



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

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*National Report
Denmark*

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The evolution of collective bargaining in Denmark.....	4
1. Introduction.....	4
2. Main characteristics of the regulative (both legal and voluntary) framework for collective bargaining and what changes have occurred in the period under study	6
2.1. Overview of Collective labour law	7
2.2. The Danish Concept of a Collective Agreement. No Statutory Definition of a Collective Agreement.....	10
2.3. Parties to Collective Agreements: Difference between Collective Agreements and other Contracts.....	12
2.4. The Official Conciliation Service	14
2.5. Formal requirements. Writing. Borderline between Collective Agreements and Customs	14
2.6. Obligatory and Normative Effect of Collective Agreements.....	15
2.7. Who are bound by collective agreements? Erga omnes effect.....	16
2.8. Negotiating Competence and Obligations	16
2.9. Can collective agreements specify working conditions below the standards defined by labour law?.....	18
3. Who are the main actors involved in collective bargaining	18
3.1. Overview	18
3.2. Trade unions	19
3.3. Employers' organizations.....	21
4. At what level does collective bargaining take place (international, national, sector, regional, company/plant), what is the relationship between the various levels, and how has it changed over time?.....	23
5. How has the incidence and coverage of collective agreements evolved and what is the relative importance of collective bargaining comparing the various sectors of the economy; the public and private sector; small and large enterprises?.....	26
6. Main contents of collective agreements (traditional bargaining on wages and working conditions, 'new' issues, broader agreements on social and economic policy, etc.)	27
6.1. Pensions.....	27
6.2. Parental leave fund.....	27

7. Transfers of undertakings and collective dismissals	28
8. Collective bargaining and European law	29
8.1. Implementation of EU Law by Means of Collective Agreements	29
8.1.1. The Problem.....	30
8.1.2. Partial Implementation by Collective Agreement	31
8.1.3. Collective Agreements with Erga Omnes Effect.....	32
8.1.4. The Danish Resistance to Implementation by Legislation	33
8.1.4.1. Stoppage of Work for Health and Safety Reasons	33
8.1.4.2. The Working Time Directive	34
8.1.4.3. The Force Majeure Clause for Family Reasons	35
8.2. Collective Agreements and Competition Law	35
8.3. The Telework Agreement.....	38
8.4. Enlargement.....	39
9. Conclusion	39

1. Introduction

There is a long tradition in Denmark for regulating the labour market by means of collective agreements rather than by legislation. The Danish Model of collective bargaining has been described as a voluntary system, because the Danish Parliament has passed little formal legislation regulating the labour market.

In 1899, a basic agreement between the two main organisations DA and LO (Danish Confederation of Trade Unions) was concluded, which remains substantially unaltered today. The basic agreement stipulates reciprocal recognition between employers and employees. This means that the trade unions are obligated to recognise the employers' managerial prerogative and, on the other hand, employers must accept the right of employees to join trade unions.

Collective bargaining is in Denmark applied to a vast variety of labour issues such as wages, hours of work, dismissals, pay during illness, paid maternity/paternity leave, the right to further training, pension contribution etc.

Denmark's entry into the Community has generally led to a shift away from collective agreements as the dominating source of law towards legislation. As a member state of the EU, Denmark has made more use of the possibilities for implementing EC directives by means of collective agreements than most other EU countries.¹

The Danish preference for implementation by means of collective agreements must be seen against the historical background of Danish labour law.² Hundred years

¹ See for more detail Nielsen, Ruth: Implementation of EC Directives in Denmark, *International Journal of Comparative Labour Law and Industrial Relations* 2002 vol 18, issue 4 p 459.

² Cf Fahlbeck, Reinhold: *Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features* and Hasselbalch: *The Roots - the History of Nordic Labour Law*, both in *Scandinavian Studies in Law* Volume 43, *Stability and Change in Nordic Labour Law*, Stockholm 20² See for more detail Nielsen, Ruth: Implementation of EC Directives in Denmark, *International Journal of Comparative Labour Law and Industrial Relations* 2002 vol 18, issue 4 p 459.

² Cf Fahlbeck, Reinhold: *Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features* and Hasselbalch: *The Roots - the History of Nordic Labour Law*, both in *Scandinavian Studies in Law* Volume 43, *Stability and Change in Nordic Labour Law*, Stockholm 02 p 87 and 11 respectively and Bruun, Niklas: *The Autonomy of Collective Agreement*, report for the VII European Regional Congress of Labour Law and Social Security 2002 at <http://www.labourlaw2002.org/pdf/Bruun.pdf>.

ago, Denmark played a pioneer role in developing the concept of a collective agreement and collective labour law generally. As Hepple points out (emphasis added):³

“labour law’ is of recent origin. In most countries it became recognised as a distinct division of law only after the Second World War. ...The exceptions were Germany and *Denmark*. In the latter, Carl Ussing, a Supreme Court judge who presided over the ‘August Committee’ of 1908-10, combined academic and practical expertise to produce a sharp analysis which helped to lay the foundations of *Denmark’s collectivist system*. ... , but mainly due for reasons of language the impact of the Danish innovations was limited to Scandinavia’.

Danish labour law evolved during the first part of the 20th century into a semi-autonomous legal discipline which was to some extent cut-off from the expert legal culture and left to the main Danish social partners, in particular the Danish Employers’ Organisation and the Confederation of Trade Unions (Danish LO). Since Denmark’s entry into the EC/EU as at 1 January 1973 Danish labour law is, however, increasingly being shaped by EU law and being brought into the mainstream of law.⁴

In Denmark, the social partners serve both as legislators, judges and litigators. The labour market organisations fulfil legislative functions mainly through the adoption of collective agreements. They have adjudicative functions mainly by participating as lay judges in the special labour courts and industrial tribunals which are only competent where a collective agreement applies. Finally, trade unions are the main litigators in Danish labour law, both in collective labour law adjudicated by the special Labour Court/industrial tribunals and in individual employment law adjudicated by the ordinary courts.

³ Hepple, Bob: *The Making of labour law in Europe. A comparative study of nine countries up to 1945*, London, 1986 p 7.

⁴ See for details Nielsen, Ruth: *European Labour Law*, Copenhagen 2000. See also Nielsen, Ruth: *Europeanization of Nordic Labour Law in Scandinavian Studies in Law Volume 43, Stability and Change in Nordic Labour Law*, Stockholm 2002 p 37.

Collective agreements are thus, in a Danish context, the key both to the legislative and the adjudicative function of the social partners.

2. Main characteristics of the regulative (both legal and voluntary) framework for collective bargaining and what changes have occurred in the period under study

The collective actors play a more important role in Danish labour law than the individual actors and at collective level, the enterprise-level is of secondary importance compared to the level of the organizations.

Collective labour law deals with the rights and duties following from collective agreements, which under Danish law are legally binding both for the parties (organizations) who have concluded them and members of the parties, e.g. the individual workers and the individual employers.

It is characteristic of Danish labour law that collective agreements, case law and unwritten principles of law have traditionally constituted the main sources of law. The legislator has not interfered much in the labour market.

There is almost no legislation on collective labour law issues, and no general employment legislation covering individual contracts of employment for all categories of workers. There are, however, legislation for specific groups of employees, notably the Salaried Employee's Act (in Danish Funktionærloven). There are also statutory acts covering specific issues, such as the Work Environment Act, the Equal Pay Act, the Equal Treatment Act, the Act on the Retention of Workers' Rights in case of Transfer of Undertakings and other examples could be mentioned.

The Danish Constitution protects the freedom of association. This does, however, only outlaw intervention into that freedom by the legislator. There is a statute law prohibiting dismissal on grounds of membership or non-membership of trade unions but as regards other aspects of the employment relationship than dismissal an employer

in the private sector is probably free to discriminate against workers because of their trade union membership unless this is prohibited by collective agreement. Closed shop agreements are lawful in Denmark.

Since most private employers are covered by collective agreements and all collective agreements are construed as containing an implied term prohibiting discrimination on grounds of trade union membership the practical main rule is that it is unlawful for a private employer to interfere with the freedom of association.

A public sector employer is required to make objective decisions on all matters including employment matters. Discrimination on grounds of trade union membership is therefore prohibited in the public sector.

Conflicts about collective agreements are settled in a special part of the procedural system, which has nothing to do with individual employment conflicts or public labour law conflicts. Individual employment cases are usually heard by the ordinary civil courts, whereas public labour law conflicts usually are dealt with by the criminal branch of the (ordinary) courts. What sanctions are available depends on where in the procedural system a case is heard.

2.1. Overview of Collective labour law

In 1908-1910, the basic principles for the solution of conflicts relating to collective agreements were as mentioned in the introduction laid down. A fundamental distinction was drawn between conflicts of interest and conflicts of right.

A conflict of interest arises in areas where no. valid collective agreement applies. This may be because the matter in dispute has never been covered by a collective agreement, e.g. due to the employer being non-affiliated to an employers' organisation; or it may be because a previously existing collective agreement has been terminated. In conflicts of interest the parties are free to take industrial action: strike, lock-out, blacking and boycott.

A conflict of right arises where the matter in dispute is already covered by a collective agreement.

A Danish collective agreement entails a peace obligation, i.e. a duty on the parties to the collective agreement and their members not to take industrial action over a matter covered by the agreement. In the event of a conflict of right, there is only in very few cases a right to resort to industrial action (strikes, etc). The exceptions from the peace obligation are:

cases where the employer does not pay the wages

cases where it is necessary to stop working in order to protect the health and welfare of the worker

cases where the employer requires the workers to do work that is not covered by the collective agreement in force

cases of lawful secondary (sympathy) strike or other industrial action.

In Denmark there is legal parity between the workers and the employers in the sense that the employer has the same right to lock-out as the workers have to strike. In the event of a conflict of right, there is virtually never a right to resort to industrial action, eg to lock-out.

The only exception from the peace obligation that is relevant for employers is cases of lawful secondary action, here lock-out.

In conflict of interest situations there is freedom to take industrial action with the modification that there must be a reasonable proportion between the goal to be obtained and the means used to obtain it. The freedom applies both to the workers and to the employers.

A lawful lock-out does not suspend the individual contract of employment under Danish law. It terminates it. After the lock-out the collective parties usually agree upon re-instatement. If they do not and if the employer does not enter into a new individual contract with a particular worker, this worker is no longer employed with the employer.

An unlawful lock-out is a breach of the collective agreement. It will usually result in the employer being sentenced to pay a bod. It neither suspends nor terminates the individual contract of employment.

As an alternative to industrial action, a procedural system has been set up to enable aggrieved parties to obtain a judicial solution of the conflict.

This procedural system has been subdivided into two branches: industrial arbitration and the Labour Court.

In broad terms, conflicts over the interpretation of collective agreements are settled by arbitration, whereas conflicts over an alleged breach of the collective agreement, e.g. strikes in violation of the peace obligation, are dealt with by the Labour Court, which can impose a fine (bod) upon the workers or others who have violated the agreement.

A standard grievance procedure for the handling of conflicts by industrial arbitration was laid down by collective agreement in 1908 (Normen for handling af faglig strid). The first Act on the Labour Court was passed in 1910.

In collective labour law there is a special sanction, the so-called 'bod' which is an amount of money the Labour Court can sentence a party to a collective agreement (or members of that party) to pay to the other party in the event of breach of the collective agreement.

When workers strike in violation of the peace obligation entailed in any collective agreement each of them are sentenced to pay a "bod" which is calculated on the basis of the number of working hours they have been on strike. The organization is regarded as responsible both if it has taken an active part in the strike and if it has not done enough to prevent the workers from striking.

When workers strike, a meeting between the organization must be held at the request of the employer or the employer organization usually within 24 hours. If the workers go back to work before this meeting or follow a suggestion from this meeting to resume work they are as the main rule not liable to pay a 'bod'.

Cases are brought before the Labour Court by the most comprehensive organisation typically the two main organizations on the Danish labour market: the Confederation of Trade Unions (LO) and the Danish Employers' Confederation (DA) and never by individuals whose rights might have been violated. If for example an employer violates his duty under a collective agreement to pay a woman equal pay, the trade union - provided it is not member of a more comprehensive organization - which is a party to that collective agreement can bring the case before the Labour Court. The individual woman who is being discriminated against can do nothing. If the trade union is member of a more comprehensive organization, e.g. the Confederation of trade unions (in Danish LO), it is up to the more comprehensive organization to decide whether or not to raise the case.

Industrial arbitration cases are usually dealt with by arbitration tribunals set up ad hoc for each individual case. The tribunal consists of a chairman and usually two representatives of each party to the collective agreement. In dismissal cases there is, however, a permanent unfair dismissal arbitration board.

In 1960, provisions against unfair dismissal were introduced into the Basic Agreement (which is a collective agreement, see above) between the Confederation of trade unions (in Danish LO) and the employers' organisation. Following this, similar provisions were introduced into the Salaried Employees Act (in Danish Funktionærloven) in 1964. The basic principle of the unfair dismissal provisions is that termination of employment shall not take place unless there is a valid reason for termination connected with the capacity or conduct of the worker/employee or based on the operational requirements of the enterprise.

2.2. The Danish Concept of a Collective Agreement. No Statutory Definition of a Collective Agreement

There is generally scarce legislation on core collective labour law issues in Denmark and no statutory definition of a collective agreement. The Danish sources of

law determining the concept of a collective agreement are mainly case law and legal literature. A collective agreement is typically defined as an agreement in the context of work which concerns pay and other conditions of employment and/or relations between the parties to it and which is concluded between, on one side, an individual employer or an employers' association and, on the other side, a collectivity of employees.

Denmark differs from most of the continental EU countries, including the other Nordic EU Member States (Finland and Sweden), where collective agreements are defined by legislation as formal, written agreements which do not qualify as collective agreements unless certain requirements are met.⁵

EC law - like Danish law - has no legislative definition of a collective agreement. In the report on Industrial Relations in Europe from 2000,⁶ the Commission defined a collective agreement in the following way:

Collective agreement: An agreement reached through collective bargaining between an employer and one or more trade unions, or between employers' associations and trade union confederations. This agreement regulates the relationships between the parties and the treatment of individual workers, and covers the wages and conditions of the workers affected.

The Commission thus takes the typical (narrow) continental European concept of a collective agreement in line with the definition laid down in the German Tarifvertragsgesetz for granted. The Danish concept of a collective agreement is, however, broader in respect of who can be parties on the worker side and in respect of formal requirements which are in principle completely lacking in Danish law.

⁵ As an example the German Tarifvertragsgesetz § 1 may be mentioned. It provides: (1) Der Tarifvertrag regelt die Rechte und Pflichten der Tarifvertragsparteien und enthält Rechtsnormen, die den Inhalt, den Abschluß und die Beendigung von Arbeitsverhältnissen sowie betriebliche und betriebsverfassungsrechtliche Fragen ordnen können. (2) Tarifverträge bedürfen der Schriftform.

See also the Swedish Co-determination Act (1976:580, sections 23-31), and Finnish Act on collective agreements (436/1946).

⁶ COM(2000)113 p 8.

2.3. Parties to Collective Agreements: Difference between Collective Agreements and other Contracts

On the employer side any employer can conclude a collective agreement individually. The employer can also choose to join an employers' organisation whereby he becomes bound by collective agreements concluded by that organisation. On the worker side the collective agreement must be concluded by a collectivity, typically a trade union.

In most EU Member States collective agreements must, on the worker side, be concluded by trade unions.⁷ In addition, trade unions need to satisfy certain requirements guaranteeing their representativity and independence of the employer in order to have capacity to conclude collective agreements.⁸

In practice the vast majority of Danish collective agreements are concluded between independent and representative trade unions and employers or employers' associations in writing. Most Danish collective agreements are therefore Tarifverträge within the German meaning of the concept.

The Danish concept of a collective agreement is, however, in principle different from the German one in that it allows a broader group of actors to conclude collective agreements and there are - in the same way as in respect of other contracts - no formal requirements.

In the early 20th century it was argued in Danish literature that the concept of a collective agreement should not be narrowed down by strict requirements as to who could conclude collective agreements because it was a new concept. It was considered better to start with a broad concept which covered not only agreements concluded by

⁷ See for example the German Tarifvertragsgesetz § 2: Tarifvertragsparteien. (1) Tarifvertragsparteien sind Gewerkschaften, einzelne Arbeitgeber sowie Vereinigungen von Arbeitgebern.

⁸ See further Gamillscheg, Franz: Trade Union Representativity in German Law in Bellace, J R and Max Rood (eds): Labour law at the Crossroads: Changing Employment Relationships: Studies in Honour of Benjamin Aaron, The Hague 1997 p 75.

well established trade unions (of which there were only few in the beginning of the 20th century) but also agreements entered into by other less well established collectivities of workers/employees with their employers concerning working conditions.⁹ By and large that broad understanding of a collective agreement *ratione personae* has survived and has found some support in the case law of the Labour Court.¹⁰ Some Danish authors (including the present author) have argued that the time has come for a narrower concept of a collective agreement in Denmark at least in respect of certain situations such as, for example, the interaction with EU law.¹¹

The traditional broad Danish concept of a collective agreement results in some borderline cases where the distinction between an individual contract - for example between one employer and 5-10 of his employees - and a collective agreement becomes blurred.¹² That weakens the mandatory, normative effect of a collective agreement.

Where protective legislation cannot be derogated from to the detriment of the worker/employee by individual contract but can be derogated from by collective agreement¹³ there is need for a sharp distinction between an individual contract and a collective agreement in order to avoid abuse by the employer.

In my view the solution is to interpret the Danish concept of a collective agreement in accordance with the continental European - eg the German - concept of a collective agreement (Tarifvertrag) at least in such situations. The use of Danish collective agreements as a means of implementing EC directives also provides arguments for narrowing down the Danish concept of a collective agreement so as to

⁹ Elmquist, Hj V: Den kollektive arbejdsoverenskomst som retligt problem [The collective agreement as a legal problem], Copenhagen 1918.

¹⁰ In AD 90.007 the Danish Labour Court held that a contract between a group of engineers employed at a plant and their employer was a collective agreement.

¹¹ See for example Jacobsen, Per: Kollektiv Arbejdsret, Copenhagen 1994 p 34, Waage, Niels: Arbejdsretsloven, Copenhagen 1997 and Nielsen, Ruth: Lærebog i Arbejdsret, Copenhagen 2001 p 121.

¹² The German distinction between works agreements (Betriebsvereinbarungen) which a German Betriebsrat can conclude with the employer on a number of work related issues and a collective agreement (Tarifvertrag) does not exist in Danish law. A Danish Works Council is different from a German Betriebsrat. Agreements concluded in a Danish Works Council (which consists of both worker representatives and employer representatives) are collective agreements under Danish law.

¹³ An example of such legislation is the Salaried Employees Act section 18 on competition clauses.

make it possible to distinguish between individual contracts which cannot be used as transposal measures for EC directives and collective agreements which can.

2.4. The Official Conciliation Service

The Official Conciliation Service assists the social partners in connection with the renewal of existing collective agreements covering entire industries. The parties themselves may request the help of the official conciliator, and the official conciliator concerned is also empowered to summon the parties in dispute to meetings in order to negotiate. During these negotiations he may ask them to make mutual concessions. If necessary, the conciliator is permitted to demand that any industrial action of which notice has been given should be postponed for up to two weeks to allow time for efforts to arrive at an amicable settlement. If a threatened work stoppage would affect essential services or functions in society or is thought likely to have far-reaching effects on the community, all three conciliators, acting collectively, may order its postponement. Where a conciliator judges there to be a possibility of a proposed solution that would be acceptable to both sides, he can put forward a mediation proposal that must be communicated to the organizations concerned so that a ballot can be held.

2.5. Formal requirements. Writing. Borderline between Collective Agreements and Customs

In practice most Danish collective agreements are in writing but it is not a legal requirement. In principle, a valid Danish collective agreement can be oral or tacit.

That informality results in a blurred borderline between customs and tacit collective agreements. That is a problem in respect of implementation of EC directives. A mere custom cannot be used as a transposal measure for an EC directive because it is not sufficiently precise and clear and the individual workers are not made fully aware of

their rights. There is therefore need for a distinction between customs and collective agreements.

Tacit or oral collective agreements are difficult or impossible to publish and therefore do not meet the publicity requirements for transposal measures for implementing EC directives.

2.6. Obligatory and Normative Effect of Collective Agreements

There are profound differences between the UK,¹⁴ on the one hand, and the continental European countries, on the other, with regard to the legal effects of collective agreements. The distinction between the obligatory and normative function of collective agreements was first developed in legal writing, in particular in Germany and Denmark in the early 20th century.

In Denmark a collective agreement is binding as a contract (its obligatory effect which entails a peace obligation) and has mandatory normative effect. which implies that it cannot be derogated from to the detriment of the worker by individual contracts. If an individual contract of employment stipulates terms and conditions which are inconsistent with the collective agreement the individual contract is partially invalid and will have to be amended so as to comply with the collective agreement.

Due to the mandatory normative function of a collective agreement it serves as a parallel to or an alternative to protective employment legislation. This effect establishes a hierarchy between collective agreements and individual employment contracts as sources of law with collective agreements as the higher ranking *lex superior*.

Very often individual employment contracts refer to a collective agreement which will then become part of the individual contract. If the individual contract of employment does not state the exact terms and conditions of the employment

¹⁴ English collective agreements have no obligatory (contractual) and no mandatory normative effect but only acquires legal effect as an implied term in the individual contract of employment. In Case 165/82, *Commission v United Kingdom* [1983] ECR 3431 the ECJ held that even though United Kingdom collective agreements are non-binding they must comply with the Equal Treatment Directive (76/207/EEC).

relationship the terms of the relevant collective agreement will become an implied term in the individual contract.

2.7. Who are bound by collective agreements? Erga omnes effect

In Denmark, collective agreements are as other contracts - except in a few special cases - only binding for employers who are parties to them. An employer who has individually entered into a collective agreement is bound by it. An employer who is member of an employer's organisation who has signed a collective agreement is also bound by the collective agreement. A Danish employer who is bound by a collective agreement must comply with it viz a viz all workers/employees doing work covered by the collective agreement irrespective of whether the workers/employees are unionized.

In order for a collective agreement to bind other employers than those who are parties to it legislation or administrative intervention is required.

Most EU Member States have a system for extending collective agreements so as to make them binding on employers who are not parties to them. That possibility does not exist in Italy and the UK and only to a very limited extent in the Nordic countries..¹⁵

In Denmark, collective agreements can *not* be extended to cover employers who are not parties to them.

2.8. Negotiating Competence and Obligations

The general starting point in European contract law is that the principle of freedom of contract confers a power to conclude contracts on all categories of physical and legal persons, including employers, trade unions and other associations and individual employees. In a European setting it is therefore rather obvious that the employers, employers' associations and trade unions have power (ie legal competence)

¹⁵ See the overview in the Commission's report on Industrial relations in Europe COM(2000)113 p 41 (which, however, as far as I can see has misunderstood Finnish law).

to negotiate and conclude contracts. It is a different question whether they have a duty to do so.¹⁶

In most EU Member States the main rule is that there is neither a right nor an obligation for either side to enter into negotiation of or to conclude collective agreements. That also applies in Denmark.

The general rule is that it is a question of power not of law whether a trade union can make an employer negotiate with it. There are almost no. statutory provisions in Danish labour law requiring the employer to recognize a trade union or to negotiate with it.

In a conflict of interest a trade union can take industrial action (strikes, etc) in order to force an employer to negotiate a collective agreement with it. If the trade union is strong enough it will succeed, if not it will fail. It is perfectly lawful for the employer to refuse to discuss the matter with the trade union. Because of the high degree of unionization most employers cannot survive refusing to negotiate. It is therefore from a practical point of view unusual for an employer to be unwilling to negotiate with a trade union.

Even in conflicts of interests strikes, etc are only lawful if they have a reasonable purpose and if there is a reasonable proportion between the means used and the ends to be obtained.

If an employer is already covered by a collective agreement with one trade union and another trade union wishes to enter a collective agreement with him covering the same work, the second trade union will not be free to take industrial action to obtain a collective agreement if the two competing trade unions are members of the same umbrella organization, typically the Confederation of Trade unions (LO). In this situation one could say that the trade union which got a collective agreement first has obtained a sort of recognition and right of negotiation which excludes other trade unions from the same confederation.

¹⁶ See above in Chapter II on the distinction between power-conferring norms and duty-imposing norms.

It is also possible for an employer to give a special recognition to one particular trade union by collective agreement in that he promises this trade union not to negotiate with others.

In special circumstance, eg concerning collective redundancies, there are statutory provisions concerning negotiation.

2.9. Can collective agreements specify working conditions below the standards defined by labour law?

In Denmark statutory protective employment legislation is only fully mandatory in respect of derogations by means of individual employment contracts while derogations to the detriment of the workers are allowed in specified situations by means of collective agreements. That applies, for example, to holiday legislation, competition clauses and collective redundancies.

3. Who are the main actors involved in collective bargaining

3.1. Overview

There is high union density in Denmark - around 80-90 % - for all groups of workers/employees. Most trade unions have no formal links with political parties or religious groups. The main criterion for dividing the workers/employees between the trade unions is education/vocational training and for unskilled workers sex. The gender criterion is, however, in the process of disappearing, see below.

The two main organizations in the private sector: the Confederation of Trade Unions (LO) and the Danish Employers' Confederation (DA) were both founded in the late 19th century. They are umbrella organizations.

3.2. Trade unions

LO, The Danish Confederation of Trade Unions, is the largest national trade union confederation in Denmark and is the most representative workers'organisation in both the public and the private sector.

LO's main objective is to handle employee interests vis-a-vis employers and public authorities. Through its cooperation with associations, cartels and other trade union organisations, LO seeks to influence the government and the political parties when it comes to drafting and implementing legislation, especially in relation to labour market policies. In its role of coordinator in relation to central collective bargaining, LO strives to secure common, overall demands.

LO's principal tasks are the following:

- To safeguard and coordinate the trade union movement's common interests
- To formulate policies and strategies internally in the trade union movement and externally vis-a-vis parliament, government, other organisations, etc.
- To represent the trade union movement's interests on various boards, commissions and committees
- To propose and coordinate guidelines for collective bargaining demands.

One of the most important LO tasks remains the activities related to collective bargaining agreements. The agreements form the basis for wage-earners' living and working conditions. But as society moves away from the traditional industrial society towards the information society, LO activities in other fields gain more significance, eg tax policy, social policy and financial policy.

Nationally, these efforts are targeted at the government, parliament and local authorities, but international work aimed at the EU and other organisations is also acquiring greater substance.

By January 2000 LO had approximately 1.5 million members in its affiliated unions, 49 per cent of whom are women. The five largest affiliated unions are:

The Union of Commercial and Clerical Employees in Denmark with 374,000 members

The General Workers' Union in Denmark (SiD) with 315,000 members

The Danish Union of Public Employees with 199,000 members

The Danish Metal Workers' Union with approximately 139,000 members

The Women Workers Union (KAD) with approximately 85,000 members.

Besides LO, the two most representative umbrella employee organisations in Denmark are the FTF, the Confederation of Salaried Employees and Civil Servants, whose membership comprises white-collar and public servant groups particularly in the public sector (approximately 450,000 members), and the AC - the Danish Confederation of Professional Associations (approximately 200,000 members), comprising mainly university graduates.

While the Danish trade union movement has been able to maintain a high degree of unionisation, there is a general economic development whereby traditional sectors, not least in industry, are losing jobs. This is why LO, with its many unions for skilled and unskilled blue-collar workers, has experienced a constant decline over the last decade, while a growth in membership has been maintained at the two other union confederations - the Confederation of Salaried Employees' and Civil Servants (Funktionærerne og Tjenestemændenes Fællesråd, FTF) and, especially, the Danish Confederation of Professional Associations (Akademikernes Centralorganisation, AC).

In May/June 2004, the members of the General Workers' Union (SiD) and the National Union of Female Workers (KAD) voted on a merger proposed by the leaderships of the two trade unions. The result was overwhelmingly in favour. A major new union for unskilled workers - 3F - was created as at 1 January 2005. This also means an end to one of the world's few unions for women workers only.

The new union brought together the 71,000 KAD members and 303,000 SiD members. Furthermore, if the Union of Restaurant Employees (Restaurationsbranchens

Forbund, RBF) carries through a decision to join the new union, the merged organisations will have near to 400,000 members and become the largest union in Denmark - well ahead of the Union of Commercial and Clerical Workers in Denmark (Handels- og Kontorfunktionærernes Forbund, HK), which has 370,000 members.

The decision to merge is a historic one, as both SiD and KAD date back more than 100 years. It was not an easy decision, especially for KAD, which is one of very few trade unions in the world to organise only female workers.

The background for the decision was external pressure on the trade union movement, especially on the unions organising unskilled workers. It is especially the two large traditional unions for unskilled and general workers, SiD and KAD, that have been affected by these developments. During the 1990s, SiD was able to maintain its membership level through the admission of a number of small unions, including unions with skilled members. The consequences for KAD - which has not had the same expansion potential as SiD - have been harsher. The result has been a strong decline in membership by over 25% from 97,000 in 1990 to 71,000 today, with the prospect of a continued fall in membership in the coming years. KAD has thus experienced increasing pressure on its resources and gloomy prospects for maintaining and efficiently furthering the members' interests through the union and its 35 local branches. SiD has been experiencing similar difficulties in maintaining a set-up with four major sector groups and over 250 branches.

The merger does not mean that the two unions have overcome the problems connected with falling membership. The new union can still foresee a loss of members in the coming years due to changes in business structure, the educational/training levels of the workforce and demographic developments. However, the amalgamation will make it possible to streamline the work and achieve 'synergy effects' that will - at least, for some years - make it easier to meet the challenges and ensure an effective safeguarding of the interests of the members

3.3. Employers' organizations

The employers are as the main rule organized by branch but some employers are individual members of the Danish Employers' Confederation (DA).

The Confederation of Danish Employers (DA) is the largest employers' organization in Denmark. DA consists of 13 employers' organisations representing more than 29.000 Danish private companies covering the manufacturing, retail, transport, service and construction sectors. As the main organisation for employers, DA coordinates collective bargaining negotiations and represents the member organisations' interests in relation to the political system.

Founded in 1896, DA is a non-profit organisation funded by the subscriptions paid by its member organisations. DA represents its member organisations' interests vis-à-vis the political system. As regards labour market regulation, DA is there to ensure the effective coordination of mutual interests, when collective agreements are negotiated.

DA's objective is to influence national, regional and international policy-makers in order to increase the competitiveness of Danish companies and their access to a qualified labour force.

In keeping with the Danish tradition for regulating the labour market through collective agreements rather than legislation, DA supports and promotes the use of collective bargaining and considers it vital to ensure that labour market regulation as far as possible is carried out through collective agreements. Collective agreements offer the greatest possible flexibility and adaptability on the labour market.

DA represents the interests of Danish employers at several levels, which obviously are interconnected:

DA's 15 regions represent the member organisations of DA. In order to exert the greatest possible influence on decision-making at regional level, they coordinate processes influencing the conditions of companies on the regional labour market.

At national level, DA represents employers' views vis-à-vis the Government, its administrative bodies, and the various employee organisations. An integrated part of the work of DA is to secure and promote the interests of Danish employers at international level within the field of its competence, especially with regard to the European Union (EU) and the International Labour Organisation (ILO)

DA is member of the Union of Industrial and Employers' Confederation of Europe (UNICE) the International Organisation of Employers (IOE) and OECD's Business and Industry Advisory Committee (BIAC).

DA nominates a member to the European Economic and Social Committee (EES), and is a member of the Social Dialogue Committee.

DA has a permanent representation in Brussels.

4. At what level does collective bargaining take place (international, national, sector, regional, company/plant), what is the relationship between the various levels, and how has it changed over time?

Collective agreements exist at different levels in Denmark. The various forms of collective agreements in Denmark include:

1) Basic agreements which contain basic rules (eg on the termination of ordinary collective agreements concluded within the framework of the basic agreement, notice of the intention to take industrial action, etc) and rules considered to be of special importance for individual contracts of employment between employers and employees falling within the basic agreement's area of coverage (eg on unfair dismissal).

The Basic Agreement covering employers and unions that belong to the DA and LO is concluded by these two confederations and extends over a number of sectors. In addition, basic agreements typically provide a more permanent foundation for relations between the parties and serve as an overarching framework for the conclusion and development of ordinary collective agreements within their area of coverage.

2) Co-operation agreements which concern arrangements on co-operation and exercise of the employer's managerial authority within the individual workplace and are normally concluded in parallel with basic agreements.

3) Industry-wide/sectoral agreements covering a given industry or branch of activity, which are normally concluded between the national employers' association for that industry and the corresponding national occupational unions and establish general rules on pay and conditions for the employees concerned.

4) Local agreements which are concluded at local level to supplement the relevant industry-wide agreement by tailoring it to local circumstances. Most such local agreements are concluded at individual enterprise level, in which case they are also referred to as *husaftaler*, i.e. company agreements.

The basic principles of collective labour law are laid down in collective agreements between the main organizations, eg in the basic agreement concluded between the two main organizations: the Confederation of Trade Unions (LO) and the Danish Employers' Confederation (DA). These collective agreements are framework agreements which cover the whole country and different sectors of the economy.

The Basic Agreement between LO and the Danish Employers' Confederation, DA, represents what is often termed the 'labour constitution' in Denmark, laying down the framework and regulations for collective bargaining, regulations regarding redundancy and dismissal and the rights of shop stewards.

During negotiations and collective agreements between the social partners, a fixed procedure is followed:

- negotiations must be completed within a certain time limit; this limit may, however, be extended; or
- if the parties conclude an agreement, the proposal for a new collective agreement is sent to the members for a ballot;
- if agreement on a new collective agreement cannot be reached, further negotiations take place between the Conciliator and the social partners;
- if the negotiations continue, conducted by the Conciliator, they must be concluded within a certain time limit;
- if the parties cannot reach agreement, a first notice concerning industrial action may be issued (strike or lockout);
- industrial action takes place unless the Conciliator decides to postpone it; he may do so in the form of two postponements, each of 14 days' duration;
- if, after that time, no agreement is reached through renewed contact between the parties, industrial action takes place.

As another example of framework agreements the co-operation agreement can be mentioned. The agreement provides for work's councils in industrial and craft enterprises employing 35 workers or more when recommended by either the employers or a majority of the workers.

Terms and conditions of work, eg relating to wages are laid down in collective agreements concluded between the trade unions and the corresponding employers' organization. These agreements usually cover the whole country but only a specific sector or branch.

Different wage-systems are used in Denmark. The most important ones are the 'normal wage system' where the collective agreement lays down the pay rate that is actually paid for the kind of work covered by the agreement. In the so-called 'minimal-wage system' the collective agreement lays down a wage rate in addition to which most employees receive extra payment based on a very wide variety of criteria. During the 1990's a 'minimum wage system' has developed where the collective agreement does not require the employer to pay any specific wage rate but guarantees that the end result for the individual worker cannot fall below a level fixed in the collective agreement. In the two last mentioned systems, the individual wages are fixed at enterprise level in principle as a result of individual negotiation but in practice the negotiation is very often carried out by the shop steward.

There is no regional bargaining in Denmark. Bargaining at enterprise level exists, when the enterprise is not a member of the relevant employer's association and may also be used to complement the country wide wage agreements. Questions on the placing of the daily working hours are often negotiated on a local basis between the shop steward and the management, if the collective agreement makes room for deviations.

5. How has the incidence and coverage of collective agreements evolved and what is the relative importance of collective bargaining comparing the various sectors of the economy; the public and private sector; small and large enterprises?

In Denmark, nearly 100% of public employers and around 70% of private employers are bound by collective agreements.¹⁷ 80-90% of all Danish workers/employees are members of trade unions.

In most EU countries the coverage of collective agreements, ie the percentage of employers who are bound to follow them, is higher than in Denmark¹⁸ though the union density, ie the percentage of workers/employees who are members of trade unions, is lower. That is mainly because most EU Member States have a system for extending collective agreements so as to make them binding on employers who are not parties to them. That possibility does not exist in Denmark, see above on collective agreements with *erga omnes* effect. In some countries, for example Germany, the employers are also more often members of employers' organisations than in Denmark That also contributes to increasing the coverage of collective agreements.

Big private employers with anglo-american background sometimes resist the Danish collective bargaining system. Workers with higher (academic) education in the private sector are often not covered by collective agreements.

The coverage of Danish collective agreements has increased in the second half of the 1990'ies. In the mid 1990'ies Scheuer found a coverage of around 50% in the private sector.¹⁹

¹⁷ Cf Udspil no 20/2000, available (in Danish) at www.lo.dk. The coverage has increased in the second half of the 1990'ies. In the mid 1990'ies Scheuer, Steen: Fælles aftale eller egen kontrakt i arbejdslivet. Udbredelsen af kollektive overenskomster, faglig organisering og skriftlige ansættelsesbeviser blandt privatansatte, Copenhagen 1996 found a coverage of around 50% in the private sector.

¹⁸ Se Waddington, Jeremy og Reiner Hoffmann: Trade Unions in Europe - facing challenges and searching for solutions, Brussels, 2000 p 45.

¹⁹ Scheuer, Steen: Fælles aftale eller egen kontrakt i arbejdslivet. Udbredelsen af kollektive overenskomster, faglig organisering og skriftlige ansættelsesbeviser blandt privatansatte, Copenhagen 1996.

6. Main contents of collective agreements (traditional bargaining on wages and working conditions, 'new' issues, broader agreements on social and economic policy, etc.)

Collective bargaining is in Denmark applied to a vast variety of labour issues such as wages, hours of work, dismissals, pay during illness, paid maternity/paternity leave, the right to further training, pension contribution etc.

6.1. Pensions

Since the 1990's most collective agreements contain provisions on pensions. Occupational pension in various forms and in a few sectors have existed in Denmark since the beginning of last century, but the occupational pension scheme which exists today was established in the years from 1989 to 1991 in connection with the collective bargaining. The occupational, or labour market, pension is regulated by collective bargaining only, not by legislation. Increase in pension was for instance one of the main employees' demands at the 2004 collective bargaining in the private sector. The principle of solidarity is a leading element in the occupational pensions. In practice two relations form the element of solidarity. A preliminary health test is not required before taken up an occupational pension customer, and men and women join the pension scheme on equal terms; the so-called unisex principle. Thus, health, civil status and sex have no influence on membership of a occupational pension fund. Around 90% of all employees are covered by occupational pensions.

6.2. Parental leave fund

In 2004, the main parties in the private sector (ie LO and DA) reached agreement on a central fund for parental leave. The mediation proposal includes an agreement on a central employerfinanced equalisation fund for parental leave (maternity & paternity leave). This fund ensures equalisation of the companies' costs in connection with parental leave benefits, thereby alleviating the burden of costs for small companies which will eventually benefit gender equality on the labour market.

The decentralised settlements and the mediation proposal have also ensured an extension of the period during which the parent receives full pay during parental leave. This period has typically been extended by 10 weeks and the majority of workers now receive full pay during leave for antenatal care and parental leave for almost six months. During the last six weeks of the 26 week-leave, workers can get up to DKK 125 per hour.

A new issue like globalisation²⁰ was also addressed in the 2004 agreement.

7. Transfers of undertakings and collective dismissals

In a few specific areas Community law has introduced a duty to bargain with a view to reaching agreement.

Article 2 of the Collective Redundancies Directive²¹ lays down that an employer who is contemplating collective redundancies must begin consultations with the workers' representatives in good time *with a view to reaching an agreement*. In *Dansk Metalarbejderforbund and Specialarbejderforbundet i Danmark*²² the ECJ stated that the sole object of the Collective Redundancy Directive was to provide for consultation with the trade unions and for notification of the competent public authority prior to such dismissals

²⁰ The adopted text on Globalisation reads:

Globalisation necessitates an adaptation of the companies' competitiveness, amongst others by means of a strengthening of flexibility as well as the adaptability of the labour market and the workers' skills.

LO and DA emphasise a strengthening of the international competitiveness of Danish companies and want to contribute to supporting a stable labour market through the continuous development of an efficient system of cooperation and bargaining which is supported by a national vocational training system for the labour market which is adapted to the new requirements arising through globalisation.

Before July 1, 2005, while the collective agreements are in operation, and by taking contributions from the parties to the collective agreements as their point of departure, LO and DA will prepare a report on how the labour market can make use of the possibilities and challenges brought about by globalisation in order to strengthen competitiveness and employment.

²¹ 98/59/EC.

²² Case 284/83 [1985] ECR 553.

The Transfer of Undertakings Directive²³ Article 7(2) similarly provides that where the transferor or the transferee envisages measures in relation to his employees, he shall consult the representatives of the employees in good time on such measures *with a view to reaching an agreement*. In Denmark these provisions are implemented explicitly.²⁴

8. Collective bargaining and European law

Denmark's entry into the Community has, as stated in the introduction, generally led to a shift away from collective agreements as the dominating source of law towards more legislation. As a member state of the EU, Denmark has, however, maintained widespread use of collective agreements as a means of implementing EC directives than most other EU countries.²⁵

8.1. Implementation of EU Law by Means of Collective Agreements

Until now, four models have been used in the Danish implementation of EC-Directives:

- 1) ordinary statutory legislation as the sole instrument of implementation (this is a clearly lawful model under Community law)
- 2) a combination of statutory legislation and ordinary Danish collective agreements where the legislative act is subsidiary to collective agreements which are at least as favourable to the workers/employees as required by the implementing legislation or the underlying directive (this is by and large a lawful model under Community law)

²³ 2001/23/EC.

²⁴ The Act on Collective Redundancies § 5 and the Transfer of Undertakings Act § 6.

²⁵ See for more detail Nielsen, Ruth: Implementation of EC Directives in Denmark, International Journal of Comparative Labour Law and Industrial Relations 2002 vol 18, issue 4 p 459.

3) collective agreements with mandatory normative effect which have been extended so as to have *erga omnes* effect as the sole instrument of implementation (this is a lawful model under Community law, but collective agreements with *erga omnes* effect only exist in exceptional cases in Denmark)

4) ordinary Danish collective agreements without *erga omnes* effect as the sole instrument of implementation (this model is inconsistent with Community law).

Model 2), ie a combination of subsidiary legislation and collective agreements is to day the typical Danish way of implementing EC directives.

8.1.1. The Problem

Implementation of Community directives by means of collective agreements has been a much contested issue in the Nordic countries, in particular in Denmark. In its report from 2000 on Industrial Relations in Europe²⁶ the Commission states on the practise of implementing directives by means of collective agreements that (emphasis added):

This practice, validated over the years by the Court of Justice of the European Communities and enshrined in Article 137(4) of the EC Treaty, is more frequent in those countries with a strong tradition of agreement-based regulation such as Belgium, Denmark or Italy. *Nevertheless, it raises the question of general coverage, continuity and appropriate publicity for agreement-based transposal measures.*

As pointed out by the Commission,²⁷ implementation of EC directives by means of collective agreements raises questions concerning coverage, continuity and appropriate publicity for agreement-based transposal measures.

²⁶ COM(2000)113 p 37.

²⁷ In COM(2000)113. Industrial Relations in Europe p 37.

The question may also be raised as to whether enforcement through the Danish Labour Court and industrial arbitration tribunals, which is a consequence of a Danish collective agreement being applicable, is acceptable measured by EU law standards relating to effective judicial protection, including Article 6 ECHR.²⁸

Finally, the question arises whether any agreement that qualifies as a collective agreement under the traditional Danish concept of a collective agreement which is broad, flexible and informal will also be able to qualify as a collective agreement for the purposes of implementing an EC directive.

8.1.2. Partial Implementation by Collective Agreement

Member States are free to leave the implementation to collective agreements supplemented by legislation which only applies to workers not covered by the collective agreements. In *Commission v Kingdom of Denmark*²⁹ the Commission brought an infringement action against Denmark for failure to implement the Equal Pay Directive. The ECJ held that Member States may leave the implementation of the principle of equal pay in the first instance to representatives of management and labour. That possibility does not, however, discharge them from the obligation of ensuring, by appropriate legislative and administrative provisions, that all workers in the community are afforded the full protection provided for in the directive. That state guarantee must cover all cases where effective protection is not ensured by other means, for whatever reason, and in particular cases where the workers in question are not union members, where the sector in question is not covered by a collective agreement or where such an agreement does not fully guarantee the principle of equal pay.

In an infringement case against Italy³⁰ concerning the transfer of undertakings directive the ECJ held similarly that although the member states may leave the implementation of the social policy objectives pursued by the directive in the first

²⁸ Article 6 ECHR with the heading Right to a fair trial stipulates: 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and *public* hearing within a reasonable time by an *independent and impartial tribunal established by law*.

²⁹ 143/83 *EC Commission v Denmark* [1985] ECR 427.

³⁰ Case 235/84 *Commission v Italy* [1986] ECR 2291.

instance to management and labour, that does not discharge them from the obligation of ensuring, by the appropriate laws, regulations and administrative measures, that all workers in the community are afforded the full protection provided for in the directive. The state guarantee must cover all cases where effective protection is not ensured by other means, in particular where collective agreements cover only specific economic sectors and create obligations only between members of the trade union in question and employers or undertakings bound by the agreements.

The Court's case law is now codified in Article 137(4) EC. In countries where collective agreements have no or limited *erga omnes* effect such agreements are therefore not sufficient as the sole means of implementing directives establishing rights for all individual workers.

8.1.3. Collective Agreements with Erga Omnes Effect

In *Commission v Belgium*³¹ the ECJ accepted that Belgium implemented the directive³² on collective redundancies into national law by a collective agreement with *erga omnes* effect. Collective agreements with *erga omnes* effect are thus sufficient to implement directives.

The Danish implementation problem arises because the possibility for extending collective agreements so as to give them *erga omnes* effect exists only to a limited extent in the Nordic countries.³³

In Denmark, collective agreements can generally (see on part time agreements in Denmark just below) *not* be extended to cover employers who are not parties to them. In Norway there is a limited possibility of extension of the coverage of collective agreements but it has so far never been used.

The Part Time Directive³⁴ was finally implemented in Denmark in the summer 2001.³⁵ The Danish Part Time Act implements the Part Time Directive by extending the

³¹ Case 215/83 *EC Commission v Belgium* [1985] ECR 1039.

³² 75/129/EEC, consolidated by 98/59/EC.

³³ See the overview in the Commission's report on Industrial relations in Europe COM(2000)113 p 41 (which, however, as far as I can see has misunderstood Finnish law).

³⁴ 97/81/EC.

major Danish collective agreements on the implementation of the Directive so as to cover any employee who is not otherwise covered by a collective agreement ensuring at least the same standard of protection as the Directive. This means that employers' who are not parties to collective agreements implementing the Directive have to obey collective agreements entered into by other employers. Denmark's implementation of the Part Time Directive thus developed a new version of the Danish Model regarding the combination of legislation and collective agreements by extending the major Danish collective agreements on implementation of the Part Time Directive through legislation.

8.1.4. The Danish Resistance to Implementation by Legislation

8.1.4.1. Stoppage of Work for Health and Safety Reasons

In Denmark a standard grievance procedure for the handling of conflicts by industrial arbitration was laid down by collective agreement between the Confederation of Danish Employers and the Confederation of Trade Unions, ie the central labour market organisations, in 1908.³⁶ It contains, in addition to a grievance procedure, a rule providing a right for workers to stop work when it is necessary for the sake of 'life, honour or welfare'.³⁷

When implementing the Working Environment Framework Directive in 1992,³⁸ Denmark took the view that the above 'life, honour or welfare' provision in Normen was sufficient to implement art 8(4) and (5) of the directive and left those provisions out of the implementing legislation. The EU Commission did not agree and regarded it as an infringement of the directive that not all Danish workers were assured the protection required by the directive. In 2001, Denmark gave in and amended the Working

³⁵ Act No 443 of 7 June 2001 on the implementation of the Part Time Directive and Act No 444 of 7 June amending the Salaried Employees Act so that the threshold for status as salaried employee is lowered from 15 hours work a week to 8 hours.

³⁶ Normen for behandling af faglig strid. See further Hasselbalch's Chapter in this volume.

³⁷ 'Liv, ære og velfærd' in Danish.

³⁸ 89/391/EEC.

Environment Act so that it repeats the disputed provisions of the directive.³⁹ The Act does not apply when protection equal to that required by the directive is offered by collective agreement.

The Danish collective agreement Normen from 1908 - which is 81 years older than the Working Environment Framework Directive - has a wording that differs considerably from that of the directive. In order to avoid discussion of whether Normen from 1908 was sufficient implementation in regard to persons covered by it, the central labour market organisations, in 2001, supplemented Normen by a new collective agreement stating that the provision on 'life, honour or welfare' in Normen from 1908 should always be interpreted in accordance with the ECJ's interpretation of art 8(4) and (5) of the Working Environment Framework Directive. In view of the traditional sceptical attitude of the Danish social partners towards the ECJ, this is a remarkable variation of implementation by collective agreement.

8.1.4.2. The Working Time Directive

In respect of the Working time Directive,⁴⁰ until recently, Denmark refused to supplement collective agreements with legislation contending that Danish collective agreements should be accepted as the sole instrument for implementing of a number of provisions in the Directive, eg the maximum of 48 working hours a week. It was a political, rather than a legal, decision. The harshest opposition to adopting implementing legislation came from some trade unions who preferred open non-compliance rather than adaptation of the Danish industrial relations model to EU law..

The EU Commission - slowly - chose to react at the legal level and finally sent a reasoned opinion to Denmark in September 2001 threatening to start infringement proceedings before the ECJ. In December 2001, the Danish government in agreement with the Employers' Organisation and the Confederation of Trade Unions (Danish LO)⁴¹

³⁹ Working Environment Act §§ 17a-17c.

⁴⁰ 93/104/EC.

⁴¹ There was still some opposition within the LO. The General Workers Union (SiD), which is one of the biggest Danish trade unions, wanted LO and Denmark to refuse to comply with the requirement of legislating in this field.

promised to table a proposal for implementing legislation early in 2002.⁴² This probably means that the debate on the possibility to implement directives solely by traditional Danish collective agreements is coming to an end.

8.1.4.3. The Force Majeure Clause for Family Reasons

There is, however, still an example of non-implementation by legislation in respect of the force majeure clause for urgent family reasons in the Parental Leave Directive.⁴³ That provision is in Denmark implemented in a number of collective agreements allowing parents to stay home in case of a child's illness but not in legislation covering those employees who are not covered by a collective agreement containing a force majeure clause.

8.2. Collective Agreements and Competition Law

A comparative study, the COLCOM⁴⁴ project, has examined the following questions:

- What is the legal status of collective agreements in EC law, including its case law, in relation to competition law?
- How is the problem of the relationship between labour law and competition law resolved in the Member States? This question especially includes the following aspect: to what extent are collective agreements sheltered from competition law?
- What is the relevant EC competence in this field?

At national level studies were conducted in Austria, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Spain, Sweden and the United Kingdom. The national reports are published as separate parts of the full COLCOM-report.

⁴² On 6 February 2002, the government proposed L 83, Act on the Implementation of Certain Aspects of the Working Time Directive which was adopted as Act no 248 of 08/05/2002 and is now the Act currently in force.

⁴³ Clause 3 in the framework agreement attached to directive 96/34/EC.

⁴⁴ Bruun, Niklas and Jari Hellsteen (eds): Collective agreement and competition in the EU, The Report of the COLCOM Project, Copenhagen 2001.

Niklas Bruun who is the main author of the COLCOM report summarised⁴⁵ the result of the comparison of the different national traditions within the EU (before the enlargement 1 May 2004) in the following way: There are three different groups of countries. In the Nordic countries labour law is explicitly sheltered from competition law in competition legislation. The Nordic Acts are based on the idea that competition law does not apply to agreements concerning the labour market (Finland), agreements between employers and employees relating to wages and other conditions of employment (Sweden), or to wages and labour relations (Denmark).

In the continental European tradition the matter is not dealt with by statutory provision but collective agreements and collective labour law rights are constitutionally guaranteed fundamental rights.

In the anglo-saxon tradition competition law applies in principle to the labour market but certain not precisely defined exemptions apply.

A number of cases have been brought before various courts and similar bodies on pension schemes agreed by collective agreements where employers are put under an obligation to contribute to a particular pensions scheme operated by a particular pension service provider designated by the collective agreement whereby other potential pension service providers are excluded from providing the service.

In *Albany, Brentjens' and Drijvende Bokken*,⁴⁶ the ECJ addressed a national system in which under collective agreements which were extended by the Dutch state so as to have effect *erga omnes*⁴⁷ affiliation to a sectoral pension fund was compulsory for all undertakings in that sector. The questions referred to the ECJ was whether such a system infringes either Article 10 EC in conjunction with Article 81 EC or Article 86(1) EC in conjunction with Article 82 EC. In essence the ECJ was faced with the following four questions:⁴⁸

⁴⁵ Bruun, Niklas: COLCOM-PROJEKTET - några komparativa slutsatser rörande förhållandet mellan konkurrensrätt och arbetsrätt i EU, i Skæringsfeltet mellem kollektive overenskomster og konkurrenceretten, ANP 2002:706.

⁴⁶ See for commentaries to the cases *Gyselen Luc*, Case Law Annotation, Common Market Law Review 2000 p 425 and Vousden Stephen: *Albany*, Market Law and Social Exclusion. Industrial Law Journal 2000 p 181.

⁴⁷ See on *erga omnes* effect of collective agreements Nielsen, Ruth: European Labour Law, Copenhagen 2000 p 88.

⁴⁸ Cf Bruun, Niklas and Jari Hellsteen (eds): Collective agreement and competition in the EU, The Report of the COLCOM Project, Copenhagen 2001 p 33.

- does Article 81 EC preclude the parties to sectoral collective bargaining from establishing by collective agreement a single sectoral fund and from asking the authorities to declare it binding erga omnes?

- do Articles 3(1)(g), 10 and 81 EC preclude the Member States from declaring such an agreement binding erga omnes?

- is the pension fund concerned an undertaking within the meaning of Article 81 EC et seq?

- do Articles 82 and 86 EC preclude the exclusive rights of the fund as a serious infringement of the freedom to conclude an insurance agreement?

The ECJ first noted that Article 81(1) EC prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Next, the ECJ underlined that under Article 3(1)(g) and (j) EC, the activities of the Community are to include not only a 'system ensuring that competition in the internal market is not distorted' but also 'a policy in the social sphere'. Article 2 EC provides that a particular task of the Community is 'to promote throughout the Community a harmonious and balanced development of economic activities' and 'a high level of employment and of social protection'.

The ECJ found that it is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 81(1) EC when seeking jointly to adopt measures to improve conditions of work and employment.

In the view of the ECJ,⁴⁹ it therefore follows from an interpretation of the provisions of the EC Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 81(1) EC.

⁴⁹ See the Brentjens judgment paragraph 57.

On the question as to whether the state was excluded from giving such a collective agreement erga omnes effect, the ECJ concluded in *Albany* that:

1. Article 3(g) of the EC Treaty [now, after amendment, Article 3(1)(g) EC], Articles 5 and 85 of the EC Treaty [now Articles 10 EC and 81 EC] do not prohibit a decision by the public authorities to make affiliation to a sectoral pension fund compulsory at the request of organisations representing employers and workers in a given sector.

The Danish Labour Court⁵⁰ has decided a similar (but smaller) case in the same way relying on the ECJ's rulings in *Albany* and others. The Danish case was about a taxicab-owner who was covered by a collective agreement under which he should pay pension contributions. He refused to pay these contributions claiming that it was contrary to competition law to force him to join a particular pension scheme. The Danish Labour Court held him liable for breach of the collective agreement which was considered valid.

8.3. The Telework Agreement

The Telework Agreement⁵¹ received a warm welcome in Denmark. The Danish social partners tend to see the EU-level telework accord as victory for the principles on which the Danish collective bargaining model is based - ie that it is the social partners themselves that solve their own problems. DA and LO have called the telework agreement a European breakthrough for the Danish way of regulating employment conditions - ie without interference from the legislature.

Denmark has a fairly high level of teleworking, with some 20% of workers using telework.⁵² The social partners in the Danish service sector, Danish Commerce and Service (Dansk Handel & Service, DHS) and the Union of Commercial and Clerical

⁵⁰ AD 1996.225, LO, *The Danish Confederation of Trade Unions for the General Workers Union v Taxicab owner Munir Ali Lanewala, intervener: Danish Employers Association (in support of LO)*. See on the case Nielsen, Ruth: *Kollektive overenskomster og konkurrenceretten*, U 2001 B s 27- 32.

⁵¹ http://europa.eu.int/comm/employment_social/news/2002/jul/telework_en.pdf.

⁵² See <http://www.eiro.eurofound.ie/2002/07/feature/dk0207104f.html>.

Employees in Denmark (Handels- og Kontorfunktionærernes Forbund/Service, HK/Service), concluded a voluntary agreement on teleworking in October 2000. It seems likely the LO and DA will conclude a framework agreement on telework based on the European framework agreement on Telework.

8.4. Enlargement

Denmark has adopted a transition arrangement requiring workers from the new Member States who work in Denmark to be employed on the conditions laid down by the relevant collective agreement. Workers from the new member countries must hold a residence- and work permit in order to work in Denmark. A worker cannot apply for this permit unless he/she has an employment offer or employment contract which demonstrates full-time employment and which meets the general working conditions established in Danish collective agreements.⁵³

9. Conclusion

In Denmark, the social partners serve both as legislators, judges and litigators. The labour market organisations fulfil legislative functions mainly through the adoption of collective agreements. They have adjudicative functions mainly by participating as lay judges in the special labour courts and industrial tribunals which are only competent where a collective agreement applies. Finally, trade unions are the main litigators in Danish labour law, both in collective labour law adjudicated by the special Labour Court/industrial tribunals and in individual employment law adjudicated by the ordinary courts.

The Danish collective law system is approximately 100 years old. Its basic rules are the same to day (2005) as they were in the beginning of the 20th century.

⁵³ LO-Denmark has prepared a guideline on the opportunities for acquiring a residence- and work permit which can be downloaded at: www.jobindenmark.dk. The guide is available in the following language versions: Estonian, Latvian, Lithuanian, Polish, English and Danish.

Denmark's entry into the EC/EU as at 1 January 1973 has, however, generally led to a shift away from collective agreements as the dominating source of law towards legislation.

On the employer side any employer can conclude a Danish collective agreement individually. The employer can also choose to join an employers' organisation whereby he becomes bound by collective agreements concluded by that organisation. On the worker side the collective agreement must be concluded by a collectivity, typically a trade union.

In most EU Member States collective agreements must, on the worker side, be concluded by trade unions. In addition, trade unions need to satisfy certain requirements guaranteeing their representativity and independence of the employer in order to have capacity to conclude collective agreements.⁵⁴

In practice the vast majority of Danish collective agreements are concluded between independent and representative trade unions and employers or employers' associations in writing. Most Danish collective agreements are therefore *Tarifverträge* within the German meaning of the concept.

The Danish concept of a collective agreement is, however, in principle different from the German one in that it allows a broader group of actors to conclude collective agreements on the worker/employee side and there are - in the same way as in respect of other contracts - no formal requirements.

The traditional broad Danish concept of a collective agreement results in some borderline cases where the distinction between an individual contract - for example between one employer and 5-10 of his employees - and a collective agreement becomes blurred. The informality of the Danish concept of a collective agreement also results in a blurred borderline between customs and tacit collective agreements. That is a problem in respect of implementation of EC directives. A mere custom cannot be used as a transposal measure for an EC directive because it is not sufficiently precise and clear and the individual workers are not made fully aware of their rights.

⁵⁴ See further Gamillscheg, Franz: Trade Union Representativity in German Law in Bellace, J R and Max Rood (eds): Labour law at the Crossroads: Changing Employment Relationships: Studies in Honour of Benjamin Aaron, The Hague 1997 p 75.

In Denmark a collective agreement is binding as a contract (its obligatory effect which entails a peace obligation) and has mandatory normative effect. which implies that it cannot be derogated from to the detriment of the worker by individual contracts. If an individual contract of employment stipulates terms and conditions which are inconsistent with the collective agreement the individual contract is partially invalid and will have to be amended so as to comply with the collective agreement.

Due to the mandatory normative function of a collective agreement it serves as a parallel to or an alternative to protective employment legislation. This effect establishes a hierarchy between collective agreements and individual employment contracts as sources of law with collective agreements as the higher ranking *lex superior*.

Very often individual employment contracts refer to a collective agreement which will then become part of the individual contract. If the individual contract of employment does not state the exact terms and conditions of the employment relationship the terms of the relevant collective agreement will become an implied term in the individual contract.

In Denmark, collective agreements are as other contracts - except in a few special cases - only binding for employers who are parties to them. An employer who has individually entered into a collective agreement is bound by it. An employer who is member of an employer's organisation who has signed a collective agreement is also bound by the collective agreement. A Danish employer who is bound by a collective agreement must comply with it viz a viz all workers/employees doing work covered by the collective agreement irrespective of whether the workers/employees are unionized.

In Denmark, collective agreements can, as the main rule, *not* be extended to cover employers who are not parties to them, ie Danish collective agreements have no erga omnes effect.

The two main organizations in the private sector: the Confederation of Trade Unions (LO) and the Danish Employers' Confederation (DA) were both founded in the late 19th century. To day (2005) 80-90% of all Danish workers/employees are members of trade unions.

Collective agreements in Denmark include: Basic agreements, Co-operation agreements, Industry-wide/sectoral agreements covering a given industry or branch of

activity and Local agreements which are concluded at local level to supplement the relevant industry-wide agreement.

The coverage of collective agreements, ie the percentage of employers whose employment conditions are governed by a collective agreement, has risen during the 1990's. Nearly 100% of public employers and around 70% of private employers are to day (2005) bound by collective agreements.

Pay and working time are traditional collective bargaining issues. Important new themes are pension rights and the establishment (in 2004) of a central parental leave fund to reimburse employers paying wages during parental leave.

Denmark's membership of the EC/EU as at 1 January 1973 has been a challenge to the traditional Danish collective labour law system. In connection with implementation of EC directives Denmark has strived to uphold the role played by collective agreements in Danish labour law. Until now, four models have been used in the Danish implementation of EC-Directives:

- 1) ordinary statutory legislation as the sole instrument of implementation (this is a clearly lawful model under Community law)

- 2) a combination of statutory legislation and ordinary Danish collective agreements where the legislative act is subsidiary to collective agreements which are at least as favourable to the workers/employees as required by the implementing legislation or the underlying directive (this is by and large a lawful model under Community law)

- 3) collective agreements with mandatory normative effect which have been extended so as to have *erga omnes* effect as the sole instrument of implementation (this is a lawful model under Community law, but collective agreements with *erga omnes* effect only exist in exceptional cases in Denmark)

- 4) ordinary Danish collective agreements without *erga omnes* effect as the sole instrument of implementation (this model is inconsistent with Community law).

Model 2), ie a combination of subsidiary legislation and collective agreements is to day the typical Danish way of implementing EC directives.

The discussion over the implementation of the Working Time Directive illustrates the tensions between Danish labour law and EU law.