3. Supporting the autonomous role of the social partners

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1. INTRODUCTION

The purpose of this study is to answer two main questions, in accordance with the mandate given by the social partners: first, to clarify whether the existing rules and practices in the European Union (EU) member states allow the social partners sufficient space to shape working conditions;¹ second, to clarify whether the existing rules and practices provide sufficient support to the social partners in the performance of their tasks or, more generally, to assess the impact of these rules and practices on their capacity to carry out their tasks.

To answer these questions, we proceed as follows. First, the legal framework within which these questions are to be answered is sketched out. This framework consists of provisions of international law, EU law and the constitutions of the EU member states (section 2). Second, the concept of ‘autonomy of the social partners’ is briefly explained. In particular, the question of how it differs from the principle of private autonomy, which dominates private law, is clarified. We also explain why the autonomy of the social partners cannot be easily assigned either to self-determination or to heteronomy, respectively (section 3). Then the fundamental relationship between the autonomy of the social partners and the state is discussed (section 4). The discussion then turns to the autonomy of the social partners and the space that they enjoy independently to shape working conditions. The criteria by which this area can be (meaningfully) determined is discussed, together with what the state must take into account when restricting social partner autonomy (section 5). This is followed by a closer examination of various social dialogue mechanisms, namely, possibilities to derogate from statutory law, declarations that an agreement is generally binding, and tripartite arrangements or institutions, that may play a role in all this and, most importantly, a discussion of their effects on social partner autonomy (section 6). The focus on these mechanisms is explained by this chapter not being about possible means to strengthen or support the social partners, but about strengthening or supporting their (jointly exercised) autonomy. A short summary concludes (section 7).

Before embarking on a discussion of the issues just raised, a clarification would seem necessary, since collective bargaining systems in the member states often differ fundamentally.² Some of these differences are legal: the legitimacy of collective agreements is based mainly on voluntary membership of the association concerned, but sometimes compulsory membership is also a factor in the application of collective agreements.³ In Austria, the role of the chambers, whose work is based on compulsory

membership, is explicitly recognized in the Constitution.⁴ In some collective bargaining systems, the collective agreement is not even binding between the parties; in others, it has the same material effect as a law.⁵ In some countries, collective bargaining takes place largely at company level, in line with the legal framework. In other countries, such as (again) Austria,⁶ the ability of individual employers to conclude collective agreements is severely restricted. The relationship between collective agreements also varies from country to country, both between agreements concluded at different levels and between agreements at the same level. Finally, to take just this one example, there are countries in which collective agreements between the social partners compete with collective agreements between other parties; in other countries this is not the case. In Portugal, for instance, Article 56 of the Constitution is regarded as establishing a 'monopoly of trade unions'.⁷ In Croatia, works councils also have the right to negotiate agreements with the employer, although important matters are reserved for collective bargaining.⁸ In Lithuania, works councils were deprived only a few years ago of the right to conclude collective agreements.⁹ In addition to these legal differences, there are far-reaching factual differences: the degree of organization varies greatly on the part of both the trade unions¹⁰ and the employers' associations.¹¹ In particular, employers' inclination to join associations is much less pronounced in some countries than in others.¹² For some countries it is reported that there are hardly any employers' associations (left) with which the unions could enter into collective bargaining.¹³ Occasionally, a 'general aversion to collective bargaining' on the part of employers is noted.¹⁴ In some countries there are relatively many trade unions; in others there are very few. In some countries sectoral trade unions predominate, in others company trade unions. There are also considerable differences in the number of unions representing only members of individual professions or occupational groups. In many countries, collective agreements are largely concluded at company level,¹⁵ while in others there are mainly association agreements. In some countries, there are collective agreements at all levels, but closer examination shows that collective agreements at association level are largely devoid of content, as in the Czech Republic.¹⁶ Sometimes, it is a criticism that collective agreements often have a declaratory character.¹⁷ In some countries, there is more coordination between the different levels of negotiation, in others less.¹⁸ Many of these differences are related to historical circumstances. In particular, it should not be forgotten that the collective bargaining systems in the younger EU member states had to be rebuilt from nothing after the collapse of communism.¹⁹

Against the background of these manifold differences, it makes sense to discuss the relevant questions – the autonomy of the social partners and its limits, the relationship of this autonomy to the state, and the possibilities of the state supporting the autonomy of the social partners – only on an abstract level. Accordingly, from the outset there is no claim to provide a description of the problems for each EU member state, nor to formulate corresponding recommendations for action. Instead, the aim of this chapter is to develop the problem situation in an abstract way in order to be able to indicate general solutions.

2. LEGAL GUARANTEES OF THE AUTONOMY OF THE SOCIAL PARTNERS

Any assessment of whether the social partners have sufficient room for fixing and shaping working conditions must be guided by the legal guarantees of the autonomy of the social partners. In relation to legal policy, it might be impossible to agree on what space is optimal for the social partners and, therefore, robust answers can be obtained only on the basis of the standards laid down in law rather than what may be deemed desirable.

As far as legal guarantees of social partner autonomy are concerned, three levels must be distinguished: first, the international level (the International Labour Organization, ILO);²⁰ second, the level of EU law; and third, the level of the member states.

2.1 International Labour Organization²¹

Under the terms of the ILO Declaration on Fundamental Principles and Rights at Work, 1998, collective bargaining is a fundamental right accepted by member states as part of their membership of the ILO, and which they have an obligation to respect, promote and implement in good faith.

In addition, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) is important. Its principal objective 'is to protect the autonomy and independence of workers' and employers' organizations in relation to the public authorities, both in their establishment and in their functioning and dissolution'.²² Even more importantly, collective bargaining forms the subject of the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), which, similar to Convention No. 87, is one of the fundamental conventions. Central to Convention No. 98 is its Article 4, which reads: 'Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.'

The Committee of Experts on the Application of Conventions and Recommendations (CEACR) has described the regulatory content of the provision as follows:

Under the terms of Article 4 of the Convention, collective bargaining must be free and voluntary and must respect the principle of the autonomy of the parties. However, the public authorities are under the obligation to ensure its promotion. Interventions by the authorities which have the effect of cancelling or modifying the content of collective agreements freely concluded by the social partners would therefore be contrary to the principle of free and voluntary negotiation. The detailed regulation of negotiations by law would also infringe the autonomy of the parties.²³ On the other hand, machinery to support bargaining, such as information, conciliation, mediation or voluntary arbitration, is admissible.²⁴

2.2 European Union

At the level of European law, too, social partner autonomy is guaranteed. Here, the Charter of Fundamental Rights of the European Union (CFEU) is of primary importance, although it has only a limited scope of application: According to Article 51(1)

CFEU, 'the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the member states only when they are implementing Union law'.

Article 28 CFEU states: 'Workers and employers, or their respective organizations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.'

Article 28 CFEU is based on Article 6 of the European Social Charter (ESC) and on the Community Charter of the Fundamental Social Rights of Workers (items 12 to 14).²⁵ It ensures a liberal system of collective bargaining and industrial action and thus is an essential element of freedom of association. Under Article 28, employees and employers should be able to regulate employment relationships themselves (within the framework of the law). It must be noted that the fundamental right is guaranteed by means of express wording only 'in accordance with Community law and national laws and practices'. This means that further concretization of the right to collective bargaining and collective action is carried out by EU law²⁶ and national legislation and practices, with wide discretionary powers.

In addition, it should be borne in mind that the EU has very limited legislative competences in the area concerned. According to section 153(5) of the Treaty on the Functioning of the European Union (TFEU), there is no competence as far as 'pay, the right of association, the right to strike or the right to impose lock-outs' are concerned.²⁷ Against this background, there are some authors who completely deny Article 28 an independent meaning and regard Article 28 as being 'symbolic' in nature.²⁸ In any event, it is out of the question that the member states still have considerable room for manoeuvre in shaping the autonomy of the social partners: Article 28 grants the social partners the right to '(regulated) self-regulation'²⁹ within the legal framework laid down by European and member state law.

As regards the possibility of restricting fundamental rights, Article 52 CFEU must be observed. Under Article 52(1) sentence 2 CFEU, the principle of proportionality applies, according to which 'limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others'. This means, first, that limitations must actually correspond to or serve the objective pursued, so the restriction must be appropriate. It means, second, that there must be no other equally suitable but less stressful means available. Finally, it means that the disadvantages caused must be proportionate to the objectives pursued. In all of this, it should be noted that the principle of proportionality leaves the national lawmaker considerable discretionary power, as is apparent from the reference to EU law and national laws and practices, which enables member states to arrive at different concretizations of freedom of association. Article 52(1) CFEU must also be observed as regards restrictions on social partner autonomy. It is occasionally assumed that in the application of Article 52(1) the limits of the right to collective bargaining (and collective measures) in Article 11(2) of the European Charter of Human Rights (ECHR)³⁰ can be invoked (at least in such a way that Article 28 CFEU is interpreted in light of the justification requirements of Article 11(2)).³¹ In view of the relatively minor significance of Article 28 CFEU, however, this question is not being discussed further.

2.3 Member States

In most member states, freedom of association is guaranteed by the Constitution.³² This applies, for instance, in the Czech Republic,³³ Estonia,³⁴ Finland,³⁵ France,³⁶ Germany³⁷ and Greece.³⁸ In some of these Constitutions, collective agreements and/or collective bargaining are mentioned explicitly,³⁹ while in others the courts interpret the relevant provisions to this effect.⁴⁰ The Irish Constitution recognizes the right to form an association, including a trade union, but does not contain a legal right to collective bargaining.⁴¹ Interestingly, some Constitutions do not mention collective bargaining, but explicitly refer to the right to strike.⁴² In some countries, freedom of association is derived from international instruments only. An example is Austria, where Article 11 of the European Convention of Human Rights is applied.⁴³

For the purposes of this chapter, the important question is under which conditions the (constitutionally guaranteed) autonomy of the social partners can be restricted. This question cannot be answered in general, as it depends on the circumstances in each member state. As far as, for example, Germany, is concerned, the constitutional guarantee of freedom of association is not subject to an explicit right of the legislator to limit it. This does not mean, however, that freedom of association is not subject to any state intervention. For the protection of other interests with constitutional status, restrictions are possible, whereby the principle of proportionality must always be observed.⁴⁴

3. THE 'AUTONOMY OF THE SOCIAL PARTNERS'

3.1 The General Concept of Autonomy

Autonomy refers to the state of self-determination, independence (sovereignty), self-administration or freedom of decision or action. Its opposite is heteronomy.⁴⁵ Max Weber developed the following definition: 'Autonomy means, by contrast to heteronomy, that the order of the association is set not by outsiders, but by members of the association by virtue of their quality (regardless of how this order is otherwise achieved)'.⁴⁶

3.2 Special Features of the Autonomy of the Social Partners

3.2.1 Autonomy of the social partners and private autonomy compared

Civil law is governed by the principle of private autonomy, which is the power of the individual to make, within the framework of the legal system, legally binding regulations independently. Private autonomy thus allows the possibility of arriving at legal transactions according to one's own will. It entitles the individual to establish, abolish or shape rights and duties. That is, private autonomy means that 'free and equal citizens can claim to determine, without state interference, paternalism or even coercion among themselves, how their opposing interests are to be adequately balanced from their point of view'.⁴⁷ Expressions of private autonomy are freedom of contract, freedom of association, freedom of property and freedom to make a will.

For its part, freedom of contract has two essential characteristics: freedom of conclusion and freedom of content and design. Freedom of conclusion refers to the right to decide freely with whom and whether a contract is concluded at all. Freedom of content and design, includes the right to freely decide on the content of a contract.

The public interest A closer look at private autonomy can help to determine more precisely what is meant by the 'autonomous role of social partners' and what the peculiarities of this specific autonomy are: While private autonomy is an elementary means for the 'free development of the personality' of each individual,⁴⁸ who as homo oeconomicus should be able to shape their legal relationships according to their own will and responsibility, the autonomy of the social partners is from the outset geared to a specific purpose, namely to bring about fair and appropriate working conditions.⁴⁹ Moreover, this social purpose is in the public interest,⁵⁰ which is why, for example, the German Federal Constitutional Court has stated that it is in the general/public interest to assign to the social partners the task of 'organising and pacifying working life in association with their respective social counterpart'.⁵¹

The contractual mechanism It should also be noted that the contractual mechanism is used differently in the field of the autonomy of the social partners than in the context of private autonomy. While the contractual freedom undoubtedly includes the right not to conclude a contract with a certain person, this negative freedom of conclusion exists only to a limited extent as regards contracts with the social partner. This can be illustrated using the example of German law again. There, it is specified that a person may avoid their declaration of intent if they have been induced to make it unlawfully by duress (or deceit).⁵² The legal interest protected by this provision is obviously private autonomy. Anyone who has been compelled to make a declaration of intent should be able to challenge it precisely because a declaration of intent brought about by coercion cannot be regarded as an expression of free self-determination in legal transactions. In the area of the autonomy of the social partners, however, the situation is completely different: here the possibility of exerting pressure on the other side is not only permissible, but even guaranteed as freedom of association also covers industrial action aimed at bringing about the conclusion of collective agreements.

Concurring agreements There is at least one other important difference between private autonomy and social partner autonomy. This becomes clear when we take a closer look at the former and, in particular, at freedom of contract as a significant manifestation of it. Freedom of contract refers to the power to conclude contracts that can be freely determined in principle with regard to both the contractual partner and the content of the contract. In contrast, the autonomy of the social partners, certainly when normative effect is attached to the contracts concluded by them, is the right to conclude contracts which have legal consequences that go beyond the contractual partners (employer, employers' association and trade union). The most significant effects of collective agreements do not occur in the relationship between the contracting parties, but vis-à-vis the parties to the employment contract. This raises a question concerning social partner autonomy that, from the outset, does not arise in the context of private autonomy (or freedom of contract), namely, that of clarifying, if necessary, the powers of the

social partners to fix working conditions by regulating the relationship between collective agreements concluded at different levels (company, sector and nationwide) and/or regulating the relationship between collective agreements concluded at the same level by competing trade unions.

3.2.2 An autonomy between self-determination and heteronomy

As regards autonomy of the social partners, an additional problem arises which is that it is not easy to judge whether agreements between the social partners are completely autonomous or whether they must be regarded as being at least partially heteronomous.⁵³ This becomes particularly clear when we take the perspective of those who, as employers or employees, are bound by collective agreements concluded by the social partners. In that instance, we must decide whether the effect of the collective agreement originates entirely from an autonomous decision in relation to self-determination (for example, because the employer has decided to join an employers' association or the employee has decided to join a trade union) or whether that effect ultimately occurs on the basis of state legislation, or at least on the basis of norm-setting derived from or recognized by the state. This problem is not addressed further here. It is sufficient to ensure at this time that the autonomy of the social partners has some special features that preclude from the outset simply equating it with the private autonomy which characterizes civil law.

4. AUTONOMY OF THE SOCIAL PARTNERS AND THE STATE

4.1 Autonomy of the Social Partners: Pre-existing, Based on Private Autonomy or Delegated by the State?

Autonomy of the social partners means that they are free to regulate working conditions by entering into collective agreements. The effect of these agreements may vary from one country to another. However, there is always the question of the relationship between social partner autonomy (and their power to conclude collective agreements), on the one hand, and state legislation, on the other. This question is of a theoretical nature and is not discussed further within a study that aims primarily at insights useful for the social partners. However, the problem cannot be completely ignored either. Instead, it can be briefly illustrated, again by using the example of German law.⁵⁴

In Germany, various theories have been advocated in legal literature and jurisprudence that aim to explain the (normative or law-equivalent) effect collective agreements have in that country. Initially, collective agreements were widely seen as ordinary contracts, but that view is incompatible with their character of (also) containing norms. In contrast, the earlier case law – namely, that of the Federal Labour Court on the binding of the parties to collective agreements to fundamental rights – was based on the thesis of the state delegating its power to legislate for employers' and employees' associations. This delegation theory, which is also widely accepted in legal doctrine, reflects the idea that the state has transferred its legislative power to the social partners and that it is then exercised by the parties to the collective agreement in their own name similar to a state power. According to the delegation theory, the norm-setting takes place 'from top to bottom', that is, through the transfer of state competences.⁵⁵ The autonomy theory takes a completely

different view. According to that theory and in contrast to a merely delegated standard setting, the normative effect of collective agreements is based on the original standard-setting authority of the employers' and employees' associations. According to this view, the autonomy of the social partners is collectively exercised private autonomy. The Federal Labour Court has taken this up in numerous judgments.⁵⁶ This view determines, in particular, the position of the court as regards the importance of fundamental rights for collective bargaining. In this respect, the court assumes that the validity of the provisions of collective agreements is based on the membership of employers (in employers' associations) and employees (in unions), who in the exercise of their fundamental rights submit to existing and future collective bargaining agreements. In contrast, the Federal Constitutional Court is closer to the idea of state-recognized legislative power of the parties to collective agreements.⁵⁷ In this view, collective agreements are rules for the content of the employment contracts that are covered by them. These rules are justified by the consent of the parties to the collective bargaining agreement and are binding in accordance with statutory law. This view of the power to set norms as recognized by the Constitution and shaped by the ordinary law also has supporters in the legal literature.

As already mentioned, the theories that are advocated to explain the relationship between collective bargaining autonomy and the state are not discussed in further detail here. All the more so because these theories might ultimately not be verifiable at all. However, this discussion was about something completely different from the start, namely, to show that the relationship between autonomous legislation of the social partners and the state raises fundamental questions that can be answered very differently depending on the position taken in principle.

4.2 Autonomy of the Social Partners: Establishing a Legal Framework

It is hard to deny that a constitutional guarantee of freedom of association, regardless of its concrete scope, depends on further specification and substantiation by state legislation.

4.2.1 International law

At the level of international law, the existence of two aspects can be demonstrated: the guarantee of the autonomy of the social partners and the need to provide an appropriate legal framework.

The autonomy of the social partners is guaranteed in general, but specifically their autonomy in the conduct of collective bargaining is protected here. The principal objective of Convention No. 87 is 'to protect the autonomy and independence of workers' and employers' organizations in relation to the public authorities, both in their establishment and in their functioning and dissolution'.⁵⁸ Legislative intervention can be used, in particular, 'to establish a legislative framework for collective bargaining, leaving it to the parties to determine together the arrangements governing their relations and agreements'. All of these legislative interventions have to be interpreted, however,

in light of Article 8 of the Convention, under the terms of which, while organizations are bound, in the exercise of these rights, to respect the law, the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in the Convention.⁵⁹

As regards Convention No. 98, in particular, the ‘principle of the independence and autonomy of the parties and of free and voluntary bargaining’, forms one of the ‘principal elements’.⁶⁰ Also, Article 3 of the Convention No. 98 makes it clear that a framework may be needed to make collective bargaining effective: ‘Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organize as defined in the preceding Articles’. In most cases, this framework may require action by the legislator, although the answer to individual regulatory questions is often left to the social partners themselves. However, where the legislator takes action, it is always called upon to take due account of the views of the social partners.⁶¹ Among the means that are proposed by the Collective Bargaining Recommendation, 1981 (No. 163), are: ‘facilitating the establishment and growth, on a voluntary basis, of free, independent and representative employers’ and worker’ organizations’; ‘establishing procedures for the recognition of the most representative organizations’; and ‘ensuring that collective bargaining is possible at any level whatsoever’.

In this respect, the CEACR has stated the following:

Whatever the type of machinery used, the Committee is of the view that its first objective should be to encourage by all possible means free and voluntary collective bargaining between the parties, allowing them the greatest possible autonomy, while establishing a legal framework and an administrative structure to which they may have recourse, on a voluntary basis and by mutual agreement, to facilitate the conclusion of a collective agreement under the best possible conditions.⁶²

What is needed then in light of Article 4 of Convention No. 98 is by no means the imposition of compulsory collective bargaining, but the provision of a collective bargaining framework within which free and voluntary collective bargaining can take place.⁶³

4.2.2 EU law

Article 28 CFEU grants social partners the right to ‘(regulated) self-regulation’.⁶⁴ Article 28 CFEU itself does not contain any specific provisions on the conditions under which the exercise of the corresponding rights is protected. As regards the relevant levels of collective bargaining, this is particularly clear because Article 28 mentions only that these must be ‘appropriate’. Also, since the EU has only very limited competences in the area concerned, the extent of the guarantee depends essentially on its substantiation in the legal systems of the member states. Accordingly, the member states are ‘entitled – but also obliged – to determine the subject matter, scope and binding effects of collective agreements’.⁶⁵

All this is of importance in the present context because interventions by the lawmaker always raise the question of whether they restrict the scope of social partner autonomy or, on the contrary, unfold it in the first place. In this respect, the autonomy of the social partners is no different from private autonomy. The latter, too, needs to be shaped in such a way that the legislator first has to ‘bring it to life’ by providing a suitable legal framework (think, for example, of rules on legal capacity).⁶⁶

4.2.3 Member states

Finally, as regards the (constitutional) situation in the member states, it varies from country to country. As far as the legal situation in Germany is concerned, the Federal Constitutional Court stated the following in 1991:

freedom of association requires from the outset a legal form. This not only consists in the creation of the legal institutions and sets of norms which are necessary in order to be able to exercise the freedoms guaranteed by fundamental rights. The significance and multiplicity of the interests touched by the activities of coalitions, particularly in the area of the economic and social order, make rather diverse legal regulations necessary which can also draw barriers to freedom of association; all the more so as the object of the guarantee is related to changing economic and social conditions which, more than in the case of other freedom rights, must leave the possibility for modifications and further developments.⁶⁷

The court thus recognizes what could be termed a comprehensive design or concretization mandate of the legislature. This mandate obliges the legislator to create the functional as well as the organizational prerequisites for trade unions and employers' associations to have sufficient scope for action and thus to place these on a sustainable and functional basis within the framework of the general legal system.⁶⁸ Whether a similar obligation is explicitly recognized in other legal systems is another question.⁶⁹ However, that is not the issue. The only important factor in this context is that exercising freedom of association always requires a basic legal framework that only the state legislator can create.⁷⁰ Also, what has already been written regarding European law applies here too: legislative measures aimed at the establishment of this type of framework do not restrict the autonomy of the social partners, but – on the contrary – bring it to fruition in the first place.

4.3 Autonomy of the Social Partners and State Legislation: Fundamental Freedom versus Power to Legislate

Irrespective of how the autonomy of the social partners is explained (or justified) in detail, it is evident that it forms (an essential) part of the freedom of association, which is for its part a fundamental right in all EU member states. This, however, leads to a significant insight as far as the relationship between the autonomy of the social partners and the state (or state legislation) is concerned: the autonomy of the social partners and the task of the state face each other in a relationship between freedom and competence. To the extent that they compete with each other, it is not a problem of delimiting mutual, (identical) competences, but a problem of protecting and (legitimately) limiting social freedom.

5. THE AUTONOMY OF THE SOCIAL PARTNERS: WHAT SPACE TO SHAPE WORKING CONDITIONS INDEPENDENTLY?

The extent to which the social partners enjoy autonomy varies from one member state to another. Article 28 CFEU refers to a large extent to the law of the member states, so that further substantiation of the right is left to them.

5.1 Criteria for Determining the Space Left to the Social Partners

From the outset, however, the question of which criteria can be considered abstractly when fixing the limits of the social partners' autonomy promises greater benefits than the

answer to the question of how the boundaries of the autonomy area are drawn in detail in the member states.⁷¹

In this respect, we think first about the state determining the subject areas which are open to autonomous legislation by the social partners. In relation to Germany, for instance, these would then be the ‘working and economic conditions’ referred to in the constitutional guarantee of freedom of association.⁷²

Secondly, there may also be barriers to autonomous regulation by the social partners in relation to content. It should be borne in mind, in particular, that the state may leave specific matters to the social partners for their own regulation in principle, but also sets specific requirements that the regulation must then satisfy.

Thirdly, and finally, it could be asked what limits exist for autonomous norm-setting in personal terms. This question initially seems almost superfluous, because we might think that from the outset it can only be a question of regulations concerning employers and employees. That the question is completely justified, however, is shown by the legal reality that the social partners often arrive at regulations that do not concern employees alone, but also (specific) self-employed persons. This became particularly clear with a decision of the European Court of Justice, which was based on a case from the Netherlands.⁷³ However, the decision has not brought full clarity to the question of the extent to which the prohibition of cartels under Article 101 TFEU precludes collective agreements for self-employed persons. That is, we could say that the references to the self-employed persons covered by the collective agreement in the reasons given by the Court are a mixture of two sharply defined concepts. On the one hand, the persons who are in a comparable situation to employees owing to economic dependence and, on the other hand, the persons whose true legal quality – the status of employee – is obscured by the contract (bogus self-employed). If the court had aimed its remarks at the latter persons, then it must be assumed that collective agreements in favour of economically dependent self-employed persons are (still) inadmissible under antitrust law. If the court had had the first-mentioned persons in mind, it could be said that the ban on cartels had been softened. The question is not to be further examined in this chapter, as in the present context it only seems significant to note that the personal scope of application must not be forgotten when addressing the question of the scope of social partner autonomy. This question is all the more important since the number of solo self-employed seems to be rising in most countries – not least in the wake of the expansion of the platform economy.⁷⁴

It should be noted here that the autonomy of the social partners can be defined by asking three questions: what can or may the social partners regulate? What barriers do they encounter in their regulations in terms of content? For which groups of persons can or may they make regulations? Only the first and second question are discussed here.

5.2 Limiting the Autonomy of the Social Partners

5.2.1 The subjects for autonomous norm-setting

The first question to be answered is what restrictions the state has to observe if it wants to withdraw certain subjects of regulation from the norm-setting of the social partners. However, there is obviously no universal answer to this question because the areas of autonomy opened up to the social partners are, as seen above, to a large extent shaped by member state law. As the scope for state intervention varies from one country

to another, more than that the state needs to justify its actions, which stands up to the requirements of the (constitutional) legal guarantee of freedom of association, cannot be said.

International law International law does little to elucidate the problem. This also applies if observations made by the standard monitoring bodies are taken into consideration. Not much more than occasional enumerations of possible subjects of negotiation can be inferred from these. For instance, the Committee on Freedom of Association has held the following:

The Committee ... recalls that matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation, etc.; these matters should not be excluded from the scope of collective bargaining by law, or as in this case, by financial disincentives and considerable penalties applicable in case of non-implementation of the Code and Guidelines. It further recalls that it is for the parties concerned to decide on the subjects for negotiation ...⁷⁵

Even less coherent are the standards which the legislator may have to follow if it wishes to adopt regulations in the area of working conditions. All that can be said in this respect is that the social partners must retain their own room for manoeuvre. For example, the CEACR holds that ‘public servants not engaged in the administration of the State should be able to negotiate collectively their wage conditions and that mere consultation of the unions concerned is not sufficient to meet the requirements of the Convention in this respect’. The Committee acknowledges that ‘the special characteristics of the public service ... require some flexibility, particularly in view of the need for the state budget to be approved by parliament’. Accordingly, it considers certain legislative restrictions of the autonomy of the social partners to be compatible with the Convention, ‘provided that they leave a *significant role* to collective bargaining’.⁷⁶

EU law As far as Article 28 CFEU is concerned, there is no exclusive power of the social partners as regards fixing terms and conditions of employment. There is not even a priority power of the social partners in that the organs of the EU would have to refrain from regulation if collective agreements are in place. One reason for this is that action by the social partners from the outset cannot guarantee harmonization of social standards. Another reason is that Articles 151 ff. TFEU, despite recognizing and promoting social dialogue, do not indicate that collective bargaining takes precedence.⁷⁷

Member states The position in the member states differs from one country to the other. Accordingly, no generally valid observations can be made. It is at least possible, however, to point to a standard that may not be legally binding in a member state, but which could nevertheless provide a guideline.⁷⁸ This is the principle of proportionality, which can be found in the Constitutions of some member states (see, for instance, Article 31(3) of the Polish Constitution) and – at the level of EU law – is explicitly addressed in Article 52 CFEU.⁷⁹ This principle is illustrated here by using the example of German law.

In Germany, the principle of proportionality stems from public law. Originally, it was developed in police law and only found its way into constitutional law with the adoption in 1949 of the Basic Law (*Grundgesetz*), the German Constitution. In the jurisdiction of the Federal Constitutional Court, it has then become the decisive test for the control of state action. The principle of proportionality is based on the idea that state measures must not be without boundaries, that they must instead be justified by a clearly defined purpose and that they must also be measured against this purpose in their scope and extent. The principle of proportionality is thus intended to ensure that state measures are in principle limited, so that the citizen is not at the mercy of state sovereignty.⁸⁰

Application of the principle of proportionality requires a three-stage examination. This examination is preceded, on the one hand, by elaborating the (objective) purpose underlying the measure and, on the other, by examining whether this purpose is legally legitimate and thus permissible. The examination based on the standard of the principle of proportionality is then based on three elements: suitability, necessity and appropriateness. A means is suitable if the intended purpose can at least be promoted with its help (fitness). The remedy is necessary if no other equally suitable but less stressful remedy is available (choice of the mildest remedy). The remedy is appropriate if the burden on the individual is not disproportionate to the purpose pursued and the benefits sought for the public. In this respect, we often regard proportionality in the narrower sense, which usually takes centre stage. In this regard, it is necessary to weigh up the consequences for the person concerned, on one hand, and the conflicting public interests, on the other. For both sides, it must first be determined abstractly which interests are affected and how these are to be legally assessed. Then the intensity of the concern as well as the benefit to the public good must be determined by the measure in question. Only then does the actual weighing take place, in which it must be asked whether, taking all these premises into account, the desired result is still in proportion to the burdens on the citizen. The limit of what is reasonable must not be exceeded under any circumstances.

The principle also applies as far as the relationship between the autonomy of the social partners and state legislation is concerned. In the regulatory areas entrusted to collective bargaining, the legislature may fix working conditions only if it has a factual reason to do so and if the intended regulation is appropriate, necessary and, in its effect, restricting collective bargaining autonomy, proportionate in the narrower sense. Moreover, it must be noted that not every public interest justifies the restriction of collective bargaining autonomy. The proportionality test requires a careful examination of which regulatory options are to be withdrawn from the bargaining parties and for what purpose.

In summary, in Germany, the state is understood to be obliged to leave a sufficiently large field of working conditions to the social partners. Although the Federal Constitutional Court's case law repeatedly refers to a 'norm-setting prerogative' of the social partners,⁸¹ this is not to be understood as referring to a taboo zone (for example in the areas of pay and working hours). What is required instead is for the autonomy of the social partners not to be dried up by working conditions fixed by the state.⁸²

5.2.2 Statutory restrictions regarding content

It is also conceivable that the legislator leaves some subjects of regulation to the social partners to regulate independently, but also fixes content-related requirements that the regulations adopted by the social partners must then satisfy.

Possibilities for derogation are relevant here, that is, the possibility opened up to the social partners to ‘set aside’ certain statutory provisions.⁸³ These derogation possibilities are often limited in respect of content, for example, by the legislator defining a corridor within which the social partners may take action. They may, for instance, be able to derogate from the legal provisions on working time, but the derogations must remain within well-defined boundaries. We explore this in more detail in the next section. Here we merely note that these derogation possibilities may be an expression of a soft approach to social partner autonomy. In Germany, for example, there is agreement that derogation possibilities can even be required by the principle of proportionality (which applies there), so that the lawmaker must always ask itself whether these derogation possibilities should not be chosen as a milder restriction of collective bargaining autonomy compared with provisions that the social partners are prevented from setting aside.⁸⁴

6. IMPACT OF SOCIAL DIALOGUE MECHANISMS ON SOCIAL PARTNER AUTONOMY

In this section, three mechanisms are examined in respect of their impact on the autonomy of the social partners: possibilities to derogate from statutory law, declarations that an agreement is generally binding,⁸⁵ and tripartite arrangements or institutions.

6.1 Derogation Possibilities

A restrained approach to social partner autonomy might involve the state creating legal regulations in the field of working conditions, but allowing them to be set aside by the social partners (to a limited extent).

6.1.1 Derogation possibilities in member states

The possibility of derogating from the law by collective agreement (and possibly only by that means) exists in many EU member states. When restricting the possibility of derogation to collective agreements (simultaneously preventing derogation from statutory law on the basis of a mere individual agreement),⁸⁶ two aspects are likely to be at the fore: on the one hand, that the parties to the collective agreement are often closer to the subject of regulation than the legislator is and can also react more quickly (and more flexibly); on the other hand, that the parties to the collective agreement, in view of their typical bargaining power, offer a greater guarantee that the regulations they have adopted adequately balance the interests involved.⁸⁷

However, the prevalence of legislation providing for derogations on the basis of collective agreements (also to the detriment of employees) varies widely between member states. Belgium might be an example of a member state in which this possibility hardly exists.⁸⁸ Accordingly, it has been noted that the scope for the social partners is considerably restricted by the many relevant legal provisions in this country.⁸⁹ In Bulgaria, the Labour Code explicitly provides that ‘the collective agreement shall regulate issues of the labour and social security relations of employees which are not regulated by mandatory provisions of the law’⁹⁰ and that ‘the collective agreement shall not contain clauses which are more unfavourable to the employees than the provisions of the law or of collective

agreement, which is binding upon the employer'.⁹¹ In Croatia, too, the social partners' room to manoeuvre is, in principle, limited to fixing conditions that are more favourable for the employees. Section 7 of the Labour Code explicitly states that 'the employer, the employee and the employees' council, as well as trade unions and employers' associations may stipulate working conditions that are more favourable for the employees than conditions prescribed by this Act',⁹² while 'the employer, employers' associations and trade unions may stipulate in a collective agreement less favourable conditions than those prescribed by this Act only if they are expressly authorized to do so by this or another law'.⁹³ In Romania, too, collective bargaining is, in principle, limited to setting terms and conditions more favourable for employees than the provisions of the law.⁹⁴ The position seems to be similar in Slovenia, where it is already evident from the Constitution that the state must ensure that workers are adequately protected.⁹⁵ In Slovenia, the favourability principle is described as being 'fundamental to labour law'.⁹⁶ In Greece, Article 22(2) of the Constitution is understood to enshrine that the law fixes minimum levels of protection for employees and leaves to collective agreements (1) the regulation of such conditions in a way more favourable to the employees, (2) the extension of the provisions of the law to employees who are not covered by them, and (3) the regulation of working conditions that are not regulated by the law.⁹⁷ In Poland, various and detailed statutory provisions exist. Against this background, it is sometimes noted that the extensive legal regulation narrows the scope for collective bargaining.⁹⁸ According to Article 9 section 2 of the Labour Code 'the provisions of collective labour agreements and collective agreements, as well as of regulations and statutes, may not disadvantage employees more than the provisions of the Labour Code and other laws and subordinate legislation'.⁹⁹ More recently, however, the lawmaker has allowed the social partners also to lower conditions of employment.¹⁰⁰

Cyprus forms a special case in many respects. The general rule is that collective agreements between trade unions and employers are not binding on them.¹⁰¹ Moreover, collective agreements have no binding effect, unless they are incorporated in individual employment contracts.¹⁰² As one author has observed, however, 'collective bargaining, based on the principle of tripartite cooperation, has traditionally played a major role in regulating industrial relations in the country. At the same time, legislation has largely constituted a secondary tool for regulation'.¹⁰³ Denmark is a special case, too, because, although most statutory provisions are non-derogable,¹⁰⁴ there is very little statutory law from the outset.¹⁰⁵ Finally, Ireland also forms a special case. Collective agreements do not, as a general rule, constitute a source of employment rights and obligations since, under the common law doctrine of privity of contract, a contract is only binding on parties who are privy (parties to) the agreement and a trade union under the existing case law cannot be regarded as an employees' agent.¹⁰⁶

In Finland, derogation from statutes is possible through a union-level collective agreement. Note, however, that agreements concluded by a national labour organization (union) on behalf of its members and generally binding collective agreements take precedence over these union-level agreements.¹⁰⁷

In Germany, derogation possibilities are widely regarded as a softer form of state regulation. These possibilities exist, in particular, in the areas of working time, dismissal protection (periods of notice), temporary agency work and fixed-term contracts.¹⁰⁸ In the Netherlands, a few statutory provisions allow for derogation.¹⁰⁹ Some of these provisions allow derogations *in peius* only by way of collective agreements with the unions

(termed the three-quarter mandatory law). Others allow derogations *in peius* also if it is with the approval of the works council (termed the five-eighths or two-thirds mandatory law).¹¹⁰ In Spain, collective agreements must respect the mandatory provisions of the law, but can set aside some provisions of statutory law. Among the areas in which collective agreements can derogate from the law are working time, distribution of working time and time schedules; shift work or any method of organizing work in shifts; pay structure and amount; working system and work performance.¹¹¹ In the wake of more recent reforms, the number of derogatory collective agreements has increased considerably.¹¹²

Several collective bargaining systems have undergone changes as regards opportunities to incorporate *in peius* derogations via collective agreements.¹¹³ Notably, the possibility of derogations *in peius* has been either introduced or enlarged. This has affected the protective function of collective agreements and emphasized the role of the state as a regulator intervening in the regulatory collective bargaining framework. In France, labour law as a heteronomous source of law plays such an important role that some authors call for greater space for autonomy.¹¹⁴ As regards the relationship between statutory law and collective agreements, two principles apply: first, that a collective agreement must not violate public policy and public order; and, second, that a collective agreement may fix conditions that are more favourable for employees.¹¹⁵ Note, however, that more recently it has become possible for a collective agreement to derogate from legal provisions even when it is not more favourable, although this possibility of 'derogatory agreements' is limited to the matters enumerated by law: working hours, procedure of economic dismissals, actors in the enterprise bargaining. These derogatory agreements may be concluded either at the industry level or at the enterprise level, and more recent legislation has enlarged the possibility of these agreements at the enterprise level.¹¹⁶

In Italy, collective agreements can, in principle, modify the law only *in melius* and not *in peius*.¹¹⁷ Exceptions apply, however, in both directions:

The legislator has sometimes authorized collective agreements to derogate *in peius* ... to imperative norms, or better to deregulate totally or partially some areas of labour law considered to be too rigid; the task has been given to collective agreements, and not performed directly by the law itself, because the social parties could be usefully involved in it and decide more appropriately according to their evaluations and the circumstances ...¹¹⁸

An example is Act 148/2011 (Article 8), which allows for derogations regarding, among other things, working time, with the relevant collective agreements having binding effects for all employees concerned. In this regard it has been observed that 'the norm is the clearest case of legal support to the extensions of the effects of collective agreements and also to their derogatory powers' and that it 'has been criticized for giving these collective agreements too sweeping power, amounting to subverting the traditional supremacy of the law'.¹¹⁹ In Portugal, the position seems to be similar. There, the principle was long applied that collective agreements could deviate from the law only insofar as they were more favourable for workers. It was only later that the Labour Code allowed collective agreements to set aside statutory provisions on a wide range of issues even if not more favourable.¹²⁰

In Hungary, the most recent labour law reform introduced far-reaching derogation possibilities. The legislator's aim was to strengthen the role of collective agreements as a contractual source of labour law. Under the old law a collective agreement could

derogate from statutory law only on condition that it offers more favourable terms for the employees. It has been observed that under this regime ‘it was not possible to establish the regulatory function of the collective agreement – employers were not willing and trade unions not capable of concluding a collective agreement’.¹²¹ The new Labour Code has introduced the following distinction: employees’ fundamental rights and important interests are regulated by norms of *ius cogens*; other rights and duties arising from the employment relationship are regulated by norms of *ius dispositivum*. The lawmaker specified cases of the above-mentioned types of derogation in every part of the law.¹²² A number of observers are critical of the reform.¹²³

6.1.2 Derogation possibilities: pros and cons

Derogation possibilities may be in the interest of a desirable flexibilization of legal provisions, while also exploiting the knowledge and proximity of the parties to collective bargaining. The advantages for employers are evident, but derogation possibilities can also be useful from a trade union viewpoint. If the institutional framework is right, these possibilities can open up space for a differentiated policy that also takes account of the interests of members.¹²⁴

Nevertheless, these regulations are not without problems. One problem is that statutory law always provides one of the social partners with fall-back security: if there is no agreement between the social partners, the regulation which is laid down by law applies. Accordingly, collective bargaining becomes arduous for the social partner who wants to change the statutory status quo. Also, under these conditions there is a danger that trade unions will use their position to wring compensation deals from employers. Moreover, derogation possibilities threaten to disrupt the freedom to bargain collectively, especially of the trade unions. If there is a particular legal regulation in favour of the employees, which is also put at the disposal of the social partners, then the trade union might feel almost obliged to defend the corresponding standard (although the item is possibly not part of its priorities). If the union does deviate from the existing dispositive regulation, then it will need to be explained particularly carefully to its members.

There is another problem with derogation possibilities. This applies, in particular, if the legislator allows the collective bargaining parties to dispose of statutory provisions on a wide range of issues. If this were to occur, it would then be up to the trade unions to oppose the employer’s requests to deviate from the law to the detriment of the employees, and to defend the legal standard of protection. Whether they succeed in doing so, however, depends solely on the balance of power between the social partners at the level at which the collective agreement is concluded.¹²⁵ The problem can be illustrated by the observations made some time ago by the CEACR concerning the legal situation in Brazil, where the legislator had made relatively far-reaching use of derogation possibilities in a comprehensive reform of labour law:

The Committee recalls ... that, although isolated legislative provisions concerning specific aspects of working conditions could, in limited circumstances and for specific reasons, provide that they may be set aside through collective bargaining, a provision establishing that provisions of the labour legislation in general may be replaced through collective bargaining would be contrary to the objective of promoting free and voluntary collective bargaining, as set out in the Convention. ... The Committee once again recalls in this regard that the general objective of Conventions Nos 98 and 154 and the Labour Relations (Public Service) Convention, 1978

(No. 151), is to promote collective bargaining with a view to agreeing on terms and conditions of employment that are more favourable than those already established by law ...¹²⁶ and that the definition of collective bargaining as a process intended to improve the protection of workers provided for by law is recognized in the preparatory work for Convention No. 154, an instrument which has the objective, as set out in its preambular paragraphs, of contributing to the achievement of the objectives of Convention No. 98.¹²⁷

One year later, the CEACR noted that:

the Committee observes that, even though it is limited by a significant number of exceptions, the possibility to set aside protective legislative provisions through collective bargaining ... remains particularly broad. Emphasizing that Article 4 of the Convention, in the same way as Conventions Nos 151 and 154 ... have the general objective of promoting collective bargaining as a means of reaching agreement on more favourable terms and conditions of work than those envisaged in the legislation,¹²⁸ the Committee recalls that it considers that the introduction of a general possibility of derogating through collective bargaining the protection established for workers in the legislation would in practice have a strong dissuasive effect on the exercise of the right to collective bargaining and could contribute to undermining its legitimacy in the long term. In the present case, the Committee considers that the extent of the derogations ... which can be made by a sectoral collective agreement, as well as by an agreement at the company level, may affect the purpose and attractiveness of collective bargaining in the country, or at the very least to significantly modify its perception by the actors concerned and accordingly compromise its promotion and exercise.¹²⁹

Two issues deserve to be noted. First, from the viewpoint of the CEACR, the assessment of collective bargaining law depends first and foremost on the extent to which the legislator uses it: while the more occasional use of this option is unlikely to raise any concerns, it leads to massive concerns if the legislator makes use of it almost across the board. On the other hand, from the CEACR's point of view, it also depends on who is granted the possibility of deviating from statutory law. In particular, it leads to reservations if it is possible to deviate from statutory law on the basis of company collective agreements. In this respect, the concerns might be owing to it being more likely at the level of the company than at the sectoral level that the trade union is not on an equal footing with the employer.¹³⁰

In summary, the results of an assessment of derogation possibilities are mixed. In some respects, there is not only nothing wrong with the derogation possibilities, but they can even be positive. However, there are also dangers involved: the social partners' agenda can be disturbed as a consequence, the negotiating balance can shift and the general standard of protection under labour law can decline.

The question remains whether derogation possibilities can be used to strengthen the autonomy of the social partners. Statutory provisions that can be deviated from under collective agreements may, from the lawmaker's perspective, favourably influence employers' propensity to participate in autonomous norm-setting.¹³¹ This applies anyway if, first, the employer can hope for regulations which from their viewpoint are more favourable than the statutory regulations, that is, which open up a flexibilization potential that otherwise would not exist; and second, if the possibilities for deviation from statutory law are exclusive and thus really only open to the participants in autonomous norm-setting by the social partners. In this situation, however, the question arises as to whether it is justified to provide for derogation possibilities with the sole aim of strengthening the

employers' associations, or whether demand must not be made of the state that there be sufficient substantive grounds for this type of arrangement.

6.2 Extension Mechanisms

The general effect of a declaration of general applicability is that the underlying collective agreement with it also covers third parties (not previously bound). Since these third parties are thus subject to the collective agreement without or even against their will, the declaration of general applicability is usually dependent on the parties to the relevant collective agreement having a certain representativeness. The requirements vary from one member state to another. At times, the existing rules are also viewed critically as being too generous.¹³² However, the problem is not further discussed here since it is the question of protecting (or supporting) the autonomy of the social partners, and not of protecting the private autonomy of third parties (their negative freedom of association), which is of sole interest.

6.2.1 International law

The Collective Agreements Recommendation, 1951 (No. 91), indicates that,

where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.¹³³

National laws or regulations may make the extension of the collective agreement subject to the following, among other, conditions:

(a) that the collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative; (b) that, as a general rule, the request for extension of the agreement shall be made by one or more organizations of workers or employers who are parties to the agreement; (c) that, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.¹³⁴

The CEACR considers that the extension of collective agreements is not contrary to the principle of voluntary collective bargaining and is not in violation of Convention No. 98.¹³⁵

6.2.2 EU law

As regards EU law, it should be noted from the outset that Directives sometimes expressly provide for the possibility of implementation by the social partners, which can be successful only if collective agreements have comprehensive coverage.¹³⁶ An example is Directive 2002/14/EC, Article 5, which expressly provides for the arrangements for informing and consulting employees to be governed by agreement between the social partners. As the decisions of the Court of Justice of the European Union (CJEU) in the cases of *Andersen* and *Holst* make clear, the EU legislator evidently accepts an outsider effect.

In Andersen, the CJEU stated:

Where the category of persons who may be covered by a collective agreement – as, in particular, in the case of an agreement which has been declared to be of general application – can be completely independent of whether or not those persons are members of a union which is a party to that agreement, the fact that a person is not a member of such a union does not in itself deprive that person of the legal protection conferred by the agreement in question.¹³⁷

In this context, the term ‘cooperative regulation’ is sometimes used.¹³⁸ That is, state (or supranational) actors and autonomous associations cooperate in legislating. The outcome is regulation between state (or supranational) and autonomous legislation.

6.2.3 Member states

In most member states legal mechanisms exist for declaring collective agreements generally binding.¹³⁹ Their effects depend from the outset on whether and under what conditions collective agreements are effective *erga omnes*.¹⁴⁰ An exception to the widespread use of extension mechanisms in the member states is Cyprus, where collective bargaining is mostly decentralized and collective agreements are as a general rule not legally binding.¹⁴¹ If they are binding, however, they also have binding effect on non-union members.¹⁴² The same applies in Malta.¹⁴³ In Denmark, there is no procedure for declaring collective agreements generally binding. Occasionally, however, provisions of collective agreements are adopted by the legislator and expressly laid down in law.¹⁴⁴ In Sweden, too, there is no statutory mechanism of extension of collective agreements to cover an entire industry.¹⁴⁵ In Ireland, no overall mechanisms exist for declaring collective agreements generally binding.¹⁴⁶ However, trade unions exert their influence by concluding national social partnership agreements. Some of these are codified to make them binding on individual employers. This comes close to a declaration of general applicability.¹⁴⁷ Finally, in the United Kingdom there is no extension mechanism.

Mechanisms for declaring collective agreements generally binding exist in most member states, but caution is required. In Belgium, for instance, only collective agreements concluded in a joint body (National Labour Council, joint committee or sub-committee) can be extended or rendered generally binding. However, as all employers and employees who fall within the scope of jurisdiction of a joint body are covered by the individual normative stipulations, a declaration of generally binding means that collective agreements rendered binding by Royal Decree move upwards in the hierarchical order of legal sources.¹⁴⁸ In Romania, the possibility of declaring collective agreements generally binding was enshrined in the law relatively late. Note, however, that at the same time the principle was abolished according to which higher-level agreements were generally applicable from the outset.¹⁴⁹ Sometimes the possibility of making collective agreements generally binding is limited to particular agreements. For instance, in Slovenia, only collective agreements concluded at the national level and agreements at the branch level concluded by a representative trade union or, cumulatively, by representative unions can be declared generally binding.¹⁵⁰ In Finland, employers who are bound by an agreement must also observe its terms in employment relationships with those of their employees who are not themselves bound by the agreement (as they do not belong to any association bound by the agreement), but who perform work covered by the agreement. Nevertheless, declarations of collective agreements as generally binding play an important role in law and practice.

If a national collective agreement can be regarded as general in the field concerned, its terms shall be applied as minimum conditions by all relevant employers.¹⁵¹ In Latvia, if members of an employers' organization or an association of employers' organizations employ more than 50 per cent of the employees in a given sector, a general agreement entered into between them and a trade union or an association of trade unions is binding on all employers of the relevant sector and applies to all employees employed by the employers. As regards these employers and employees, the general agreement comes into effect on the day of its publication in the official newspaper, after a joint application of the parties.¹⁵² In Spain, collective agreements are extended by law to all the workers affected, regardless of whether they are unionized or not.¹⁵³

Existing extension mechanisms differ in respect of procedural requirements, as well as substantive issues. In Bulgaria, industry and sectoral collective agreements can be declared universally binding if this is the common will of the parties.¹⁵⁴ The same applies in the Czech Republic¹⁵⁵ and Slovakia, where higher-level collective agreements can be declared generally binding (such a declaration at the request of one of the parties requires additional criteria to be fulfilled).¹⁵⁶ In Hungary, sectoral agreements (which are rare in practice) can be declared generally binding at the joint request of the parties.¹⁵⁷ A joint request is, in principle, also needed in Poland.¹⁵⁸ In Austria, a collective agreement (concluded by an association with voluntary membership) can be made generally binding at the request of one of the parties to it.¹⁵⁹ In Croatia, where company-level bargaining prevails,¹⁶⁰ a declaration of general applicability may be made at the request of one of the parties, whereby the existence of a public interest in said declaration – the central requirement – is determined by a tripartite body.¹⁶¹ Also, in the Netherlands, the declaration of general applicability does not require that the application is made by all parties, although in practice that is usually the case.¹⁶² In Greece, a declaration as generally binding can be triggered by any competent trade union, even if it is not the most representative and did not participate in the conclusion of the collective agreement.¹⁶³ In France, all representative unions and employers' organizations must have negotiated the agreement, but not all of them need to have signed it for its possible extension by the Minister of Labour, although at least one of each must have done so.¹⁶⁴ In Luxembourg, collective agreements that have been extended through a declaration of general obligation by the competent Ministry apply to all companies in a given sector, industry, occupation or type of activity. Both trade unions and employers' associations can request the extension.¹⁶⁵

As regards substance, it should be noted that national systems differ according to the power of the authority to make substantial changes to the rules of the collective agreement that is to be declared generally binding. In Austria, for example, it is not possible to amend the contents of a collective agreement that has been declared universally binding.¹⁶⁶ In addition, the period of validity of the generally binding collective agreement is limited to the duration of the underlying agreement.¹⁶⁷ Note, however, that the declaration of general applicability may be limited to parts of the collective agreement.¹⁶⁸ In Croatia, the law explicitly states that the declaration of general applicability ends with the termination of the underlying collective agreement.¹⁶⁹ The same applies in the Netherlands. In addition, there is a statutory maximum duration of two years.¹⁷⁰ Moreover, some collective bargaining provisions are already excluded from a declaration of general applicability by virtue of law.¹⁷¹ It is also worth noting in the Dutch legal

situation that the competent minister can exempt specific companies from the generally binding declaration, a possibility previously used to a considerable extent (and, in the opinion of many, also abused).¹⁷² The Netherlands is also interesting from a practical point of view because collective agreements are declared generally binding almost automatically and the majority of employers seems to have a positive attitude towards this.¹⁷³

In France, the law provides that, for the possibility of enlargement or extension to exist, an industry-wide collective agreement must contain a given substantial minimum of provisions. The law does not establish the exact content of these provisions but only provides that they must relate to particular subjects, which are increasingly numerous and cover collective relations rather than individual relations.¹⁷⁴ The competent Minister may further decide to exclude some provisions of the collective agreement from extension, either because they are unlawful and against public order or because they do not suit the branch of the economy to which they would apply if the agreement was extended.¹⁷⁵ Moreover, instances of enlargement may occur. For example, the competent Minister may proceed to the enlargement of an agreement if in a given area, for a given branch of activity, either there are no unions able to conclude an agreement, or if although they exist, they are persistently unable to reach one. The Minister may also enlarge a collective agreement already extended in the same branch of activity to a different territorial area in which economic circumstances are similar. Moreover, the Minister may enlarge to an occupational sector a collective agreement already extended into another occupational sector if the sector concerned is similar.¹⁷⁶

6.2.4 Extension mechanisms: pros and cons

The question that has to be answered in all this is, do these mechanisms help to strengthen collective bargaining autonomy or do they perhaps do the opposite? This issue is discussed using the example of German law. Germany is particularly interesting in this respect as an amendment was adopted in 2014 as part of a legislative package that, according to the lawmaker, aimed at strengthening collective bargaining.

Under German law, members of the parties to a collective agreement and the employer who is himself or herself a party thereto are bound by the agreement. The latter refers to an employer who personally concludes an agreement. These agreements are relatively rare, however, as the bulk of collective agreements are concluded in Germany by associations and at sectoral level. As regards these association-level collective agreements, section 3(1) of the Act on Collective Agreements states that employers and employees are bound by them only if they belong to the employers' association or trade union that concluded the relevant agreement.

Section 5 of the Act on Collective Agreements contains the basic provision dealing with declaring collective agreements generally binding. According to this provision, for decades the rule applied that collective agreements could be declared generally binding only if, first, the employers bound by the agreement employed not less than 50 per cent of the employees coming within its area of application and if, second, the declaration that the agreement is generally binding appeared to be in the public interest. This changed with the enactment of the Act to Strengthen Collective Bargaining in 2014. This Act not only introduced a nationwide statutory minimum wage, but also made it easier to declare a collective agreement generally binding. In its official justification for the new law, the government stated:

The partners to collective bargaining are not in a position anymore to ensure that reasonable wages are paid across the board. In the area of simple activities, in particular, fragmentation of labour relations – such as the dissolution of traditional industry boundaries – and the increasing international mobility of workers – has damaged the assertiveness of collective representatives. In branches that are characterized by a low degree of trade union membership, this has led to collective agreements fixing wages that are not sufficient for a single adult working full-time to sustain his economic existence without state help.¹⁷⁷

In order to remedy this, the law now states that the Ministry can declare a collective agreement generally binding only on condition that this is in the ‘public interest’. This interest is deemed to exist if either the collective agreement concerned has ‘major significance for the content of working conditions within its area of application’, or if ensuring the effectiveness of collective norm-setting against the consequences of an ‘undesirable economic development’ requires a declaration of a collective agreement as generally binding.¹⁷⁸

There is controversy in Germany as to whether the new law on declarations of collective agreements as generally binding really strengthens the autonomy of the social partners. While some – in accordance with the legislator – affirm it, others firmly deny it, and some even speak of the reform as a ‘law to weaken collective bargaining’.¹⁷⁹ This controversial issue has significance far beyond Germany, as we have to ask in general what effects it has on social partner autonomy if the state creates the conditions for a simplified declaration of general applicability of collective agreements. The examination of this issue should start with the declaration as generally binding having the direct effect of broadening the legal effects of the collective agreement on which it is based. Since this occurs only as a consequence of state intervention, we construe this as a strengthening of the collective agreement by the state. As the generally binding declaration of a collective agreement does not extend the autonomy of the social partners (as regards subject matter, personnel or content), it is not possible to refer to a strengthening of social partner autonomy in this respect.

If making it easier for declarations to be declared generally binding has the effect of strengthening social partner autonomy, it must therefore be an indirect effect. This type of effect could be seen in particular in that the declaration of general applicability may influence the willingness of employers and employees to participate in autonomous norm-setting. The reason for the decline in the autonomy of the social partners in Germany (and in many other countries) lies in the degree of organization on the trade union side, but also on the employer side has declined noticeably in recent decades. However, there is no distinct picture. For example, it can be argued that the declaration of a collective agreement as generally binding tends to have a negative effect on employees’ willingness to join a union. We might ask, in particular, why employees should join (and pay union dues) when they are already protected by the state. Conversely, it can be argued that, on the employers’ side the willingness to join the relevant association increases because employers become subject to a collective agreement without any action on their part, but are only given some (potential) influence over its content if they join the association that concluded the agreement.¹⁸⁰ However, the effects of facilitating the declaration of an agreement as generally binding can also be discussed controversially at a fundamental level. For some, the autonomy of the social partners is strengthened because the state orientates itself towards existing collective agreements. Others see

a weakening of social partner autonomy because the state seeks to influence a private autonomous decision to join an employers' association or union by declaring a collective agreement generally applicable. The underlying view is that this inevitably implies a weakening of social partner autonomy since they depend on the legitimising effect of a (truly) voluntary membership.¹⁸¹

While all this is highly controversial and/or speculative, at least the extension of a collective agreement protects employers who are already bound by the agreement from having to compete with companies that are not bound by it. Whether this protection of employers against undercutting competition is the purpose of the generally binding declaration (or a mere side-effect) can be left open.¹⁸² It is inevitably a consequence of such a declaration (even if its only purpose may be to protect employees who have not previously benefited from the agreement). Against this background, it will hardly be possible to deny that the declaration of general applicability has a stabilizing effect on the collective agreement system to the extent that it deprives employers bound by an agreement of an incentive to leave the employers' association. It cannot therefore be said that facilitating the declaration of general applicability strengthens social partner autonomy. It can be asserted, however, that it supports their autonomy (at least in the medium term).¹⁸³

The following consideration also argues in favour of permitting the generally binding declaration of collective agreements under simplified conditions. If collective agreements lose their shaping force owing to a decline of membership in trade unions and employers' associations, then the state can have the task of ensuring sufficient protection for employees, which can no longer be achieved by collective agreement. In this situation, the state may make use of labour legislation. However, the means of declaring an existing collective agreement generally binding can also be considered. This might even be preferable. Not only does the state remain closer to the ideas of the social partners, but the rules contained in a collective agreement may also be better adapted to the situation in a particular sector or industry, as would be the case with general state legislation. Alternatively, if an increasing number of collective agreements are declared generally binding, a parallel and potentially competing regulatory system could emerge that could eventually restrict the social partners' own regulatory leeway. That is, the declaration of an agreement as generally binding deprives other collective parties of regulatory leeway at least in so far as some minimum working conditions are then already in place. In this respect, there is sporadic discussion in Germany that state intervention could pose a 'toxic danger' to the autonomy of the social partners.¹⁸⁴

6.3 Tripartite Agreements and Institutions

6.3.1 International law

The ILO is a tripartite organization. Nonetheless, it takes a critical stance as far as the involvement of state institutions in collective bargaining is concerned. Although it is acknowledged that tripartism, which includes the public authorities, may be appropriate for settling issues that are broader in scope, such as the formulation of legislation or economic and social policy, it is also acknowledged that Convention No. 98 'tends essentially to promote the bipartite negotiation of terms and conditions of employment,

namely between employers and employers' organizations, on the one hand, and workers' organizations, on the other'. In the view of the CEACR, the

presence of the government may also be justified if the general collective agreement is limited to fixing the rate of the minimum wage, although the negotiation of other terms and conditions of employment must be undertaken in a bipartite context and the parties must enjoy full autonomy in this respect in order to ensure that the content of the agreements so concluded is not dependent on the policy choices of successive governments.¹⁸⁵

The relationship between collective bargaining, on the one hand, and the statutory minimum wage, on the other, is also interesting in this respect. Article 2(2) of the Minimum Wage Fixing Convention, 1970 (No. 131) explicitly provides that, subject to compliance with the binding nature of minimum wages, 'the freedom of collective bargaining shall be fully respected'. Moreover, Paragraph 6 lit. (e) of the Minimum Wage Fixing Recommendation, 1970 (No. 135) explicitly indicates that minimum wages may be fixed by giving the force of law to provisions of collective agreements.¹⁸⁶ Finally, it is explicitly stated in the Preamble of the Recommendation that 'minimum wage fixing should in no way operate to the prejudice of the exercise and growth of free collective bargaining as a means of fixing wages higher than the minimum'.

6.3.2 EU law

In the EU, there is pronounced tripartism. According to Article 154(2) TFEU, 'before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action'. Even more importantly, Article 155 TFEU involves the social partners in a procedure which eventually results in national or supranational law.¹⁸⁷

Note that the General Court recently interpreted Article 155 TFEU in a restrictive manner on the basis of, among other things, a 'teleological interpretation'.¹⁸⁸ In this regard, the Court stated that:

The social partners' autonomy, recognised in Article 152 TFEU, means that during the stage of negotiating and concluding an agreement, which exclusively involves the social partners ..., the latter may engage in dialogue and act freely without receiving any order or instruction from whomsoever and, in particular, not from the member states or the institutions. It follows that the institutions, and in particular the Commission, must refrain from any conduct aimed at directly influencing the course of the negotiations or imposing the principle or content of an agreement on the social partners. On the other hand, once the social partners have freely negotiated and concluded an agreement and the signatory parties have jointly requested the implementation of that agreement at EU level, the Commission once again has a right to act and resumes control of the procedure.¹⁸⁹ ... it must be recalled that Article 155 TFEU merely involves the social partners in the process of the adoption of certain non-legislative acts without according them any decision-making power. The social partners are authorised only to conclude an agreement then request the Commission to submit to the Council a proposal for the implementation of that agreement at EU level. By contrast, the social partners are not themselves accorded the power of adopting acts that produce binding legal effects as regards third parties, or even of directly submitting a proposal for a decision implementing an agreement to the Council. Consequently, the objective of promoting the role of the social partners and the dialogue between them, respecting their autonomy, does not mean that the institutions, namely the Commission and then the Council, are bound to give effect to a joint request presented by the signatory parties to an agreement seeking the implementation of that agreement at EU level.¹⁹⁰

6.3.3 Member states

Tripartite arrangements and/or institutions exist in many member states. For instance, in Belgium, the Council of the National Labour Council, which is composed of 26 members equally divided between the employers' associations and the trade unions, gives advice to the legislature as well as to the executive. In Croatia, the Economic and Social Council, a tripartite body, plays an important role by i. a. providing opinions on draft legislation in the area of labour and social security and encouraging alternative means of dispute resolution in collective labour disputes.¹⁹¹ The Council provides opinions to the minister responsible for labour regarding any issues in the conclusion and application of collective agreements, as well as assessments of the possible impact of the extension of a collective agreement.¹⁹² Tripartite institutions also exist in the Czech Republic (Council for Economic and Social Agreement),¹⁹³ Denmark (National Labour Council),¹⁹⁴ Finland (Labour Council),¹⁹⁵ France (National Collective Bargaining Commission),¹⁹⁶ Greece (Supreme Council of Labour),¹⁹⁷ the Netherlands (Foundation of Labour and Social and Economic Council),¹⁹⁸ Poland (Social Dialogue Council),¹⁹⁹ Portugal (Economic and Social Council),²⁰⁰ Romania (Tripartite National Council for Social Dialogue),²⁰¹ Slovakia (Economic and Social Council of the Slovak Republic)²⁰² and Slovenia (Economic and Social Council of the Republic Slovenia).²⁰³ In Poland, general agreements are a special type of collective accord concluded by the most representative social partners mainly on socio-economic issues of key importance for the country. These accords are political agreements, but have indirect legal effects. The accords are usually concluded with the participation of the government.²⁰⁴ In Italy, the Constitutional reform of 2016 tried to abolish the National Council for Economics and Labour, but it was rejected by a popular referendum. In Hungary, the National Economic and Social Council is no longer a tripartite body after the most recent reform.²⁰⁵

In Bulgaria, too, trade unions and employer organizations play an active role in establishing labour policy through tripartite cooperation (tripartism) and social dialogue.²⁰⁶ This is explicitly acknowledged in Article 3 of the Labour Code.²⁰⁷ Tripartite cooperation concerns regulation of employment relationships (conclusion of employment contracts, remuneration, working time, rest and leave, healthy and safe working conditions, the workers' and employees' professional qualification and so on).²⁰⁸ Four types of bodies exist: the National Council for Tripartite Cooperation; sectoral and branch councils for tripartite cooperation (which discuss the specific issues of the employment and social security relationships as well as living standards issues that concern working conditions, and so on); district councils for tripartite cooperation; and municipal councils for tripartite cooperation.²⁰⁹ In Cyprus, also, tripartite institutions play an important role. This applies, in particular, to the national level, although in practice the sectoral level also seems to be affected.²¹⁰ Cooperation between the government and the social partners is so strong that there is sometimes mention of a 'Cypriot corporatist model'.²¹¹

In Malta, the Employment Relations Board can make recommendations to the minister regarding any national minimum conditions of employment, for eventual inclusion in a national standard order. Moreover, the board can make recommendations to the minister regarding any sectoral conditions of employment, for eventual inclusion in a sectoral regulation order. Finally, it can advise the minister on any matter relating to the conditions of employment or on any matter referred to the board by the minister.²¹² To some

extent, the board is also used as a substitute for the (barely existing) collective bargaining at sectoral level. In this respect, it has been noted that:

in contrast with most other European countries, where sectoral bargaining takes place on a large scale, in Malta the Board effectively provides a rare forum which under some situations resembles a form of sectoral bargaining, although it has proven itself to be more effective as a tool of tripartite social dialogue than a sectoral bargaining platform.²¹³

In Lithuania, under an agreement signed by the government, trade unions and employers' organizations, the latter two pledge not to initiate collective disputes or other actions on issues on which the government executes its obligations as specified in the tripartite agreements. The parties also agreed, by 1 December each year, to enter into an annual tripartite agreement on minimum wage (salary), a non-taxable minimum and other urgent economic, social and labour issues, to develop the tripartite partnership structure and to establish committees at the Tripartite Council.²¹⁴

In Ireland, tripartite arrangements historically played an important role. As one observer wrote, the 'trade unions achieved significant influence through their participation in these corporatist tripartite agreements with government and employers' organizations in which wage agreements are traded for tax, social welfare and employment law concessions'.²¹⁵ However, the importance has diminished, not least because agreements reached within this framework might not bind individual employees and employers owing to the doctrine of privity of contract.²¹⁶

In some member states, tripartite arrangements or institutions also play a role in collective bargaining. An example is again Belgium, where the National Labour Council has the competence to conclude collective labour agreements, and does so frequently. Collective agreements must be supported by organizations that represent at least 90 per cent of the employers and at least 90 per cent of the employees. Collective agreements concluded in the National Labour Council may be either agreements covering the entire country and different branches of activity, or agreements covering a particular branch, where, for that branch, no joint committee exists or no longer functions.²¹⁷

6.3.4 Tripartite arrangements and institutions: pros and cons

In several EU member states, (bilateral) agreements between the social partners exist alongside (tripartite) agreements in which the state is also involved. In some countries, tripartite agreements are firmly anchored institutionally.

There can be a great deal to be recommended for these tripartite arrangements. For example, it may be that in some areas the social partners lack the power independently to fix working conditions, so that tripartite agreements may be preferred to a situation in which there are no regulations whatsoever on working conditions involving the social partners. If social partner autonomy is weak, tripartite arrangements can have a compensatory, perhaps even a substituting effect.²¹⁸ It appears that the social partners in some countries are increasingly relying on state legislation, although the collective agreements they conclude also have legal effect.²¹⁹

However, this should not hide that tripartite agreements involving the state cannot be considered part of the autonomy of the social partners. This applies initially because the arrangements made by those involved are not based solely on the will of the social partners. This also applies as, in negotiations involving a third party, there is always a danger

that the will of the other parties will be distorted. It is evident that this danger is particularly great when the third party is the state. Finally, remember that tripartite agreements may have effects on genuine social partner agreements by, for example, leading to indirect state influence on collective bargaining policy, and possibly even to a *de facto* restriction of the social partners' scope for action. Against this background, it is possible for tripartite agreements to have negative effects on (genuine) collective bargaining.

7. CONCLUSIONS

The autonomy of the social partners is guaranteed at the international level, the level of EU law and the level of national law. The relevant guarantees differ considerably. Accordingly, the power to restrict the autonomy of the social partners by law varies. However, states enjoy a wide margin of discretion when shaping the boundaries of autonomy.

Social partner autonomy is true autonomy in that it refers to a state of self-determination, independence (sovereignty) and self-administration. There are, however, significant differences between the autonomy of the social partners, on the one hand, and private autonomy (and, especially, freedom of contract) on the other. In particular, freedom not to conclude a contract with another is restricted within the framework of the autonomy of the social partners. Moreover, subjecting employers and employees to collective agreements concluded by the social partners always contains an element of heteronomy. The best way to describe the situation is that the collective agreement is somewhere between self-determination (autonomy) and external determination (heteronomy).

As far as the relationship between social partner autonomy and the state is concerned, views differ: for example, that the state recognizes this autonomy, that it has conferred autonomy on the social partners, or that autonomy is ultimately based on the free choice of the employers and employees involved. The role of the state is to provide an appropriate legal framework within which the social partners exercise their autonomy. Freedom of association can only be exercised effectively if the state provides a minimum set of rules. These measures do not restrict the autonomy of the social partners; on the contrary, they bring it to fruition in the first place.

Irrespective of that, state legislation and social partner autonomy are related on the basis of competence and freedom: if the state legislator regulates working conditions, it does so in the exercise of a legislative competence, whereas the social partners exercise a fundamental right when fixing working conditions.

In abstract terms, the autonomy of the social partners can be defined using topical, personal and substantive criteria. The question then has to be asked: what subjects of regulation are open to the social partners, for which groups of persons can they regulate and what options do they have? As far as the scope of autonomy is concerned, whether and to what extent the state can allocate or withdraw specific subjects to or from the social partners depends on the respective constitutional guarantee of freedom of association. In some member states, the principle of proportionality must be observed on this basis, which could also provide orientation in states in which it does not apply. The principle of proportionality is based on the idea that state measures (including legislation) must not be without boundaries, that they must instead be justified by a clearly defined purpose,

and that they must also be measured against this purpose in their scope and extent. As regards the regulatory options open to the social partners, remember, in particular, that the state may allow the social partners to derogate from statutory provisions, but this will sometimes be subject to compliance with specific requirements. That is, these possibilities for derogation are often limited, for example by the lawmaker defining a corridor within which the social partners can act.

With regard to the relationship between the autonomy of the social partners and the state, three mechanisms of social dialogue merit particular interest: derogation powers, extension mechanisms and tripartite arrangements. The power to deviate from statutory provisions by means of collective agreements can be an expression of careful handling of the autonomy of the social partners, but can also have negative effects on the freedom of collective bargaining. One of the drawbacks is that in these circumstances, statutory law always provides one of the social partners with fall-back security: if no agreement is reached, then the regulation applies which is laid down by law. Accordingly, collective bargaining becomes arduous for the social partner who wants to change the statutory status quo. The use of these provisions for the sole purpose of strengthening willingness to join associations appears problematic if there are no reasons for it. Declarations of collective agreements as generally binding, initially only strengthen the agreement, not the autonomy of the social partners. These declarations can influence the willingness of employers and employees to participate in the autonomous setting of standards. However, the corresponding effects for employers and employees are probably different. Moreover, much will depend on whether only short- and medium-term effects are taken into account or whether possible long-term effects are also considered. Also, the declaration of being generally binding by the state may be preferable to state legislation. There is, however, a risk of eventually arriving at a parallel and potentially competing system to the ruling-making system based on social partner autonomy. Tripartite agreements are positive in many respects. If social partnership does not work and the social partners do not reach collective agreements, it could be considered that tripartite agreements are still better than no agreements at all. However, tripartite agreements do not belong to the real sphere of social partner autonomy and can, even, have negative effects. Tripartite agreements are not based on the will of the social partners alone. Moreover, there is always a risk that the state will influence the will of one of the two social partners (or both). Finally, there is the danger that these agreements will force the social partners' collective bargaining policy in a particular direction or even restrict their room for manoeuvre.

NOTES

1. The question implies that what is at issue here is the content and limits of the social partners' power to determine working conditions. However, the social partners also cooperate in many other ways (which do not pose legal problems) and this should not go unmentioned.
2. Cf. also Chapter 2 in this volume.
3. This is the case, in particular, in Austria. See Melzer-Azondanloo, in F. Hendrickx (ed.) (various dates), *International Encyclopaedia for Labour Law and Industrial Relations*, n. 625.
4. See Article 120a(2) of Austria's Constitution.
5. See also Liukunnen, in U. Liukunnen (ed.), (2019), *Collective Bargaining in Labour Law Regimes – A Global Perspective*, p. 1, (14).

6. See Melzer-Azondanloo, in Hendrickx (various dates), n. 685.
7. See Gomes and Carvalho, in Hendrickx (various dates), n. 313.
8. Cf. Bagić, in T. Müller, K. Vandaele and J. Waddington (eds) (2019), *Collective Bargaining in Europe – Towards an Endgame*, vol. 1, p. 93 (98).
9. Cf. Blažienė, in Müller et al. (2019), vol. 2, p. 381 (387).
10. Cf. Chapter 2, Figures 2A.1 and 2A.2 in this volume. The relative strength of trade unions in some countries might be influenced in part by legal factors, such as that they often have other responsibilities. See, for instance, Jonker-Hoffrén, in Müller et al. (2019), vol. 1, p. 197 (206), noting that Finnish trade unions manage unemployment funds. As regards Sweden, see Chapter 2, section 4.1 in this volume.
11. Cf. Chapter 2, Figures 2A.3 and 2A.4 in this volume.
12. Cf., for instance, Jacobs, in Hendrickx (various dates), n. 266, noting that ‘the phenomenon of falling membership of employers’ organizations in Germany is not matched in the Netherlands’.
13. Cf., for instance, Kirov, in Müller et al. (2019), vol. 1, p. 77 (81).
14. See Kallaste in Müller et al. (2019), vol. 1, p. 171 (183) regarding Estonia.
15. Cf., for instance, Hajdú, in Hendrickx (various dates), n. 1147, noting that this is ‘despite considerable efforts by both unions and previous governments to encourage industry level bargaining’. Cf. also Zammit et al., in Hendrickx (various dates), n. 1038 ff., regarding Malta.
16. Cf. Pichrt and Štefko, in Hendrickx (various dates), n. 687.
17. See also Borbély and Neumann, in Müller et al. (2019), vol. 2, p. 295 (300), as regards the situation in Hungary: ‘It is a general problem that a large proportion of collective agreements simply copy and paste regulations from the Labour Code’.
18. As regards the former, see for instance, Glassner and Hofmann, in Müller et al. (2019), vol. 1, p. 33 (41).
19. Again, we must not forget that there were often significant precursors. As regards, for instance, Croatia, see Grgurev, in Hendrickx (various dates), n. 172.
20. Provisions of regional international law is not be taken into account here.
21. In order to illustrate the content of international law, this chapter also refers to various statements by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA), which form important elements of the ILO monitoring mechanism. With regard to the first-mentioned committee, in order to avoid misunderstandings, it is worth recalling the mandate of the committee, which the committee itself describes as follows:

The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee’s work based on its impartiality, experience and expertise. The Committee’s technical role and moral authority is well recognized, particularly as it has been engaged in its supervisory task for more than 90 years, by virtue of its composition, independence and its working methods built on continuing dialogue with governments taking into account information provided by employers’ and workers’ organizations. This has been reflected in the incorporation of the Committee’s opinions and recommendations in national legislation, international instruments and court decisions. (CEACR, 2019, ‘Report of the Committee of Experts on the Application of Conventions and Recommendations’, ILO, Geneva, para. 32).

With regard to the latter committee, it should also be noted that its decisions are taken on a case-by-case basis, which is why it is always advisable, ‘to read for details of the case, including the context of its conclusions and recommendations’. See also CFA (2018), *Compilation of Decisions of the Committee on Freedom of Association*, 6th edn, Geneva: ILO, ‘Introduction’, para. 9.

22. See ‘General Survey of the Committee of Experts on the Application of Conventions and Recommendations on the Fundamental Conventions’, 2012, ILO, Geneva, para. 55.
23. See *ibid.*, para. 200.
24. See *ibid.*
25. See Explanation to Article 28.
26. In this respect, the Court of Justice of the European Union (CJEU) has stressed that collective bargaining autonomy can only be exercised in accordance with EU law; see CJEU of 3 September 2011 – C-447/09 (Prigge).
27. As regards the predecessor norm, the following was stated:

the meaning and purpose of Article 137(5) EC is primarily to protect the social partners’ autonomy in collective bargaining from being restricted, as evidenced not least by the close association between

pay and the other matters excluded from the Community's powers: the right of association, the right to strike and the right to impose lock-outs, which are particularly important in relation to fixing pay and, accordingly, are referred to 'in the same breath' as pay in Article 137(5) EC. (Opinion of Advocate General Kokott delivered on 9 January 2008 Case C 268/06 Impact, para. 172)

See also CJEU of 10 June 2010 in Joined Cases C 395/08 and C 396/08, *INPS v. Tiziana Bruno*, Massimo Pettini (C-395/08), and *INPS v. Daniela Lotti*, Clara Matteucci (C 396/08), para. 36: 'fixing the level of pay falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States'.

28. See Barnard, 'Article 28 the right of collective bargaining and action', in S. Peers, T. Herve, J. Kenner and A. Ward (eds) (2014), *The EU Charter of Fundamental Rights*, p. 794. See also Dorssemont and Rocca, 'Article 28', in F. Dorssemont, K. Lörcher, S. Clauwaert, and M. Schmitt (eds) (2019), *The Charter of Fundamental Rights of the European Union and the Employment Relation*, p. 465 (502). Cf. also C. Schubert (2013), 'Collective agreements within the limits of Europe: collective autonomy as part of the European economic system', *European Labour Law Journal*, 4 (3), p. 146.
29. See Köchle, in M. Holoubek and G. Lienbacher (eds) (2014), *Charta der Grundrechte der Europäischen Union*, Art. 28 GRC, n. 15.
30. Article 11 (2) ECHR:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

31. Cf. Schubert, in M. Franzen, I. Gallner and H. Oetker (eds) (2018), *Kommentar zum europäischen Arbeitsrecht*, 2nd edn, Art. 28 GRC, n. 57.
32. Cf. <https://fra.europa.eu/en/chartopedia/article/28-right-collective-bargaining-and-action> (accessed 27 July 2021).
33. Article 27(1) of the Constitution.
34. Article 29 of the Constitution.
35. Section 13 of the Constitution.
36. Sections 6–8 of the Preamble to the Constitution. The Preamble has 'constitutional value'. See Mazuyer, in Liukunnen (2019), p. 251 (254).
37. Article 9(3) of the Constitution.
38. Article 22(2) of the Constitution: 'General working conditions shall be determined by law, supplemented by collective labour agreements concluded through free negotiations and, in case of the failure of such, by rules determined by arbitration'. Cf. in this regard Papadimitriou, in Liukunnen (2019), p. 311 (312): 'Même si la Constitution reconnaît ainsi les pouvoirs réglementaires de l'Etat dans le domaine des relations de travail, étant en droit d'établir des niveaux de protection minimale, l'autonomie collective, reconnue de façon solennelle, met un terme à son omnipotence. Ces relations doivent pouvoir être réglées librement par les représentants des intérêts collectifs, sans ingérence du pouvoir d'Etat. L'Etat devra ainsi limiter ses pouvoirs de réglementation devant le développement des compétences respectives des représentants collectifs' ('Even if the Constitution thus recognizes the regulatory powers of the State in the field of labour relations, being entitled to establish minimum levels of protection, collective autonomy, solemnly recognized, puts an end to its omnipotence. These relations must be freely regulated by the representatives of collective interests, without interference from the state power. The state must therefore limit its regulatory powers in view of the development of the respective competences of the collective representatives').
39. See, for instance, Belgium (Article 23 of the Constitution), Cyprus (Article 26 of the Constitution), Italy (Article 39 of the Constitution), Spain (Article 37(1) of the Constitution) and Poland (Article 59(2) of the Constitution). As regards Spain, it was the Constitutional Court which elevated the right to bargain collectively to a 'quasi-fundamental right'. See Chacartegui, in Liukunnen (2019), p. 529 (530) with reference to the jurisprudence of the Court. As regards Poland, the provision can be read together with Article 20 of the Constitution which forms the basis for the development of all forms of social dialogue, including collective bargaining. See Pisarczyk and Skupień, in Liukunnen (2019), p. 417 (418).
40. This applies, for example, to the legal situation in Slovenia. See Peček, in Liukunnen (2019), p. 501 (506) with reference to the jurisprudence of the Constitutional Court.
41. Cf. Maccarrone et al. in Müller et al. (2019), vol. 2. p. 315 (321).
42. See, for instance, Article 50 of the Constitution of the Republic of Bulgaria, Article 29 of the Constitution of the Republic of Estonia or Article 61 of the Constitution of the Republic of Croatia.

43. See Article 11(1) of the Convention: 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.'
44. Cf. Federal Constitutional Court of 11 July 2017 – BvR 1571/15, 1 BvR 1588/15, 1 BvR 2883/15, 1 BvR 1043/16, 1 BvR 1477/16, note 143: 'The right to form associations to safeguard and improve working and economic conditions is granted unconditionally. It is not a special case of the general right to freedom of association and thus not subject to the limitations of Art. 9(2) GG. However, this does not preclude the legislature from setting any rules at all within the scope of protection of this fundamental right. Legal provisions that cause an impairment of Art. 9(3) GG can be justified if they protect fundamental rights of third parties or other rights of constitutional rank and the common good'.
45. <https://de.wikipedia.org/wiki/Autonomie> (accessed 27 July 2021).
46. M. Weber (1921), *Wirtschaft und Gesellschaft*, pt 1, ch. 1, s. 12.
47. Di Fabio, in T. Maunz and G. Dürig (eds) (2019), *Grundgesetz-Kommentar*, 88th edn, Art. 2 GG, n. 101.
48. Cf. also R. Bradley Kar (2016), 'Contract as empowerment', *Chicago Law Review*, **82** (March), p. 759.
49. Cf. also D.P. Weber (2013), 'Restricting the freedom of contract – a fundamental prohibition', *Yale Human Rights and Development Journal*, **16**, p. 102 ff.: '[T]he general right of one individual to obligate himself and to receive another's obligation in return is a fundamental, though not unlimited right. History has shown that the ability to contract, to order one's affairs and to obtain contractually guaranteed payments in exchange for services or goods is fundamental to the ability of any individual to succeed in a market economy'.
50. See also section B of the Industrial Relations Code of Cyprus where it is explicitly stated that the partners should bear in mind the 'public interest' in their negotiations.
51. See, for instance, Federal Constitutional Court of 6 May 1964 – 1 BvR 79/62.
52. See section 123(1) of the German Civil Code: 'A person who has been induced to make a declaration of intent by deceit or unlawfully by duress may avoid his declaration'.
53. As regards German law, see, for instance, Jacobs, in H. Wiedemann (ed.) (2019), *Tarifvertragsgesetz*, 8th edn, Introduction, nn. 17 ff. (with further references).
54. Cf. also Thüsing, in Wiedemann (2019), s. 1 TVG Inhalt und Form des Tarifvertrags, nn. 31 ff. (with further references).
55. Cf. with regard to Austria, Melzer-Azondanloo, in Hendrickx (various dates), n. 658:

Collective agreements are not intended to regulate only the relationship of its parties, but above all, the elements of the individual employment relationships covered by it. As this concerns the legal relationships of persons who are not party to the collective agreements themselves (creation of 'objective law'), the conclusion of collective agreements needs specific legal empowerment.

56. See, for instance, Federal Labour Court of 15 April 2015 – 4 AZR 796/13.
57. See, for instance, Federal Constitutional Court of 27 February 1973 – 2 BvL 27/69. More recently, however, the Court referred to a 'collectivized private autonomy'; see Federal Constitutional Court of 11 July 2017 – 1 BvR 1571/15, 1 BvR 1588/15, 1 BvR 2883/15, 1 BvR 1043/16, 1 BvR 1477/16, para. 147.
58. General Survey (op cit. in note 22), para. 55.
59. Ibid.
60. Ibid., para. 167.
61. See General Survey (op cit. in note 22), p. 169 ff.:

Various methods of application can therefore be envisaged and, while certain States give preference to legislative measures, others are content with satisfactory application in practice, or through case law. Most of the provisions relating to the right to organize and to collective bargaining are contained in labour legislation and in instruments regulating industrial relations at the national level. However, while the fundamental principles underlying these Conventions are set out in many constitutions, other means of application are determined directly by collective agreements concluded between employers' and workers' organizations at the different levels. In general, the Committee encourages the use of methods of application for Conventions Nos 87 and 98 which have their origins in tripartism, social dialogue and full and frank consultations between the social partners. This is particularly important in relation to legislation setting out the rights protected by these instruments with a view to ensuring that the parties concerned are committed to the principles and, accordingly, that the measures adopted are sustainable over time.

62. Ibid., para. 242.
63. Cf. in this regard, for instance, also Observation (CEACR) – adopted 2016, published 106th ILC session (2017) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – China – Hong Kong Special Administrative Region.

64. See Köchle, in Holoubek and Lienbacher (2014), Art. 28 GRC, n. 15. As she further notes, Article 28 'enshrines an essential aspect of the separation of state and society' and at the same time 'aims to ensure the existence of fair 'bargaining powers' in this process of self-regulation of employment relationships' (ibid., n. 16).
65. See ibid., Art. 28 GRC, n. 38.
66. That is, according to the German Constitutional Court: 'Private autonomy is necessarily limited and requires legal form. Private law systems therefore consist of a differentiated system of coordinated regulations and means of organisation, which must be integrated into the constitutional order', see Federal Constitutional Court of 9 September 1993 – 1 BvR 567/89 a. o. (II. 2a).
67. Federal Constitutional Court of 26 June 1991 – 1 BvR 779/85.
68. Cf. in this regard the interesting discussion of the legal situation in Macao by Wei and Rafael, in Liukunnen (2019), p. 399 (403) where there is a lack of this type of legal framework.
69. The legal situation in Italy is remarkable, where Art. 39(2) of the Constitution explicitly refers to 'provisions of the law', which, however, have never been enacted. See Magnani, in Liukunnen (2019), p. 357 (358). See, in this regard, Treu, in Hendrickx (various dates), n. 5478:

The lack of any legal provision for collective bargaining has become a major characteristic of Italian industrial relations, as the pressure to implement Article 39 of the Constitution has declined. While originally it stemmed rather from a number of inertia factors, or from mainly tactical motives, it has come with the passage of time to be recognised by the trade unions, and to a large extent by management and the public authorities, as the most suitable means of promoting effective bargaining and improved relations between social partners.

70. This even applies in countries such as Italy. Though there is no systematic legal regime in this country, there is still the basic decision that collective agreements are part of ordinary contract law. Moreover, the Constitution affirms the right of trade unions to enter into collective agreements. Existing gaps were filled on the basis of autonomous regulation by the biggest federations of employers and employees; see Magnani, Italy, in Liukunnen (2019), p. 357 (357). As regards the younger member states, some observers have recognized the key role of the state. See, with regard to Latvia, Täre, in Hendrickx (various dates), n. 184: 'In Latvia after regaining independence in the 1990, the state has played a very important role in setting the framework for industrial relations and social dialogue.'
71. Since the aim of this study is to fill out the concept of 'autonomy' in material terms, all questions relating to the 'procedural autonomy' of the social partners, that is, what procedural rules apply to their negotiations, are not discussed. However, note that the relevant legal requirements appear to be very detailed in some countries; cf., for instance, the description of the law in Slovakia, by Barancová and Olšovská, in Hendrickx (various dates), n. 460 ff., 514.
72. Article 9(3) sentence 1 of the Constitution: 'The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession'.
73. CJEU of 4 December 2014 – *FNV Kunsten Informatie en Media v Staat der Nederlanden* (Case C-413/13). This case concerned a collective agreement for musicians representing members of an orchestra. This collective agreement laid down minimum wages and other working conditions not only for temporary musicians employed under an employment contract, but also for temporary musicians who worked under a service agreement (and thus could not be regarded as employees). The Dutch competition authority took the view that a collective bargaining provision laying down minimum remuneration for self-employed musicians fell within the scope of the European prohibition on cartels (Article 101 TFEU).
74. Cf. in this regard, for instance, Lianos et al. (2019), 'Re-thinking the competition law/labour law interaction: promoting a fairer labour market', *European Labour Law Journal*, **10** (3), p. 291.
75. 386th Report, Case No. 3237, para. 203. See also Compilation of decisions of the Committee on Freedom of Association, 6th ed. 2018, para. 1291 with further references.
76. General Survey (op cit. in note 22), para. 219 (emphasis added).
77. Cf. C. Schubert (2013), 'Collective agreements within the limits of Europe: collective autonomy as part of the European economic system', *European Labour Law Journal*, **4** (3), p. 146.
78. See also Ł. Pisarczyk (2019), 'The crisis of the collective bargaining system in Poland', *International Journal of Comparative Labour Law*, p. 77: 'it is important to eliminate those regulations that are not necessary to safeguard other freedoms or values and that constitute an obstacle to the development of collective bargaining'.
79. Cf. also, with regard to Greece, Papadimitriou, in Liukunnen (2019), p. 311 (313) with further references:

le législateur peut interdire la négociation dans certaines matières ou imposer certaines limites à une telle négociation. Mais une telle interdiction doit correspondre à des circonstances qualifiées de 'gravité

exceptionnelle' comme une crise financière et économique grave. Les tribunaux grecs ont été plusieurs fois appelés à s'exprimer sur la conformité à la Constitution de telles mesures restrictives. Ils se prononcent tant sur la conformité des mesures à la protection de l'intérêt général que sur le respect du principe de proportionnalité. Il faut pourtant reconnaître que les tribunaux grecs se montrent plutôt hésitants quant au contrôle de l'activité législative conduisant à des limitations de l'autonomie collective.

(The legislator may prohibit negotiation in certain matters or impose certain limits on such negotiation. But such a prohibition must correspond to circumstances of 'exceptional gravity' such as a serious financial and economic crisis. The Greek courts have been called upon several times to rule on the conformity of such restrictive measures with the Constitution. They rule both on the conformity of the measures with the protection of the general interest and on the respect of the principle of proportionality. However, it must be acknowledged that the Greek courts are rather hesitant to review legislative activity leading to limitations of collective autonomy.)

80. See G. Lübke-Wolff (2018), 'The principle of proportionality in the case-law of the German Federal Constitutional Court', *Human Rights Law Journal*, **34** (1–6), p. 12; cf. also N. Petersen (2018), *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa*. See also a discussion of the proportionality principle in Canadian law by McEvoy, in Liukunnen (2019), p. 121 (134).
81. See, for instance, Federal Constitutional Court of 24 May 1977 – 2 BvL 11/74.
82. Cf. Löwisch and Rieble, in M. Löwisch and V. Rieble (2017), *Tarifvertragsgesetz*, 4th edn, Grundlagen, n. 209.
83. In this context, it is exclusively a matter of deviation from the law by collective agreements. A completely different issue is the deviation from the collective agreement by other regulations (and the consequent decentralization of collective bargaining); cf. M. Keune (2011), 'Decentralising wage-setting in times of crisis? The regulation of wage-related derogation clauses in seven European countries', *European Labour Law Journal*, **2** (1), p. 86.
84. See, for instance, Rieble, in Löwisch and Rieble (2017), Grundlagen, n. 200: 'In the context of proportionality, it must always be asked whether the legislator should not have to choose legal provisions that can be set aside by collective agreements as a less restrictive means of restricting collective bargaining autonomy'.
85. That a collective agreement has been made generally binding by the state means that it now extends to employment relationships which were not covered by it.
86. Cf. S.J. Schwab (2014), 'The union as broker of employment rights', in C.L. Estlund, and M.L. Wachter (eds), *Research Handbook on the Economics of Labor and Employment Law* p. 248.
87. See, as regards Austria, Melzer-Azondanloo, in Hendrickx (various dates), n. 677:

The reason for introducing 'split effect' was that collective agreement regulations can be adjusted to changing conditions more easily and quickly than statutes, and that the parties to a collective agreement will be better informed on certain problems than is the legislature. On the other hand, the bargaining power of the parties to a collective agreement is more balanced than that of the parties to an individual employment contract – provisions in a collective agreement can be more trusted than those in an employment contract to offer a fair solution for a certain problem.

88. See Blanpain, in Hendrickx (various dates), n. 58: 'Belgian labour law can, in general, be regarded as having an "imperative" nature. This means that parties cannot deviate from the law either by individual or collective agreement, except when the law sets only minimum standards which can be improved upon'. See also Kéfer, in Liukunnen (2019), p. 65 (75).
89. Blanpain, in Hendrickx (various dates), n. 114:

With so much social and labour legislation, there is, of course, less room for collective bargaining, and the process of private bargaining must take into account the existing legal rules. While in fact these are mostly protective minimum standards that can be improved upon by collective bargaining, nonetheless collective bargaining does not have the same coverage as it might if there were fewer legal restrictions.

See also, however, note 956 stating that 'in theory, the social partners in Belgium enjoy a quasi-total autonomy in the fixing of wages and working conditions in the broadest sense of the phrase'.

90. Section 50(1) of the Labour Code.
91. Section 50(5) of the Labour Code. See also Mrachkov, in Hendrickx (various dates), n. 578:

The law does not allow collective labour contracts to include clauses which are less favourable than those of the minimum standards as provided for in the legal provisions. Parties cannot contract below

the level of minimum standards. They may improve on them, i.e. agree to more favourable working conditions. This is the basic social meaning and significance of a collective labour contract for the workers and in the interest of trade unions. This also explains the reticent position which employers sometimes have towards collective bargaining, because for them more favourable working conditions means higher production costs and more costs for the allowance of manpower. Nevertheless, if a collective labour contract contains working conditions less favourable than the provided minimum legal standard, the respective stipulations in the collective labour contract shall be null and void because of the conflict with the imperative legal provisions. Such stipulations have no legal effect; consequently, no rights can be derived from them, nor can they give rise to any obligations. Instead of these stipulations, the minimum legal standards established by the relative imperative legal provisions will be applied.

92. Section 7(1) of the Labour Code.
93. Section 7(2) of the Labour Code. See also Grgurev, in Hendrickx (various dates), nn. 24 and 30.
94. Cf. Dimitriu, in Hendrickx (various dates), n. 95.
95. See Article 66 of the Constitution: 'The state shall create opportunities for employment and work, and shall ensure the protection of both by law'. See also Vodovnik et al., in Hendrickx (various dates), n. 45.
96. See Stanojević and Poje, in Müller et al. (2019), vol. 3. p. 545 (547).
97. Cf. Douka and Koniaris, in Hendrickx (various dates), n. 1229.
98. Cf. Mitrus and Hajn, in Hendrickx (various dates), n. 52:

The detailed character of the statutory regulations naturally limits the scope of negotiations between employers and unions. The role of the state in the domains of labour law and industrial relations is, therefore, vital and diverse. First, the state acts as the legislator establishing labour law regulations. Second, it is a participant in the tripartite dialogue with the social partners. Third, state institutions act as an employer in the public sector. The significant participation of the state in the economy is one of important factors shaping industrial relations in Poland.

There is a similar assessment regarding the law in the Czech Republic. See Pichrt and Štefko, in Hendrickx (various dates), n. 687.

99. Cf. Mitrus and Hajn, in Hendrickx (various dates), n. 88.
100. Cf. Pisarczyk (2019), p. 73.
101. Cf. Emilianides and Ioannou, in Hendrickx (various dates), n. 110.
102. Cf. *ibid.*, n. 610.
103. Cf. *ibid.*, n. 587.
104. Cf. regarding the few exceptions Munkholm and Schjølør, in Liukunnen (2019), p. 225 (235).
105. Cf. Hasselbalch, in Hendrickx (various dates), nn. 55, 70 and 129.
106. Cf. Costello, in Hendrickx (various dates), n. 20 (with reference to *Goulding Chemicals Ltd v. Bolger*, [1977] IR 211).
107. Cf. Suviranta and Paanetoja, in Hendrickx (various dates), n. 93.
108. Cf. Linsenmaier, in R. Müller-Glöße, U. Preis, I. Schmidt, M. Franzen, I. Gallner and T. Kania (eds) (2020), *Erfurter Kommentar zum Arbeitsrecht*, 20th edn, Munich: C.H. Beck, Art. 9 GG n. 89a.
109. Cf. Jacobs, in Hendrickx (various dates), n. 312 noting that 'there is no relevant demarcation between the rules set out in collective agreements and those set out in law' and that 'there is no general dogmatic line to be drawn'.
110. Cf. *ibid.*, n. 34. An example is Article 7:672(2) of the Civil Code which regulates periods of notice in case of dismissal. According to paragraph 5 of this Article, 'the period referred to in paragraph 2 can only be shortened by collective agreement or by arrangement by or on behalf of an authorized administrative body'.
111. See Chacartegui, in Liukunnen (2019), p. 529 (533).
112. See also *ibid.*, p. 529 (542); M.C. Rodríguez-Pinero Royo (2019), 'Collective bargaining in the renewed Spanish labour law: a new tool for economic policy?', *Oñati Socio-Legal Series*, 9 (1), p. 7.
113. See also Liukunnen, in Liukunnen (2019), p. 1 (16).
114. Cf. Rojot et al., in Hendrickx (various dates), n. 69:

In the matter of labour law, as in many other parts of French law, the heteronomous sources have traditionally played the main role. This is a little less true now. In recent decades, many authors and observers have, more or less explicitly, stressed the importance of the autonomous sources and very often yearned for their development. Indeed, the autonomous sources seem to be more appropriate to harmonious social relations. However, reality is more complex. First, heteronomous and autonomous sources do not truly compete but, rather, articulate themselves. Secondly, the heteronomous sources are the most important and this situation is accepted even by the employers.

115. Cf. *ibid.*, n. 757.
116. Cf. *ibid.*, n. 762 ff. (with specific reference to the Fillon Act of 4 May 2004, the Act of 20 August 2008 and the El Khomry Act of 8 August 2016 and, more recently, the Act of 8 August 2016) adding that in the most recent legislation, 'there are contrary examples, in which the collective agreement can be less favourable than the contracts of employment and nevertheless impose itself upon them' (fn. 453). See also note 748 with reference to the judgment of the Constitutional Court of 29 April 2004 where the Court denied that the principle of favourability was anchored in constitutional law. See, finally, Mazuyer, in Liukunnen (2019), p. 251 (257).
117. See: Liukunnen, in Liukunnen (2019), p. 1 (16): 'In Italy, non-derogability *in peius* is considered an essential feature of collective agreements. A collective agreement, as well as an individual employment contract, may improve, but cannot worsen, conditions for workers provided by legislation. This is considered to derive from the nature of labour law, which seeks to protect workers.'
118. Cf. Treu, in Hendrickx (various dates), n. 505.
119. Cf. *ibid.* See also Magnani, in Liukunnen (2019), p. 357 (361, 367).
120. Cf. Gomes and Carvalho, in Hendrickx (various dates), n. 15: adding that

it seems that the collective regulation instruments and particularly the collective agreements became, as a result, the most important source of labour law since they could, as a rule, deviate from the law, unless the legal rules stated otherwise, and they could establish a less favourable or a more favourable treatment for the employees.

121. Cf. Hajdú, in Hendrickx (various dates), n. 246.
122. Cf. *ibid.*, n. 247.
123. See, for instance, Kun, in Liukunnen (2019), p. 333 (336) with further references:

This brand new regulatory concept significantly enlarges the role and influence of employers (employer interest representations) and trade unions on the labour market, while it simultaneously increases their responsibility and reduces the regulative functions of state regulation. According to the legislator, this 'minimalist' regulatory concept may contribute most effectively to creating a mutual interest in the conclusion of collective agreements, to the wider application of collective agreements and to the enhancement of their scope and coverage. Collective autonomy is largely based on the theoretical equilibrium of the parties concluding the collective agreement. In the current context (the extension of the regulatory role of collective bargaining), it would have been logical to put some emphasis on the reinforcement of the position of the bargaining partners, especially that of trade unions. However, the contrary is happening in the new Code, as the rights and operational conditions of trade unions are cut back to a considerable extent.

See also Borbély and Neumann, in Müller et al. (2019), vol. 2. p. 295 (300) criticizing contradictory approaches in the new legislation.

124. See also M.W. Finkin (2020), 'Union dispossession of labour protection: a paradox, in two legal systems', in *International Journal of Comparative Labour Law and Industrial Relations*, 36 (1), p. 1 who, however, adds the warning 'that considerable care must be taken when such license is legislated lest discrete or insular groups be dispossessed of a valuable right in a process that advantages employee coalitions that exclude them, or the union as an institution, at their expense'.
125. In this respect, the concerns expressed about the recent reform of collective bargaining law in Hungary also seem relevant. See Kun, in Liukunnen (2019), p. 333 (336).
126. The CEACR refers in this context to the 2013 General Survey on collective bargaining in the public service, para. 298.
127. Observation (CEACR) – adopted 2017, published 107th ILC session (2018) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Brazil.
128. See in this regard also General Survey (op cit. in note 22), para 198:

The Committee emphasizes that the overall aim of this ... is, however, the promotion of good-faith collective bargaining with a view to reaching an agreement on terms and conditions of employment. The agreements so concluded must be respected and must be able to establish conditions of work more favourable than those envisaged in law: indeed, if this were not so, there would be no reason for engaging in collective bargaining.

See also General Survey of the Committee of Experts on the Application of Conventions and Recommendations concerning labour relations and collective bargaining in the public service, 2013, para. 298: 'The Committee emphasizes that the overall aim of Conventions Nos 98, 151 and 154 is to

promote collective bargaining aimed at reaching agreement on terms and conditions of employment that are more favourable than those already established (although concession bargaining has become more frequent, especially in light of the global economic crisis)*.

129. Observation (CEACR) – adopted 2018, published 108th ILC session (2019) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Brazil. It should be noted that the case (and its evaluation by CEACR) gave rise to a highly controversial discussion in the CAS; see Individual Case (CAS) – Discussion: 2018, Publication: 107th ILC session (2018) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Brazil.
130. Cf. in this regard the position in Slovenia where deviations from the law by collective agreements concluded at the company level are permitted in two cases only. See Peček, in Liukunnen (2019), p. 501 (518) with references also to the academic discussion.
131. Cf. in this regard, for instance, Müller and Schulten, in Müller et al. (2019), vol. 2. p. 239 (260).
132. See, for instance, as regards the legal provisions in Portugal, Gomes and Carvalho, in Hendrickx (various dates), n. 458: ‘The minister can choose the collective agreement to be extended even if the parties of that agreement represent an insignificant portion of the workers and/or employers concerned. Needless to say such a possibility is a direct threat to the freedom of employers and workers not to be affiliated’.
133. Para. 5(1) of the Recommendation.
134. Para. 5(1) of the Recommendation.
135. General Survey (op cit. in note 22), para. 245.
136. This should be distinguished from the situation where a Directive allows the social partners to derogate from its provisions to a certain extent. An example of this is Article 17(2) of the Working Time Directive 2003/88.
137. CJEU, 18 December 2008, Case C 306/07 (*Ruben Andersen*), note 34. See also CJEU of 11 February 2010, Case C 405/08 (*Holst*), where the Court referred to the former decision.
138. See Franzen, in Franzen et al. (2018), art. 155, AUEV, n. 3.
139. See in Müller et al. (2019), vol. 4, app. A3 Extension mechanisms in Europe.
140. See in this regard, for instance, C. Schubert and L. Schmitt (2019), ‘Collective working conditions for everyone?! – Collective provisions with erga omnes effect and statutory extension of collective agreements from a German law perspective’, *European Labour Law Journal*, **10** (1), p. 3.
141. Cf. Emilianides and Ioannou, in Hendrickx (various dates), n. 577.
142. Cf. *ibid.*, n. 613 noting that, in practice, often the effect of collective agreements is extended to outsiders: ‘in practice an employer may be prevented from acting contrary to the terms of the collective agreement even with regard to employees not covered by such agreements, since in such a case the trade unions may consider that the different treatment might undermine its bargaining power.’
143. Cf. Zammit et al., in Hendrickx (various dates), n. 1028.
144. Cf. Hasselbalch, in Hendrickx (various dates), nn. 62 and 817.
145. Müller et al. (2019), vol. 4, app. A3 Extension mechanisms in Europe.
146. The option to extend agreements is limited to those sectors covered by sectoral employment orders or by employment regulation orders.
147. Costello, in Hendrickx (various dates), n. 24.
148. Blanpain, in Hendrickx (various dates), n. 973. See also *ibid.*, n. 974:

The binding effect given to collective agreements concluded in joint bodies in general, and in the case of extension by Royal Decree in particular, has as a consequence that collective bargaining becomes a process with a law-making function. Rules and norms are laid down which are generally binding and which thus become the law in the branch of activity, or in the whole private sector if the agreement is concluded in the National Labour Council. This law-making process performs many functions: it sets minimum standards, so protecting employers who would observe such standards against unfair competition from employers who would not; and it ensures minimum wages and conditions for those workers who would not otherwise be in a position to force their employer to pay higher wages and provide better conditions. The law-making effect of collective bargaining in Belgium gives tremendous power to the social partners. They can, as it were, levy taxes on a branch of activity and make all the employers pay additional social security contributions They can also make all employers, whether or not they are members of the employers’ association, contribute towards the payment of a benefit reserved for trade union members only.

149. Cf. Dimitriu, in Hendrickx (various dates), n. 641.
150. Cf. Vodovnik et al., in Hendrickx (various dates), n. 519. See also Peček, in Liukunnen (2019), p. 501 (513).
151. Cf. Suviranta and Paanetoja, in Hendrickx (various dates), nn. 83 and 85.
152. Cf. Täre, in Hendrickx (various dates), n. 208.

153. Müller et al. (2019), vol. 4, app. A3 Extension mechanisms in Europe.

154. See Article 51b (3) of the Labour Code:

(1) The collective agreements by industries and branches shall be concluded between the respective representative organizations of employees and of employers on the basis of an agreement between their national organizations, which shall set forth general provisions in respect of the scope and the procedural framework of the industry and branch level agreements. (2) The representative organizations of the employees shall prepare and submit a common draft to the representative organizations of the employers. (3) Where the collective agreement on industry or branch level has been concluded between all representative organizations of the employees and of the employers in the industry or the branch, the Minister of Labour and Social Policy may, upon their joint request, extend the application of the agreement or of individual clauses thereof to all enterprises of that industry or branch.

155. Cf. Pichrt and Štefko, in Hendrickx (various dates), nn. 696 ff. (with criticism of the material requirements of declarations of collective agreements as generally binding); see also Chapter 5 in this volume.

156. Cf. Barancová and Olšovská, in Hendrickx (various dates), n. 471.

157. Cf. Hajdú, in Hendrickx (various dates), nn. 157 and 1192 ff.

158. Cf. Mitrus and Hajn, in Hendrickx (various dates), n. 707. See also Pisarczyk and Skupień, in Liukunnen (2019), p. 417 (424).

159. Cf. Melzer-Azondanloo, in Hendrickx (various dates), nn. 743 and 745.

160. See Smokvina and Laleta, in Liukunnen (2019), p. 183 (197).

161. Cf. Grgurev, in Hendrickx (various dates), n. 184.

162. Cf. Jacobs, in Hendrickx (various dates), n. 315.

163. Douka and Koniaris, in Hendrickx (various dates), n. 1285.

164. Cf. Rojot et al., in Hendrickx (various dates), n. 851.

165. Cf. Thomas et al., in Müller et al. (2019), vol. 2, p. 403 (408).

166. Cf. Melzer-Azondanloo, in Hendrickx (various dates), n. 744: 'The state has no influence on the contents of the charter as such, because the Board only extends the scope of application of an already existing collective agreement. Therefore, charters are sometimes referred to as the "partly-autonomous" creation of (collective labour) law.'

167. Cf. *ibid.*, n. 746.

168. Section 18 (2) of the Labour Constitution Act: 'The application for the declaration of a collective agreement on the statutes may relate to all or individual provisions of the collective agreement which are legally binding for the employment relationships subject to it, but individual provisions may not be dissolved from a direct legal and factual context'.

169. Cf. Grgurev, in Hendrickx (various dates), n. 184.

170. Cf. Jacobs, in Hendrickx (various dates), n. 316.

171. See section 2(5) of the Act on declaring the provisions of collective agreements to be generally binding and non-binding.

172. Cf. Jacobs, in Hendrickx (various dates), n. 316.

173. Cf. *ibid.*, n. 318.

174. Cf. Rojot et al., in Hendrickx (various dates), n. 855. See also Erhel, p. 169 (188 ff.).

175. Cf. Rojot et al., in Hendrickx (various dates), n. 861.

176. Cf. *ibid.*, n. 868.

177. Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Stärkung der Tarifautonomie (Tarifautonomiestärkungsgesetz), German Parliament Printed Matter 18/1558 of 28 May 2015.

178. It may be of interest to note that the Federal Constitutional Court recently denied a claim by the social partners for a collective agreement concluded by them to be declared generally binding by the state. In the view of the Court, such a claim against the state does not arise from the fundamental right of freedom of association. The Court acknowledged that freedom of association protects the right of the collective bargaining parties to conclude collective agreements which aim from the outset to bind non-members as well. However, in the opinion of the Court, this does not mean that there is any entitlement to have them declared to be generally binding. The Court argued that the state cannot arbitrarily leave its norm-setting power to non-governmental bodies and cannot hand over citizens without restrictions to the norm-setting power of actors who are not democratically or by virtue of membership legitimised towards them. See Federal Constitutional Court of 10 January 2020 – 1 BvR 4/17.

179. See G. Forst (2015), 'Die Allgemeinverbindlicherklärung von Tarifverträgen nach dem sogenannten Tarifautonomiestärkungsgesetz', *Recht der Arbeit*, p. 25. Cf. also E. Brameshuber and V. Zwinger (2018), 'Collectively agreed (minimum) labour conditions as "protection boosters"', *International Journal of*

Comparative Labour Law, 34 (January), p. 82; A. Perulli and T. Treu (eds) (2019), *The Role of the State and Industrial Relations*, p. 28.

180. Cf. U. Preis and A.P. (2017), *Das neue Recht der Allgemeinverbindlicherklärung im Tarifautonomietärkungsgesetz*, p. 17). See also, with regard to the Netherlands, Been and Keune, in Müller et al. (2019), vol. 2, p. 445 (449):

The very existence of the extension mechanism, however, might well be an important reason why the membership rate of employers' associations is high to begin with. If the collective agreement will apply to your company anyway, you better become a member and have a chance to influence what is in it. From time to time the extension mechanism is questioned by one or other political party, but for the time being most of the political parties, employers' organizations and unions agree with the present practice.

181. Cf. Löwisch and Rieble, in Löwisch and Rieble (2017), s. 5 TVG Allgemeinverbindlichkeit, n. 34.
182. Cf., for instance, *ibid.*, n. 33 (with further references).
183. The long-term effects may look different.
184. See K. Beppler (2014), *Gutachten B zum 70. Deutschen Juristentag*, Munich: C.H. Beck, B 111. With regard to Portugal, for instance, it may be interesting to note that some observers also indicate the dangers for the collective bargaining system that can arise if declarations of general applicability are handled too generously. See cf. Gomes and Carvalho, in Hendrickx (various dates), n. 456: 'The Code specifically foresees ... the possibility of an administrative regulation ... extending the scope of a collective agreement. ... Although traditionally possible in the Portuguese system, this administrative regulation undermines the collective autonomy of trade unions and employers organizations'.
185. See General Survey (op cit. in note 22), para. 214.
186. Cf. General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135), para. 288.
187. Cf. also Jaspers, 'Collective bargaining in EU law', in T. Jaspers, F. Pennings and S. Peters (eds) (2019), *European Labour Law*, pp. 249 ff.
188. General Court of 24 October 2019 – Case T-310/18 (European Federation of Public Service Unions, EPSU).
189. *Ibid.*, paras 86 ff.
190. *Ibid.*, paras 89 ff.
191. Cf. Grgurev, in Hendrickx (various dates), n. 88.
192. Cf. Blanpain, in Hendrickx (various dates), n. 160.
193. Cf. Pichrt and Štefko, in Hendrickx (various dates), n. 233; see also Chapter 5 in this volume.
194. Cf. Hasselbalch, in Hendrickx (various dates), n. 713.
195. Cf. Suviranta and Paanetoja, in Hendrickx (various dates), n. 59.
196. Cf. Rojot et al., in Hendrickx (various dates), n. 859.
197. Cf. Douka and Koniaris, in Hendrickx (various dates), n. 226. See also Chapter 8 in this volume.
198. Cf. Jacobs, in Hendrickx (various dates), nn. 281 ff.
199. Cf. Mitrus and Hajn, in Hendrickx (various dates), nn. 609 ff. See also Chapter 11 in this volume.
200. Cf. Gomes and Carvalho, in Hendrickx (various dates), n. 316.
201. Cf. Dimitriu, in Hendrickx (various dates), nn. 52 and 603 ff.; Volonciu, 379 (386 ff.).
202. Cf. Barancová and Olšovská, in Hendrickx (various dates), n. 80.
203. Cf. Vodovnik et al., in Hendrickx (various dates), nn. 68 ff.
204. Cf. Mitrus and Hajn, in Hendrickx (various dates), n. 79.
205. Cf. Hajdú, in Hendrickx (various dates), n. 1142.
206. Cf. Mrachkov, in Hendrickx (various dates), n. 92.
207. The provision reads as follows:

(1) The State shall carry out the regulation of labour and directly related relations, insurance relations, as well as living standard issues, in cooperation and after consultations with the employees' and the employers' representative organizations. The scope of living standards issues, subject to consultations, shall be determined by act of the Council of Ministers upon proposal of the National Council for Tripartite Partnership. (2) Partnership and consultations shall prevail in the course of the approval of normative acts about the relations and issues pointed out in Para 1. (3) On issues in the scope of Para. 1, agreements may be signed between the representative organizations of the workers and the employees and employers for adoption of normative acts, where: 1. the agreement has been signed upon their request after consideration of the state; 2. the state has proposed signing of the agreement. (4) The fulfilment of the agreements under Para. 3 shall be performed by the state.

- 208. Cf. Mrachkov, in Hendrickx (various dates), n. 569.
- 209. Cf. *ibid.*, n. 571.
- 210. Cf. Emilianides and Ioannou, in Hendrickx (various dates), n. 586:

It should be noted, however, that sectoral social dialogue differs somewhat from social dialogue at the national level, as social dialogue at the sectoral level should properly be more of a bilateral dialogue. However, in practice, sectoral social dialogue often ends up being discussed at a national level in the tripartite bodies.

- 211. See *ibid.*, n. 580.
- 212. Cf. Zammit et al., in Hendrickx (various dates), n. 82. As for the Malta Council for economic and social development cf. nn. 1087 ff.
- 213. Cf. Zammit et al., in Hendrickx (various dates), n. 86.
- 214. Cf. Nekrosius and Andriuskeviciute, in Hendrickx (various dates), n. 252.
- 215. Cf. Costello, in Hendrickx (various dates), n. 24. Cf. also O'Connell, 259 (259 ff.).
- 216. Cf. Costello, in Hendrickx (various dates), n. 24: 'The same privity of contract problem which applies in the case of ordinary collective agreements is a difficulty here as well. Neither individual employers nor employees are privy to the agreement, and may not, therefore, be legally bound by, or legally rely on, the agreement.'
- 217. Cf. Blanpain, in Hendrickx (various dates), n. 914.
- 218. Cf., for instance, with regard to Latvia, Täre, in Hendrickx (various dates), n. 194: (current model 'well structured', 'with already rooted traditions' and 'appropriate').
- 219. Cf. Kahancová et al., in Müller et al. (2019), vol. 3, p. 525 (526): 'Trade unions and employers' associations in general believe that legislative solutions are more likely to be enforced than regulations implemented via collective bargaining, despite the binding character of collective agreements.'

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