform an employee about, *inter alia*, the collective agreements governing the employee's conditions of work. The information shall be in written form and be given to the employee within two months after commencement of employment. Such information will often, depending on the way in which it is provided, have the effect of a reference clause. That is, the applicable provisions of a collective agreement are regarded as incorporated into the employment contract between the employer and the outside employee. This is, for instance, the case if the information is provided in a written contract signed by both employer and employee. The situation will usually be the same if information is given to the employee before a binding employment contract has been concluded.

Second, the collective agreement will affect the employment relationship of outside employees even without such explicit contractual reference. In all the Nordic countries the provisions of applicable collective agreements will, as a result of case law, supplement the employment relationships of outside employees. Sometimes, this is explained as an implied term in the employment contract; on other occasions, the collective agreement is regarded as the "usage" of the enterprise. It should be stressed that the provisions of a collective agreement in relation to outside employees are only default by nature.[38]

In Sweden the decisive factor in determining a dispute as to whether a collective agreement shall have a supplementary effect or not is whether the agreement as such, or some part or it, has been applied in the workplace. Relevant "usage" is the application of the collective agreement, not the application of a certain provision within it. This means that it is possible for new provisions in a collective agreement, governing matters previously unregulated, to apply to an existing individual contract. The employment relationship of the outside employee is supplemented by provisions in the collective agreement in force from time to time.

In Norway and Sweden both favourable and unfavourable terms of a collective agreement are applicable to the outside employee. A situation that has been subject to case law in both Norway and Sweden is where a collective agreement has been changed to the detriment of employees, e.g. by an extension of working hours or by withdrawing previously provided additional pay. Outside employees have argued that, since they are not bound by collective agreement, the employer may not apply any amended agreement to them. Both the Norwegian and Swedish labour courts have rejected this argument, stating that it

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37 Council Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

38 The line of thoughts is rather similar the one used on incorporation of collective agreements in Britain. *See*, *for instance*, Wedderburn (1986) 318–321.

is the collective agreement, as and when it is updated, that has a supplementary effect.[39] A similar rule seems to prevail in *Denmark*.[40]

In *Finland* the point of departure is that an outside employee only derives rights from a collective agreement, but has no duties or liabilities in relation to it. This is explained by the fact that outside employees are not bound by the agreement. However, there are some exceptions to this rule in statutes outside the Finnish Collective Agreements Act.

Third, there are statutory rules that allow an employer bound by a collective agreement to apply some of the provisions in that agreement to outside employees. As explained above, the Nordic countries have statutory provisions that allow for derogation through collective agreement (even to the detriment of employees), but not through individual employment contracts. Where there are such semi-mandatory provisions in statutes, they regularly entitle the employer bound by a collective agreement also to apply the agreement to outside employees performing work covered by it.

A further question concerns which of the provisions of the collective agreement that will have a legal impact on the outside employee in these ways. It is obvious that not all provisions of any collective agreement will be incorporated into the individual agreements of outside employees. Only the normative part of a collective agreement may have supplementary effect on the employment relationship of outside employees.

According to *Swedish* case law not every (normative) provision of a collective agreement is regarded as capable of supplementing an individual contract of an external employee. Rather, only those provisions that are intended to be applied generally to all employees are concerned. There are some difficult borderline questions. For example, there is the common situation where a collective agreement lays down a minimum wage for a group but also provides for a further "pot" to be distributed locally on the basis of local negotiations. According to case law, in such situations, an external employee cannot claim other benefits than those that follow from the rules that are applicable to the group as a whole. Nor can an external employee claim benefits which, under the collective agreement, are due only to members of organisations expressly covered by that agreement. Thus, the parties to the collective agreement, especially the trade union, can exert influence concerning which provisions shall be applied to outside employees. It follows from this that no principle of equal treatment of union members and outside employees is applied. Case law has been criticised for not offering sufficient protection to outside employees. The situation is similar in Denmark.

Rules on the supplementary effect of collective agreements for outside employees are constructed in a fairly complicated way. This can be explained by the fact that these rules are composite by nature. They are partly characterised by a desire to ensure that outside employees enjoy a minimum level of protection in their employment relationships. In Sweden its is obvious that the Labour Court, when determining the scope of this minimum protection, has taken into

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39 The judgements of the Swedish Labour Court AD 1990 nr 33 and the Norwegian Supreme Court Rt 1985 at 78.

40 Hasselbalch (1997) 54 f.

consideration the need to leave this area largely open to trade unions and employers' organisations to regulate as they see fit. Finally, the rules are also intended to provide methods for regulating outside employees' working conditions so as to reduce transaction costs, i.e. the costs of planning, adapting and monitoring the production of goods and services.

6 Outside Employers

As we have seen, the point of departure in the Nordic countries is that collective agreements only have normative mandatory effect in relation to the signatory parties and members of their organisations. The question to be addressed now is the effect of a collective agreement on "outside-employers", i.e. employers who are not members of an organisation bound by a collective agreement or have not concluded a collective agreement of their own. When discussing the situation of outside employers it is the interests of trade unions to control conditions for the supply of labour and prevent social dumping that are to the fore. Traditionally the discussion has focused on national employers not covered by collective agreements. During the 1990s the focus of the discussion has been on competition from foreign employers temporarily operating in the country in question.

In *Finland* a system for extension of collective agreements (*erga omnes*) was introduced in the Employment Contracts Act in 1970. The regulation was altered in connection with the adoption of a new Employment Contracts Act in 2001. According to this legislation, the employer shall apply the employment conditions prescribed in nation-wide collective agreements, which are declared generally binding (*allmänt bindande*) by a special board. The board shall declare a collective agreement generally binding if the agreement is regarded as representative in its sector. A collective agreement is considered representative if half of the employees or more in a particular sector are covered by the agreement. However, available statistics are not the only circumstance to be taken into account. The board shall also consider how established the collective agreement is in its sector, and also the percentage of employers and employees organised in the branch. The provisions of the generally applicable collective agreement set a minimum standard. Provisions in employment contracts inconsistent with generally binding agreements are void.

The value of the system of generally binding collective agreements has been disputed since it was introduced in 1970. Employers have argued, for instance, that the regulation lacks reciprocity, since only the rights and not the obligations of the agreements are extended to employees. When the regulation was adopted in 1970 trade unions feared that it would diminish willingness to become a union member. However, it soon proved that the *erga omnes* system tended to raise the degree of organisation on both employer and employee sides. Employees needed the trade unions to enforce the rights of the generally binding collective agreements, and employers needed the assistance of employers' organisations to interpret and administer the agreements.[41]

41 Ahlberg & Bruun (1996) 126 et seq.

In *Norway* a system of extension of collective agreements was adopted in 1993.[42] The reason for the Act was to prevent foreign employers, performing work in Norway, from having a competitive advantage through lower costs of employment compared with Norwegian employers. According to the Act, a special board may declare a nation-wide collective agreement, or a part of it, to be generally applicable to employees within the scope of application of the agreement. This procedure has not yet been used in practice.

In *Denmark* and *Sweden* there are (with some minor exceptions) no rules concerning extension of collective agreement. Nevertheless, it is not unusual for an outside employer and an employee to agree that the normative provisions of a certain collective agreement shall govern the employment relationship, or that the employer should *de facto* apply the provisions of the agreement. Further, it should be noted that to some extent there are unwritten norms, which have the character of guidelines and which include a reference to the contractual usage manifested in the "most proximate" collective agreement. Judgement AD 1976 no 65 of the Swedish labour court provides an example. The case concerned the fixing of overtime rates when an employment contract, which lacked provisions on the matter, was not covered by a collective agreement. The court held that the employee was entitled to overtime allowance in accordance with the current practice in the trade, and that this practice was to be found in the collective agreement whose application was closest at hand.[43] In Denmark there are similar judgements regarding period of notice[44] and minimum wages (where an employment contract did not contain any provision on wages).[45] Finally, when establishing whether a provision in an employment contract should be adjusted according to the general clause on unfair terms of contracts[46], the most proximate collective agreement will often be regarded as the yardstick against which the fairness of the provision in the employment contract should be measured.

As demonstrated, legislation on collective agreements in Sweden and Denmark does not provide any effective means for combating social dumping. Instead, the most prominent means of combating social dumping is for trade unions to conclude an accession collective agreement with outside employers. If an outside employer refuses to sign a collective agreement, the normal procedure is for the trade union to declare a boycott against that employer. Such a boycott entails that members of the trade union refuse to be employed by the outside employer. To make the action more effective, the primary boycott is combined with sympathy (secondary) actions. These actions may be taken by the trade union itself, or by other trade unions. Sympathy actions are usually aimed at stopping deliveries to and from the outside employer, and are usually very effective.

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42 Act no. 58 of 4 July 1993 on extension of collective agreements.

43 Sigeman (1978) 209.

44 U74/481 H *and* U92/759 Ø.

45 U95/615 Ø.

46 The same general clause is found in Article 36 of the general contracts acts in all the Nordic countries.

Especially in Denmark there is rather strong resistance to adopting a system of extension of collective agreements. Danish labour law is based clearly on the idea of collective self-regulation, where social partners determine and administer the rules of the labour market. It has been argued that the introduction of a system of collective agreement with an *erga omnes* effect would require serious reconsideration of some of the main principles of collective labour law in Denmark (not least questions regarding the solving of disputes on the labour market). As far as disputes of interests are concerned, a system of extension of collective agreement would threaten the legitimacy of the right to sympathy actions. When it comes to disputes of rights, it would endanger the control of the interpretation of the collective agreements exercised by social partners through the system of arbitration.[47] The same attitude, although less clearly pronounced, is found also in Sweden.

This attitude is clearly showed in implementation of the Posting Directive[48] in Denmark and Sweden. The directive deals with the conditions of employment for employees temporally performing work in another country. According to the Rome Convention[49] the law of that country will normally not be applicable to the employment contract. Nevertheless, the idea of the directive is that some of the rules governing employment in the host state shall apply even to work temporally performed there. It follows already from *Rush Portuguesa* (C-113/89 [1990] ECR I-1417) that community law does not preclude member states from extending some parts of their labour legislation or collective agreements (at least those agreements having an *erga omnes* effect) to any person who is temporally employed within their territory.[50] According to this judgement, member states are *allowed* to extend their legislation or collective agreements. The directive, however, goes further and *requires* member states to ensure that certain basic standards of their own labour law systems apply to employees temporary performing work within their territory.

The standards that member states are obliged to extend to posted workers are pointed to in Article 3 of the directive. It follows from the article that the standards:

- must be laid down in certain sources of law (namely law, regulation or administrative provision and – concerning the building industry – collective agreements with an *erga omnes* effect); and,
- concern certain issues (enumerated in Article 3.1), including minimum rates of pay.

Further, the directive makes it optional for member states to extend generally applicable terms and conditions of employment laid down in, *inter alia*, collective agreements to all similar undertakings in a certain sector. It is held that this option refers to the kind of collective agreements concluded in Denmark and Sweden.

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47 Kristiansen (1997) 313 et seq.

48 Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

49 The Rome Convention of 19 June 1980 on the law applicable to contractual obligations.

50 See, most recently, *also* C-369/96 *and* C-376/96 Arblade [1999] ECR I-8453 *and* C-49/98 *Finalarte* judgement 2001-10-25, not yet reported.

At least partly the objective of the Posting Directive is to combat social dumping. However, the method employed in the directive differs from that traditionally used in Denmark and Sweden. As we have seen above, the task of combating social dumping has mainly been entrusted to the trade unions. It follows from the directive that it is a task for the member states to engage in the supervision of conditions of employment of persons not covered by national law and national collective agreements. Thus, it is not surprising that the Danish and Swedish legislators have chosen to implement the directive in a somewhat minimalist way. This is most evident in the fact that neither of these countries has used the option to extend collective agreements to posted workers. One argument for not taking this option is that the traditional method – forcing the outside employer to sign a substitute agreement – is effective enough. Further, the Swedish and Danish authorities did not want to introduce an *erga omnes* system through the backdoor. It follows from the directive that companies that post workers cannot be treated less favourably than domestic companies. If Denmark and Sweden had created an obligation for foreign companies to pay wages according to domestic collective agreements, they would also have had to extend this obligation to all national companies not bound by collective agreement.[51] On this point there is consensus between the government and organisations on both sides of the labour market. However, since there are no statutes on minimum wages or collective agreements with an *erga omnes* effect, probably the most important of the issues referred to in Article 3 of the directive – minimum rates of pay – is omitted from the Swedish and Danish acts on posted workers.

However, a more sympathetic attitude towards extending collective agreements might now be found in Denmark. While implementing the Part Time Directive[52] in 2001 Denmark adopted a new act which extends the coverage of the major Danish collective agreements to all employees who are not otherwise covered by a collective agreement, ensuring at least the same standard of protection as the directive. A similar technique was, as a response to a reasoned opinion of the European Commission, used in January 2002 to implement the Working Time Directive.[53]

7 Concluding Remarks

In the Nordic countries, legal regulation of the normative function of the collective agreement was first developed during the early decades of the 20th century. Since then the structure of collective bargaining and the content of collective agreements have undergone major changes. From the 1950s bargaining was to a large extent centralised at national intersectoral level. However, in recent decades, collective bargaining in the Nordic countries has undergone dramatic decentralisation. Such decentralisation has manifested itself

51 Bruun (2000) 113.

52 Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC.

53 *See further* Nielsens article above.

in two ways. First, the importance of collective bargaining at national intersectoral level has decreased. Second, the substance of collective agreements concluded at national sector level has moved from detailed regulation to framework agreements, leaving generous leeway for negotiations at company level. Despite these changes in the actual content of collective agreements, the rules and principles established during the first decade of the 20th century have been remarkable stable. Nevertheless, there are some tensions in the field of legal regulation of the normative function of collective agreement.

As a result of the decentralisation of collective bargaining many essential aspects of the employment conditions today is decided at company level – in negotiations between the employer and the local branch of a trade union, shop steward, or even directly with the individual employee (possibly assisted by the trade union). The individualisation of employment conditions that follows from this development seems to have underpinned demands to recognise the role of the individual in enforcement of provisions based on collective agreement. The amendment to the Danish Labour Court Act in 1997, where subsidiary *locus standi* for individual employees was confirmed, is one of the responses to such demands. The conflict between collectivism and individualism is also apparent regarding questions of negative freedom of association, and in the field of sex discrimination concerning equal pay.[54]

Another area where changes to legal regulation are found concerns extension of collective agreement (*erga omnes*). A system for extension of collective agreements was introduced in Finland in 1970, and in Norway in 1993. In Denmark and Sweden there has been fairly strong resistance to adopting a system of extension of collective agreements. Although experience from Finland shows that this need not be the case, the argument is that such a system would threaten the position of the social partners. However, recent developments in Denmark reflect greater sympathy towards extending collective agreements in connection with implementation of EC directives.

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54 *See further* the articles of Fahlbeck and Roseberry in this volume.

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