INDUSTRIAL RELATIONS

Manual on the Legal Principles of Industrial Relations in the European Union

ECA
European Cockpit Association

European Cockpit Association – Manual on the Legal Principles of Industrial Relations in the European Union

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About ECA

The European Cockpit Association (ECA) represents the collective interests of professional pilots at European level, striving for the highest levels of aviation safety and fostering social rights and quality employment.

www.eurocockpit.be

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1 INTRODUCTION

1.1 PROFESSIONAL AFFAIRS DIRECTORS' WELCOME – PAUL REUTER & PATRICK ARPINO

By Paul Reuter

I can clearly remember my first IFALPA Negotiations Seminar which I attended during the early days of my pilot representative career, more than 20 years ago.

Locked up in a nondescript airport hotel, somewhere in Europe, we were, a bunch of crew reps from all over the European region, initiated to the mysterious ways of negotiating (hopefully successful) Collective Labour agreements for our colleagues.

In retrospect, these were the days of easy bliss, with the self-assuredness that comes from knowing the strength of your position (or youthful foolishness), with a well-defined adversary, your airline management, and an easy-to-use, if often ill-adapted, tool: your local labour law.

Little did we suspect that all of that would change with the liberalisation of European air transport.

Flag-of-Convenience and AOC shopping, widespread use of pay-to-fly and other « creative » employment models and the advent of low-cost carriers, most of which operate in a transnational framework, have changed the landscape dramatically.

Add to that the fact that staff representative organisations are at a clear disadvantage due to the nature and intricacies of the dynamics between European law and National law and you can understand why pilot associations and their unions have been struggling to contain the erosion of working conditions.

Part of ECA's industrial work over the years has been to develop projects, thanks to financial support from the European Commission, to deliver data, answers and tools to further ECA's vision that:

- Every professional Pilot operating in Europe is represented by ECA Member Associations, is covered by the best possible Collective Labour Agreement, and is subject to EU laws and EEA countries' social laws, in a global fair and social aviation market.
- Europe's legislation leaves no place for companies engaging in social dumping based on 'atypical' forms of employment, forum-shopping, flags of convenience that distort fair competition within Europe.
- The companies' freedoms to operate across national borders are matched by corresponding workers' rights to organise, bargain and enforce labour agreements transnationally.

In order to support the successes and learn from the struggles of the last years that ECA and its Member Associations have experienced, ECA has developed this European Industrial Manual thanks to one such EU Commission funded project.

This manual is a reference guide to all EU-relevant Industrial material and should be seen as a complement to the IFALPA I-Manual.

In addition, the template framework CLA for Transnational Airlines complements the European Industrial Manual and is intended for TNA pilots wishing to explore further a common structure and foundation for their CLAs while allowing for specific national context. It can be seen as a logical follow-up tool to ECA's TNA Handbook.

These publications are a toolbox for MAs and pilot representatives to use in negotiations and when shaping TNA-wide CLAs. Like any efficient tools they will be adapted and completed based largely on your experience when using them.

We hope these tools will give you an edge when negotiating and we look forward to your feedback!

Paul Reuter,

ECA Professional Affairs Director

By Patrick Arpino

Why do we need an industrial manual?

When I started my career, aviation was booming. It was a few years after the 9/11 crisis and the effects of the liberalisation of air transport in Europe were becoming evident. At that time, flying was the only thing that mattered to me, and if I could do it within a reasonable distance from my home, that was a plus.

That's how I signed my first contract, from a French base, with an English contract. I had to open a bank account, in British Pounds of course, to receive my salary. I had to declare my income in the United Kingdom, and in case of illness there were forms to use in order to be reimbursed for health expenses... by the United Kingdom. "It's Europe", I was told at the time. And in the end, not knowing much about labour law, social law, and even less about European law, I ended up telling myself that maybe this was indeed the European way and how it should be.

Today, 17 years later, it seems simply inconceivable to me. Numerous union battles, led by volunteer pilot experts, devoted to the values of our profession and assisted by equally devoted legal and industrial experts, have made it possible to change mentalities.

Have the abuses stopped?

Clearly no. Certainly some clarifications, notably in social law, have improved the situation today, but abuses are still too common. The European giants have continued to expand in a transnational way, making career management even more complex.

Young pilots, often financially dependent, have in most cases no other choice than to accept the first job offer, whatever the conditions. The right to unionise is still too often undermined.

The social problems arising from the European dimension of air transport are numerous. The different regulations coming from the EASA are unfortunately still limited to technical considerations. The FTL reform still leaves a bitter taste and the little progress made by the Agency on the links between socio-economic factors and safety (Art. 89 of the EASA Basic Regulation) is a perfect example of the work we still have to do.

The fight for fair and equitable working conditions for pilots in Europe is still long. Often pilots are confronted with problems relating to social law, labour law, and European law. These subjects are often difficult to understand, especially since the 27 Member States sometimes have different readings of these very technical subjects. The saga of the A1 forms related to the posted workers directive is a perfect example.

This complexity often turns to the advantage of companies with lower social costs, which in return do not hesitate to practice social dumping.

Should we be discouraged?

The answer is clearly no! Numerous battles have been fought at union level and victories have been obtained. It is important to recognise them. Whether it is on the harmonisation of social security schemes, trade union recognition in large transnational airlines, or the recent decision of the CJEU on questions of applicable law. Considerable work has been done by our union staff and volunteer experts to study and better understand all these technical legal concepts. It is this work that gives us credibility.

This industrial handbook (the term professional handbook is probably even more accurate), in addition to reviewing all past legal work, provides an overview of European issues on the industrial questions of our profession.

New challenges are also emerging from the Covid crisis. The massive layoffs, followed by the summer of chaos 2022, and its thousands of flight cancellations, show the limits of a model based on an eternal search for cost reduction. Our industry must become environmentally and socially responsible. I am sure that this manual will contribute to give the necessary tools to our representatives to defend the professional values of European pilots and thus win new battles.

Patrick Arpino,

ECA Professional Affairs Director

1.2 HOW TO USE THIS MANUAL

1. The Manual on the Legal Principles of Industrial Relations in the European Union is meant as an **introduction** to the legal framework of the EU and fundamental principles of industrial relations within the European continent. The fact that it is an introductory and practical manual means that it does not go into detail and does not give extensive legal explanations. Therefore, the reader should use the manual with the necessary caution, as every situation is different and could require a deeper analysis of the legal system.

2. This manual has **two main objectives**. As a **first objective** it wants to give a concise **overview of the legal framework and the principles connected to industrial relations and employment within the European union** so trade union affiliates and employee representatives can get a clear view on the fundamental social rights they could use in Europe when representing their pilots or air crew or negotiating collective bargaining agreements or wish to take collective action. These rights especially are useful when their trade union rights are restricted by national authorities and air carriers. However, most fundamental rights are not absolute and can be limited, furthermore it can be difficult to enforce these rights. Therefore, the manual explains the content and extent of these rights and discusses the different enforcement mechanisms, including their strengths and weaknesses (see part 2.1 and 2.2).

Next to the fundamental rights, the manual also has a look at the main elements of **secondary EU law**, meaning the EU regulations and directives which have the most important impact on national law regarding the employment situation of pilots (see part. 2.3).

In addition, the manual explains the **relationship between EU law and national law** and how trade unions, pilots or workers can use EU rules, even when these rules contradict national legislation or when national regulation remains absent (see part. 3).

Finally, the manual also goes beyond the EU legal framework and gives an overview of the national legal rules of all 27 EU Member states regarding:

- The conditions to take collective action (right to strike);
- The main characteristics of worker representation and collective bargaining at company level (see part 4).

3. The **second objective** of this manual is to offer a **template of collective bargaining agreement** which can be used all over the EU. The template includes the main clauses which can be included in a collective bargaining agreement. Every clause is accompanied by a short explanation regarding the content and the main issues trade union negotiators should be aware of. Most clauses also contain examples of provisions. However, every single collective bargaining agreement will be different, so that the template should be used with caution and it should always be adapted to the specific situation.

4. Finally, the manual also contains an overview of the **relevant ECA documents regarding Industrial Relations** which were previously adopted and/or published. These include the adopted positions of the ECA, reports and guidance published by the ECA and other reference studies (not published by the ECA).

2 RELEVANT PRINCIPLES AND RIGHTS CONCERNING INDUSTRIAL RELATIONS IN THE EU

2.1 INTERNATIONAL STANDARDS AND FUNDAMENTAL RIGHTS

2.1.1 The United Nations and The International Labour Organisation (ILO)

A. The Universal Declaration of Human Rights

5. CONTENT - The United Nations is an intergovernmental organisation aiming to maintain international peace and security, develop friendly relations among nations, achieve international cooperation, and be a centre for harmonizing the actions of nations. In its framework, the nations have developed several international treaties containing fundamental rights. Most known is the **Universal Declaration of Human Rights** (UDHR) which was adopted in 1948. The UDHR contains some human rights which are of interest for industrial relations and the work place, like:

- Article 4: the prohibition of slavery
- Article 7: the principle of equality and non-discrimination
- Article 12: the right to privacy
- Article 20: the right to freedom of peaceful assembly and association
- Article 22: the right to social security
- Article 23: the right to work, the right to equal pay, the right to just and favourable remuneration, the right to form and to join trade unions
- Article 24: the right to leisure and annual paid leave

- Article 25: the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control

6. NOT LEGALLY BINDING - The strong point of the UDHR is that it is seen as the modern international basis of all international treaties and human rights laws. However, it is **not a legally binding document**, therefore it is very difficult or even impossible to base legal claims on it.

B. The International Covenant on Economic, Social and Cultural Rights

7. CONTENT - The UDHR resulted in the development of several other international human rights treaties. Most important for industrial relations is the **International Covenant on Economic, Social and Cultural Rights (ICESCR)** of 1966 (entered into force in 1976). Like the title suggests, this treaty contains economic, social and cultural rights. 171 countries have signed and ratified the treaty, including all European states. However, the United States has signed but not ratified it. The ICESCR contains the following social rights:

- Article 6: the **right to work**
- Article 7: the **right to just and favourable conditions of work**, which ensure, in particular:

  (a) Remuneration which provides all workers, at a minimum, with:

  (i) equal pay for equal work;

  (ii) A decent living for themselves and their families;

  (b) Safe and healthy working conditions;

  (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

  (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.
- Article 8: **collective rights**, including:
  - The **right of everyone to form trade unions and join the trade union** of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests;
  - The **right of trade unions to establish national federations or confederations** and the right of the latter to form or join international trade-union organisations;
  - The **right of trade unions to function freely** subject to no limitations other than those prescribed by law, and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
  - The **right to strike**, provided that it is exercised in conformity with the laws of the particular country.

8. NATURE OF RIGHTS - Unlike the UDHR, the ICESCR is a legally binding document. However, most of the rights contained in it are **purely positive rights** (i.e. containing positive obligations for the state), this means that states who have ratified the ICESCR are merely asked to take the necessary steps to achieve the full realisation of these rights, but they do not offer

substantive rights for individuals to base their claims on. Only some of the collective rights also include **negative obligations** for the state to not interfere in the establishment, organisation and free functioning of the trade unions. Also, the right to strike can be seen as containing a negative obligation for states not to interfere (except under certain conditions).

9. USEFULNESS - The ICESCR can be useful to refer to when basing legal claims on fundamental rights, but it would be recommended to look for other more enforceable fundamental rights in ILO Conventions, European sources or national law. The implementation of the ICECSR is monitored by the Committee on Economic, Social and Cultural Rights, a body of human rights experts who will examine the countries' reports outlining the legislative, judicial, policy and other measures which the countries have taken to implement the rights affirmed in the Covenant. The Committee will then give recommendations based on this report. The recommendations are not legally binding. Therefore, the enforcement mechanism of the ICESR is rather weak.

C. The International Labour Organisation

10. INTRODUCTION – Next, there is the **International Labour Organisation (ILO)**. This is the oldest specialised organisation of the United Nations. It was established by the Treaty of Versailles in 1919 right after World War I, making it in fact older than the UN itself. 189 of the UN's 193 countries are members of the ILO, making it the UN specialised organisation with the highest membership. Member States are not only represented by delegates from the national authorities, but also by delegates from employers and employees' organisations. This gives the ILO a unique tripartite constellation.

11. INTERNATIONAL LABOUR STANDARDS - The ILO produces two kinds of legal documents during the annual meeting in Geneva of the International Labour Conference (where all the delegates gather). These legal documents contain the so-called **International Labour Standards**. First, there are the **ILO Conventions** and their additional protocols. These can be seen as international treaties which are signed and ratified by member states which are legally bound by this text. Some countries and doctrines are hesitant in awarding the same (legally binding) status as an international treaty to the conventions, but the legal arguments for awarding a lesser status are not convincing. Second, there are the **ILO Recommendations**, these are legally non-binding guidelines for the member states. Therefore, the recommendations have rather a moral value than a legal one. One can refer to them as a reference point, but they will be insufficient to base a legal claim on. Nonetheless, member states who have signed and ratified the recommendations should still undertake the necessary efforts to implement the recommendations.

12. FUNDAMENTAL CONVENTIONS - In its long existence, the ILO has produced **190 conventions** and protocols [1] and **206 recommendations**. However, not all conventions and recommendations are still up-to-date, and some were replaced by later instruments. When assessing whether a convention or recommendation is useful in a certain case, it is necessary to see whether the relevant member states have signed and ratified the documents. In general, European Countries are doing well in signing and ratifying a high number of conventions and recommendations. In order to highlight the most important conventions, **ILO Declaration on**

[1] See the full list here: https://www.ilo.org/dyn/normlex/en/f?p=1000:12000:::NO

Fundamental Principles and Rights at Work (1998) named 8 conventions as "**the fundamental conventions**", which all ILO member states should sign and ratify. These are:

- 1. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- 2. Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- 3. Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol)
- 4. Abolition of Forced Labour Convention, 1957 (No. 105)
- 5. Minimum Age Convention, 1973 (No. 138)
- 6. Worst Forms of Child Labour Convention, 1999 (No. 182)
- 7. Equal Remuneration Convention, 1951 (No. 100)
- 8. Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

All the EU and EEA Member states have ratified the fundamental conventions. The United States has only ratified two out of eight.

During the International Labour Conference of 2022 (in light of the COVID-19 pandemic), the ILO decided to add two more fundamental Conventions, which means that the total is now 10:

- 9. Occupational Safety and Health Convention, 1981 (No. 155)
- 10. Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)

Next, the ILO also indicated **4 priority conventions for governance**. These conventions do not contain important social rights but are important for the functioning of the international labour standards system and enforcement. The 4 are:

- 1. Labour Inspection Convention, 1947 (No. 81)
- 2. Employment Policy Convention, 1964 (No. 122)
- 3. Labour Inspection (Agriculture) Convention, 1969 (No. 129)
- 4. Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)

13. CONVENTIONS NO. 87 AND NO. 98 - Especially the fundamental Conventions no. 87 (**freedom of association**) and no. 98 (**right to collective bargaining**) are of upmost importance for industrial relations. They do not only provide for essential trade union rights to establish and organise themselves and to negotiate and conclude collective bargaining agreements, but the ILO expert bodies (see further) also defend the longstanding view that these conventions also imply the **fundamental right to strike**. This is highly significant as there are no ILO labour standards which explicitly recognise the right to collective action.

14. GENERAL SUPERVISION - The ILO has no proper court system, therefore the **enforcement system** of the ILO itself is more based on a **name-and-shame** procedure, which makes it rather weak. The **general supervision** system consists out of the examination by two ILO bodies of reports on the application in law and practice sent by Member States and on observations in this regard sent by workers' organisations and employers' organisations. Member States have to report every 3 years on the implementation of and respect for Conventions (and Recommendations) that they have ratified and every six years regarding Conventions which they have not ratified. In the first place the **Committee of Experts on**

the Application of Conventions and Recommendations (also called Committee of Experts or CEACR) will examine the reports and observations which will lead to an annual report.[2] This report will be submitted to the **Conference Committee on the Application of Standards of the International Labour Conference**. This is a standing committee of the Conference, made up of government, employer, and worker delegates. It examines the Committee of Experts' report and selects from it a number of observations (the most concerning ones) for discussion. The governments referred to in these comments are invited to respond and to provide additional information. Often this leads to the Conference Committee drawing up conclusions recommending that governments take specific actions to remedy a problem or to invite ILO missions or technical assistance. The discussions and conclusions of y the Conference Committee are published in its own report. The general supervisory mechanism, based on reports can therefore embarrass Member States, especially when the issue is picked up by the Conference Committee as this shows the gravity of the situation. A trade union can therefore bring important issues at the attention of the national trade unions who are representing the workers in the ILO so they will include the matter in their observations to the Committee of Experts. As said, the reports of the Committee of Experts and Conference Committee have no legal value and cannot directly be used for individual or collective claims before national courts. However, a critical opinion of the ILO supervisory bodies can have an impact on the authorities and might be a powerful argument to convince national and international courts. Furthermore, The Committee of Experts exists out of 20 eminent jurists appointed by the Governing Body, and they are generally seen as an authoritative a-political institution, although their views have also been criticised by certain governments and legal doctrine as too far-reaching.

The Committee of Experts also produces **General Surveys** with their views on specific issues.[3] These General Surveys can be read as important guidelines for the implementations of important international labour standards. For industrial issues the most relevant General Survey is the one regarding **Fundamental Conventions of 2012**.

15. SPECIAL PROCEDURES - Next to the general supervisory system, the ILO also knows **three special procedures**.

First, there is the **representation** procedure, according to which any national employers or workers' organisation has the right to present to the ILO Governing Body a representation against any member State which, in its view, "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party". A representation is therefore not a monopoly of trade unions which are represented in the ILO bodies. Subsequently a three-member tripartite committee will investigate the representation and the Government's response to it and submit a report with recommendations to the Governing Body. The report will be published. If the government does not take the necessary measures, the Committee of Experts may be requested to follow up the case or, in the most serious instances, the case may lead to a complaint, in which case the Governing Body may decide to establish a Commission of Inquiry.

The second special procedure is the **complaint procedure**. A complaint may be filed against a member State for not complying with a ratified Convention by another member State which has ratified the same Convention, a delegate to the International Labour Conference or the

[2] Reports of the CEACR can be found on Normlex, de ILO Data Base.
[3] You can find the General Surveys here: https://www.ilo.org/global/standards/information-resources-and-publications/WCMS_164145/lang--en/index.htm

Governing Body of its own motion. The Governing Body will consequently establish a Commission of Inquiry who will investigate the issue and make recommendations. This will only happen in very serious cases and repeated severe violations of important conventions. Therefore, the complaint procedure is only rarely used (only 13 times). If governments do not fulfil the recommendations the Governing Body can ask the International Labour conference to take further actions, like the suspension of a country as ILO Member State. This only happened once (Myanmar in 1996 because of serious violations of the Forced Labour Convention). In general, the complaint procedure is **not very useful as a legal instrument for ECA** and its affiliates as this is a highly political procedure.

Third, there is the **Committee on Freedom of Association (CFA)** to specifically supervise the implementation of the fundamental Conventions Nos 87 and 98 on freedom of association and collective bargaining, including the right to strike. The CFA examines **complaints** of violations of freedom of association, whether or not the country concerned has ratified the relevant conventions. Complaints may be brought against a member State by employers' and workers' organisations. The CFA is a tripartite Governing Body Committee (and therefore does not exist out of independent legal experts like the Committee of Experts). If the CFA decides to receive the case, it establishes the facts in dialogue with the government concerned. If it finds that there has been a violation of freedom of association standards or principles, it issues a report through the Governing Body and makes recommendations on how the situation could be remedied. Governments are subsequently requested to report on the implementation of its recommendations. Next, cases can be referred to the Committee of Experts for further examination or the CFA can propose a direct contact mission to the concerned government and the national social partners to address the problem directly. In case of freedom of association (collective social rights) issues, it could be the preferred option for trade unions to lodge a complaint with the CFA. Although the recommendations have no legally binding effect, the CFA has already examined over 3000 cases and is seen as an authoritative voice in all freedom of association issues. This is another name and shame mechanism, but it has led to many positive evolutions in the past. It has compiled all its decisions prior to 2018 in a **Compilation of Decisions** which makes it very easy to consult its case law. [4] These decisions concern issues on the following subjects:

- Trade union and employers' organisations' rights and civil liberties;
- Right of workers and employers without distinction whatsoever to establish and join organisations;
- Right of workers and employers to establish organisations without previous authorisation;
- Right of workers and employers to establish organisations of their own choosing;
- Right of organisations to draw up their constitutions and rules;
- Right of organisations to elect their representatives in full freedom;
- Right of organisations to organise their administration;
- Right of organisations to freely organise their activities and formulate their programmes;

[4] You can consult the CFA Compilation of Decisions here: https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/WCMS_632659/lang--en/index.htm.

- Right to strike;
- Dissolution and suspension of organisations;
- Right of employers' and workers' organisations to establish federations and confederations and to affiliate with international organisations of employers and workers;
- Protection against discrimination;
- Protection against acts of interference;
- Collective bargaining;
- Consultation with the organisations of workers and employers (social dialogue);
- Facilities for workers' representatives.

16. CONCLUSION - In conclusion, the International Labour Organisation is interesting as it has produced international treaties on a wide range of industrial relations subjects and social rights which most European Countries have ratified. Its monitoring systems are authoritative but remain weak as they do not have any legally binding force. Furthermore, ILO recommendations and complaints are always directed towards governments and not towards employers. For ECA the different monitoring procedures of the ILO can be interesting to put pressure on national governments (but also on the EU, as it sees itself as an important partner organization of the ILO and it has an observing non-member status in in the International Labour Conference) to take action to solve certain issues. Moreover, ILO recommendations, views and reports can be used as legal arguments before European and national courts.

2.1.2 Council of Europe

17. ECHR AND ESC - The Council of Europe is the leading human rights organisation in Europe, not to be confused with the European Union or with its institution the Council of the European Union. The Council of Europe has 47 member states, including all EU countries and amongst others, the UK, Norway, Switzerland, Russia and Turkey. The only missing European country is Belarus. Based in Strasbourg (France), the Council of Europe has **two important legal instruments** which impact fundamental social rights, the European Convention on Human Rights and the European Social Charter. We will discuss both below.

A. The European Convention of Human Rights

18. INTRODUCTION AND CONTENT - The **European Convention of Human Rights (ECHR)** of 1950 is Europe's most important human rights' treaty. It is enforced by the **European Court of Human Rights (ECtHR)** seating in Strasbourg, not to be confused with the Court of Justice of the European Union seating in Luxembourg. As the first important human rights treaty post World War II the ECHR gained immense importance as one of the legal instruments that have to guarantee the prevention of another major war and large-scale violations of human rights like under the fascist regimes. The ECHR is conceived as a more traditional human rights instrument, focusing on civil and political fundamental rights and thus less on economic and social rights. Nonetheless the ECHR is also of importance for industrial relations and social rights. Especially the following provisions are often used in social law cases:

- Article 8: **right to privacy,** which also extends to the privacy of workers in a professional employment context.

- Article 9: **freedom of thought, conscience and religion,** which can also extend to the employment context.
- Article 10: **freedom of expression**, which is also valid for workers expressing their personal opinion.
- Article 11: **freedom of association**, which indirectly extends to the right to collective bargaining and, in a lesser degree, to the right to take collective action (right to strike).
- Article 14: **prohibition of discrimination** based on sex, race, colour, language, religion, political or other opinions, national or social origin, association with a national minority, property, birth or other status, extended by the ECtHR to sexual orientation.

19. JUSTIFICATION OF RESTRICTIONS - These rights are not absolute and can be restricted, usually on the condition that restrictions are "in accordance with law" and "necessary in a democratic society". The ECtHR's **justification test** will include an assessment of:

- the **legality** of the measure: laid down in legislation in a broad sense (internal, impersonal legal norm which is known to the citizen and formulated in such a way that he can see its legal consequences with reasonable foreseeability);
- the **legitimate aim** of the measure, which has to correspond to an aim which is expressly named by the relevant provisions in the ECHR, e.g. interests of national security, public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or the rights of others;
- The **appropriateness** of the measure in light of the legitimate aim (does it actually serve the purpose);
- The **proportionality** of the measure in light of the legitimate aim, considering whether the same could not have been achieved with less intrusive measures and considering the rights and interests of affected persons and others.

20. THE ECTHR - What makes the ECHR such a powerful instrument is the fact that its implementation is enforced by the **supervision of the ECtHR**. The Court consists out of independent judges which are elected by the Parliamentary Assembly of the Council of Europe (each Member State can appoint 3 candidates for the function). Judges are usually senior national judges or important legal scholars (the ECHR demands that judges are of "high moral character" and have qualifications suitable for high judicial office or be jurists of recognised competence). Its case law can be found on the HUDOC website, it's views on industrial relation rights are summarised in the ECtHR's Guide on Article 11 – Freedom of Assembly and Association.[5]

Individuals, groups, **organisations** and countries can file a complaint against a member state of the Council of Europe for an alleged violation of the ECHR. The judgments of the Court are **binding and final**. Neither the accusing party nor the state complained against can appeal, except to the Grand Chamber of the Court itself. When a Member State is unsuccessful, it is obliged to do everything possible to prevent the violation from recurring in the future. The **Committee of Ministers** of the Council of Europe will monitor the execution by Member States of the judgements of the ECtHR, if an execution or implementation is not forthcoming, the Committee may call out the Member States by way of a resolution. The EU and EEA Member

[5] For the Hudoc database, see https://hudoc.echr.coe.int/ ; for the ECtHR Guide on Article 11, see https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf.

States of the Council of Europe usually execute the judgements without many problems (less can be said of countries like Russia and Turkey).

The facts that the ECtHR is the principal interpreter of the Convention and the fact that its decisions are legally binding for the Member States means that national courts will have to look at the case law and interpretation of the ECtHR when they are confronted by a case which involves a fundamental right which is protected by the ECHR. Therefore, the ECtHR has a major influence of the judicial system of most of its Member Systems, although some countries have difficulties with recognising the hierarchical superiority of international law and international courts over their own supreme and constitutional courts.

21. PROCEDURE BEFORE THE ECTHR - Any individual, organisation or Member State may bring a case before the ECtHR. However, before the Court can take up a case, a number of **conditions** must be met. First of all, the petitioner **himself must be the victim** (he must suffer a disadvantage) of a violation of the ECHR; this makes it more difficult for trade unions to lodge a complaint themselves, although this is certainly not impossible. Next, the complaint must be directed against the public body or government. This means that **no complaint can be directed against another citizen, a private organisation or the employer**. It is also essential that a complaint can only be filed when there is no longer a legal remedy available in the country where the violation took place (subsidiarity principle). In other words, a judgment of a court of last instance is required before one can turn to the ECHR. Further, there is a time limit that must be observed: one must file a complaint before the Court within **4 months** after the final adverse national judicial decision. This term was brought down from 6 months as from 1 February 2022. Finally, it must not be an anonymous complaint; the identity of the complainant is indispensable in the procedure.

The great importance of the judgments of the ECtHR have made it a very popular last resort for legal claims in Europe. This resulted in the overflooding of the Court with cases, causing a significant procedural delay in examinations by the Court and a strict test of admissibility. However, the exit of Russia from its adherence to the ECHR in 2022 will significantly decrease the number of cases.

The ECtHR is also monitored by a reporting system before the Secretary General and the Committee of Ministers of the Council of Europe. However, this system is of minor importance.

22. CONCLUSION - In conclusion, the ECtHR is a very interesting instrument as it is a legally binding document which can be used by individuals and organisations like trade unions before national courts and which is monitored by a powerful international Court. However, a procedure before the ECtHR needs to comply with strict conditions. Furthermore, the ECHR only contains a limited number of relevant rights for industrial relations and as social rights is not the core of the convention, the ECtHR might have less interest in the specific background and context of industrial relation disputes.

B. The European Social Charter

23. INTRODUCTION - The European Social Charter (ESC) is the less known sister of the ECHR. It was established in 1961 and revised in 1996. However, not all ratifying parties to the original ESC have ratified the revised version of 1996 so it is always important to see which version

should be applied. [6] All EU and EEA Member States have ratified a version of the ESC, just like i.a. the UK, Switzerland, Turkey, Ukraine, Georgia and Armenia. As most EU Member States have ratified the revised version, we will focus on this version below.

24. CONTENT - The revised ESC (96 version) is very interesting because it covers a wide range of social rights, including:

- Art. 1: Right to work
- Art. 2. **Right to just conditions of work** (limited working time, paid public holidays, paid annual leave, weekly rest periods, right to information regarding main conditions, measures regarding night work)
- Art. 3. Right to safe and healthy working conditions
- Art. 4. **Right to fair remuneration** (decent living standards, overtime pay, equal pay, reasonable period of notice for termination, limitations for wage deductions)
- Art. 5. **Right to organise** (right to establish and join trade unions and employers' organisations)
- Art. 6. **Right to bargain collectively:**
  - 1. Social dialogue
  - 2. Collective bargaining
  - 3. Conciliation and voluntary arbitration to settle disputes
  - 4. Right to take collective action, including strikes
- Art. 8. Right of employed women to protection of maternity
- Art. 9. Right to vocational guidance
- Art. 10. Right to vocational training
- Art. 20. Right to equal opportunities without discrimination on the grounds of sex
- Art. 21. **Right to information and consultation**
- Art. 22 **Right to take part in the determination and improvement of the working conditions and working environment** (worker involvement within the undertaking)
- Art. 24. Right to protection in cases of termination of employment (right to valid reasons for dismissal)
- Art. 25. Right of workers to protection of their claims in case of insolvency of the employer
- Art. 26. Right to dignity at work (against sexual harassment, reprehensible conduct like bullying)
- Art. 27. Right of workers with family responsibilities to equal opportunities and equal treatment.
- Art. 28. **Right of workers' representatives to protection in the undertaking and facilities to be accorded to them** (right to facilities to exercise their function and effective protection against retaliation).

[6] Have only ratified the original ESC: Croatia, Czech Republic, Denmark, Iceland, Luxembourg, Poland (and also Switzerland and the UK).

- Art. 29. **The right to information and consultation in collective redundancy procedures**.

The rights which are most important for industrial relations are in bold.

25. EXCEPTIONS AND RESERVATIONS - It is important to know that every Member States has the right to make **reservations or ask for opt-outs** regarding certain rights, but they have to respect a minimum number of certain core rights. In case of a conflict, it is recommended to see if the relevant Member State has posed any reservations before trying to claim a right within the Charter. The website of the Council of Europe provides a nice overview of this.[7]

26. NATURE OF RIGHTS - Some of the rights in the ESC are of a more **programmable nature**, this means that they include positive obligations for the Member States to develop a policy to support these rights, but do not offer a substantive right for individuals. Other rights, like the right to take collective action in art. 6.4 are more seen as **negative obligations** for the Member States, which does mean that an individual or trade unions could be able to claim these rights before the European Committee of Social Rights (ECSR, see below) or their national courts (if a right is recognised to have a direct effect by the national jurisdiction).

27. WEAK ENFORCEMENT - Although the ESC offers a wide range of social rights, it is often seen as the little brother of the ECHR because the **lack of strong enforcement mechanisms**. The main enforcement mechanism is not a court like the European Court of Human Rights but a committee called the **European Committee of Social Rights (ECSR)**. Therefore, the enforcement of the ESC resembles the enforcement mechanisms of the ILO (see above) and is more based on a monitoring and name and shame system than on "hard law" court rulings which are directly applicable in a Member State.

28. PROCEDURE BEFORE THE ECSR - The ECSR consists of 15 independent, impartial members are elected by the Council of Europe's Committee of Ministers for a period of six years, renewable once. Often, they are highly regarded law professors.

The ESC knows **two different enforcement mechanism**. First, there is a **monitoring system**. Every year the Member States have to submit a report on the respect and implementation of the rights within the ESC, to which the national social partners can add their remarks. The ECSR will investigate these national reports and will publish **conclusions**. These conclusions can declare that the Member State is in conformity, ask for further information, contain recommendations to improve the situation or even clearly state that a Member State is violating a specific right. Especially in the last cases, a negative conclusion is seen as a reprimand which could shame a member state into action (but which cannot be used before the national) courts.

Next, for Member States which have ratified the 1995 **collective complaint protocol** to the ESC, it is also possible for organisations and trade unions to introduce a collective complaint before the ECSR against a Member State if they think that it is violating a right in the ESC. This

[7] For the 1961, ESC see: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=035 ; for the 1996 ESC, see https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=163.

collective complaint procedure is ratified by Belgium, Croatia, Cyprus, Czech Republic, France, Greece, Ireland, Italy, Netherlands, Norway, Portugal and Sweden. This means that it cannot be used against the majority of the ESC Member States. In a collective complaint procedure, the ECSR will judge a specific case like a court under the **following conditions**:

- **Individuals** cannot submit a complaint (are allowed: the European social partners, national social partners, Employers' organisations and Trade Unions in the country concerned and specific international NGO's).
- Complaint can only be lodged **against a member state**, not against private employers.
- **Individual situations** may not be submitted (it needs to be about a continuous situation or practice).
- complaints may be lodged **without domestic remedies having been exhausted** and without the claimant organisation necessarily being a **victim** of the relevant violation.

After a negative Decision of the ECSR, the **Council of Ministers** of the Council of Europe will make a **recommendation** in which it will advise the concerned Member State to stop the violation as soon as possible and the Member State will have to report on its implementation of this recommendations. In any case the decisions of the ECSR must be respected by the States concerned but they are not enforceable in the domestic legal system.

The collective complaint procedure is seen as a **more effective form of naming and shaming** than the monitoring procedure with reports and conclusions, as there is a clear decision of the ECSR which is not hidden in the more generic conclusions, but both enforcement systems have the same legal effect. The success of these mechanisms will mostly depend on how serious the Member States will take their responsibilities and the attention of national doctrine and case law for these systems (which varies from country to country) as national courts could be inspired by decisions of the ECSR.

All the ECSR's conclusions and decisions can be found on the **HUDOC database**, the ECSR's viewpoints are summarised in its **Digest of 2018**. [8]

29. CONCLUSION - In conclusion, the ESC offers a lot of interesting rights to trade unions and workers, but just like the ILO, these rights are **often difficult to enforce** seen the absence of strong enforcement mechanisms. However, that **does not make the ESC worthless**. A condemnation by the ECSR could be followed by the national case law. Moreover, it could also be a good idea to claim the rights within the ESC before the national courts, especially when they offer clear and precise rights to workers and therefore could be directly applicable (even horizontally against employers), this is e.g. the case in the Netherlands for the right to take collective action in art. 6.4. ESC. But whether a right has a horizontal and direct effect in a Member State mostly depends on the national case law.

[8] For the conclusions and decisions of the ECSR, see https://hudoc.esc.coe.int/; For the Digest, see https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80.

2.1.3 The European Union

A. The Treaties (TEU and TFEU)

30. The European Union is a complicated and vast international organisation. We will only focus on the social rights and competences and their enforcement.

31. EU COMPETENCES - Since the Treaty of Maastricht (1992), the EU has **social competences** written in its (now) **Treaty on the Functioning of the European Union** or TFEU (in the Social Policy Chapter). This chapter refers to the EU's respect for social rights and the European Social Charter [9] and lists its competences on the basis of which the EU Institutions can make new Directives and Regulations in the social field. **The competences refer to**:

- improvement in particular of the working environment to protect workers' health and safety;
- working conditions;
- social security and social protection of workers;
- protection of workers where their employment contract is terminated;
- the information and consultation of workers;
- representation and collective defence of the interests of workers and employers, including co-determination;
- conditions of employment for third-country nationals legally residing in Union territory;
- the integration of persons excluded from the labour market;
- equality between men and women with regard to labour market opportunities and treatment at work;
- the combating of social exclusion;
- the modernisation of social protection systems.

There are **3 explicit exclusions**: pay, the right of association, the right to strike or the right to impose lock-outs.

32. COMPETENCE FOR EU SOCIAL PARTNERS - The Chapter also offer the European social partners the right to take over the legislative initiatives from the Commission to negotiate European Framework Agreements (or to start negotiations on a topic on their own initiative) and to ask the EU Institutions to implement these Framework Agreements into Directives (for more information see no. 53). Unfortunately, this system did not have a big success during the last years.

[9] "The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion."

33. OTHER IMPORTANT PROVISIONS IN THE EU TREATIES - Some other important provisions in the TFEU and the Treaty on the European Union (TEU) are:

- **Art. 3.3 TEU**: ambition of the EU to work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
- **Art. 9 TFEU:** In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health. (Also called the Horizontal Social Clause)
- **Art. 45 TFEU:** Free movement of workers (right to work in another EU Member State)
- **Art. 56 TFEU**: Free movement of services (for companies to provide services in other EU Member States).
- **Art. 49 TFEU:** Freedom of Establishment (for persons and companies to establish themselves in another EU Member State)
- **Art. 100.1 TFEU:** the legislative competence for the EU to lay down appropriate provisions for sea and air transport.

34. PROCEDURE BEFORE THE CJEU - The Treaties of the EU are enforced by the **Court of Justice of the European Union (CJEU)**. This is a powerful EU Institution which consists out of 27 judges (one from every Member State, appointed for a renewable term of 6 years). The CJEU functions as the **supreme court of the EU** and therefore has the last word on all matters relating to EU law. This also means that its judgements are legally binding for Member States. Even if some Member States sometimes try to ignore its rulings or pretend that its own constitutional court is on an equal or higher hierarchical level than the CJEU, in principle, EU law takes always precedence of national law, and so does the case law of the CJEU. [10]

There are many **different ways in which a case can be brought before the CJEU** but in 99% a case involving a trade union will be submitted via the procedure of a **reference for a preliminary ruling**. This means that a national court will submit a preliminary question to the CJEU concerning the correct interpretation of EU law, mostly when it is unclear if the national implementation of EU law is correct or if a certain situation is in conformity with EU law or not. In contrast with the procedure before the European Court of Human Right, it is **not necessary that a reference for a preliminary ruling is a remedy of last resort**. Any national court can submit such a reference to the Court. Therefore, it is just up to the party to convince a national court to do so. However, according to the TFEU, a national court of last instance does have the obligation to refer a preliminary request to the CJEU if it is not certain regarding the correct interpretation of EU law (but it is up to the court itself to see assess this). The number of national courts submitting references for preliminary rulings are increasing, but still varies from country to country. E.g. the CJEU receives many references from Belgium, Germany and the Netherlands, but way less from Central and Eastern European Member States. In this way, convincing a national court to submit a referral can be an important challenge. Furthermore,

[10] See part 3.1.1 regarding the primacy of EU law.

the CJEU will **only rule** (sometimes after receiving a legal opinion of an Advocate-General) **on the interpretation of EU law** but it will not take a decision which directly will solve the dispute pending before the national courts. It is up to the referring national court to apply the CJEU's interpretation in its own decision on the merits. This sometimes has as a consequence that the CJEU's rulings are rather theoretical and that it does not offer a measure-made or clear solution. Although the rulings of the Court have an important value as precedents, they **do not function as binding precedents** for all Member States and for all national courts. Nevertheless, CJEU rulings are binding for the parties, and most Member States will change their legislation if it turns out that it is in violation of EU law. As this is a system of references by a national judge, the parties the national case before that judge are also the parties before the CJEU, this means that the **Member State does not need to be a party in a national case brought before the CJEU** (unlike before the ECtHR, where you can only bring a case against a state). However, in any case before the CJEU, any Member State (not only the one where the dispute takes place or the parties come from) can **intervene** and submit an opinion before the CJEU, which the Court will take into consideration in its ruling. The higher the number of interventions, the more important a case become. Another indication of the importance of a case is the fact that it is not treated by a normal chamber of three or five judges but by the so-called "**Grand Chamber**" which means a plenary session of fifteen judges or even in full.

All the case law of the CJEU can be found on the **Curia website** or through the EU's legal database: **EUR-LEX**. [11]

B. EU Charter of Fundamental Rights

35. INTRODUCTION - The EU Charter of Fundamental Rights (EU Charter or CFREU) was **adopted in 2000 but only became of real importance in 2009** when it was given the same legal value as the two EU Treaties (TEU and TFEU). This means that the Charter is **part of the EU primary law** (to be seen as a de facto constitution of the EU). The EU Charter contains fundamental rights and principles and could be seen as a combination of the European Convention of Human Rights and the European Social Charter as it includes **political and civil rights and social and economic rights**. On many occasions, the right protected by the instruments of the Council of Europe are thus also protected by the EU Charter, which offers individuals and trade unions multiple legal sources to base their claims on. However, at certain points, the EU Charter clearly goes beyond the rights offered by the ECHR and the ESC.

36. SOCIAL RIGHTS - Regarding industrial relations, the **most important rights** are:

- Art. 5: Prohibition of slavery and forced labour
- Art. 7: Respect for private and family life
- Art. 8: Protection of personal data
- Art. 10: Freedom of thought, conscience and religion
- Art. 11: Freedom of expression and information
- Art. 12: Freedom of assembly and association (incl. trade unions)
- Art. 15: Freedom to choose an occupation and right to engage in work

[11] For Curia, see https://curia.europa.eu/jcms/jcms/j_6/en/; For EUR-LEX, see: https://eur-lex.europa.eu/.

- Art. 16: Freedom to conduct a business (often used to counter social rights)
- Art. 17: Right to property (also often used to counter social rights)
- Art. 21: Non-discrimination
- Art. 23: Equality between women and men (incl. equal pay)
- Art. 26: Integration of persons with disabilities
- Art. 27: Workers' right to information and consultation within the undertaking
- Art. 28: Right of collective bargaining and action (incl. strike)
- Art. 29: Right of access to placement services
- Art. 30: Protection in the event of unjustified dismissal
- Art. 31: Fair and just working conditions (incl. working time)
- Art. 32: Prohibition of child labour and protection of young people at work
- Art. 33: Family and professional life (work-life balance)
- Art. 34: Social security and social assistance

37. PROBLEMS WITH APPLICATION AND INTERPRETATION - The long list above offers an extended collection of social rights and principles to EU Citizens. However, the **enforceability of the EU Charter is much debated**, even if it is considered as primary EU law. There are three main issues with the application of the EU Charter.

First, the EU charter contains "**rights and principles**". It is unfortunately unclear what is the exact difference between the two and it is mostly a mystery which of the articles contains rights and which contains principles. Some scholars state that principles are merely positive ambitions of the EU and the member states and therefore should not be seen as enforceable rights. This could e.g. said of the right to work and the article relating to Family and professional life. In any case, as the EU Charter offers no clarity, it is up to the Court of Justice of the EU to judge in individual cases when certain rights and principles can be enforced and when not. The CJEU has already stated that the right to collective bargaining in art. 28 should be seen as a right, but the rights of the elderly (art. 25), the integration of persons with disabilities (art. 26) and information and consultation (art. 27) are considered to be mere principles.

Second, art. 51 of the EU Charter states that its provisions are addressed to the institutions, bodies, offices and agencies of the EU with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. This means that, in principle, **individuals and trade unions can only base a claim on the EU Charter** against an institution of the EU itself or a Member State, but only **when the case relates to EU law** (e.g. when the provisions of a Directive or Regulation is involved, e.g. in a case of transfer of undertaking). This also means that the EU Charter **only applies vertically** (against public authorities) and **not horizontally** (against a private entity). Therefore, unless in case of a public employer (in case of a nationalised air carrier), it is difficult to base a claim on the EU Charter against a private air carrier. Nonetheless, the **CJEU has accepted a horizontal effect for certain rights**. E.g. the anti-discrimination rights, but also the right to collective bargaining (including the right to strike) in art. 28 were already give, a horizontal effect by the Court.

Therefore, it could still be worth to invoke the rights of the EU Charter against a private employer.

Third, whenever a right or principle in the EU Charter contains the same rights as in the European Convention of Human Rights, the **EU Charter should be interpreted in the same way as the ECHR**. It is far from clear if this means that the CJEU should therefore follow the case low of the European Court of Human Rights. In any case, the accession negotiations of the EU to become a member of the Council of Europe have failed precisely because the CJEU refused to become a "lower court" in comparison to the ECtHR. Nevertheless, in case of similar rights, the CJEU will normally take the case law of the ECtHR into consideration (without accepting its priority).

38. CONCLUSION - In conclusion, the EU Charter is a very broad fundamental rights treaty, but it is **mostly useful if EU law is involved and it will be tricky to use it in individual cases directly against air carriers**, except for certain articles like the right to collective bargaining and the right to take collective action in art. 28. Nonetheless, it can never harm to refer to the EU Charter and it is a good tool to use in policy discussions, especially on EU level, as EU institutions like the EU Commission should always respect the EU Charter.

C. European Pillar of Social Rights

39. INTRODUCTION - Lastly, we mention the European Pillar of Social Rights (EPSR). This EPSR was officially **"adopted" in 2017** but contrary to what its title suggests, this is **not a legal instrument** containing rights, but rather an ambitious document with long-term **policy objectives in the social field**. The EPSR is **not enforceable before the courts**, but that does not mean it has no value (see below).

40. CONTENT - First, let's discuss what is in the EPSR. It exists out of 3 main chapters with in total 20 social "rights" (see schedule below). Many of these rights have a legal counterpart as a right or principle in the EU Charter or can at least partly be supported on the basis of the rights in the EU Charter. However, the EPSR **goes beyond the rights within the EU Charter** as sets more detailed policy objectives which should not be seen as "fait accompli" but goals towards which the EU legislator and the EU Member States should strive.

41. IMPACT ON SECONDARY EU LAW - The previous Juncker Commission and the current von der Leyen Commission , used or use the EPSR as a sort of **moral guidebook and as the motivation to implement new social secondary legislation**, i.a.:

- The Directive on Transparent and Predictable Working Conditions
- The Work-life Balance Directive
- The creation of a European Labour Authority
- Directive on Adequate Minimum Wages (still under negotiation)
- Directive for the Protection of Platform Workers (still under negotiation).

42. OTHER IMPLEMENTATION - In any case, the **renewed attention** by the former and current EU Commission **for the social dimension** of the EU is emphasised by the EPSR. Not only in legislative initiatives, but also e.g. in von der Leyen's EPSR Action Plan (2021) or in the economic

I. Equal opportunities and access to labour market	II. Fair working conditions	III. Social Protection and inclusion
1. Education, training, life-long learning	**5. Secure and adaptable employment**	**11. Childcare**
2. Gender equality	**6. Wages**	**12. Social protection**
3. Equal opportunities	**7. Information (work conditions) + dismissal protection**	**13. Unemployment benefits**
4. Active support to employment	**8. Social dialogue and involvement**	**14. Minimum income**
	9. Work-life balance	**15. Old age/pensions**
	10. Health & safety + data protection	**16. Health care**
		17. Inclusion persons w disabilities
		18. Long-term care
		19. House and assistance for homeless
		20. Access to essential services

governance through the **European Semester** and the **EU NextGeneration** budget (Recovery and Resilience Plans after the Covid-19 Pandemic). Member states are constantly asked to take into consideration the implementation of the EPSR.

43. CONCLUSION - As said, the EPSR has no real legal value. It can be used during policy discussions (especially on EU level), but not before courts. Furthermore, it suffices that the next EU Commission ignores the EPSR to basically make it disappear. There is no enforcement mechanism to supervise the implementation of the EPSR, expect maybe the system of the European Semester, in which the European Commission can give recommendations to the Member States to take certain measures.

2.2 MAIN INDUSTRIAL RELATIONS FUNDAMENTAL RIGHTS

44. OVERVIEW OF DIFFERENT RIGHTS - Below we will give an overview of the main fundamental rights for industrial relations: the freedom of association, the right to collective bargaining, the right to (take) collective action, the right to social dialogue and the right to information and consultation. These rights are closely connected but know a certain variation in the level of acceptance and protection they enjoy. In the schedule below, you can find a concise overview of the most important sources of these rights.

Right / Source	Freedom of association	Collective bargaining	Collective action	Social dialogue	Information and consultation
UNDHR	Art. 20				
ICESCR	Art. 8				
ILO	C. 87 And C. 98	C. 87 And C. 98	C. 87 And C. 98	R 113	C. 158 and R. 166
ECHR	Art. 11	Art. 11	Art. 11	/	/
ESC	Art. 5	Art. 6.2	Art. 6.4	Art. 6.1	Art. 21 and 29[12]
CFREU	Art. 12	Art. 28	Art. 28	/	Art. 27
TFEU	/	Art. 154 and 155	/	Art. 152 and 154	Art. 152, 153 and 154
EPSR	/	Principle 8	Principle 8	Principle 8	Principle 8

2.2.1 Freedom of association

45. SOURCES - The freedom of association is the s**tarting point of all industrial relations fundamental rights** as this offer workers to right to organise themselves and establish trade unions. This right is also known as the "Freedom of assembly and association" or the "Trade Union Freedom". As seen above we can find this right in **the following international standards**:

- The Freedom of Association and Protection of the Right to Organise ILO Convention of 1948 (No. 87), which is a fundamental ILO Convention.
- ILO Convention no. 98 on the freedom to organise and collective bargaining (also fundamental)

[12] The general right to information and consultation is only included in article 21 of the Revised European Social Charter. Also, the more specific right to information and consultation in case of collective redundancies in article 29 of the Revised ESC does not appear in the original ESC of 1961. So, the ESC of 1961 did not provide a general right to information and consultation, but it was later added in the second article of the Additional Protocol of 1988.

- On UN level also, article 20 of the Universal Declaration of Human Rights and article 8 of the International Covenant on Economic, Social and Cultural Rights[13]
- Article 11 of the European Convention of Human Rights
- Article 5 of the European Social Charter
- Article 12 of the EU Charter of Fundamental Rights

46. GENERAL INFORMATION - The freedom of association is such an important principle for the ILO, that not only **two fundamental conventions** are basically dedicated to it, but also the ILO Committee which monitors cases regarding industrial relations disputes is called the **Freedom of Association Committee**. This Committee has the most elaborate case law on the freedom of association, but also the other discussed supervisory committees and courts should not be forgotten. And since the trade union freedom is **explicitly mentioned in article 11 of the ECHR**, the ECtHR has a rather extensive case law regarding this right. The Freedom of Association falls both within the civil and political rights as in the category of social and economic rights, which further highlights the artificial distinction between these 2 categories of rights. This also means that the freedom of association is clearly protected by all fundamental right instruments.

There are some theoretical discussions about the meaning of the word "freedom" and the difference with "right", but in practice this is a fundamental right to associate, organise and establish a trade union.

Below, we give an overview of the interpretation of this right by the ILO, the ECtHR, the ECSR and the CJEU.

47. ILO CONVENTION NO. 87 - According to the ILO, the Freedom to association in Convention no. 87 contains the **following elements**:

- **Right** of workers and employers without distinction whatsoever to **establish and join organisations**
  - without distinction whatsoever" used in this Article mean that the freedom of association should be guaranteed without discrimination of any kind based on occupation, sex, colour, race, beliefs, nationality, political opinion, etc., not only to workers in the private sector of the economy, but also to civil servants and public service employees in general.
- Right of workers and employers to establish organisations **without previous authorisation**
  - Although the founders of a trade union should comply with the formalities prescribed by legislation, these formalities should not be of such a nature as to impair the free establishment of organisations.
- Right of workers and employers to establish and join organisations **of their own choosing**
  - This means that only allowing one trade union to exist is problematic;
  - Freedom of choice of the organisation's structure;
  - Right to make their own statutes and rules and enforce them;

[13] It can also be found in article 22 of the International Covenant on Civil and Political Rights.

- Right to manage their owns structures;
- Right to formulate work policies;
- Right to create federations and join international organisations.

- The ILO allows, within certain margins, **union security clauses** (closed shop), which means agreements between unions and employers that the latter will only hire trade union members, but national authorities can regulate this (often prohibited)
- **Prohibition for authorities to intervene** in these rights, including by posing conditions for the granting of a legal persona to trade unions (if these conditions make it more difficult), nor can they suspend the working of a trade union or dissolve the trade union.

48. ILO CONVENTION NO. 98 - In ILO Convention no. 98, the following elements are added:

- Trade union members should enjoy protection against any measure of the employer which creates **a negative distinction** between them and non-members (discrimination).
- This means that employer cannot take measures or put pressure on workers to **not join a trade union** or on trade union members to **give up their membership.**
- Trade union activity cannot impact the career of a member.

49. ART. 11 EUROPEAN CONVENTION OF HUMAN RIGHTS - Article 11 of the European Convention of Human Rights explicitly mentions the trade union freedom as a **special part of the freedom of association**, this is called the freedom to form and join trade unions. Based on the case law of the European Court of Human Rights, the following elements can be distinguished (based on the ECtHR's Guide on art. 11 ECHR):

- The freedom of association is not absolute and can be **limited** according to the conditions of Article 11 § 2.
- Trade-union freedom is an **essential element of social dialogue** between workers and employers, and hence an important tool in achieving **social justice** and harmony (Sindicatul "Păstorul cel Bun" v. Romania [GC], 2013, § 130).
- Article 11 safeguards freedom to protect the occupational interests of trade-union members by trade-union action, the conduct and development of which the Contracting States must both **permit and make possible** (Swedish Engine Drivers' Union v. Sweden, 1976, § 40; Tüm Haber Sen and Çınar v. Turkey, 2006, § 28).
- However, it does **not guarantee** trade unions or their members **any particular treatment by the State**. Under national law trade unions should be enabled, in conditions not at variance with Article 11, to **strive for the protection of their members' interests** (Sindicatul "Păstorul cel Bun" v. Romania [GC], 2013, § 134).
- The words "for the protection of his interests" cannot be construed as meaning that only individuals and not trade unions may make a complaint under this provision (Federation of Offshore Workers' Trade Unions and Others v. Norway (dec.), 2002). Article 11 protects **both workers and unions** (Yakut Republican Trade-Union Federation v. Russia, 2021, § 30).
- Workers' representatives should as a rule, and within certain limits, enjoy **appropriate facilities** to enable them to perform their trade-union functions rapidly and effectively (Sanchez Navajas v. Spain (dec.), 2001).
- A policy **restricting the number of organisations** to be consulted by the Government is not incompatible with trade-union freedom (National Union of Belgian

Police v. Belgium, 1975, §§ 40-41,where the applicant union was able to engage in other kinds of activity vis-à-vis the Government for the protection of the interests of its members).

- Article 11 § 2 **does not exclude any occupational group** from the scope of that Article. At most the national authorities are entitled to impose "lawful restrictions" on certain of their employees in accordance with Article 11 § 2 (Sindicatul "Păstorul cel Bun" v. Romania [GC], 2013, § 145). Article 11 thus applies to everyone in an employment relationship (see Sindicatul "Păstorul cel Bun" v. Romania [GC], 2013, §§ 141 and 148, concerning members of the clergy; Manole and "Romanian Farmers Direct" v. Romania, 2015, § 62, as regards self-employed farmers). Prison work cannot be equated with ordinary employment. A statutory ban on the unionisation of working inmates can therefore be justified, having regard to the lack of sufficient consensus between the Council of Europe member states as regards the right of prisoners to form and join trade unions (Yakut Republican Trade-Union Federation v. Russia, 2021, §§ 44-47).
- The Convention makes no distinction between the functions of a Contracting **State** as holder of public power and its responsibilities **as employer**. Article 11 is accordingly binding upon the "State as employer", whether the latter's relations with its employees are governed by public or private law (Schmidt and Dahlström v. Sweden, 1976, § 33; Tüm Haber Sen and Çınar v. Turkey, 2006, § 29).
- An employee or worker should be **free to join or not join** a trade union without being sanctioned or subject to disincentives (Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom, 2007, § 39).
- Although an obligation, imposed by law or an agreement (**closed-shop**), to join a particular trade union may not always be contrary to the Convention, it will violate the **negative freedom not to join** a Trade Union if there are important negative consequences (e.g. dismissal, loss of license) (Young, James and Webster v. the United Kingdom, 1981, § 55; Sigurður A. Sigurjónsson v. Iceland, 1993, § 36; Sørensen and Rasmussen v. Denmark, 2006)
- **Financial incentives** for workers in order to give up their trade union rights / membership are not acceptable (Wilson, National Union of Journalists and Others v. the United Kingdom, 2002, § 46)
- Imposing **disproportionate penalties** or even **criminal or disciplinary sanctions** to trade union members in relation to their trade union activities can have an effect to dissuade them from participating in legitimate trade union actions and can therefore violate Article 11 (Trade Union of the Police in the Slovak Republic and Others v. Slovakia, 2012, § 55; Ognevenko v. Russia, 2018, § 84; Karaçay v. Turkey, 2007, § 37; Urcan and Others v. Turkey, 2008, § 34; Doğan Altun v. Turkey, 2015, § 50).
- The right to form trade unions includes the right of trade unions to **draw up their own rules**, to **administer their own affairs** and to **establish and join trade union federations** (Cheall v. the United Kingdom (Commission decision), 1985; Yakut Republican Trade-Union Federation v. Russia, 2021, § 30; Associated Society of Locomotive Engineers & Firemen (ASLEF) v. the United Kingdom, 2007, § 38).
- As they are value-based and ideological organisations, a **trade union should be free to choose its members**; there is no obligation under Article 11 for associations or organisations to admit whoever wishes to join. (Associated Society of Locomotive Engineers & Firemen (ASLEF) v. the United Kingdom, 2007, § 39; Cheall v. the United Kingdom, Commission decision, 1985; Associated Society of Locomotive Engineers & Firemen (ASLEF) v. the United Kingdom, 2007, § 39). However, when trade unions carry out public duties or they receive considerable public funding, their right to refuse

members might be limited. Furthermore, the rules regarding their membership should be followed and should not be unreasonably or arbitrary (or discriminatory).

50. ART. 5 EUROPEAN SOCIAL CHARTER - Under article 5 of the European Social Charter, employers and workers have the right to freedom of association in national or international associations for the protection of their economic and social interests. The European Committee of Social Rights includes the following aspects in article 5 ESC:

- **Forming trade unions and employer associations:**
  - Trade unions and employer organisations must be free to organise **without prior authorisation**, and initial **formalities** such as declaration and registration must be simple and easy to apply.
  - If **fees** are charged for the registration or establishment of an organisation, they must be reasonable and designed only to cover strictly necessary administrative costs.
  - Requirements as to **minimum numbers** of members comply with Article 5 if the number is reasonable and presents no obstacle to the founding of organisations.
  - Trade unions and employers' organisations must be **free to form federations and join similar national and international organisations** and so States Parties may not limit the degree to which they are authorised to organise.
  - There must also be provision in domestic law for a right of **appeal to the courts** to ensure that all these rights are upheld.
- **Freedom to join or not to join a trade union**
  - Workers must be **free not only to join but also not to join** a trade union.
  - Domestic law must guarantee this right and include **effective punishments** and remedies where this right is not respected.
  - Trade union members must be **protected** from any **harmful consequence** that their trade union membership or activities may have on their employment (reprisal, discrimination relating to recruitment, dismissal or promotion)
  - Where such discrimination occurs, domestic law must make provision for adequate **compensation**.
  - No worker may be **forced to join or remain a member** of a trade union. Any form of compulsory trade unionism (closed shop) is incompatible with Article 5.
  - Domestic law must clearly prohibit all pre-entry or post-entry **closed shop clauses** and all union security clauses (Stricter vision than the ILO).
  - The same rules apply to **employers' freedom** to organise.
- **Trade union activities**
  - Trade unions and employers' organisations must be **autonomous** in respect of their organisation or functioning.
  - Trade unions are entitled to **choose their own members** and representatives. The following examples constitute infringements in breach of Article 5:
    - prohibiting the election of or appointment of foreign trade union representatives;
    - substantially limiting the use that a trade union can make of its assets;

- substantially limiting the reasons for which a trade union is entitled to take disciplinary action against its members.

– Trade unions and employers' organisations must be **largely independent** where anything to do with their infrastructure or functioning is concerned. They are entitled to perform their activities effectively and devise a work programme.

– Trade union officials must have **access to the workplace** and union members must be able to hold meetings at work in so far as employers' interests and company requirements permit.

- **Representativeness**

  – Domestic law may restrict participation in various consultation and collective bargaining procedures to **representative trade unions** alone.

  – The following **conditions** must be met:

  a) decisions on representativeness must not present a direct or indirect obstacle to the founding of trade unions;

  b) areas of activity restricted to representative unions should not include key trade union prerogatives;

  c) criteria used to determine representativeness must be reasonable, clear, predetermined, objective, prescribed by law and open to judicial review.

- **Personal scope**

  – Article 5 applies to all workers in both **public and private sector**.

  – The prohibition to form "trade unions" for **unemployed and retired workers** is not contrary to Article 5, only if they are entitled to form organisations which can take part in consultation processes connected with their rights and interests.

  – States Parties must secure for **nationals of other parties,** treatment not less favourable than that of their own nationals in respect of becoming a founding member of and membership of trade unions and enjoyment of the benefits of collective bargaining.

  – Certain limited restrictions for **police and army** can be accepted.

51. COURT OF JUSTICE OF THE EUROPEAN UNION AND EU – The TFEU gives certain competences to the European social partners and highlights the importance of social dialogue (see further), but it only refers to the principle of freedom of association in **article 151 TFEU**, which sets out the social policy objectives of the Union. Therefore, most important is article 12 of the Charter of Fundamental Rights, which reads as follows: "*Employers and workers of the European Community shall have the right of association, in order to constitute professional organisations or trade unions of their choice for the defence of their economic and social interests*."

Article 12 CFREU is based on article 11 ECtHR, but also on Article 11 of the Community Charter of the Fundamental Social Rights of Workers (an non-legally binding Charter that was adopted on 9 December 1989 and later evolved into the CFREU (therefore, we will not mention this Community Charter anymore). As seen, the interpretation of article 12 of the CFREU should follow the same the interpretation of article 11 ECHR, for which the case law of the ECtHR could be useful (although the CJEU does not consider itself bound by it. Unlike other social rights, the freedom of association is included in the "Freedoms" chapter of the CFREU and not in the Solidarity chapter. It is also the only article that explicitly mentions trade unions. In any case,

the case law of the CJEU regarding the freedom of association is limited. In a recent case regarding Hungarian laws directed against NGO's which would be forced to register their members and donators, the Court stated that "*the freedom of association constitutes one of the essential bases of a democratic and pluralist society, inasmuch as it allows citizens to act collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life".* [14] The **CJEU has not yet ruled on any trade union case involving art. 12 CFREU**.

2.2.2 Right to collective bargaining

52. INTRODUCTION AND CONTENT - The right to collective bargaining could be seen as an **essential element of the freedom of association** and is one of the best protected industrial relations rights in the international rights instruments. Collective bargaining can be **defined** as all negotiations between one or more employers (or their organisations) and one or more workers' organisations (trade unions) for determining working conditions and terms of employment, including issues related to pay and working time, and for regulating relations between employers and workers or as : "*a process of accommodation of interests, covering all types of bipartite or tripartite discussions, concerning labour and industrial relations which may have a direct or indirect impact on the interests of employees or groups of employees".* [15] Collective bargaining can be bipartite between employers and workers (or their respective organisations) or tripartite, in case also the authorities are involved (usually at policy level or central/national level).

We can find the right to collective bargaining in the **following international rights instruments**:

- ILO Convention no. 98 concerning the right to organize and to collective bargaining (fundamental convention) and ILO Recommendation no. 91 regarding collective bargaining agreements
- ILO Convention no. 150 (Labour Administration Convention)
- ILO Convention no. 151 regarding labour relations in the public service and ILO Recommendation no. 159
- ILO Convention no. 154 to promote collective bargaining and ILO Recommendation no. 163
- Article 11 European Convention of Human Rights (not mentioned explicitly, but recognised by the ECtHR)
- Article 6.2 European Social Charter
- Article 28 of the EU Charter of Fundamental Rights

53. ILO CONVENTION NO. 98 – As seen above, Convention no. 98 is also an important convention for the freedom of association, which is logical, since the right to collective bargaining is an essential corollary or element of the freedom of association. There are a couple of ILO instruments dedicated to the right to collective bargaining, but Convention no. 98 is by far the

[14] CJEU 18 June 2020, C-78/18, Commission v. Hungary.
[15] G. BAMBER, P. SHELDON and B. GAN, "Collective Bargaining: international developments and challenges" in R. BLANPAIN (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies,* Alphen aan den Rijn, Kluwer Law International, 2010, 613-614.

most important one and is designated as a **fundamental convention** by the ILO. Therefore, we will only look at the elements of Convention no. 98:

- Convention no. 98 applies to the **private and to the public sector**. Only functionaries of the State (that execute state power), the army and police are in principle excluded. For more specific rules regarding the public sector, see ILO Convention 151. The ILO states that also self-employed persons can benefit the protection of the right to collective bargaining
- The **material scope** of the negotiations is not limited to traditional working conditions and is determined by the parties.
- The social partners are **free to determine their own relationship and procedures**. If this is not done spontaneously, the State shall promote and support it.
- A restriction of the right to collective bargaining to the **most representative trade unions** can only be accepted under strict conditions. There are some principles for granting exclusive negotiation rights:
  - These rights should be granted by an independent institution;
  - The organisation should be elected by a majority of the involved workers;
  - Non-selected organisation should be able to ask for a re-election after a reasonable period (often 12 months).
- Collective bargaining can take place **at any level** (national / industry / sectoral / company / …), it is up to the **social partners to choose the appropriate level** (no forced decentralisation)
- The **hierarchy (legal coordination) of the levels** of negotiation should be clearly established.
- Collective agreements legally take **precedence over individual employment agreements** (unless the social partners agree otherwise).
- Negotiators shall have access to **appropriate training and information**, which are deemed necessary for the negotiations.
- Any **maximum period of time** imposed for the negotiations should be proportionate.
- Only voluntary procedures can be laid down in order to help the parties find a solution in the most autonomous way possible in the event of a conflict during the negotiations (**no compulsory arbitration**).
- Encouraging (usually by the employer) **renunciations** by the employees of their right to collective bargaining are problematic (e.g. promising additional benefits for employees who do not support/join the trade unions in order to make collective bargaining impossible).
- The parties should (in principle) **not be forced to negotiate** (or to stay at the negotiation table, as an initial government order for the social partners to sit together is often deemed acceptable).
- The parties (and the state) must respect the **principle of good faith** and implement collective agreements that have been concluded.
- The public authorities should **not interfere with the content** of collective agreements, e.g. in order to bring them into line with their socio-economic policies.

- In principle, legislation should not force the **renegotiation** of rights or conditions already acquired through social dialogue (or collective bargaining).
- A **restriction on (future) collective bargaining** (e.g. setting wage standards, restricting wage indexation) can only be imposed under certain conditions (exceptional, temporary, necessary, previous consultation, etc.).
- The parties determine (in principle) the **duration** of the collective agreement. However, the survival of the collective agreement (after the end of its term) does not fall under the protection of the right to collective bargaining.
- The **compulsory automatic renewal** (or prolongation) of the collective agreement is not permitted.
- The public authorities may not refuse **administrative approval** for the declaration of universal applicability (extension) on account of the collective agreement's content, but purely formal conditions may be imposed.
- The **extension** of collective agreements is only possible if the parties are actually the most representative, and sometimes a previous tripartite analysis is required.
- If the state itself is a party to the collective agreement, it can only exceptionally hide behind the **budgetary situation** in order to breach or adjust the agreement.

54. IMPLICIT RECOGNITION IN ARTICLE 11 EUROPEAN CONVENTION OF HUMAN RIGHTS – Unlike the freedom of association, the right to take collective action is not explicitly mentioned in article 11 ECHR, nor in any other provision of the Convention. The ECtHR initially held the view that social rights did not belong in the ECHR and therefore the right to collective bargaining was not seen as a substantial element of the freedom of association in article 11. However, the ECtHR changed its opinion in 2008 in the *Demir and Baykara v. Turkey* ruling, using an extensive method of interpretation (taking into consideration ILO Conventions, the European Social Charter, article 28 CFREU and the (constitutional) practices in the member states. Since Demir and Baykara, the right to collective bargaining is seen as an essential element of art. 11 ECHR, which means that states only have a limited margin of appreciation to restrict this right. In the case law of the ECtHR, we find the **following principles**:

- **States remain free to organise their system** so as, if appropriate, to grant special status to **representative trade unions** (Demir and Baykara v. Turkey, 2008, § 153-154).
- The right to collective bargaining does **not mean a "right" to a collective agreement** (National Union of Rail, Maritime and Transport Workers v. the United Kingdom, 2014, § 85), or a right for a trade union to maintain a collective agreement on a particular matter for an indefinite period (Swedish Transport Workers Union v. Sweden, 2004).
- There is no requirement under the Convention that an employer enters into, or remains in, any particular collective bargaining arrangement or accede to the requests of a union on behalf of its members (UNISON v. the United Kingdom, 2002). However, the **negative freedom of association** does not include a right for employers who are not members of a contracting employers' organisation to free itself from a collective bargaining agreement which is declared generally applicable by the authorities.
- A State's **positive obligations** under Article 11 do not extend to providing for a mandatory statutory mechanism for collective bargaining (Unite the Union v. the United Kingdom, 2016, § 65 in fine; Wilson, National Union of Journalists and Others v. the United Kingdom, 2002, § 44).

55. ARTICLE 6.2 EUROPEAN SOCIAL CHARTER – Unlike the ECHR, the ESC does contain an **explicit mention of the right to collective bargaining**: *"With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements*". Article 6 as a whole is also called the right to collective bargaining (although it i.a. also includes a right to social dialogue and a right to collective action).

According to the ECSR, article 6.2 ESC contains the **following elements**:

- Domestic law must recognise that **employers' and workers' organisations may regulate their relations by collective agreement**. If necessary and useful, i.e. in particular if the spontaneous development of collective bargaining is not sufficient, positive measures should be taken to **facilitate and encourage** the free and voluntary conclusion of collective agreements.
- States Parties should **not interfere** in the freedom of trade unions to decide themselves which industrial relationships they wish to regulate in collective agreements and which legitimate methods should be used in their effort to promote and defend the interest of the workers concerned, including the use of collective action.
- Trade unions must be allowed to **strive for the improvement of existing living and working conditions** of workers and in this area the rights of trade unions should **not be limited by legislation** to the attainment of minimum conditions.
- The extent to which collective bargaining applies to **public officials**, including members of the police and armed forces, may be determined by law. Officials nevertheless always retain the right to participate in any processes that are directly relevant for the determination of procedures applicable to them.
- A **mere hearing** of a party on a predetermined outcome will not satisfy the requirements of Article 6.2 of the Charter. On the contrary, it is imperative to regularly consult all parties throughout the process of setting terms and conditions of employment and thereby provide for a possibility to influence the outcome. Especially in a situation where trade union rights have been restricted, it must maintain its ability to argue on behalf of its members through at least one effective mechanism.
- The rapidly changing world of work and proliferation of contractual arrangements, often with the express aim of avoiding contracts of employment under labour law, has resulted in an increasing number of workers falling outside the definition of a dependent employee, including low-paid workers or service providers who are de facto "dependent" on one or more labour engagers. These developments must be taken into account when determining the scope of Article 6.2 in respect of **self-employed workers**. The decisive criterion is rather whether there is an imbalance of power between the providers and engagers of labour. Where providers of labour have no substantial influence on the content of contractual conditions, they must be given the possibility of improving the power imbalance through collective bargaining.
- It is open to States Parties to require trade unions to meet an **obligation of representativeness** subject to certain conditions. Such a requirement must not excessively limit the possibility of trade unions to participate effectively in collective bargaining. The criteria of representativeness should be prescribed by law, should be objective and reasonable and subject to judicial review which offers appropriate protection against arbitrary refusals.

- The **extension** of collective agreements "should take place subject to tripartite analysis of the consequences it would have on the sector to which it is applied".

Mandatory dispute settlement and arbitration procedures do not fall under article 6.2 ESC but under article 6.3 ESC. In this respect, the ECSR only accepts voluntary arbitration.

56. EU TREATIES: EU COLLECTIVE BARGAINING – The importance of the right to collective bargaining is mirrored in **article 154 and 155 TFEU**, which grant an institutional power to the European Social Partners. According to Article 154, every time the EU Commission wishes to submit a legislative proposal relating to social policy, it will have to **consult** the European Social Partners. These can give their viewpoint on the proposal of the Commission, but they can also decide that they **will start to bargain collectively** with each other on the proposed topic, effectively taking over the legislative initiative from the EU Commission. Article 155 TFEU forms the legal basis of EU collective bargaining and also grants the European social partners the right to start **negotiations on their own initiative** (without proposal of the EU Commission). If the European Social Partners reach an agreement, they conclude a **European Framework Agreement**. The legal value of such a European framework agreement is far from clear, especially regarding EU Member States and other Parties. Therefore, article 155 TFEU includes the possibility for the European social partners to ask the EU Commission and the Council to **transpose the Framework agreement into an EU Directive**, which would make it clear that the agreement has to be implemented by the Member States. However, the EU Commission has sometimes **refused this request** by the European Social Partners (on sector level) because it did not consider the transposition of the framework agreement necessary or appropriate. The CJEU has ruled that the EU Commission indeed has the power to refuse this request. [16]

Furthermore, since 1991, article 155 TFEU has only led to four cross-industry European Framework Agreements and about 20 sectoral framework agreements. Although some of these framework agreements have led to very important EU legislations, the result in practice remains rather **disappointing**.

57. ART. 28 EU CHARTER OF FUNDAMENTAL RIGHTS – Article 28 if the EU Charter of Fundamental rights includes both the right to **collective bargaining and the right to take collective action**, stating "*Workers and employers, or their respective organisations, have, in accordance with Union 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.*" This highlights the intrinsic connection between collective actions as a means to empower workers during collective bargaining. The fundamental right to collective bargaining is **not unlimited**, as is emphasised by the *wording "in accordance with Union law and national laws and practices"*, which clearly indicates that national legislations can limit and regulate the collective bargaining practices. Nevertheless, these national rules should **not disproportionally restrict the right** by setting high thresholds or difficult procedural requirements etc. The wording "at appropriate levels" indicates that collective bargaining should be possible at the most appropriate level, i.e. national, sectoral or company level. In principle, it is up to the social partners themselves to decide on which level the negotiations take place, but EU Member States could prescribe certain levels in order to promote collective bargaining.

[16] CJEU 2 September 2021, C-928/19, EPSU v. EU Commission.

58. CASE LAW OF THE CJEU - As seen above, the EU Charter has its limits in its application. Therefore, in order to invoke the charter, there should be a clear connection with the application or implementation of EU law. There is also a **question whether you could invoke this article against an air carrier** (horizontal effect) as the charter was mostly meant to have a vertical effect (applicable against EU institutions and member states). However, there are **arguments in favour of a horizontal application** of this article as the CJEU has explicitly recognised the importance of the right to take collective action in article 28 of the Charter in the *Airhelp* and *Eurowings* cases against several airline companies that refused to compensate travellers because their flights were cancelled due to a strike. [17] However, there are no such cases where the right to collective bargaining itself was directly invoked against a private employer. Most of the case law of the CJEU on collective bargaining dates from before the Charter could actually be invoked, so the case law of the CJEU does not give much guidance for now. In relation to competition-law, the CJEU famously awarded an exception to collective bargaining agreements on the EU competition rules (so they would not be seen as illegal agreements) in the *Albany* case. [18] In this case, the CJEU highlighted the **importance of collective bargaining agreements for the development of social policy in the EU**. However, in later case law, often collective bargaining agreements were deemed to **violate the freedom to provide services (or establishment) in posting-related cases** [19] or to **violate the anti-discrimination rules** [20]. In later posting-related cases, the CJEU became a **bit more favourable** towards protective measures for posted workers laid down in collective bargaining agreements, without mentioning article 28 of the Charter. In the *Hennings* case, it was the first time that the Court referred to article 28 of the Charter in a case where a CBA was deemed to violate the anti-discrimination rules. [21] However, this justification test was very brief, and the CBA was deemed to be in violation of discrimination rules anyway (leading to the conclusion that the right to collective bargaining does not mean that the social partners can agree on discriminatory measures). In any case, the CJEU has called the fundamental right to collective bargaining of "paramount importance in EU law", but this was, ironically enough, done in the *EPSU* case in which the CJEU deemed it acceptable that the Commission refused to implement a framework agreement between sectoral social partners at EU level into a directive. [22] In conclusion, article 28 of the Charter is an important fundamental right, which most likely can be invoked against air carriers if there is an EU-connection, but the **CJEU's case law is not always unambiguously supportive of collective bargaining** (although there seems to be an improvement) and in any case there is a danger that the CJEU will prefer other fundamental rights or economic freedoms. This risk should be taken into account while planning the strategy in specific cases e.g. before trying to convince a national judge to pose a preliminary question to the CJEU. It is also possible to invoke art. 28 of the Charter before the

[17] CJEU 23 March 2021, C-28/20, Airhelp v. SAS; CJEU 6 October 2021, C-613/20, CS vs. Eurowings.
[18] CJEU 21 September 1999, C-67/96, Albany Internation v. Stichting Bedrijfspensioenfonds Textielindustrie.
[19] CJEU 11 December 2007, C-438/05, ITWF and Finnish Seamen's Union v. Viking Line; CJEU 18 December 2007, C-341/05, Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan en Svenska Elektrikerförbundet; CJEU 3 April 2008, C-346/06, Dirk Rüffert v. Land Niedersachsen.
[20] E.g. CJEU 27 October 1993, C-127/92, Enderby ; CJEU 8 April 1976, 46/75, Defrenne v. Sabena.
[21]CJEU 8 September 2011, C-297/10 and C-289/10, Sabine Hennings and Alexander Mai; confirmed in CJEU 28 June 2012, C-172/11, Enry.
[22] CJEU 2 September 2021, C-928/19 P, EPSU v. Commission.

national court, especially if the case involves elements of EU law, but in many cases, national judges will probably be reluctant to really rely upon the charter to make a decision.

59. PRINCIPLE 8 OF THE EUROPEAN PILLAR OF SOCIAL RIGHTS – Principle 8 of the Social Pillar regarding social dialogue and the involvement of workers is included in the chapter about fair working conditions. This principle states that the social partners "*will be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action. Where appropriate, agreements concluded between the social partners shall be implemented at the level of the Union and its Member States*." The wording of "*in matters relevant to them*" and "*where appropriate*" have drawn some criticism that it makes the strength of this principle too relative or prone to limitations. In any case the principle is not enforceable before the courts, but should more be seen as a policy guideline of the EU and especially the EU Commission. Therefore, principle 8 is **mostly useful to invoke when talking or negotiating with EU institutions or relating to the development of EU social policy**. The EU Commission also tries to implement the Social Pillar via economic governance (by giving non-enforceable guidelines to the member states in the European Semester). Certain EU Member States e.g. have received EU recommendations to enforce their collective bargaining system or to improve the involvement of social partners. Nevertheless, in the past, economic governance was also used to restrict the right to collective bargaining (especially during the economic and financial crisis.

2.2.3 Right to take collective action

60. INTRODUCTION AND CONTENT - The right to take collective action is the **ultimate "weapon"** of a trade union. Without the possibility to take collective action, it is difficult to convince employers to enter into negotiations to conclude collective bargaining or to give in to certain demands. Therefore, the **right to collective action and the right to collective bargaining are closely intertwined** and often appear next to each other in the same legal provisions. Nevertheless, collective actions can also exist outside of the scope of collective bargaining (although some countries only recognise a collective actions relating to collective bargaining as a legal forms of strike). A **collective action is a wide notion** which encompasses different kinds of collective actions. The most well-known one, often used as a synonym, is a strike or work strike, meaning that workers will collectively cease their labour. Another popular form of a collective action is a strike pickets in which case the workers will organise a "picket" by e.g. assembling at the front entrance of the company with banners and slogans (while collective ceasing their work). There are also actions in which the workers refuse to do certain tasks (e.g. administrative strikers) or slow-down their work (a slow-down action) or actually to their job extremely precise, thereby rendering the work ineffective and slow. Another variation is a secondary strike or solidarity strike, where workers from one company strike in solidarity with the workers of another company (often a sister company within the same group). In any case, the right to take collective action is not absolute and every country sets certain limits. In order to see whether these limits to the right to strike are acceptable it is very useful to look at the case law of the international courts and committees that enforce the right. We can find the right to take collective action in the **following international legal provisions**:

- Implicitly in the Freedom of Association and Protection of the Right to Organise ILO Convention of 1948 (No. 87);
- Implicitly in ILO Convention no. 98 concerning the right to organise and to collective bargaining (fundamental convention);

- ILO Convention no. 150 (Labour Administration Convention);
- Article 11 European Convention of Human Rights (not mentioned explicitly, but recognised by the ECtHR);
- Article 6.4 European Social Charter;
- Article 28 of the EU Charter of Fundamental Rights.

61. IMPLICIT RECOGNITION BY THE ILO IN RECOMMENDATIONS NO. 87 AND NO. 98 – **Nowhere** in the International Labour Standards is the right to strike (or collective action) **explicitly mentioned**. However, this does not mean that the ILO would not recognise the right to collective action. The Committee of Experts and the Freedom of Association Committee have **derived** the right from the important Conventions Nos 87 and 98. First, they looked at Convention No. 87 on Freedom of Association and Protection of Trade Union Rights of 1948. Article 3 of this Convention states in section 1: *"Workers' and employers' organisations shall have the right to establish their statutes and rules, to elect their representatives freely, to organise their management and work and to formulate their programmes of work"*. These organisations are defined by Article 10 as "*any organisation of workers or employers, the object of which is the promotion and defence of the interests of workers or employers*". The monitoring bodies have derived from this that workers' and employers' organisations have the right to promote and defend their interests, including through collective action such as strikes or lock-outs. Convention No. 98 on Freedom of Association and Collective Bargaining also points in this direction, as Article 4 exhorts Member States to promote collective bargaining. One way of doing this is by allowing collective actions. This implicit recognition by the monitoring bodies has caused the necessary **controversy**. The ILO Employers' Group also admitted in the past that collective action is part of customary international law, but after a long silence contested the view that the Committeee of Experts and the Committee on Freedom of Association can derive an (unlimited) fundamental right from Convention No. 87. Certainly, after the publication of the 1994 General Survey on Freedom of Association and Collective Bargaining by the Expert Committee, the employers' group had become frustrated with the extensive case law of the ILO supervisory bodies that had contributed greatly to the international development of the right to strike. At the 2012 International Labour Conference, the discussion on the status of the right to strike between employers' and workers' organisations even escalated into an open conflict during the International Labour Conference. The 2012 escalation caused a great deal of consternation within the ILO itself but also among various national authorities. The Director-General of the ILO proposed to refer the matter to the International Court of Justice. This referral received the support of the workers' group but was rejected by certain (mainly African) States and the employers. The discussion was then provisionally settled by a compromise in 2015. The Joint Position of 23 February 2015 states: *"The right to take industrial action by workers and employers in support of their legitimate industrial interests is recognised by the constituents of the International Labour Organisation"*, without explicitly referring to the Conventions no. 87 and no. 98. Therefore, the dispute seems mostly settled in favour of the right to strike.

62. PROTECTION AWARDED BY THE ILO - Strikes are an essential means by which workers can defend their economic and social interests. The objective of the strike is **not limited to the improvement of working conditions or terms of employment**. Strikes against a certain government policy are also allowed if that policy threatens the economic and social interests of workers (protest strike). Strikes may be used to try to weigh on the policy. Only **purely**

political strikes (unrelated to social and economic policy) and long-delayed strikes, unrelated to negotiations, do not fall within the protected scope of application of the ILO. Also, **legal disputes** do not have to be the subject of a strike, but are supposed to be submitted to the competent court. **Solidarity strikes** or secondary strikes, where workers strike in solidarity with workers of another company, are in principle allowed.

The **conditions that have to be met to be allowed to strike**, have to be reasonable and may not make striking practically impossible. Requiring a prior request is allowed, cooling-off periods and voluntary or compulsory (but short) conciliation and mediation procedures are also possible, especially in the case of essential services. Making authorisation dependent on a majority vote of the workers, on the other hand, is not so obvious; certainly, if a special majority is required, this is contrary to the law. If the request to strike has to specify the planned duration of the strike, the Experts Committee states that this duration may be indefinite. Compulsory arbitration procedures are sometimes acceptable to end a collective conflict, if the parties request it or if the strike may be limited, for example with regard to essential services (see below). Mandatory arbitration in advance is not possible, except again in the public sector and in case of essential services.

The Trade Union Freedom Committee and the Experts Committee also list some cases in which **strikes can be prohibited**:

- an **acute national emergency**, during a short period;
- for the **public sector**, if there is a danger for the community and if the prohibition or restriction is compensated by other means. The public sector restriction should only apply to 'agents of the state', it should not be defined too broadly. The restrictions do not apply or apply much less to personnel of public enterprises. For example, teachers, railway staff and postal workers are not covered;
- **essential services**, if there is a clear and imminent danger to the life, safety or health of part or all of the population. The monitoring committees have drawn up lists of functions that they consider essential and those that they do not.

However, restrictions or prohibitions on the public sector or essential services must be balanced by prompt and impartial procedures, such as conciliation/mediation and arbitration, after which the result can actually be implemented.

In certain cases, **minimum services** may also be imposed in order to meet safety requirements. This is what the Freedom of Association Committee calls the minimum safety service with regard to the safety of the personnel or the company equipment (machines, etc.). This differs from the minimum service which can be 'imposed' on essential services, non-essential services, where the scale and duration of the strike may result in an acute national crisis, and public services of fundamental importance. In addition, the Expert Committee sets **two conditions for the minimum service**: firstly, it must actually be a minimum service. This is about those services that are strictly necessary to meet the basic needs of the population, while maintaining the effectiveness of collective action. Secondly, workers' representatives (the trade unions) must be involved in defining the minimum service, alongside the employer and the government. The Expert Committee therefore speaks of a 'negotiated minimum service'.

If a strike turns out to be illegal, for instance because it is purely political or because it goes against an existing ban, the declaration of illegality should be made by an independent authority (i.e. a court) and not by the government.

Only in cases where the right to strike can be restricted or prohibited can the government or employer issue a **'back to work' order** and **break the strike**. The use of armed soldiers or police to break the strike can only be allowed in very limited cases (acute crisis, essential services, if public order is at risk). For example, the army (or other public forces) may only be deployed in such situations to take over the strikers' work. Also, bringing in temporary staff from outside the company to replace strikers' risks undermining the right to strike and infringing on the freedom of association.

As regards **strike pickets**, the authorities must also refrain from intervening unless the strikers disturb public order and threaten workers. Strike pickets must not involve **violence**, and strikers must **respect the freedom of other workers to work**. The employer must do the same, which means that he is not allowed to **close down the company** during a strike.

Proportional wage reductions are a normal consequence of the strike for workers. However, other (non-penal or administrative) **consequences or sanctions** are out of the question. These include, for example, closing trade union offices, dismissals, refusal to rehire a striker and forcing him to work overtime. Legislation that qualifies strikes as a breach of contract, among other things, also violates the right to strike. So is discriminating against strikers in favour of non-strikers. Criminal and administrative sanctions are only possible in case of abuse of the right to strike, especially if the strikes are violent or illegal. The sanctions imposed in this case have to be proportional, otherwise they are too intimidating for trade unions to start new strikes. If the strike is peaceful, no striker should be arrested or detained, or be subject to criminal prosecution.

63. IMPLICIT RECOGNITION IN ARTICLE 11 ECHR - The right to collective action is **not mentioned anywhere in article 11 ECHR** or anywhere else in the Convention. Yet the ECtHR considers the right to strike to be an aspect of the right to assembly and the right to form and join trade unions for the protection of one's interests. The right to peaceful assembly and freedom of association is one of the foundations of a democratic society. For these reasons, according to the Court, it must be interpreted broadly in relation to the freedom of association. The **interpretation and guarantee of the right to strike in the ECHR depends to a large extent on the interpretation by the ECtHR**. This interpretation has undergone an **important evolution**. Below, an overview is given of the case law of the ECtHR concerning the right to strike. This case law is not as extensive as the one of the ILO supervisory bodies or the ECSR, but the importance of the ECHR makes this case law interesting, nonetheless.

64. CASE LAW OF THE ECTHR - The case law can be **divided in two parts**, before and after the *Enerji Yapi-Yol Sen* [23] case of 2009 and after. In ***Schmidt and Dahlström*** [24] the ECtHR found that the right to strike was one of the main techniques to defend workers' interests but also that it was not the only technique. The conclusion was therefore that the right to strike is not an indispensable part of the (trade union) freedom of association. Of course, this had the

[23] ECtHR 21 April 2009, no. 68959/01, Enerji Yapi-Yol Sen/Turkey, www.echr.coe.int.
[24] ECtHR 6 February 1976, no. 5589/72, Schmidt and Dahlström/Sweden, www.echr.coe.int

consequence that Member States have a **great deal of discretion to limit the right to strike**. In the *Unison* judgment of 2002, the Court accepted that a strike fell within the protection of Article 11 of the ECHR, but the imposed ban fell within the large margin of appreciation of the Member State (the UK) and therefore the restriction was deemed justified. [25]

However, the case law evolved after the above-mentioned *Demir and Baykara* case [26] of 2008 in which the ECtHR finally recognised the right to collective bargaining as an essential element of article 11 ECHR. More or less the same seemed to have happened for the right to collective action in 2009. The civil servants' trade union ***Enerji Yapi-Yol Sen*** had sued the Turkish State because, in a circular, it had reminded them of the current ban on strikes for civil servants pending the harmonisation of the right to strike with the ECHR. [27] In its assessment, the Court adopted the extensive interpretation method from *Demir and Baykara*; by looking at the right to strike in other international human rights instruments E.g. it looked at the ILO and cited Article 6 § 4 of the ESC. The ECtHR therefore rejected Turkey's argument that the right to collective action does not fall under Article 11 of the ECHR and the court abandoned the restrictive jurisprudence of *Schmidt and Dahlström* and seemed to recognise the right to strike as an essential part of Article 11.

However, the euphoria among advocates of the right to strike was tempered in 2014 by the *RMT v. UK* ruling. [28] The UK transport workers' union RMT's complaint concerned the UK legal **prohibition of secondary strikes**, i.e. a strike by workers of one company or economic entity in solidarity with the workers of another company/economic entity affected by a collective conflict. The Court again applied the *Demir and Baykara* method and deduced from the recognition of secondary strikes by the ILO Freedom of Association Committee and the ECSR that a secondary strike falls under the protection of Article 11 of the ECHR. In addition, it also pointed to the reproaches that the UK received from the ILO and the ECSR for this prohibition and to the recognition of secondary strikes by most European countries. Nevertheless, the ECtHR found that the British prohibition was justifiable, because it serves to protect the rights of others, because the government has a large margin of appreciation (also because secondary actions would belong less to the core of Article 11 ECHR than primary actions) and because the prohibition had proportional consequences in this case, as the unions were just as capable of defending their members through primary actions. This means that under other circumstances the prohibition might not hold, for instance if the legal construction of the company would not allow the employees to exert sufficient pressure. **This view seems difficult to reconcile with that of the ILO and the ECSR**, and also the Court of Justice has in a recent ruling granted solidarity strikes the necessary protection under Art. 28 EU Charter (in the *Eurowings* case, see below).

In addition, the Court made it clear that the trade unions (and academics) had read more into the *Enerji Yapi-Yol Sen* judgment than the Court intended. The assertion that the ECtHR in *Enerji Yapi-Yol Sen* had recognised the right to strike as an indispensable part of the right to association in Article 11 ECHR was somewhat invalidated, because the **Court stated that it**

[25] ECtHR 10 January 2002, no. 53574/99, UNISON v. UK.
[26] ECtHR 12 November 2008, no. 34503/97, Demir and Bakaya/Turkey, www.echr.coe.int.
[27] ECtHR 21 April 2009, no. 68959/01, Enerji Yapi-Yol Sen/Turkey, www.echr.coe.int.
[28] ECtHR 8 April 2014, no. 31045/10, Nation Union of Rail, Maritime and Transport Workers v. The United Kingdom, www.echr.coe.int

had merely referred to the view of the ILO supervisory bodies without expressing its own view on this matter. The same denial was repeated in the *Association of Academics v. Iceland* case of 2018. The Court clarified: "*So far the Court has not found that the taking of industrial action should be accorded the status of an essential element of the Article 11 guarantee, but it is clear that strike action is protected by Article 11 as it is considered to be a part of trade union activity*". [29]

Although also in *Veniamin Tymoshenko v. Ukraine* [30] and in *Hrvatski lijecˇnicˇki sindikat v. Croatia* [31] strike bans by the authorities were condemned by the ECtHR as being a violation of Article 11 of the ECHR, it seems clear after *RMT v. UK* and *Association of Academics v. Iceland* that the right to strike is **not really seen an essential element of that Article 11 ECHR**. However, it is equally the case that the RMT jurisprudence does not prevent a certain protection of the right to collective action by the ECtHR. However, for the time being, the Court refuses to explicitly accord the same status to the right of collective action as it did to the right of collective bargaining. Therefore, claiming a violation of the right to collective action before the ECtHR constitutes a serious risk that the Court will award a rather **broad margin of appreciation** to a Member State to restrict the right to strike. **Only blatant violations seem to stand a chance**. E.g. in the case of *Ognevenko v. Russia*. [32] The Court had to consider the dismissal of a train driver who had participated in a strike. The national court ruled that his dismissal was justified. It invoked laws, which prohibit strikes for train crews with responsibility for train traffic and services to passengers. The Court, referring to the view of the ILO supervisory bodies, stated that rail traffic is not an essential service and that the mere negative economic impact cannot provide sufficient justification. Nor did alternative justifications offer Russia any relief. The Court concludes that participation in the strike is considered a breach of disciplinary rules, resulting in the most severe punishment (namely dismissal). This sanction inevitably creates a disincentive for trade unionists to participate in strikes to protect their professional interest, which constitutes a disproportionate restriction. **In other les clear cases, it might be best to avoid the ECtHR**.

65. ARTICLE 6.4 EUROPEAN SOCIAL CHARTER – In art. 6.4 ESC, the Member States recognise: *"the right of workers and employers to take collective action in cases of conflict of interests, including the right to strike, subject to obligations under previously concluded collective agreements".*

Article 6 § 4 of the ESC guarantees the right to take collective action for both workers and employers. The appropriate form of collective action for employers is the **'lock-out'**, the exclusion of workers. The most important point in this article is the explicitly guaranteed (in contrast to the lock-out) **right to strike for workers**. The ESC was the **first treaty to explicitly establish this right**.

66. SCOPE OF ARTICLE 6.4 ESC - **To whom does the right to strike apply?** In the first place, it applies to the workers, and since it concerns collective action, the involvement of a trade union seems appropriate, but it is not necessary. Excessive formalities regarding the scope are not accepted. For instance, France decided that public sector employees could only strike if the

[29] ECtHR 15 May 2018, no. 2451/16, Association of Academics/Iceland, www.echr.coe.int.
[30] ECtHR 2 October 2014, no. 48408/12, Veniamin Tymoshenko a.o./Ukraine, www.echr.coe.int
[31] ECtHR 27 November 2014, no. 36701/09, Hrvatski lijecˇnicˇki sindikat/Croatia, www.echr.coe.int.
[32] ECtHR 20 November 2018, nr. 44873/09, Ognevenko/Rusland, www.echr.coe.int.

request for strike was submitted by one of the most representative trade unions. However, the degree of organisation in France is rather low and the ECSR therefore considered this decision contrary to Article 6. 4 ESC. Also in Romania, such a condition had been imposed by the legislator, which was also disapproved by the ECSR. Whether this is just as much of an excessive formality for countries with a high degree trade union density, is doubtful. Once the strike is initiated by a trade union, every employee can join the strike, even if he belongs to another or no trade union. The scope *ratione personae* is therefore very broad.

As regards the **total exclusion of certain public servants**, such as police officers and military personnel, reference can be made to the ECSR decision on collective complaint No. 83/2012 by EuroCOP (European Police Union) against Ireland, in which an absolute prohibition on strikes for police officers was deemed contrary to Articles 5 and 6 of the ESC. However, it is not clear whether this decision could apply to all "agents of the State".

The question can be asked to what extent **self-employed workers** could make use of a right to strike. In theory, this sounds strange, because the self-employed normally have no employer whom they could hit with a strike. In the modern world of work, the line between employee and self-employed status is becoming less clear and there are e.g. freelancers or platform workers (workers in the platform economy) who (although disputed) are often not considered employees but are de facto economically dependent on certain companies. As the ECSR decided in 2018 that such economically independent workers should be able to make use of the right to collective bargaining, it seems that this should also be possible for the right to collective action. After all, in practice, strike action in the platform economy is already abundant.

Article 6.4 ESC explicitly refers to conflicts of interest, which means that **legal disputes** are excluded. Legal disputes in this case are conflicts about the existence, the interpretation or the validity of a collective agreement or about a violation thereof. Otherwise, strikes are allowed, unless the workers are bound by certain obligations arising from previously concluded collective agreements, as explicitly stated in Article 6.4 ESC. Of course, workers may strike when negotiating a new collective agreement, but other purposes are also permitted. The right may not be limited to this.

The right to strike does **not only apply to the classic industrial action** (a collective cease of work by employees). In addition, there is a restrictive protection for the lock-out by the employer, who must be very careful not to abuse this right. Also strike pickets and solidarity strikes are recognised by the ECSR. Pure political strikes are excluded, but the notion of 'any negotiation between workers and employers in the context of an industrial dispute' in Article 6.4 ESC must, however, be interpreted broadly to include strikes against the socio-economic government policy.

67. RESTRICTIONS AND PROTECTION OF ART. 6.4 ESC - Restrictions are only allowed if they are prescribed by law of a certain quality (legality requirement), if they serve a legitimate purpose (finality requirement) and if they are necessary in a democratic society (necessity requirement). The finality requirement is explicitly linked to: the protection of the rights and freedoms of others and of public order, national security, public health and morality. For example, using these criteria, the ECSR found that Norway could not impose compulsory arbitration before workers were allowed to strike, as the government only took economic arguments into account. Finally, there is a proportionality requirement.

We could categorise **different sorts of restrictions**:

- **Restrictions on essential services:** Some sectors are essential to the proper functioning of the country or society, think for instance of energy suppliers, medical institutions, etc. A strike in these services may represent a great danger for society. Nevertheless, the ECSR considers a general prohibition of strikes in the essential sectors usually disproportionate. On the other hand, a compulsory minimum service provision for these sectors is allowed, subject to conditions similar to those of the ILO. Unlike the ILO, the ECSR has not drawn up a list of sectors that it does or does not consider essential. The experts accept that countries make their own subdivisions, but do not feel bound by them. Civil aviation is not considered an essential service.
- **Restrictions for the public sector**: As is the case for essential services, a general prohibition on strikes for public sector employees (including important services) is contrary to Article 6.4 ESC; but also here a compulsory minimum service can be permitted. Even allowing workers to go on strike symbolically, but prohibiting them from actually stopping work, is contrary to the Charter. However, a prohibition to strike is allowed for certain specific public officials if their services are of such importance that their non-performance poses a direct risk to public health, public order, national security and the other matters listed in Article G of the ESC. A clear assessment of whether the prohibition of strikes is proportionate to the interests invoked is necessary. The ECSR explicitly mentions police officers, military personnel, judges and senior officials as categories for which a restriction to the right to strike may be possible. Certain services, which may not be considered essential, are public services of primary importance in the eyes of the ECSR, for which some restrictions such as a minimum service is possible. An example is rail transport. Most air carriers are private companies (although often partly owned by Governments) and therefore cannot be seen as public services.
- **Procedural requirements**:. Firstly, in certain cases collective agreements can be interpreted as an obligation of social peace and a kind of self-imposed prohibition to strike. This obligation must be very clear from the wording of the collective agreement. Secondly, a quota can be set for the approval of a certain number of workers before starting the strike. This number may not be too high, as it would excessively restrict the right to strike. Also, requiring prior mediation and arbitration is not necessarily contrary to Article 6 ESC. provided that this mechanism is not so slow as to make a subsequent strike virtually useless. Finally, one must look with the same eyes at so-called 'cooling-off periods' (periods during which workers must wait after the beginning of the conflict of interests with the start of the strike): they are allowed as long as they do not last too long.
- **General limits:** Besides bans and restrictions, the right to collective action is also restricted by other limits. E.g. Strikers cannot commit crimes, violence or threats and unduly prevent other employees to work (as they have the right to work) by obstructing their access to the workplace. Also employers and third parties have certain rights (right to ownership, free movement, safe traffic, etc.) which could lead to certain proportionate restrictions of the right to strike.

In principle, **the participation in a strike does not constitute a breach of contract** on the part of the employee. A **dismissal for this reasons is not allowed**. On the other hand, the ECSR does accept that the employer gives formal notice of termination of the contract after the strike has ended and after the strikers have recovered all their rights as employees. In general, this means that the employer has to pay a termination fee or give a notice period and comply with all the procedural requirements. Of course, employers should not abuse their dismissal rights: if the strike is the only reason for the unilateral termination of the employment contract, a judge should not accept it. A dismissal for urgent reasons is by all means excluded.

In addition, the ECSR considers that regulations that make trade unions or workers liable under civil or criminal law for the consequences of illegal strikes do not violate the Charter.

Employers do not have to pay striking workers during the strike. However, the deduction from their wages should not be disproportionate to the duration of the actions. In addition, workers who do not belong to trade unions must be given the same protection as those who do.

68. THE RIGHT TO COLLECTIVE ACTION IN THE EU - Article 153(5) TFEU **explicitly excludes strike action from the competences of the European Union**. The European institutions have no legislative competence in the matter, which belongs 100% to the level of competence of the Member States. As the case law of the Court of Justice shows, this exclusion can be put into perspective. Even if the institutions cannot regulate it, the right to strike is **recognised as a fundamental right** in and by the EU, both **by the Court of Justice and in Article 28 of the Charter of Fundamental Rights of the European Union**. Moreover, the treaties refer to the ESC in the preamble of the TEU and Article 151 TFEU, which should demonstrate the importance that the EU attaches to fundamental social rights. Nevertheless, **the EU's attitude towards the right to collective action is probably the most problematic of all the international legal orders discussed**. This is because the right to collective action is often at odds with the economic freedoms of the internal market, as evidenced by the Viking and Laval jurisprudence of the Court of Justice (see below).

Both regulation no. 2679/98 concerning the free movement of goods and Directive no.2006/123 concerning the freedom of services contain provisions stating that its provision should not interpreted be - in such a way as to affect in any way the exercise of fundamental rights as recognised in the Member States, including the right to strike. In the Services Directive this is nuanced by adding that these practices should be in conformity with EU law.

69. VIKING & LAVAL CASE LAW OF THE CJEU – As mentioned, the CJEU does not have the best reputation regarding the protection of the right to collective action, mostly due to the Viking & Laval cases of 2007. The ***Viking*** **judgment** [33] concerned the freedom of establishment (Article 49 TFEU). In which the Finnish ferry company Viking Line wanted to reflag a ferry from Finland to Estonia. This would mean that from now on the ship's employees would be subject to Estonian employment law instead of Finnish employment law. It is the flag of the ship that determines the applicable legislation. Because Viking Line had to pay its Estonian employees high wages, which were laid down in Finnish collective agreements, the Rosella was a loss-making enterprise for the company. However, the Finnish employees were members of the Finnish trade union FSU, which decided to take action, supported by the international transport union ITF, to demand that the crew be governed by Finnish law even after reflagging. Although FSU had negotiated that there would be no redundancies, it did not abandon the strike and called on ITF in a circular to all its members not to negotiate with Viking Line for reasons of solidarity. ITF had a principled policy against the practice of reflagging. Through the skilful use of private international law, the case came before a Court of Appeal in the United Kingdom, which referred questions to the Court for a preliminary ruling. On the one hand, the Court explicitly recognised for the first time the right to strike as a fundamental right in the EU (although not absolute). On the other hand, the Court refused to follow the unions in arguing

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that the right to strike cannot fall within the scope of the internal market. For this, they referred to the Albany judgment, in which the Court had exempted collective labour agreements from the applicability of EU competition law, since collective agreements would inherently constitute a restriction on free competition. Similarly, the organisation of a strike (with a Community dimension) can be considered as an inherent restriction on the internal market. However, the Court did not make an analogy here. It went on to find that the blocking of the ship was a breach of the freedom of establishment. However, it did not itself rule on whether the restriction was justifiable. But it did give the referring Court of Appeal some telling guidelines. For example, the Court stated that collective action can justify a restriction on the freedom of establishment if it aims to protect employees, provided that the jobs or working conditions concerned are at risk or are seriously threatened. In this regard, the Court noted that ITF was pursuing its anti-establishment policy, irrespective of whether the exercise by that right of freedom of establishment could have harmful consequences for the jobs or working conditions of workers. According to the Court, it was necessary to verify whether the restriction (the collective action) was proportionate: on the one hand, the trade union did have at its disposal other means, less restrictive of the freedom of establishment, to bring the collective negotiations with Viking to a successful conclusion and, on the other hand, whether FSU had exhausted those means before initiating this action. Therefore, it was clear that the UK Court would deem the collective action as a violation of the freedom of establishment.

In the ***Laval* case** [34], the right to strike came into conflict with the free movement of services. The Latvian building contractor Laval posted Latvian workers to its subsidiary Baltic (incorporated under Swedish law) on the building site of a school in Sweden. It was common practice in Sweden for the employer to conclude a collective agreement with the trade unions beforehand on the conditions of employment, in this case, inter alia, on the wages. Laval, however, refused to conclude a collective agreement awarding high Swedish wages to Latvian workers. The Latvian workers, who were not members of the Swedish trade union, were already protected by a Latvian collective agreement, which Laval had concluded with the Latvian trade unions. After the negotiations had failed, the Swedish trade union blockaded the building site, and Laval took the view that the free movement of services and the provisions of the Posting of Workers Directive 96/71/EC had been infringed. The Court first examined the provisions of the Posting of Workers Directive 96/71/EC. Article 3(1) allows Member States to impose a hard core of their labour law on posted workers from another Member State in order to combat social dumping. When transposing the Directive, Sweden had laid down several of these core elements, but not the minimum wages, as it was Swedish practice to let the social partners set the wages in ad hoc collective agreements. However, Article 3(1) of the Posting of Workers Directive 96/71/EC required at the time that the nucleus be laid down by law, regulation or administrative provision or by collective agreements or arbitration awards which have been declared universally applicable (this was later adjusted by the 2018 revision of the Posting of Workers Directive). The Swedish system of ad hoc collective agreements did not comply with this. Furthermore, the Swedish trade union could not rely on Article 3(7) of the Directive which states that the imposition of the hard core does not prevent the application of terms and conditions of employment which are more favourable to workers. The Court specified that this provision allows only the country of origin of the posted workers to offer a higher level of protection and not the countries where the posted workers carry out their work. For those Member States, the minimum conditions of the hard core are also the maximum they can

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impose. Finally, the loophole in Article 3(10) of the Directive, which allows Member States to impose public policy provisions, does not apply either.

The Court then went on to examine whether the Swedish trade union's collective action constituted a restriction on the free movement of services. As in Viking, it found that the right to take collective action is a fundamental right in the EU, but that it may nevertheless fall within the scope of the internal market rules. Again, the Court concluded that there had indeed been a restriction of a fundamental freedom. Unlike in Viking, however, it did explicitly take a stand on the possible justification. On the one hand, the collective action had a legitimate aim: to prevent social dumping and to protect workers. On the other hand, the collective action cannot be justified by that objective because the obligations (paying the high Swedish wage) that followed from the intended accession to the collective agreement are not admissible as they are contrary to the Posting of Workers Directive. In addition, according to the Court, the Swedish procedure is characterised by the absence of provisions that are sufficiently precise and accessible to foreign service providers that it is in practice impossible or extremely difficult for such an undertaking to know what obligations it has to comply with as regards the minimum wage. The collective action did not pass the justification test.

70. POST VIKING & LAVAL DEVELOPMENTS: TOWARDS A MORE POSITIVE VIEW? – The Viking and Laval cases sparked an immense political and academic debate and both the ILO and the ECSR have expressed explicit criticism on this case law. But more importantly, these cases also cause trade unions to avoid the CJEU when collective actions are involved. However, the **Viking & Laval cases date from before the EU Charter entered into primary EU Law** and the CJEU had to start thinking as a human rights court. Furthermore, as already mentioned before, the CJEU has also acted in defence of the right to collective action in article 28 EU Charter.

In two cases concerning strikes in the aviation sector, the Court seems to attach great importance to the right of collective action in Art. 28 EU Charter. In the *Airhelp* case of 23 March 2021 [35], the Scandinavian airline SAS was confronted with a pilots' strike after negotiations on working conditions had failed. As a result of this strike, several flights were cancelled. According to Art. 5.3 of Regulation (EC) No 261/2004, passengers must be compensated by the airline for a cancelled flight, unless the airline can prove that the cancellation was caused by extraordinary circumstances which could not have been avoided despite taking all reasonable measures. According to SAS, the collective action was an extraordinary circumstance because it was not inherent in the normal exercise of its activity and was beyond its actual control. However, the Grand Chamber of the Court of Justice finds that, in principle, a strike called by the trade union of the staff of an airline operating flights, in compliance with the conditions laid down by national law, does not fall within the concept of an exceptional circumstance. The Court observes, first, that the right to take collective action, including strike action, is a fundamental right laid down in Article 28 of the EU Charter. A strike must be regarded as one of the ways in which collective bargaining can take place and is therefore an event inherent in the normal exercise of an employer's activity. Secondly, as the right to strike is a right of the workers guaranteed by the Charter, a strike is foreseeable for any employer, especially if it is announced. Moreover, the airline retains a certain control over events, since in principle it has the means to prepare for the strike and to mitigate its effects, if the strike relates to the working conditions of the worker. Indeed, working conditions are

[35] CJEU 23 March 2021, C-28/20, Airhelp v. SAS.

internal to the company and the employer can influence the strike by, for example, making concessions on working conditions. Finally, SAS had also argued that the obligatory compensation of flights cancelled due to a strike would infringe its freedom of enterprise (Article 16 EU Charter), its right to property (Articles 16 and 17 Charter EU) and its right to bargain (Article 28 EU Charter). The Court rejects this, among other things, because the risk that the airline will have to compensate for the cancelled flights does not mean that it must simply give in to all the demands of the employees. Moreover, the Court points out that the right to property and freedom of enterprise are not absolute rights and that, in this case, the interest of consumer protection is a justifiable objective for limiting these rights of the enterprise. This case thus represented a shared victory for the right of collective action and consumer law. This position of the Court was confirmed in the *Eurowings* case of 6 October 2021, where the same reasoning was applied to a solidarity strike by Eurowings staff with the staff of parent company Lufthansa. [36]

However, it is probably too soon to qualify the CJEU as an ardent supporter of the right to collective action. Therefore, whenever a specific case presents a conflict between the right to collective action and other rights or fundamental economic freedoms, **it is recommended to think twice before aiming for a preliminary question to the CJEU**.

71. PRINCIPLE 8 OF THE EUROPEAN PILLAR OF SOCIAL RIGHTS – Just like the right to collective bargaining, the right to collective action is included in the EPSR. However, this **has not led to specific policy actions regarding collective actions** (which is difficult seen the explicit exemption of the legislative competences of the EU) nor have the EU institutions gave recommendations to member states regarding e.g. a better respect for this right. therefore, until now, the EPSR does not have a real impact on the right to collective action.

2.2.4 Right to social dialogue

72. RECOGNITION AS PART OF THE RIGHT TO COLLECTIVE BARGAINING - While there is a clear right to collective bargaining and right to collective action, a right to social dialogue has **not received the same interest or recognition**. In the broad definition of collective bargaining, social dialogue itself, as a form of consultation necessary to start collective negotiations, could be included in that right. This is remarkable, because in theory social dialogue is the broader concept of which collective bargaining is a part. However, the better legal protection of the right to collective bargaining makes it tempting to include social dialogue in that protection. The need to include the right to social dialogue within the right to collective bargaining follows from its weak protection as an independent element. The **international legal orders hardly ever explicitly mention a recognised right to social dialogue**, except in ILO Recommendation No. 113 and in Article 6.1 ESC (but clearly as an accessory of the right to collective bargaining). Besides the connection to the right to collective bargaining, we could also claim that the right to social dialogue is formalised by the right to information and consultation, but the concept of social dialogue is broader than such a right to be informed or consulted for workers or worker representatives within the undertaking. The right to information and consultation is discussed in detail below in 2.2.5.

[36] CJEU 6 October 2021, C-613/20, CS vs. Eurowings.

73. ILO RECOMMENDATION NO. 113 - In Recommendation 113, the ILO urges Member States to install **consultation and cooperation procedures at the national and sectoral levels**. But an ILO Recommendation **lacks any binding effect**. According to the ILO, social dialogue includes all forms of negotiation, consultation, information exchange, between or among representatives of governments and workers and employers on matters of common interest regarding economic and social policy. In their "**UN Guiding Principles**" paper, some major international workers' representatives adopt this definition, while stating, however, that there is no fundamental right to social dialogue, only a fundamental right to collective bargaining. [37] The ILO Committee on Freedom of Association has, however, stated in its Compilation of Decisions in the context of the right to collective bargaining that prior consultation of the social partners is certainly important in the event of changes to the collective bargaining system. The European Union defines (European) social dialogue in a similar way as *"discussions, consultations, negotiations and joint actions involving organisations from both sides of industry (employers and employees)"*. [38]

74. ARTICLE 6.1 ESC - In addition, the legal order of the European Social Charter is the only one to explicitly recognise the right to social dialogue as part of the right to collective bargaining in a broad sense in Art. 6.1 ESC. That right includes an obligation on Member States to **promote bipartite social dialogue in the light of the effective realisation of the right to collective bargaining**. Art. 6.1 ESC is the clearest example that social dialogue and collective bargaining are inherently linked. The right to social dialogue appears to be necessary for an effective right to collective bargaining.

75. RECOGNITION IN THE EU TREATIES - **Article 152 TFEU** implies an obligation for the EU to **recognise and promote the role of social partners at the European level**. The EU must also promote mutual (and thus social) dialogue, while respecting the autonomy of the social partners. The scope of this article is limited to the European social partners recognised by the European Commission, namely the European Trade Union Confederation, BusinessEurope (Confederation of European Business, CEEP, (European Centre of Employers and Enterprises providing Public services), UEAPME (European Association of Craft, Small and Medium Sized Enterprises), Eurocadres (the Council of European Professional and Managerial Staff) and CEC (European Confederation of Executives and Managerial Staff as part of the European Trade Union Confederation) but this could also be extended to the recognised social partners on European sectorial level, including the European Cockpit Association. Social partners at national level will have to act through these EU-level organisations in order to invoke Article 152 TFEU. Moreover, there is a certain **problem of invocability** as this article contains is a very vague and rather positive obligation for the Union. The institutions are given a great deal of policy freedom in interpreting it, and the **chances of success are very limited** should the social partners ever dare to invoke the article before the Court of Justice. Nevertheless, a certain negative obligation can also be seen under Article 152 TFEU, namely a prohibition for the European institutions to take action when this would endanger the respect for the autonomy of

[37] ITUC, INDUSTRIALL GLOBAL UNION, UNI GLOBAL UNION and THE CLEAN CLOTHES CAMPAIGN, "UN Guiding Principles on Business and Human Rights and the human rights of workers to form or join trade unions and to bargain collectively", 2012, http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2790&context=globaldocs.
[38] European Commission, *Industrial Relations in Europe 2014*, Luxembourg, Publications Office of the European Union, 2015, 115.

the social partners. Article 152 TFEU therefore represents an interesting opportunity for the social partners to put a stop to the European institutions.

In addition, **Art. 154 and 155 TFEU** are equally interesting in this respect, as they provide a good example of how social dialogue can be transformed into collective bargaining. Art. 154 TFEU contains here the scheme of **compulsory social dialogue in the EU**. In particular, the Commission must promote social dialogue, and it is obliged to consult the social partners before making legislative proposals in the social policy field, and later to consult them on the specific content of those proposals. Art. 154 TFEU creates a certain right to social dialogue for the social partners at EU level. Art. 154.4 and 155 TFEU extend this right even further. Indeed, the social partners are given the right to inform the Commission that they are taking the initiative out of its hands and will themselves seek to conclude a collective agreement at EU level. Art. 155.1 TFEU clearly states that social dialogue can lead to contractual relations and thus to collective bargaining. These two articles demonstrate well that social dialogue and collective bargaining belong together. However, Art. 154 TFEU only creates a right to social dialogue in the specific situation of the EU legislative procedure. It does not explicitly establish a fundamental right to social dialogue, but it can support such a right. Moreover, it follows from the coherence of Article 154 TFEU with Article 155 TFEU that social dialogue can flow over into collective bargaining and form part of it. According to this view, social dialogue may fall within the scope of the right to collective bargaining.

76. PRINCIPLE 8 OF THE EUROPEAN PILLAR OF SOCIAL RIGHTS - Finally, besides the Treaties, the 8th Principle of the European Pillar of Social Rights states that the **social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices**. This However seems to only implicate the European and national social partners. At the company level the principle states that Workers or their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular, on the transfer, restructuring and merger of undertakings and on collective redundancies. This relates to the right to information an consultation (see below). Finally, the principle states that support for increased capacity of social partners to promote social dialogue shall be encouraged, this could be directed to all levels of social dialogue. In any case, this principle is **not useful before a court**, but it can be used to support a more political or moral argument when European an national unions feel that they lack the capacity to take up their role as social partners or when they are being obstructed by the Member States.

2.2.5 Right to information and consultation

77. INTRODUCTION AND CONTENT – Finally, a last important collective fundamental right is the right to information and consultation of workers. Unlike the other rights, this right is focusing on the **competences of certain social dialogue bodies or worker representatives at company-level**. This is the right to **receive certain information of the employer or to be consulted by the employer regarding certain issues**. Often these rights relate to important decisions, e.g. in case of restructuring, collective dismissals, closing or transfer of undertaking. But sometimes these information and consultation obligations go further than this. The right to information and consultation in general does not receive the same esteem as the freedom of association, the right to collective bargaining and the right to collective bargaining

which from the three pillars of industrial rights. Nonetheless, the right to information and consultation **provides substance to two important forms of social dialogue** and therefore could be seen as a part of the right to social dialogue that has been best elaborated, as well as an accessory of the right to collective bargaining, since a right to information and consultation may constitute a preliminary stage for further collective bargaining. However, information and consultation can also be a completely separated process from collective bargaining. In any case, the fundamental protection of this right might seem weak in comparison with the freedom of association, the right to collective bargaining and the right to collective action, but concerning the European Union, it is by far **the most substantiated aspect of collective labour rights in the secondary EU legislation** (see below). A distinctive right to information and consultation can be found in the following international legal sources:

- ILO Convention no. 158 on the termination of Employment (and Recommendation no. 166);
- ILO Recommendation no. 94 on Cooperation at the level of the undertaking;
- ILO Recommendation no. 143 on the Workers' Representatives;
- ILO Recommendation no. 129 on the Communications within the Undertaking
- Possibly article 11 ECHR (but very uncertain);
- Article 21 Revised European Social Charter;
- Article 2 of the Additional Protocol of 1988 to the European Social Charter of 1961;
- Article 27 EU Charter of Fundamental Rights;
- Principle 8 of the European Pillar of Social Rights;

78. PROTECTION BY THE ILO – The ILO does not know a single general fundamental right to information and consultation on every issue of importance within the undertaking. In the absence of such a general right, the ILO has produced a number of recommendations that do try to give more body to the principle of information and consultation (which the ILO tries to promote):

- **ILO Recommendation no. 94 of 1952 on Cooperation at the level of the undertaking**: indicates that it is necessary to promote the consultation and collaboration between employers and workers at company level for issues of common interest which are not covered by collective bargaining or which are not normally the subject of other procedures which establish working conditions.
- **ILO Recommendation no. 143 of 1971 on the Workers' Representatives**: affirms the need of a consultation, before the dismissal of a workers' representative becomes final.
- **ILO Recommendation no. 129 of 1967 on the Communications within the Undertaking** refers to the rights and obligations of social partners concerned by a restructuring and the rules which are supposed to guide the information-consultation process. It highlights the importance of a climate of comprehension and reciprocal trust at company level and that communicating and consulting before decisions on matters of major concern are taken by the management. Next, the recommendation lists a themes to be included in the information-consultation process at company level, e.g. working conditions (hire, transfer, termination) but also the general situation of the company and the explanation of decisions susceptible to affect directly or indirectly

the situation of the personnel. So the recommendation goes beyond mere restructuring issues.

Besides these non-binding Recommendations, the ILO also provides a binding **Convention no. 158 of 1982 on the Termination of Employment** (together with Recommendation no. 166). This Conventions obliges the employer, in case of (collective) redundancies due to economic or technologic reasons to provide the workers' representatives in good time with all relevant information, including the reasons behind the envisaged redundancies, the number and the categories of workers likely to be affected and the period over which these are expected to be implemented", in order to limit the effects. Besides, the employer has the obligation to carry out consultations with the workers representatives prior to the layoffs. The binding nature of this convention makes it more interesting that the above-mentioned recommendations. But it also does not constitute a general right to information and consultation (only in case of certain redundancies).

Finally, the ILO also has the **ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2000)**, which establishes principles dealing with consultation within multinational companies. According to the Declaration, "in multinational as well as in national enterprises, systems devised by mutual agreement between employers and workers and their representatives should provide, in accordance with national law and practice, for regular consultation on matters of mutual concern. Such consultation should not be a substitute for collective bargaining."

79. UNCERTAIN PROTECTION UNDER ARTICLE 11 ECHR – **Article 11 ECHR does not contain an express mention** of the right of information and consultation, but neither does it mention the right to collective bargaining and the right to collective action, which have been found to be protected by the provision according to the case law of the ECtHR (see above). However, in the *National Union of Belgian Police v. Belgium* case (1975) [39] the applicant trade union complained that the Belgian Government had not recognised it as one of the most representative organisations which the Ministry of the Interior was required by law to consult. The Court held that there had been no violation of Article 11, finding that the applicant trade union had other means of acting vis-à-vis the Government, besides consultations with the Ministry of the Interior. Therefore, the conclusion was that **Article 11 ECHR does not contain a right to be consulted for the trade unions**. Nevertheless, **we can ask ourselves whether this vision would still be held after the evolution of the *Demir & Baykara* case law** (see above), when a right to collective bargaining was clearly recognised. Especially when information and consultation can be seen as an accessory of collective bargaining, a certain extension of the protection of Article 11 ECHR can be expected. However, in the absence of ECtHR case-law in this sense, the **protection** of the right to information and consultation under the ECHR **remains very weak or even uncertain**.

80. ARTICLE 21 REVISED EUROPEAN SOCIAL CHARTER – Article 21 of the Revised European Social Charter (1996) **explicitly recognises** the right to information and consultation. [40] It reads as follows:

With a view to ensuring the effective exercise of the right of workers to be informed and consulted within the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice:

[39] ECtHR 27 October 1975, no. 4464/70, National Union of Belgian Police v. Belgium.
[40] Only valid for Member states which ratified the revised ESC, see further below.

- *A) to be informed regularly or at the appropriate time and in a comprehensible way about the economic and financial situation of the undertaking employing them, on the understanding that the disclosure of certain information which could be prejudicial to the undertaking may be refused or subject to confidentiality; and*
- *B) to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking.*

According to the views of the ECSR, this provision applies to **all private and public undertakings**. However, States may **exclude undertakings employing less than a certain number of workers** from its scope. Moreover, the article does not apply to **public servants** (in a strict sense). All categories of employees (in other words all employees with an employment contract with an undertaking, whatever their status, length of service or workplace) must be taken into account when calculating the number of employees covered by the right to information and consultation. The thresholds established by Directive 2002/14/EC (see 2.3.9) which concern undertakings with at least 50 employees or establishments with at least 20 employees in any one EU member state are in conformity with this provision. Workers and/or their representatives must be **informed on all matters relevant to their working environment** except where the conduct of the business requires that some **confidential information** not be disclosed. Furthermore, they must be **consulted in good time** with respect to proposed **decisions that could substantially affect the workers' interests**, in particular those which may have an impact on their employment status. Workers must have **legal remedies** when these rights are not respected and there should be **sanctions** for employers which fail to fulfil their obligations.

81. ARTICLE 2 OF THE ADDITIONAL PROTOCOL TO THE 1961 EUROPEAN SOCIAL CHARTER - Finally, it is important to mention that the original European Social Charter of 1961 does not mention a right to information and consultation itself. However, this right was added with **Article 2 of the Additional Protocol to the European Social Charter of 1988**. Therefore, unlike for the right to collective bargaining and the right to collective action in article 6 (where the text of the 1961 version and the 1996 are the same), here it is **important to make a division between the different texts**. The difference with the text of the Revised Charter is that it does not include a right to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking. In addition, the 1988 provision also explicitly states that the Parties may exclude from the field of application, those undertakings employing less than a certain number of workers, to be determined by national legislation and practice. This is not included in the 1996 version, but such restrictions are still allowed by the ECSR. **In practice**, the 1988 Protocol text is only of importance for EU Member States who have not ratified the revised charter and who have ratified the additional protocol, these are: Croatia, Czech Republic and Denmark. furthermore Luxembourg and Poland (and Iceland, Switzerland and the UK) have ratified the 1961 Charter, but not the Additional Protocol, therefore these States are not bound by a right to information and consultation under the European Social Charter in any form.

82. ARTICLE 29 OF THE REVISED EUROPEAN SOCIAL CHARTER – Next to a general right to information and consultation, the revised European Social Charter also contains a more **specific information and consultation right in case of collective redundancy procedures**

(somewhat similar to ILO Convention no. 158). For this specific situation, article 29 provides that "*the Parties undertake to ensure that employers shall inform and consult workers' representatives, in good time prior to such collective redundancies, on ways and means of avoiding collective redundancies or limiting their occurrence and mitigating their consequences, for example by recourse to accompanying social measures aimed, in particular, at aid for the redeployment or retraining of the workers concerned*. A similar provision does not exist in the original ESC of 1961, nor in its additional protocols.

83. ARTICLE 27 EU CHARTER OF FUNDAMENTAL RIGHTS - Article 27 of the EU Charter recognises the **workers' right to information and consultation within the undertaking**. The provision states that *"Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices."* This fundamental right **has been extensively developed in secondary legislation**, notably in Directive 2002/14/EC establishing a general framework for informing and consulting employees in the EU (see 2.3.9), but also in the Transfer of Undertaking Directive 2001/23/EC (see 2.3.2), Directive 98/59/EC on Collective Redundancies (see 2.3.9) and the Directive 2009/38/EC on the establishment of a European Works Council (see 2.3.10). Furthermore the Treaty on the Functioning of the European Union also provides for a right to be informed and consulted for the European Social Partners in article **154 TFEU**. As seen, every time the EU Commission wishes to submit a legislative proposal relating to social policy, it will first have to consult the European Social Partners. These can give their viewpoint on the proposal of the Commission but they can also decide that they will start to bargain collectively on the matter. In any case, seen the large amount of secondary EU legislation, it is **recommendable to support a case on the relevant directives rather than (solely) on article 27 of the EU Charter**. In the *Association de Médiation Sociale* case (C-176/12) the CJEU has ruled that it cannot be invoked in a dispute (also concerning Directive 2002/14EC) between individuals (employer and trade union/workers). Article 27 of the EU Charter therefore lacks a horizontal effect and is thus more seen as an obligation for the EU Member States that for the employers. The Court also did not seem to value the right to information and consultation as a true right but merely as a principle (which cannot be invoked).[41]

84. PRINCIPLE 8 OF THE EUROPEAN PILLAR OF SOCIAL RIGHTS – The **7th Principle** of the EPSR is titled "Information about employment conditions and protection in case of dismissals" but this concerns an individual right to information for the workers in certain circumstances. The collective information and consultation right is again enshrined in the **8th principle**, which states that Workers or their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular on the transfer, restructuring and merger of undertakings and on collective redundancies. As the EU has created a good deal of secondary legislation to give substance to this right, referring to the (non-binding) EPSR **does not seem to bring much to a case** when it can be supported by the relevant directives.

[41] CJEU 15 January 2014, C-176/12, Association de médiation sociale v. Union locale des syndicats CGT, et. al.

2.3 RELEVANT SECONDARY EU LEGISLATION

85. INTRODUCTION - Below, we will offer a concise overview of the **most important parts of the 'social acquis' of the EU social policy**, this means the Directives and Regulations that had the most impact in the social field.

2.3.1 Posting of workers

86. Posting of workers refers to the fact that a worker is **temporarily posted abroad (to another Member State) by his employer**. In this context, the posted worker works in the territory of an EU Member State which is different than the one in which he normally works. The Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (the Posting of Workers Directive) [42] updated and amended by the amending directive 2018/957 [43] aims to protect posted workers and to provide equal opportunities for service providers.

87. Article 3 of this directive contains a **list of core employment conditions that must be granted to the posted worker**, in the framework of transnational provision of services, to posted workers in their host country. These core terms and conditions of employment are those established by the Member State where the work is temporarily performed and consist out of the following matters:

- Maximum work periods and minimum rest periods;
- Minimum paid annual holidays;
- Remuneration, including overtime rates (this point does not apply to supplementary occupational retirement pension schemes);
- The conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- Health, safety and hygiene at work;
- Protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and young people;
- Equality of treatment between men and women and other provisions on non-discrimination;
- The conditions of workers' accommodation where provided by the employer to workers away from their regular place of work;
- Allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons." [44]

[42] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (date of effect : 10/02/1997)

[43] Directive 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (date of effect : 29/07/2018)

[44] Art. 3 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, amending by the Directive 2018/957 of the European Parliament and of the Council of 28 June 2018

88. In case of activities in **civil aviation**, where pilots and other aircrew are constantly working in different member states, it is not always easy to know when someone is posted and thus is protected by the Directive. In 2020, European Cockpit Association and other European social partners therefore have published a study on this topic: "Should Aircrew be declared posted?". See point 6.2.3 and find the summary and full study here.

2.3.2 Transfer of undertaking and restructuring

89. Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or business (the Transfer of Undertaking Directive) [45] aims to **protect employment rights when there is a transfer of ownership of a company**. The employment rules regarding a transfer of undertaking are sometimes referred to as "**TUPE**" (Transfer of Undertaking Protection of Employment). This directive spells out both the EU-wide rights of employees which work in a company or a business whose ownership is transferred and the obligations of the transferee (the entity that buys or acquires the company) and transferor (the entity that sells the company).

90. In concrete terms, article 4 of the Directive establishes that the **transfer is not a ground for dismissal and that employees retain the same rights and obligations** existing before the operation. This means that a transfer of undertaking **cannot change the working conditions of an employee**. Article 3 provides that the terms and conditions of a collective bargaining agreement are also maintained unless national governments decide to limit its duration. This limitation cannot be less than one year. However, rights and obligations resulting from the complementary social protection schemes are not maintained.

91. Subsequently, article 5 provides that employees' rights and obligations are not maintained when the transfer is carried out in a context of **insolvency or bankruptcy** proceedings (with the exception of the right to be represented).

92. Furthermore, article 6 establishes that **employee representatives** have to continue to perform their role until their reappointment is possible because employees must remain represented during a transfer. Lastly, the Directive imposes in article 7 a **consultation requirement** of the company's workers' representation bodies before the adoption of measures concerning employees and an information requirement concerning the details (especially the reasons and the consequences) of the transfer.

amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

[45] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (date of effect : 11/04/2001)

2.3.3 Transparent and predictable working conditions

93. Directive 2019/1152 on transparent and predictable working conditions in the European Union (the TPWC Directive) [46] aims to enhance working conditions. It sets minimum rights and new rules on the information to be given to workers concerning their working conditions. Chapter II of the Directive contains a **list of information on basic elements that employers must provide to workers by writing** during the first working week (some information can be given a bit later), such as the identity of the parties to the employment relationship, the nature of the activity or the duration of the normal workday or week. In particular, article 7 also lists documents and information that must be given in case of posting of workers, e.g. the applicable minimum working conditions in the host country.

94. At the same time, the Directive establishes a **number of minimum rights** for workers in Chapter III such as:

- No probationary periods exceeding 6 months;
- The right to work for another employer outside the established working hours under certain conditions (limitation of exclusivity clauses);
- The obligation for employers to pay the costs of mandatory trainings and the obligation that these training should take place within the working hours;
- The right to request a more stable and predictable form of work (which the employer must answer within a time limit);
- Employer obligation relating to the minimum predictability of work;
- Complementary measures for on-demand contracts.

95. According to Chapter IV, EU member states also must ensure that workers have the right to an effective and impartial dispute resolution or redress without any adverse consequence resulting from a complaint submitted by themselves. Employees receive a dismissal protection and that the burden of proof lies upon the employer.

2.3.4 Discrimination

96. There is a whole set of EU legislation, especially directives, that aims to **combat discrimination**. These EU Directives aims to provide "the prohibition of discrimination on grounds of sex, sex change, marital status, race, ethnic origin, religion or belief, sexual orientation, age and disability"[47]. The following are the most important :

- Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of **racial and ethnic origin** (Racial Equality Directive)[48],
- Council Directive 2000/78/EC establishing a general framework for **equal treatment in employment and occupation** (Employment Equality Directive, combating

[46] Directive 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (date of effect : 31/07/2019)
[47] C. BARNARD, *EU employment law*, 4e éd., Oxford, 2012, p. 337.
[48] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (date of effect : 19/07/2000)

discrimination based on based on religion or belief, age, disability and sexual orientation on the labour market)[49],

- Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of **men and women** in matters of employment and occupation (recast) (Sex equality Directive)[50],

97. The Employment Equality Directive and the other discrimination directives have a **broad scope** and apply to conditions of access to employed or self-employed activities, including promotion; vocational training; employment and working conditions (including pay, dismissals, the making of reasonable changes at the workplace to allow disabled workers to work, ...);membership of and involvement in an organisation of employers or workers or any other organisation whose members carry on a particular profession.

98. There are **two forms of discrimination** : direct discrimination and indirect discrimination. Direct discrimination "involves one prohibited group being treated less favourably than another" while indirect discrimination covers "measures which seem neutral or apply to all, but which are discriminatory in practice" [51].

99. Discrimination is one of the oldest legal domains where the EU interfered in the social policy of Member States. Therefore, it should not be a surprise that **the Court of Justice of the EU has been very active in this field** and in order to understand the national anti-discrimination rules, it is often necessary to look at the interpretation of the rules by the CJEU.

2.3.5 Whistle-blower protection

100. Whistle-blowers are protected by rules and procedures established in Directive 2019/1937 on the **protection of persons who report breaches of EU law** (the Whistleblowing Directive) [52]. This Directive notably covers reports on **breaches of rules in the area of transport safety in the civil aviation sector**. The material scope of this Directive is limited, but **Member States may extend the scope to other domains**. E.g. Belgium has included social fraud, which means that any breach of social law can be reported under the whistleblowing system. Breaches can include unlawful acts as well as omissions and abusive practices.

101. Companies (except if less than 50 employees) have to install an **internal reporting mechanism**, in which a report will receive a decent follow-up by an independent person (or service) who will protect the confidentiality of the reporter. This obligation will only come into force for companies of less than 250 employees at the end of 2023 (but airlines usually would reach this threshold). Next, persons can also **report externally** to a competent authority. In

[49] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (date of effect : 02/12/2000)
[50] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal treatment of men and women in matters of employment and occupation (recast) (date of effect : 15/08/2006)
[51] C. BARNARD, *ibidem*, pp. 277-278.
[52] Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (date of effect : 16/12/2019)

both cases, there are strict deadlines, so reporters will have to receive feedback within 3 months after the receival of their report is confirmed (which has to take place within 7 days).

102. According to article 6, there are some **conditions in order to qualify for protection**. Reporting persons are protected under this Directive provided that :

- " they had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive ; and
- they reported either internally or externally in accordance with the correct procedure,- or made a public disclosure (if the conditions are fulfilled for this)."[53]

103. Thanks to this act, reporting persons are **protected against all forms of retaliation**, such as demotion, dismissal, intimidation or blacklisting. They should also have access to appropriate support measures (such as independent information and advice or legal aid) and remedial measures (such as interim relief or immunity from liability for breaching clauses in their contracts). EU member states must take the necessary measures to ensure this protection and to respect the right to an effective remedy and to a fair trial.

2.3.6 Working time and work-life balance

104. The working time restriction in Directive 2003/88/EC concerning certain aspects of the organisation of working time (the Working Time Directive) [54] **donot apply to civil aviation sector** as there are specific minimum standards for working time in this sector organised by **Council Directive 2000/79/EC** concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the AEA, the ETF, the ECA, the ERA and the IACA. [55]

105. Working conditions agreed by the signatory parties and provided by the directive are as follows :

- A maximum annual working time of 2000 hours in which the total flight time is limited to 900 hours (clause 8.2);
- A number of 7 days per months and at least 96 days per years free of all service (clause 9);
- At least 4 weeks' paid annual leave (clause 3.1);
- A free health assessment before the employees' assignment and then at regular intervals (clause 4.1 (a));
- Health and safety protection of the employees appropriate to the nature of their work (clause 5.1);

[53] Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, art. 6.
[54] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (date of effect : 02/08/2004)
[55] Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) (date of effect : 01/12/2000)

- The obligation on the employer of adapting work to the worker (clause 6).

106. Next, **Directive 2019/1158 on work-life balance** for parents and caregivers and repealing Council Directive 2010/18/EU (the Work-Life Balance Directive) [56] aims to ensure gender equality with regard to treatment at work and labour market opportunities and to improve access to family-related leave and to flexible working arrangements. The purpose is to facilitate the reconciliation between work life and family life for parents and caregivers.

This Directive provides notably the introduction of paternity leave (at least 10 working days), the strengthening of the right to 4 months of parental leave, the introduction of a 5 days per year's caregiving' leave and the extension of the right to demand flexible working arrangements to workers who are parents of children below 8 years old and to all caregivers.

EU member states have to take the necessary measures to achieve the goals of this act. For example, articles 11 and 12 requires them to set up protection against discrimination and dismissal for workers who are parents or caregivers.

2.3.7 EASA Regulation and Flight time limitations

107. **Regulation (EU) 2018/1139** of the European Parliament and of the Council of 4 July 2018 sets forth **common rules in the field of civil aviation** and establishes a **European Union Aviation Safety Agency (EASA)**. This Regulation aims at maintaining a high uniform level of civil aviation security, which implies that essential requirements be met by aircrew and that flight time limitations be enforced to guarantee the safety of air operations. The power to adopt flight time limitations has been delegated to the Commission (see below). Further, the EASA Regulation establishes essential requirements for aircraft with respect to their airworthiness and environmental compatibility. Manufacturers will be required to issue certificates of airworthiness, in accordance with the technical requirements. The Regulation also provides risk- and performance-based rules that set objectives but leave some flexibility as to the means for achieving them. It also promotes taking non-binding measures (such as safety promotion actions) whenever this is possible. Cabin crew involved in commercial air transport are subject to certification and should be issued with an attestation. The European Commission has established detailed rules and procedures for the qualification of cabin crew members. The regulation also sets out essential requirements for safe ground handling services, which are now included within the scope of the regulation, and closes a number of other safety gaps.

108. In addition, **Commission Regulation (EU) No 83/2014** of 29 January 2014 amending Regulation (EU) No 965/2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council currently provides for specific limits at EU level concerning among others flight times, duty periods and rest periods.

109. This act notably sets out **flight and duty time limitations** for air crew. According to the Subpart FTL of Annex III of this Regulation :

[56] Directive 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (date of effect : 01/08/2019)

- (a) The total **duty periods** to which a crew member may be assigned shall not exceed:
  - 60 duty hours in any 7 consecutive days;
  - 110 duty hours in any 14 consecutive days; and
  - 190 duty hours in any 28 consecutive days, spread as evenly as practicable throughout that period.
- (b) The total **flight time** of the sectors on which an individual crew member is assigned as an operating crew member shall not exceed:
  - (1) 100 hours of flight in any 28 consecutive days;
  - (2) 900 hours of flight time in any calendar year; and
  - (3) 1000 hours of flight in any 12 consecutive calendar months.
- (c) Post-flight duty shall count as duty period. The operator shall specify in its operations manual the minimum time period for post-flight duties".

2.3.8 Atypical employment

110. Directive 2008/104/EC on **temporary agency work**[57] aims to enhance the protection of temporary agency workers by guaranteeing equal treatment concerning basic working and employment conditions. These conditions relate to the duration of working time, breaks, rest periods, overtime, night work, holidays and public holidays ***and*** pay. Equal treatment also applies to the protection of children and young people, the protection of pregnant women and nursing mothers, the protection against discrimination (based on sex, religion, race or ethnic origin, beliefs, age, disabilities or sexual orientation) and the treatment for men and women (article 5).

This Directive also establishes a framework for the use of this flexible form of working. Temporary agency workers must have the right to conclude an employment contract with the user-undertaking at the end of their assignment and must consequently be informed of vacant posts. They also must have access to the equipment and collective services of the undertaking and be encouraged to participate in training programmes (article 6). Furthermore, agency workers must be taken in account for the constitution of bodies representing workers and the user undertaking must keep these bodies informed on the use of agency workers (article 7).

111. Next, the European partners have concluded some European Framework Agreements regarding atypical forms of work:

- the European Framework Agreement on **part-time work** concluded by UNICE, CEEP and ETUC on 6 June 1997 (transformed into Council Directive 97/81/EC of 15 December 1997 [58]): The agreement sets out to remove unjustified discrimination of part-time workers and improve the quality of part-time work. It also aims to help develop part-time work on a voluntary basis and allow employees and employers to organise working time in a way which suits both parties' needs.

[57] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (date of effect : 05/12/2008)
[58] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

- the European Framework Agreement on **fixed-term work** concluded by ETUC, UNICE and CEEP on 18 March 1999 (transformed into Council Directive 1999/70/EC of 28 June 1999 [59]): The agreement forbids employers to treat fixed-term workers in a less favourable manner than permanent workers solely because they have a fixed-term contract, unless the difference in treatment can be justified on objective grounds. The agreement also aims to improve the quality of fixed-term work by preventing abuse arising from the use of successive fixed-term employment contracts or relationships. EU countries, after consultation with the social partners, must introduce one or more of the following measures: imposing objective reasons justifying the renewal of such contracts or relationships, limiting the maximum total duration of successive fixed-term employment contracts and relationships and limiting the number of renewals.

112. Finally, Council Directive 91/383/EEC supplementing the measures to encourage improvements in the **safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship** (the Health & Safety for Temporary Employment Directive) [60] aims to bring health and safety protection for atypical employment contracts in line with the protection for other workers. Indeed, these workers are more at risk from occupational diseases or accidents at work than other workers.

The Directive supplements this goal with some dispositions which notably provide the obligation to inform workers of the risks in the job (article 3), to supply them a sufficient training appropriate to the job (article 4) and an appropriate special medical surveillance when it is required due to the job (article 5). It relates also the responsibilities between user undertakings and temporary employment agencies and the conditions governing the performance of the work (article 8).

2.3.9 Information and consultation

113. Directive 2002/14/EC establishing a **general framework for informing and consulting employees in the EU**[61], sets up general principles on the minimum information and consultation rights for workers in EU companies that employs at least 50 people (or 20 if it is a branch of a larger business).

114. According to article 4, the obligation of information and consultation covers :

- "information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;
- information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment;

[59] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.
[60] Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship.
[61] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (date of effect : 23/03/2002)

- information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations".

Moreover, the information must be provided **in good time** to enable employee representatives to prepare for consultation on related issues.

According to the same article, consultation have to take place :

- "while ensuring that the timing, method and content thereof are appropriate;
- at the relevant level of management and representation, depending on the subject under discussion;
- on the basis of information supplied by the employer (…) and of the opinion which the employees' representatives are entitled to formulate;
- in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate;
- with a view to reaching an agreement on decisions within the scope of the employer's powers (…)".

Important to notice is that **confidential information** provided to employee representatives and to any experts who assist them cannot be revealed (article 6).

115. There are two other Directives concerning worker information and consultation at national level.

The first is the Council Directive 98/59/EC on the approximation of the laws of the Member States relating to **collective redundancies**[62] which provides information and consultation requirements of staff representatives in case of collective redundancies. Indeed, according to article 2, when an employer is considering collective redundancies, he must "begin consultations with worker's representatives in good time with a view to reaching an agreement. These consultations shall, at least cover ways and means of :

- avoiding collective redundancies or reducing the number of workers affected, and
- mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant".

The same article also provides an information requirement concerning the details (especially the reasons and the modalities) of the redundancies.

The second is the Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of **transfers of undertakings**, businesses or parts of undertakings or businesses[63] which is already referred in point 2.3.2 (cf. point 60 on the employees' information and consultation requirements in case of transfer of an ownership of a company).

[62] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (date of effect : 09/10/2015)
[63] Council Directive 2001/23/EC of 12 MARCH 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (date of effect : 09/10/2015)

2.3.10 European works council

116. Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast)[64] establishes a **European works council (EWC)** with the purpose of ensuring information and consultation rights of employees in Community-scale undertakings or groups of undertakings on transnational issues.

Through these European works councils which operate at a transnational level**, employees are informed and consulted** by management on the progress of the business and any **significant decisions that could concern them** (article 1). The central management is responsible for the establishment of a European Works Council. As a consequence, it notably has to provide the information necessary for allowing negotiations to set up the EWC (article 4). A special negotiating body in which employee representatives and the central management are represented has to be established. Within this special negotiating body the detailed arrangements, form and rules of the European Works Council(s) should be agreed upon (article 5 and 6). Confidential information provided to the members of special negotiating bodies, the EWC and to any experts who assist them cannot be revealed (article 8). Members of the EWC and the special negotiating body, enjoy protection and guarantees similar to those provided for employees' representatives by the national legislation and/or practice in force in their country of employment (article 10).

2.3.11 Social security coordination

117. Regulation (EC) No 883/2004 on the coordination of social security systems [65] establishes common rules in order to **protect social security rights in case of moving within the EU**. However, this act **does not replace national social security systems**. EU countries can freely decide on the beneficiaries, eligibility conditions and levels of benefits of their social security systems. The coordination regulation only contains the rules to find the applicable national social security rules.

All the traditional branches of social security are covered by the regulation (article 3). The concept is that beneficiaries are guaranteed that they will remain covered by their social security system even if they move to another EU country.

118. The **basic principles** are the following :

- **Principle of one single applicable law** : beneficiaries of this Regulation are covered by the legislation of a single country only, determined in accordance with this act (article 11). As regards to posted workers within the civil aviation sector, article 12 provides that posted workers who pursue an activity as an employed person remain subject to the legislation of the sending Member State. Article 13 sets out the rules to determine the applicable social security system if the employee has activities in two

[64] Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) (date of effect : 09/10/2015)
[65] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (date of effect : 31/07/2019)

or more Member States. In general the system of the Member State of residence applies if he pursues a substantial part (i.e. at least 25% of the working time) of his activity in that Member State or if he is employed by various undertakings or various employers whose registered office or place of business is in different Member States. If this is not the case, the social security system of the Member State in which the registered office or place of business of the undertaking or employer employing him is situated, will be applied.

- **Principle of equal treatment or non-discrimination** : beneficiaries benefit of the rights and obligations under the legislation of this country in the same way as the nationals thereof (article 4).
- **Principle of aggregation of periods** : beneficiaries benefit of an aggregation of their previous periods of insurance, residence or work in other countries included on the calculation of their benefits (article 6).
- **Principle of the exportability of benefits** : beneficiaries can collect a cash benefit which they are entitled from a country in which they do not live. With a few exceptions, these benefits are not subject to any reduction, amendment, suspension, withdrawal or confiscation by another Member State (article 7).

119. The regulation also is also connected to the **European health insurance card** (EHIC) which provides the access to medical benefits for persons staying in another Member State than their country of residence at the same cost et on the same terms as persons insured in that country.

2.3.12 Supplementary pensions

120. Different forms of pension accrual are generally symbolised through the so-called `**pension pillars'**, often (albeit roughly) divided in three main pillars. The first pillar is composed of the **statutory pensions**. This is the main national and state sponsored system. The third pillar incorporates **the pension savings build-up autonomously by individuals** (without interference of the state or the employer). This chapter will solely consider the second pillar, which is linked to employment and consists of the **supplementary pensions** provided by the employer via collective pension schemes. The second pillar is meant to be an adequate replacement of income after retirement, the amount depending on the Member State, the pension provider, the employer and the individual saver.

Below we will summarise how supplementary pensions are regulated at both European and national level and what the current standing is regarding their transferability. The aim is to provide a concise overview of the possibilities and requirements in the current context regarding transfers of supplementary pensions across EU Member States' borders. This will prove to be challenging, considering that the supplementary pensions' landscape is very diverse and closely linked to national legislative regimes, rules and systems.

121. The design of pension systems in general is a competence of the Member States, not of the EU. When it comes to supplementary pensions, there usually exist two types of pension providers across the EU:

- The first are the **institutions for occupational retirement provision (IORP's)**, they are governed by the IORP II Directive of 14 December 2016, which had to be transposed into national law by 13 January 2019. The Directive implements, through minimum harmonisation, rules with regard to general governance, requirements for

competent and reliable management, remuneration policy, key functions, risk management and self-assessment, outsourcing, investment management and the appointment and role of the depositary of the assets.

- The second type are the **insurance undertakings**, who are subject to the Solvency II Directive of 25 November 2009. This Directive was based on a full harmonisation approach. The aim of the Solvency II Directive was to unify a single EU insurance market and to enhance consumer protection. Firstly, quantitative requirements were introduced, the most important of which was the amount of capital an insurer has to hold in-house. In addition, the Directive contains requirements for the governance and risk management, the effective supervision and the disclosure and transparency of insurers.

These two types of pension provision are **mainly organised nationally**. This is because, as mentioned above, the competence regarding pension schemes lies with the Member States, but it can also be attributed to the regulation of pension schemes being heavily intertwined with national provisions on social security, labour law and taxation.

Despite the mainly national design of pension plans, a number of pension providers do exist who engage in cross-border pension plans. These are both insurance groups and the more relevant pan-European pension funds, discussed further below.

122. Council **Directive 98/49/EC** on **safeguarding the supplementary pension** rights of employed and self-employed persons **moving within the Community** [66] seeks to contribute to the removal of obstacles to the free movement of employed and self-employed persons (article 1) when moving from one Member State to another. This protection does not concern social security schemes covered by Regulation (EC) No 883/2004 (cf. point 2.3.12).

This act provides **four principles**:

- **Equality of treatment** as regards preservation of pension rights (article 4) : the same preservation of vested pension rights is provided to persons who left a supplementary pension scheme as a consequence of their moving to another Member State and to persons remained in the same country in respect of whom contributions are no longer being made.
- **Cross border payments** (article 5) : payment made by supplementary pension schemes in other Member States are net of any taxes and transaction charges and of all benefits due under these schemes.
- Contributions to supplementary pension schemes by and on behalf of **posted workers** (article 6) : posted workers have to option to continue to be made to a pension scheme established in their country during the period of posting in another Member State. As a consequence of this choice, posted workers and their employers are exempted from any obligation to make contributions to a supplementary pension scheme in another member state.
- **Information to scheme members** (article 7) : scheme members, when they move to another Member State, have to be informed about their pension rights and the options which are available to them under the scheme.

[66] Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community (date of effect : 25/07/1998)

123. This legislation is completed by the **Directive 2014/50/EU on minimum requirements** for enhancing worker mobility between Member States by improving the acquisition and **preservation of supplementary pension rights.** [67] Both Directive 98/48/EC and Directive 2014/50/EU contain obligation for the Member States to ensure that the built up supplementary pension rights in one Member State are not lost when a worker moves to another Member State. However, these directives do not include a right to transfer the supplementary pension itself to another Member State as if the supplementary pension scheme would continue to function as normal from the new Member State.

124. The above means that there is **no EU-wide right for individuals to transfer their supplementary pension** to another Member State. There are also **no harmonised EU rules ensuring the portability** of supplementary pension rights. Nonetheless, transferring supplementary pension is sometimes possible.

There exist **two forms of portability**. First, there is the possibility for savers, after changing their residence to another Member State, to continue contributing to the same pension product with the same pension provider without any cross-border transfers of assets taking place while being able to benefit from tax relief and other advantages offered in the new Member State of residence. This first type of portability implies that providers are able to design a flexible personal pension product that embraces/can be adapted to all features required at national level to benefit from fiscal relief or other incentives. Considering the diversity of personal pension markets across the EU, this is very challenging, as a single provider would need to be able to deal with the specific languages and national legal requirements in the different Member States.

Second, there is the possibility for savers, after changing their residence to another Member State, to transfer their personal pension savings to the same or to a different provider in another Member State (i.e. cross-border switching of providers) in order to benefit from tax relief and other advantages offered in the new Member State of residence. Savers may transfer their assets during the accumulation phase when moving abroad. Alternatively, they may find it in their best interest to transfer their assets and consolidate their pension pots only when starting the decumulation phase (i.e. usually after the retirement, when the persons stops saving or contributing but starts to spend the savings). There are many obstacles to such transfers, including outright bans of transfers in some Member States (see next point). Even when allowed by national law, cross-border transfers of personal pension savings are rarely attractive to savers because of the complexity and the costs of the process. In addition, when the transfer is made to a different provider (i.e. cross-border switching), there may be further limitations and/or prohibitive exit fees.

125. Therefore, **Cross-border transfers of supplementary pension rights are not very common and have to be carried out in accordance with different national rules**. In about one third of the EEA Member States, pension scheme members have a statutory right to transfer their accrued pension rights to another EEA country. In most countries there are conditions attached to the right to transfer, most importantly related to the features of the receiving scheme. E.g. in case of a transfer after the termination of the employment contract,

[67] Directive 2014/50/EU of the European Parliament and of the Council on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights (date of effect: 20/05/2014).

18 EEA Member States 68 know a statutory right to transfer the accrued supplementary pension rights or funds within the Member State and 11 EEA Member States 69 allow a transfer to another Member State. 70 In some countries that provide a right to internal transfers, external transfers are not allowed. 71 Conditions concerning the right to transfer relate to the timing, the type of receiving scheme, the sum transferred, an obligation to provide information or advice. Only very few countries seem not to have imposed conditions. Furthermore, there can be different rules and conditions on a transfer during the term of an employment contract or for collective transfers of the whole or parts of a supplementary pension scheme. In other words, even when an external transfer to other Member States is possible, complying with the different rules and conditions of different Member States is not an easy task.

126. At a side note, the European Commission is looking to support pension stakeholders by preparing a **European tracking service for pensions** (ETS). Once completed, the ETS would provide mobile workers with an overview of their pension rights held in different countries and schemes. However, this project (which started in 2020) is still in an early stage with only 8 EU Member States involved.

127. As seen above, there does not exist one harmonised approach towards occupational pensions. Pension providers are often hindered by a myriad of national requirements, which sometimes stem from European Directives but which are implemented differently among the Member States. The EU, however, has in recent years been starting to recognise the importance of a unified approach – or at least a unified overview – of supplementary pensions, resulting in initiatives to encourage an EU harmonisation in this field.

The initiative that goes the furthest, is the possibility to set up **Pan-European Pension Funds**, introduced by the IORP I Directive (2003/41/EC). This means that different local (national) funds or group insurances can be brought under a single pan-European fund. Of course, the IORP only includes supplementary pensions managed by institutions for occupational retirement provision and not those managed by insurance undertakings.

The European insurance market is dominated by more than 90 insurance groups with a head office in the EEA operating on a cross-border basis. On 31 December 2016, there were also more than 80 IORP cross-border pension funds. The administrative and supervisory procedures for pursuing cross-border activity are sometimes still considered as cumbersome and lengthy. Recital 12 of the IORP II Directive states: "*In particular, facilitating the cross-border activity of IORPs and the cross-border transfer of pension schemes by clarifying the relevant procedures and removing unnecessary obstacles could have a positive impact on the undertakings concerned and their employees, in whichever Member State they work, through the centralisation of the management of the retirement services provided*". An IORP operating cross-border is subject to the notification procedure set out in the Directive. Simply put, an

[68] AT, BE, BG, CZ, DE, ES, FR, HR, HU, IE, IT, LT, LU, NL, NO, PL, PT, and RO.
[69] AT, BE, DK, HR, HU, IE, IT, LI, LT, LU and NL.
[70] The official date stems from 2016, so it is possible that more Member States allow a transfer by now. Also the UK use to allow a transfer, but it no longer forms a part of the EEA since Brexit, however it is likely that it still allows a transfer (internally and externally).
[71] BG, CZ, ES, NO, SE and SI.

IORP will remain subject to the prudential supervision of the relevant authorities of its 'home' Member State (that is, where the IORP was established), but will also become subject to supervision by the relevant authorities in the 'host' Member State (or States) where it operates, but only in relation to compliance with the social and labour laws applicable to the field of supplementary pensions. Only authorised IORPs can start operating cross-border. Another important feature of cross-border pension funds is that they must 'at all times be fully funded.

In conclusion, creating a EU-wide supplementary pension scheme still takes a lot of effort and only seems manageable for the pension funds of large EU-wide groups.

3 EU LAW VS. NATIONAL LAW

3.1 HIERARCHY OF NORMS AND EU COMPETENCE

3.1.1 *Primacy*

128. The principles of **primacy and direct effect** are necessary to understand how national and EU law intertwine as is often the case before the national judge and how the latter is given preference to the former should a conflict arise.

129. The **principle of primacy** is one the cornerstones of the European legal order. Together with the direct effect, it regulates the relationship of EU law with the national laws of Member States. According to the principle of primacy, **EU law is superior to the national laws** of Member States so that Member States may not apply a national rule that contradicts EU law. With EU law having precedence over national law, the uniform protection of citizens across the national territories of the EU is ensured, since Member States cannot validly invoke their national laws as an excuse for not applying EU law.

130. The principle of primacy is not set forth in the treaties on which the EU is based, yet it is a **fundamental principle of EU law** which has been enshrined by the Court of Justice of the European Union (CJEU) in its well-known *Costa v. Enel* Case of 15 July 1964. [72] In this case, the Court declared that the laws issued by the European institutions are to be integrated into the legal systems of the Member States, who are obliged to comply with them. Therefore, EU law takes precedence over national laws, so that if a national rule is contrary to a European legal provision, Member States' authorities cannot apply it. National law is neither rescinded nor repealed, but its binding force is suspended.

131. The CJEU has made clear that the primacy of EU law is **absolute**:

- **All national acts are subject to this principle, irrespective of their nature**: acts, regulations, decisions, ordinances, circulars, etc., irrespective of whether they are issued by the executive or legislative powers of a Member State. The judiciary is also subject to the primacy principle. Member State case-law should also respect EU case-law. The CJEU has ruled that even national constitutions should be subject to the principle of primacy. As such, it is the responsibility of national judges not to apply the provisions of a constitution which contradict EU law;
- Likewise, **it applies to all European legal acts with binding force**, whether emanating from primary legislation, mainly the Treaty on the European Union and the

[72] CJEU 15 July 1964, 6/64, Costa v. Enel.

Treaty on the Functioning of the European Union (TFEU), or secondary legislation (regulations, directives and decisions).

132. The CJEU is responsible for ensuring that the principle of primacy is adhered to. Its rulings may impose **penalties on Member States** who infringe it once the Commission brings an action for failure to fulfill an obligation of EU law (cf. infra). It is also the task of national judges to ensure that the principle of primacy is adhered to. Should there be any doubt regarding the implementation of this principle, judges may make use of the reference for a preliminary ruling procedure (cf. infra). Most importantly, **national judges**, of their own motion, are under the obligation to refuse to apply any conflicting provision of national legislation, even if it is adopted subsequently, and it is not necessary for them to request or await the prior setting aside of such provisions by legislative or other constitutional means.

133. The principle of primacy entails **refusal to apply national law**, but it does not replace it with the provision of EU law with which it is in conflict. For that, the European provision must be directly applicable within the national legal order so that it can be invoked before the national judge.

3.1.2 *Direct effect*

134. Direct effect is a cornerstone of the European legal order. Together with the principle of primacy, it defines **how the national and European legal orders intertwine**. The direct effect of EU law has been enshrined by the Court of Justice in its famous *Van Gend en Loos* judgment of 5 February 1963. [73] In this judgment, the CJEU states that EU law not only engenders obligations for Member States, but also rights for individuals. **Individuals may therefore take advantage of these rights and directly invoke them before national courts**. As a result, it is not necessary for the Member State to adopt the European act concerned into its internal legal system. Individuals may invoke it directly, despite the absence of any prior implementation into national law.

135. The direct effect is an undisputed principle of EU law, but it is subject to **conditions**, which vary depending on the legal act at issue. It is also important to specify against whom that legal act may be invoked, the state or another individual.

136. There are two aspects to direct effect: a vertical aspect and a horizontal aspect.

- **Vertical direct effect** is concerned with relations between individuals and the State. This means that individuals can invoke a European provision in relation to the State.
- **Horizontal direct effect** pertains to relations between individuals. This means that an individual can invoke a European provision in relation to another individual.

According to the type of act concerned, the CJEU has accepted either a full direct effect (i.e. a horizontal direct effect and a vertical direct effect) or a partial direct effect (confined to the vertical direct effect).

137. As far as primary legislation is concerned, i.e. the treaties at the top of the European legal order, the CJEU established the principle of the direct effect in the *Van Gend en Loos*

[73] CJEU 5 February 1963, 26/62, van Gend en Loos.

judgment. [74] However, it laid down the condition that the obligations must be **precise, clear and unconditional and that they do not call for additional measure**s, either national or European. In the *Becker* judgment of 19 January 1982, the CJEU rejected the direct effect where the States have a margin of discretion, however minimal, regarding the implementation of the provision in question. [75]

138. The principle of direct effect also relates to acts of secondary legislation, such as those adopted by European institutions on the basis of the founding Treaties. However, the application of direct effect **depends on the type of act**:

- A **regulation** always has direct effect. In essence, Article 288 TFEU specifies that regulations are directly applicable in the Member States. This direct effect is vertical as well as horizontal;
- A **directive** is an act addressed to Member States and must be transposed by them into their national laws. However, in certain cases, the CJEU recognizes the direct effect of directives in order to protect the rights of individuals. Therefore, the CJEU rules that a directive has direct effect when its provisions are unconditional and sufficiently clear and precise. However, it can only have direct vertical effect and it is only valid once the transposition deadline has elapsed;
- A **decision** may have direct effect when it is addressed to a Member State. As a consequence, the CJEU only recognizes a direct vertical effect.

139. Once the conditions for direct effect are met, the individual can **invoke the European rule before the national judge**, who must apply it to resolve the case, as he/she would with national law. Whereas primacy leads to a national law being set aside, direct effect replaces it with legal obligations directly flowing from EU law with which the national judge must comply.

3.1.3 EU Competence in social policy

140. **Article 151 of the Treaty on the Functioning of the European Union** (TFEU) details the **EU's social policy objectives**: promoting employment, improving working and living conditions, equal treatment of workers, proper social protection, social dialogue, developing human resources aimed at achieving a high and sustainable level of employment, as well as combating exclusion.

141. In addition, **Article 6 of the Treaty on European Union** (TEU) gives binding force to the social rights in the EU Charter of Fundamental Rights. A horizontal social clause is introduced by Article 9 TFEU. The definition and implementation of the EU's policies and actions must take into account the following social requirements:

- the promotion of a high level of employment;
- the guarantee of adequate social protection;
- the fight against social exclusion;
- a high level of education, training and protection of human health.

[74] Idem.
[75] CJEU 19 January 1982, C-8/81, Ursula Becker v Finanzamt Münster-Innenstadt.

142. Social policy is primarily the responsibility of EU Member States. However, certain aspects are a **shared competence with the EU.** In that regard, the European Parliament and the Council may adopt incentive measures to support and complement the actions of EU Member States in certain areas, such as the fight against social exclusion. They may also adopt minimum requirements by means of directives, i.e. EU legislation which imposes objectives to be attained while enabling EU Member States to adopt stricter provisions with a view to do so. **These directives only concern**:

- health and safety of workers;
- working conditions;
- social security and social protection of workers (EU Member States remain responsible for defining the fundamental principles of their social security systems);
- protection of workers in the case of termination of their employment contract;
- information and protection of workers;
- collective representation and defence of workers' and employers' interests;
- working conditions for non-EU nationals residing legally on EU territory;
- integration of persons excluded from the labour market;
- equality between men and women concerning their treatment in relation to employment.

143. Implementation of these directives at the national level may be **carried out by social partners at their joint request**. If not, which is most often the case, it is for **Member States** to ensure implementation of the directives into national legislation.

144. **Social dialogue** is also organized at EU level. 'Social dialogue' describes the negotiations conducted by the social partners (i.e. employers' and workers' organisations) in order to defend the interests of their members. It is recognised as a European Union objective under Article 151 TFEU.

In particular, prior to taking action in the social field, the European Commission must consult the social partners (Article 154 TFEU). Then, the social partners can negotiate agreements that can be implemented independently according to their national practices, or request their implementation through a Council directive (Article 155 TFEU). If they do not take up the matter, the Commission submits its proposal to the Council and Parliament who adopt the text according to the normal legislative procedure.

3.2 NON COMPLIANCE AND ENFORCEMENT

145. Social policy is a shared competence which means that **Member States may continue to intervene sovereignly in that field so long as EU legislation has not been adopted**. Once EU legislation has been adopted, via directives in general, Member States must comply with it and implement this legislation into their national legal order.

146. If they do not comply, the Commission may file an **Action for failure to fulfil an obligation** before the CJEU. The Commission must first address a reasoned opinion to the Member State, which has not complied with EU law. If, after a certain period, the Member State

has still not rectified its failure to fulfil its obligation, the Commission may then bring proceedings against the Member State before the CJEU.

Private litigants also have an important role to play in these proceedings, since they will, in most cases, be the ones who warn the Commission about the Member States' failures to fulfill their obligations. To this end, the Commission has set up a specific mechanism where anyone, without having to demonstrate a specific interest and free of charge, may submit a complaint on any breach of EU law in writing to the Secretariat-General of the Commission, who will then gather information and open infringement proceedings if deemed appropriate.

An **online complaint form** can be found through the following link: https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/.

Once the matter has been referred, if the CJEU finds that there has been a failure to fulfil an obligation, it shall deliver its first judgment, which includes the measures to be adopted by the Member State in order to rectify the situation. Subsequently, if the Commission considers that the Member State has not taken the necessary measures, it shall bring the matter before the CJEU a second time. If the Court confirms that the Member State has not complied with its first judgment, it may then impose a fine upon the Member State.

147. In the famous *Francovich* case [76], the CJEU came to the conclusion that "it is a principle of Community law that the **Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible**". Through this judgment, the CJEU established the principle of State liability for breaches of EU law.

The following three conditions have to be met for establishing State liability for breach of EU law:

- the rule of law infringed must be intended to confer rights on individuals;
- the breach must be sufficiently serious;
- there must be a direct causal link between the breach of the obligation resting on the State and the loss or damage sustained by those affected. It is a question of assessing whether the alleged loss or damage flows sufficiently and directly from the breach of EU law by the Member State to render the Member State liable to rectify the breach.

As regards to the **seriousness of the breach**, the CJEU has made clear that where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach. The breach will, for instance, be sufficiently serious if the Member State has not transposed a directive in time.

Besides, State liability may be invoked in any case in which a Member State breaches EU law, whatever the organ of the State whose act or omission was responsible for the breach, even where the judiciary is responsible for it. This is particularly important when the principles of

[76] CJEU 19 November 1991, C-6/90 and C-9/90, Frankovich.

primacy and direct effect are not respected by national judges or when a jurisdiction of last resort declines to refer a preliminary ruling where it should have done so.

It is within the framework of **national liability law** that the Member States must rectify the consequences of any loss or damage caused by an infringement of EU law. Therefore, it is up to the national courts both to assess, on the basis of the cases in question, whether the complainants are entitled to reparation for any loss or damage they may have sustained as a result of an infringement of EU law by a Member State and, if so, to determine the amount of the reparation. However, there are two principles with which the conditions laid down by national law must comply, namely that they must not be less favourable than those relating to similar domestic claims (principle of equivalence) and that they must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (principle of effectiveness).

148. The two aforementioned remedies are the main means to hold Member States accountable for breach of EU law. One should also keep in mind that when a Member State has not transposed a European directive into national law by the due date, it is **possible for private applicants to require direct application of the provisions of the directive which are clear, precise and unconditional** in any dispute against said Member State. This possibility does not exist against other private applicants since the directive does not have any horizontal direct effect.

Besides, should a private applicant find itself involved in a legal dispute where a national provision going against EU law is invoked, this applicant could, if doubt remains as to the incompatibility of this national provision with EU law, invite the judge to refer a **preliminary question to the CJEU** and ask it to take a stand on the interpretation of the EU provision and as to its compatibility with the national provision at stake. The ruling will be binding for the national judge. The private applicant could then, based on the principle of primacy, ask the judge to disapply the conflicting national provision.

149. As regards **non-compliance of private companies** and more particularly **air carriers** with EU law, the means of redress are the same as for national law and very often in social policy national law will be infringed at the same time as EU law since most EU social initiatives translate into directives which should be transposed into the national legal order. Infringements of EU social law can therefore give rise to complaint before the competent labour inspectorates. Civil proceedings can also be started to claim redress as well as criminal proceedings when the provisions of EU law which are infringed are criminally sanctioned.

3.3 FINDING THE COMPETENT JURISDICTION AND THE APPLICABLE LAW

150. The national employment law applicable in an EU context is determined in accordance with article 8 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the **Rome I Regulation**), which provides as follows:

> "*1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that*

cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply."

151. Therefore, the law of the **habitual place of work** is, according to article 8 of the Rome I Regulation, in principle applicable unless the parties agree otherwise. Even if the parties have chosen the applicable law, this **could not have the effect of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that would have been applicable in the absence of choice**, so the law of the habitual place work and if this place cannot be determined the place of business through which the employee was engaged with the reservation that these two places could be discarded if the contract is more closely connected with another EU country.

152. As to the **competent jurisdiction**, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the **Brussels I Regulation**) (now replaced by Regulation (EU) No 1215/2012 – **Brussels Ibis Regulation**) provides that (art. 21):

"*1. An employer domiciled in a Member State may be sued*

(a) in the courts of the Member State in which he is domiciled; or

(b) in another Member State:

(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or

(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1."

153. Therefore, looking at the competent jurisdiction and/or applicable law, the notion of "**habitual place of work**" is key and will very often be invoked by employees with a view to sue the employer before a jurisdiction accessible to them and/or with a view to apply the non-

derogatory norms of a legislation which is very often more favourable to them than the law chosen in the contract or the law of the place of hiring.

154. Based on the prolific caselaw of the CJEU, several **indicia** will be taken into consideration by the national courts with a view to determine the habitual place of employment in the **aviation sector** :

i. the place from which the worker carries out his transport-related tasks,

ii. the place where he returns after his tasks, receives instructions concerning his tasks and organizes his work,

iii. the place where his work tools are to be found,

iv. the place where the aircraft aboard which the work is habitually performed is stationed, and

v. the place where the 'home base' is located, being understood that its relevance would only be undermined if a closer connection were to be displayed with another place.

155. For more details on these issues, especially in a posting context, please consult the following study commissioned by the European Cockpit Association: "Should Aircrew be declared posted?". See part 2.3.1 and 6.2.3.

4 NATIONAL LEGISLATION: COUNTRY OVERVIEW

4.1 THE RIGHT TO COLLECTIVE ACTION: CONDITIONS FOR THE RIGHT TO STRIKE

156. Below we give an overview of the main procedural conditions and rules to start a collective action per EU country. We also have a look at the rules relating to employers replacing striking workers by temporary workers. The information has been gathered from existing overviews and data bases, [77] where possible directly from the primary sources or comparative doctrine. As the authors cannot verify if all the information is 100% up-to-date and did not have access to all the national primary sources or case law, the reader is advised to consult the overview with necessary caution and seek further legal assistance by national experts in case a legal issue concerning a strike arises.

The schedule below offers a quick view of the main possible restrictions to the right to strike per country:

- **Peace obligations**: Provisions within a collective bargaining agreement that prohibit the signing trade unions to start a collective action concerning the content of the collective bargaining agreement.
- **Notice**: A (often written) notification of the strike, which usually must be given a minimum days or weeks in advance (i.e. the notice period) and often has to included specific elements (e.g. reason of the strike).

[77] E.g. W. WARNECK, "Strike rules in the EU27 and beyond, a comparative overview", ETUI, Brussels, 2007; EPSU and ETUI, "The right to strike in the public sector", Factsheets 2018; the ILO database NatLex; the Conclusions of the ECSR.

- **Ballot**: Some countries or agreements require that the employees of a company hold a ballot (vote), which often is secret (the vote of each employee remains confidential). Ballots are often accompanied by a participation quorum (a minimum percentage of employees who have to participate to the ballot) and a quorum for approval (a minimum percentage of employees who have to vote in support of the strike).
- **Strike breakers**: The question is whether the employer can hire other workers, including temporary agency workers, to replace the striking workers during the collective action. This could have the effect of breaking the strike (because the employer will feel less consequences of the strike action). In many countries replacing striking workers is outlawed (in line with the view of the ILO).
- **Prior dispute settlement procedures**: In some countries trade unions or workers first have to follow specific negotiation, mediation, conciliation or arbitration procedures before they are allowed to start a collective action.
- **Ultima ratio**: The Ultima-ratio requirement means that a strike can only be accepted as a means of last resort, after all means of negotiation have been tried to resolve the conflict. Many countries adhere to this principle, although it could be questioned whether (a strict interpretation of) this requirement is in line with e.g. the European Social Charter.

Restrictions to the right to collective action						
Country	**Peace obligation**	**Notice**	**Ballot**	**Strike breakers (replacing strikers)**	**Prior dispute settlement procedures**	**Ultima Ratio**
Austria	X					X
Belgium	X					
Bulgaria		X	X		X	X
Croatia		X		X	X	X
Cyprus		X (renewal CBA)		Unclear	X	
Czech Republic	X	X	X		X	X
Denmark	X	X (by CBA)	X (by CBA)		X	
Estonia		X	X	X	X	X
Finland	X	X		Uncertain		
France		X			X	X
Germany	X		X (by trade union)			X
Greece	X	X	X		X	
Hungary	X				X	

Ireland		X	X	X		
Italy	X	X			X	
Latvia	X	X	X		X	X
Lithuania	X	X	X			
Luxembourg	X	Public sector		X	X	
Malta					X	
Netherlands	X				X	X
Poland	X	X	X		X	X
Portugal	X	X	X			
Romania	X	X	X		X	X
Slovakia	X	X	X		X	X
Slovenia		X	X			
Spain	X	X				
Sweden	X	X		(X)	X	

4.1.1 Austria

157. Austria has a notably **low level of strike action**, compared to other member states, as a result of their social partnership system (Sozialpartnerschaft). This system results in CBA's which in their turn result in a balanced collective bargaining system, which regulates industrial action, since **neither strikes nor picketing are regulated under the Constitution, by law or rarely by case law**. Collective agreements often foresee peace obligations, which need to be respected (so trade unions cannot organise a strike regarding the content of a CBA).

158. The **only condition** for a collective action is that execution of the strike needs to be proportionate or reasonable and not inflict any 'unethical damage'. There are no clear provisions regarding picketing, but it is not considered illegal. There is **no formal system in place to call a strike**, nor notice periods. Usually it is the trade union that initiates through secret strike ballots.

159. A system of **minimum services** is provided in the essential services, though there is no list which services are considered essential. In the absence of case law, it is unclear if it applies to the civil aviation sector, but we would state it is not.

160. The employer **may not replace workers on strike**, either with temporary agency workers or with jobseekers placed by the public employment services, work can also not be outsourced to other corporations or foreign workers.

4.1.2 Belgium

161. Belgium recognises the right to strike as a fundamental and **individual right** (but exercised collectively with or without the support of a trade union). The right to strike in Belgium is **not explicitly enshrined in the Constitution nor in law**, however, it has been developed through case law. Collective agreements often foresee **peace obligations**, which need to be respected. In practice it is difficult to enforce this obligation, since trade unions have no legal personality.

162. There exists no precise definition of a strike in Belgian law, but it is assumed that there needs to be pressure on the employer or a third party. Even international secondary action is possible. Capital and equipment needs to be safeguarded. Solidarity strikes are allowed. Picketing is permitted as long as it is done peacefully and without physical prevention from entering the workplace.

163. There are **no general requirements for starting a strike**. However, CBA's or regulations of joint committees (per sector) sometimes require specific methods and periods for notification, beginning by sending a letter to the chair of the joint committee or the employer. The sanction is often the withdrawal of trade union organisation support.

Minimum services-provisions are foreseen in 'key services' and essential services, the latter determined by joint committees in the event of a strike. There are no such rules for civil aviation.

164. It is **forbidden for the employer to replace workers** on strike with temporary agency workers. Unlike the other rules, this prohibition is specifically laid down by law.

4.1.3 Bulgaria

165. Bulgaria has **a thoroughly worked-out set of rules related to strikes and picketing**. The right to strike is guaranteed in their Constitution and laid down in a law on the settlement of collective labour disputes, which grants both trade unions and groups of employees the right to initiate a strike. Collective agreements as well as arbitrational awards often foresee peace obligations, which need to be respected.

166. Strikes need to concern collective labour disputes and cannot create obstacles for those wishing to work. Solidarity and warning strikes are allowed. Picketing is allowed if done peacefully.

167. The decision to call a strike must be taken as a last resort, since **all means of negotiation must be exhausted**. The decision needs to be approved by a **simple majority** of the workers in the enterprise/unit concerned. **Notice** must be given 7 days before the start of the strike. Warning strikes do not require a prior notice but can only last for an hour. Strikers must remain present at the workplace.

168. Minimal level of services are foreseen in a written agreement 3 days before the strike in the essential services, with a procedure assisted by the National Institute for Conciliation and Arbitration if such an agreement cannot be reached. However the civil aviation sector does not appear to be an essential service.

169. During a lawful strike, employers are **not allowed to employ new workers**, including temporary agency workers, to substitute striking workers, unless it is necessary for the performance of essential services.

4.1.4 Croatia

170. The right to strike is guaranteed in the **Croatian Constitution** and laid down in the **labour act**, which grants the right to initiate a strike **exclusively to trade unions**. However, trade unions are easily established and the ECSR has expressed how it finds this condition unlawful. There exist no peace obligations.

171. Strikes need to concern the protection of economic and social interest, the non-payment of remuneration/compensation, or the conclusions, amendment or renewal of a collective agreement. Solidarity and warning strikes are allowed. There are no explicit legal provisions concerning picketing.

172. Strikes may not begin before the conclusion of the compulsary **mediation procedure** or prior to the completion of other amicable dispute resolution procedures agreed upon. A strike must be **announced to the employer** or to the employers' association against which it is directed, with the reasons for the strike, its location, the date and time of its commencement and the method of its execution included in a letter. However, the Labour Act does not prescribe a specific notice period, nor a ballot.

173. Regarding **minimum services**, the trade union and the employer then prepare and adopt an agreement on rules applicable to the maintenance of production activities, with a specific procedure in place if this agreement can't be reached. The aviation sector does not fall under the concept of essential services.

174. There are no explicit rules concerning the replacing of striking workers.

4.1.5 Cyprus

175. Cyprus considers the right to strike a fundamental human right, employees do not need to be unionised to be able to strike, but the support of a trade union is necessary (see below). The right is guaranteed in the Constitution and laid down in the trade union law as well as some specific sectoral laws. Case law is not extensive and there are few collective agreements. There are no peace obligations. Solidarity and warning strikes are allowed. Picketing is allowed if done peacefully, near the employer's premises.

176. Strikes need to be reasonable and in contemplation or furtherance of a dispute which cannot be resolved through the **compulsory negotiation and mediation mechanisms** of the Industrial Relations Code and the applicable collective agreements.

177. The decision to call a strike, both in the private and in the public sector, must be **endorsed by the executive committee of a trade union** (to ensure that a strike in one

branch is not counter to the interests of another branch where the trade union is active). Therefore, wild cat strikes (without support of a trade union) are illegal. Next, the articles of association of every trade union must include a provision that, for a decision to strike to be legitimate, a general assembly of the employees involved needs to be held, with **secret balloting** as to whether the employees are in favour of striking or not. Specific procedures are to be followed in public and semi-government sectors. If the dispute concerns the renewal of a collective agreement a **notice period** of 10 days has to be respected. If it concerns the violation of an existing agreement no notice period applies.

178. Essential services in Cyprus include 'safe operation of air transport and the control of air traffic', and their employees' right to strike is subjected to two restrictions: (1) all means of direct negotiations between the parties to the conflict need to be exhausted and (2) there needs to be a guarantee of a minimum level of service, directly agreed upon by the parties. This restriction seems however limited to air traffic controllers and is not extended to the civil aviation sector.

179. **Replacement workers** may be hired by an employer during a strike.

4.1.6 Czech Republic

180. The right to strike is guaranteed in the Czech Republic's Constitution and Charter of Fundamental Rights and Basic Freedoms. The Collective Bargaining Act nr. 2 grants the right to strike **exclusively to trade unions** (but this act could in practice be circumvented by supporting the strike on the basis of the constitution). There exist no peace obligations.

181. Strikes governed by the **Collective Bargain Act** can only arise in a dispute over the conclusion of a collective agreement, except with regard to solidarity strikes, they are governed by specific rules. Strikes called to protect economic and social rights of workers are also supported by the Supreme Court, but the CBA does not apply to them and the legal framework that does remains unclear (basically these strikes are supported on the basis of the Constitution instead of the Collective Bargaining Act). There are no provisions on warning strikes, but they are used in practice. Picketing is allowed if done peacefully.

182. The decision to call a strike must be taken by at least **1/3 of the employees**, since at least half the employees must participate in a **ballot** in which **2/3 must vote in favour**. A strike can only be done undertaken as a **last resort**, after a procedure for **mediation** has been followed and the choice for arbitration has been denied. When the decision to strike has been taken, the trade union must **notify the employer** at least 3 days prior to the start of the strike. The notification should include: information about the time when the strike will start, the reasons for and objectives of the strike, the number of employees who are to participate in the strike and a list of workplaces that will not operate during the strike. Trade unions are required to co-operate with the employer during the strike in protecting equipment from loss, damage, destruction or misuse, and maintaining essential facilities or activities where this is necessary.

183. There are no clear rules on the establishment of a minimal level of service or on essential service.

184. Collective bargaining agreements can include restrictions for employers on **hiring agency-workers** during industrial action.

4.1.7 Denmark

185. In Denmark, the labour market is regulated through collective bargaining agreements, which explains why the right to take industrial action is regarded as fundamental. The right itself is mostly regulated through CBA's and case law and is therefore linked to the trade unions and unionised members. Almost always there are peace obligations in CBA's which need to be respected.

186. Denmark makes a **clear distinction** between a conflict of rights, when the matter is covered by a CBA and there is no right to industrial action and a conflict of interests, where there is such a right. Strikes should serve a common purpose which is fair and legal and is deemed relevant and proportionate. Solidarity strikes are allowed. Picketing is permitted, in so far it is non-violent and exerts no moral pressure over employees who want to work. Work-to-rule strikes, slowdown strikes and staggered strike are in principle deemed illegal.

187. When there are no specific provisions on negotiation and mediation in a predetermined CBA, the '**Standard Rules for Handling Industrial Disputes'** foresees a **procedure**. The parties to a dispute can voluntarily agree to refer the matter to an Arbitration Tribunal. If it comes to a strike, there must follow two notifications:

- (1) to the main employer organisation of which the other party to the dispute is a member, two weeks before the possibility of taking strike action will be discussed
- (2) at least seven days before the action is due to commence. The terms of the second notice must not differ from those laid down in the first notice. A strike can only be initiated legally if it has been approved by the body of the trade union responsible for calling such an action.

188. In general, civil servants and essential sectors are in general not allowed to strike.

189. Rules regarding **replacing striking workers** are laid down in collective bargaining agreements (usually prohibited).

4.1.8 Estonia

190. The right to strike is guaranteed in the Estonian Constitution and laid down in the Collective Labour Dispute Resolution Act, the Trade Unions Act, the Emergency Act etc., these laws grant employees and associations or federations of employees the right to initiate a strike. There are no peace obligations.

191. The lawfulness of a strike is determined by the Courts, a strike in general has to concern lawful demands about labour matters. Solidarity and warning strikes are permitted, each governed by their own rules. Picketing is allowed if done peacefully.

192. Before a strike can be commenced, there are **mandatory negotiation and conciliation proceedings**. Afterwards, the decision to organise a strike must be taken during a **general meeting of employees**, with the **reason** of said meeting **notified** to the

employees two weeks in advance for regular strikes, three weeks for warning strikes and five for solidarity strikes. At least half of the workforce must participate in the assembly. If they declare an actual strike, the organisers of the strike are required to **notify in writing** the other party, a public conciliator and the local government of a planned strike at least two weeks in advance. The notice must set out the reasons, exact time of commencement and possible scope of the strike. A strike must be directed by a **strike leader**, a person authorised by the general meeting of employees or trade union. He or she is required to apply measures to preserve the assets of the other party and to maintain the rule of law and public order, and is liable for violations of law and damage caused by the strike.

193. The **beginning of a strike may be postponed** once on the proposal of the public conciliator: (1) by one month by the government; or (2) by two weeks by the city or rural municipality government. The government also has the right to **suspend a strike** in the case of a natural disaster or catastrophe, in order to prevent the spread of an infectious disease or in a state of emergency.

194. The minimum level of **essential services** to be provided is determined by agreement of the parties. In the case of disagreements, the minimum level of services is determined by the public conciliator whose decision is binding on the parties. According to the Emergency Act, air passenger travel is not considered an essential service.

195. It is **allowed to replace strikes** by other workers.

4.1.9 Finland

196. In Finland, the right to strike is derived from the Freedom of Association which is included in the Constitution. Legislation governs parts of the collective bargaining process (but not directly the right to strike). The Collective Agreements Act lays down a peace obligation when there is a collective agreement.

197. An action falls under the scope of industrial action if it has a collective aspect, is organised in a way that can be taken seriously and concerns work-related demands. Solidarity and warning strikes are permitted, each governed by their own rules. A solidarity strike is only legal if the primary strike is also legal. Picketing is permitted if it doesn't hinder employees who are willing to work.

198. Regarding the procedural aspects, first, a **compulsory mediation process** must take place. Afterwards, a strike can be organised by a **group of workers or by a trade union**, following a procedure according to their own internal rules.

In general, **written notice** of a strike must be given fourteen days in advance. After notice of intended industrial action has been given, the parties are required to partake in a **compulsory mediation** process led by the National Conciliator or by a part-time conciliator. If a conciliator fails to settle a dispute by negotiation or in any other manner, he may present the parties with a draft settlement, prepared in writing, which they are required to accept or reject without delay. If the parties do not accept the draft settlement, the conciliator then considers whether

the proceedings should be continued or stopped. If a settlement is accepted by the parties, all industrial action must cease. The Labour Court has sole jurisdiction in disputes relating to the interpretation and breaches of the statutory regulations and the provisions of collective agreements (dispute over rights) and the National Conciliator's Office is competent to deal with disputes over interests associated with the conclusion of a new collective agreement.

199. No statutory list of **essential services** has been provided. In essential services, if the intended work stoppage resulting from the dispute is likely to affect essential functions of society or substantially harm the public interest, and if additional time for mediation is deemed necessary, the Ministry of Economic Affairs and Employment may postpone the work stoppage for up to 14 days. No **minimum level of service provisions** exist.

200. The **lawfulness of the use of strikebreakers** is much debated. In practice, employers often appoint temporary workers from within or outside the company/service to undertake tasks that have been declared as coming under the remit of the strike. Employees cannot be replaced permanently. In any case, a trade union can always try to invoke that this practice violates the right to strike.

4.1.10 France

201. The right to strike is guaranteed in the French Constitution and laid down in the Labour Code and the Transport Code. It is considered an individual right, but has to be exercised collectively, meaning that only a **representative trade union** may give prior notice to call a strike or make the employer aware of the demands, after which any employee may go on strike. There exist **no peace obligations**.

202. Strikes need to have a lawful object. Solidarity strikes are allowed, with specific rules governing them. Picketing is allowed if it is done peacefully and does not hinder non-strikers.

203. In the private sector, no **notice** must be given, contrary to the public sector, where 5 days before the commencement of the strike is required. Notice must contain the following information: the place, date and time of the beginning of the strike action, its duration and the reasons for calling the strike. For the private sector the law requires only that the employer is aware of the strike demands.

204. The exercise of the right to strike in the **civil aviation sector** is subject to specific obligations, such as **prior negotiation**, the prohibition for trade unions to file a new notice for the same reasons as the notice in progress and the obligation for employees to declare themselves strikers at least **48 hours** before stopping work or to **inform the employer 24 hours in advance** of the decision to **return to work**. The lack of information does not make the employee's participation in the strike illegal, but he or she is liable to disciplinary sanctions.

205. Employees at whatever hierarchical level whose presence at their workplace is necessary to ensure the uninterrupted operation of public services, may be summoned or requisitioned. **Minimum service obligations** are laid down in statutes for air traffic controllers.

206. France has restricted the use of non-striking employees, sub-contractors or newly-hired **replacements during a strike**.

4.1.11 Germany

207. In Germany, the right to strike is derived from the right to collective bargaining and in general, the constitutional freedom of association. The rest of the labour disputes rules have almost entirely been developed through case law.

208. Strike action needs to be aimed at the **conclusion of a collective bargaining agreement**, this means that only trade unions can start a strike (wild cat strikes are prohibited). Solidarity strikes are allowed, with specific rules governing them. Warning strikes are permitted, but subjected to the proportionality principle. Picketing is allowed if done peacefully.

209. The Federal Labour Court has established under what **conditions a strike is generally acceptable**:

- industrial action may be taken only between parties having the capacity to conclude collective agreements – i.e. trade unions;
- the purpose of the industrial action must be to guarantee or improve working conditions through a negotiated collective agreement;
- the peace obligation must be respected;
- industrial action must not violate basic rules of labour law;
- industrial action must satisfy the ultima ratio principle (all possibilities of a peaceful negotiation settlement must have been exhausted, if this was agreed upon in the collective agreement).
- industrial action must observe the rules of fair play.

210. As said, **trade unions** must be able to demonstrate that they have the **capacity to bargain collectively** in order to be entitled to call a strike. This depends on their 'social power', the ability to enforce their objectives, to exert enough pressure to conclude a CBA. This therefore is linked to their representativeness, and there is an ongoing legal debate if the exclusion of smaller trade unions is in conformity with the Constitution. Next, each individual must **notify** his or her employer of his/her intention to strike (implicitly or explicitly). But there are **no notice periods** or formal requirements. A court can conduct a proportionality test if the desired goals and the freedom to take action to that purpose weigh up against the legal position of the entities (in)directly affected. Other formalities such as ballots are subject to trade union rules.

211. The Federal Labour Court has recognised the need to ensure the supply of **essential services** and goods, even during a strike. Where no agreement can be reached between the parties on minimum services, the details may be decided directly by the court called to rule on an injunction request against a strike, who will weigh the risk to take collective action against the rights of those affected by the strike.

212. In 2017, Germany adopted a legislative amendment to the Manpower Provision Act, which now **forbids the employer from hiring agency workers** as strike breakers if the business is directly involved in a labour dispute.

4.1.12 Greece

213. The right to strike is guaranteed in the Greek Constitution and laid down in national legislation. It is **exclusively awarded to trade unions**. Collective agreements often foresee in **peace obligations**.

214. Strikes need to concern the preservation and promotion of workers' economic, labour, trade union and social insurance interests. Solidarity and warning strikes are allowed, with specific rules governing them. There are no specific provisions with regard to picketing, but it is most likely allowed if done peacefully.

215. Industrial action **depends on the different categories of trade unions**, primary, second-level and third-level trade unions. For the **first category** (primary level), strike action needs to have prior approval of the general assembly, with participation of at least 50% of union members. In **second-level trade unions**, the executive council may call a strike unless otherwise determined by statute. Concerning **third-level trade unions**, only solidarity strikes are permitted. **Notice** should be given at least 24 hours on beforehand in the private sector. When calling a strike, a trade union must provide the **minimum staff** necessary for the safety of installations and the prevention of damage or accidents. Before a strike is called, there often are **compulsory conciliation and mediation procedures**, of which the terms are stated in collective agreements.

216. Regarding strikes in the 'essential services', a statutory list mentions "the **transport of persons and goods by land, sea or air**". The law provides that, prior to any strike action, the trade union calling the strike is **obliged to invite (in writing) the employer to discuss the relevant issues**, four days prior to any action. This must also be notified to the Ministry of Labour and the supervising Ministry. No new demands may be made afterwards and the necessary staff should be made available according to the terms of an annually, pre-arranged agreement. The employer may also request social dialogue following the announcement of the strike demands or the strike decision, or where he/she considers that the industrial peace within the enterprise is at great risk of being disturbed. A **discussion** between the parties, which does not involve a suspension of the right to strike, takes place within 48 hours of the invitation being issued and is chaired by a mediator.

217. **Recruiting strikebreakers is prohibited**. Nevertheless, the employer maintains the right to make adjustments in order to cover vacancies, such as the appointment of non-striking employees who usually perform other tasks or the transfer of staff to other branches or offices, or even the working of overtime, etc.

4.1.13 Hungary

218. Hungary guarantees the right to strike in its Constitution and lays down the necessary procedures in the **Act on Strikes**. The right to strike is considered an individual right, meant to be exercised collectively. Collective agreements often foresee **peace obligations** that need to be respected.

219. Strikes may solely be called for the protection of workers' economic and social interests. Solidarity and warning strikes are allowed, with specific rules governing them. Picketing is not regulated, but is considered lawful if done peacefully.

220. Before a strike can be called, a **seven-day conciliation procedure** must be followed. Only when the negotiations did not yield any results or where they did not take place for reasons not attributable to the initiators of the strike, a strike may be called. For strikes targeting several employers, employers must appoint a representative if so requested, the government appoints a conciliator if the targeted employer cannot be identified.

221. A statutory list of essential services does not include air passenger transportation, but this list is not exhaustive. Consequently, social partners can be required to negotiate and agree on the minimum services required prior to carrying out a strike if there are regulatory guidelines in place (this does not seem to be the case for now).

222. Employers are **not allowed to assign temporary agency workers** to replace workers on strike.

4.1.14 Ireland

223. There is **no Constitutional right** to strike in Ireland, the legal basis consist of a combination of law (Industrial Relations Act, Code of Practice on Voluntary Dispute Resolution…), collective agreements and case law. There are no peace obligations.

224. All strike action are in theory considered illegal and could lead to dismissal or sanctions. However, the law provides immunities for authorised trade unions and its members from criminal prosecution and/or civil liabilities where industrial action is in "contemplation or furtherance of a trade dispute" and where the procedures have been respected. Also solidarity strikes are permitted in this case. (with specific conditions).

225. Engagement in dispute resolution and negotiations is voluntary. There is, however, the obligation that trade unions must hold a **secret ballot** before engaging in industrial action, under penalty of losing their negotiation license. All of the trade union's members who might be reasonably interested in taking part in the industrial action must be given a fair opportunity of voting. The union may not organise a strike if the majority of its members vote against strike action unless the ballot was organised by more than one trade union and an aggregate majority of all the votes cast favours such strike action. Prior to the industrial action, employers must receive one week **notice**.

226. In Ireland, there are no specific procedures governing the use of temporary workers to replace workers on strike, which means that the use of **strikebreakers is permitted**.

4.1.15 Italy

227. Italy guarantees the right to strike in its Constitution, the regulation was developed through case law. The right to strike is considered an individual right meant to be exercised collectively. Collective agreements often foresee peace obligations that need to be respected.

228. Strikes should adhere to some **conditions** in order to be legitimate: they should protect the direct and legitimate common interests of the participants, aim at the conclusion of a collective agreement, not violate rights and interests of others, not aim at the overthrow of the Italian Constitution or the abolition of a democratic form of government and be decided upon freely and voluntarily by the employees as a group, acting on their **own behalf or through a trade union**. Solidarity strikes are allowed, but they are governed by their own rules. Picketing is allowed if done peacefully. Although a political strike does not fulfil the above-mentioned conditions, the Constitutional Court has recognised them as valid as long as they do not aim to subvert the constitutional democratic system. Therefore, Italy is one of the only countries where political strikes are legal.

229. The parties have the obligation to **notify**, in writing, the length of the notice period, the method of implementation and the reasons for the strike. Cancelling it afterwards is considered an unfair practice. **Conciliation procedures** (if laid down by law or in CBA's) need to be respected.

230. In the statutory list of essential services, **transport** is mentioned. According to Article 4 Aviation Reform Law No. 242/1980, the Minister of Transportation must be given **advance notice** at least five days before the date of the strike, although usually a 10 day-notice must be respected in essential services. Notice should be given by the organisers of the strike action to ensure that international connections are maintained in line with for what prescribed by the international Civil Aviation Organization (ICAO). **Minimum service arrangements** must be set out in collective agreements. Injunctions can be ordered whenever the strike risks damaging fundamental rights, but only after a hearing. If the conflict persists between the parties, it is also possible to avoid or postpone the strike by issuing an administrative injunction via the Prime Minister, Ministers or Prefect

231. Strikers **cannot be replaced by other workers** recruited from outside the company. Employers may not offer financial inducements to employees not to take part in the strike.

4.1.16 Latvia

232. The right to strike in enshrined in the Latvian Constitution, and it is regulated in the Strike Law and Labour Dispute Law. The right to strike can be exercised by **both groups of employees and trade unions**. There are sometimes peace obligations in CBA's.

233. Strikes can be called in order to protect economic or professional interests. Solidarity strikes are allowed, but they are governed by their own rules. Picketing is allowed if done peacefully.

234. Strikes should only be called for as an **ultima ratio.** First, there are conciliation, mediation and arbitration proceedings, during which parties must refrain from taking industrial

action. If, within a time period of **10 days** from the day on which the dispute was referred to the conciliation commission, a conciliation commission is not established or settlement of the dispute regarding interests is not commenced in an arbitration court, in a conciliation commission or through a conciliation method or if the execution of an adjudication of the arbitration court is not enforced, a strike can be called.

235. A trade union has to take its bylaws in account when they adopt a decision regarding a strike. A general meeting for a **ballot** has to be called, with more than 3/4th of the members (or employees) participating. A 3/4th majority has to vote in favour. [78] The process and the results of the voting are recorded in the minutes. If it is not possible to convene a general meeting of the members of the relevant trade union due to the large number of members or due to the specific nature of the work organisation, the decision is taken by a simple majority in accordance with the by-laws at a meeting of authorised representatives of the trade union. Afterwards, a **strike committee** should be established, who has to **notify** the relevant employer, the State Labour Inspectorate and the Secretary of the National Tripartite Co-operation Council at least **ten days** prior to the commencement of the strike, the decision of the general meeting, including the date, time and place of commencement, the reasons, the demands, the number of strikers and the composition and leader of the strike committee. During the strike, it is prohibited to submit to the employer demands which have not been indicated in the declaration of a strike.

236. **Essential services** who should provide a minimum level of services include "air traffic control services" and "services related to the safety of movement of all forms of transport", but not civil aviation in general. They should have an agreement in writing about the minimum level of services 3 days prior to the beginning of the strike.

237. Fines are imposed on employers who force their non-striking employees to assume the work of their striking employees, or who **hire outside replacements** in order to prevent or suspend the strike or to hinder the fulfilment of the demands of the striking employees.

4.1.17 Lithuania

238. Lithuania has enshrined the right to strike in its Constitution, and it is regulated in the Lithuanian Labour Code. The right to strike is awarded **exclusively to trade unions**, they alone can call a strike according to the procedures laid down in their regulations. There can be peace obligations.

239. Strikes need to concern previously declared demands that have a connection with the work or interests of the employees. Conflicts of rights, so during the term of validity of a collective agreement are left to the courts. Warning strikes are allowed, but they are governed by their own rules. Picketing is allowed if done peacefully.

240. Strikes should only be called for as an **ultima ratio** and in that case, it should follow the procedure laid down by law, involve the relevant entities and adhere to the conditions established by law. If the trade union wishes to calls for a strike, it needs to organise a **ballot** as a strike requires the support of at least ¼ of its members and at industry level and the

[78] Some sources mention a participation and voting majority of ½.

permission according to the bylaws of the trade unio. A **strike committee** must be established, written notice must be given and must include the demands put forward as grounds for the strike, the date, time and place of the strike, the expected number of striking workers, the composition of the strike committee and documentary evidence proving the number of members of the trade union who voted in favour of the strike. These documents, including ballots, ballot papers and other related documents, must be kept by the trade union for three years.

241. Services for **civil aviation**, including flight management, have to provide a **minimum level of services** during regular and warning strikes, as they are a categorised **essential service**. Should an aviation union wish to strike, it should **notify** the employer or the employers' organisation and its individual members at least **ten working days** prior to any strike action. The parties to a dispute must also notify the Government of the Republic of Lithuania and the municipal authorities about the agreement on a minimum level of services. They can voluntarily establish a list on employees who will be called upon to work during the strike. If an agreement cannot be reached within five days, the minimum level of services is determined by the commission on labour disputes.

242. Lithuania has **restricted** the use of non-striking employees, sub-contractors or newly-hired **replacements** during a strike.

4.1.18 Luxembourg

243. The right to strike stems from a ruling of the highest court that interprets the right as implicitly enshrined in the Constitution's freedom of association article. It is considered to be a fundamental right. Collective agreements often foresee peace obligations, that need to be respected. Solidarity strikes are illegal.

244. All collective disputes over working conditions must first, before any work stoppage, be referred to the **National Conciliation Office** in order to make the action taken legal. When all possibilities of conciliation have been exhausted, the joint conciliation committee formed within the service draws up a memorandum stating the points still in dispute. During the two weeks following the non-conciliation act one of the parties may refer the dispute to an arbitrator nominated by the Government and proposed to both organisations. Insofar as the organisations accept the arbitrator, they undertake to accept also the result of the arbitration process. If the attempts at conciliation and arbitration are unsuccessful, a strike can begin.

245. Strikes themselves are **extremely rare** in Luxembourg, usually the industrial action strands in the compulsory conciliation or mediation procedures or stays at the level of a demonstration. Should this all fail, **written notice** should be given in the **public sector** by the trade unions to the President of the Government at least 10 days before the action. It must state the reasons for, the venue of, the date and time of the beginning of and the expected duration of the planned strike action. This is **not required in the private sector**.

246. The Government may authorise ministers to requisition all or some employees of a department who are indispensable in the provision of essential services. Aviation does not seem to be declared an essential service.

247. The use of **strikebreakers** (replacing striking workers) is permitted.

4.1.19 Malta

248. The Employment and Industrial Relations Act as well as the Recognition of Trade Unions Regulations contain references to the right to industrial action. They establish immunity for trade unions and employers' associations, insofar the action is taken in "contemplation or furtherance of a trade dispute". In Malta, **only registered trade unions** can call a strike. There exist no peace obligations. Picketing is allowed if done peacefully.

249. The trade dispute must be first **formally registered**. After that, there is a **compulsory conciliation procedure**. However, the trade union is not forced to suspend the strike if the matter in dispute is under judicial scrutiny.

250. A **minimum level of service** for must be ensured by persons employed as Air Traffic Controllers at the Malta International Airport and in the said Airport Fire Fighting Section, as well as for persons in public transport services, which however does not include air passenger transport. Disputes surrounding these provisions are deliberated by a special Joint Negotiating Council.

251. The use of **strikebreakers is not allowed**.

4.1.20 The Netherlands

252. In the Netherlands, there are no clear Constitutional provisions or legislation concerning the right to strike, which leads to it being developed through case law. The right to strike is considered an individual right, meant to be exercised collectively. Collective agreements usually foresee peace obligations that need to be respected.

253. Strikes are meant to be used in a collective conflict of industrial interests, albeit that this is interpreted broadly. Conflict of rights are reserved for the courts. Picketing is allowed if done peacefully.

254. Strikes should only be called for as an **ultima ratio**, first, potential **joint dispute resolution procedures**, sometimes laid down in collective agreements, need to be exhausted. Apart from following the procedural rules, strikes should also hold up to a proportionality test. The Court will determine the lawfulness of a strike in view of the type and duration of the action, the relationship between the action and its intended purpose, the damage inflicted on the interests of the employer or others, and the nature of these third-party interests along with the (potential) damage caused.

255. There is **no statutory list of essential services**, it is for the courts to intervene, should they deem strike action too precarious in certain sectors.

256. Although in practice, employers do sometimes hire temporary workers to **replace strikers**, it is forbidden by law, as both letting incumbent temporary workers do the work of striking employees and recruiting new temporary workers for this purpose is forbidden.

4.1.21 Poland

257. Poland guarantees the right to strike in its Constitution and lies down the rules regarding this right in its Collective Labour Dispute Resolution Act. The right to strike is **exclusively awarded to trade unions**. Collective agreements usually foresee peace obligations that need to be respected.

258. Strikes should have as ultimate aim the achievement of a collective agreement. Solidarity and warning strikes are permitted, but governed by their own rules. Picketing is allowed if according to the rules in the Collective Labour Dispute Resolution Act.

259. Strikes should only be called for as an **ultima ratio**. First, there are **compulsory negotiation and mediation procedures** that need to be exhausted. Should these fail, there are specific time periods for **cooling-off periods and notice periods** (usually 14 days), depending on the category of strike. The strike may only be called by a union after the approval of the majority of voting employees, provided that at least 50% of the workers employed in the enterprise took part in the **strike ballot.**

260. There does not exist a statutory list for essential services, so this is up to the discretion of the courts.

261. Employers may **not assign work to a temporary worker** that is usually performed by a worker of the user-company that is taking part in a strike.

4.1.22 Portugal

262. Portugal guarantees the right to strike in its Constitution and has further regulated the right in the Act on Collective Bargaining. The right to strike is recognised as a fundamental right of workers, regardless of their sector or employer. Collective agreements usually foresee peace obligations that need to be respected.

263. Strikes should exert pressure in order to obtain decisions favourable to the striking employees' collective interests. Solidarity strikes are permitted, but governed by their own rules. Picketing is allowed if done peacefully.

264. A **notice** should be given five working days in advance. Where there is no trade union, the decision to strike must be taken by **secret ballot**, organised by an elected strike committee. The meeting thereto must be called by at least 20% of the workers involved or 200 workers. The decision is valid only if the meeting was attended by a quorum of 51% of the employees and the action must be approved by a majority vote of the assembly.

265. **Minimum services** are normally agreed between employers and unions and can be stipulated or changed by collective agreements. An arbitration board determines minimum services, if they fail to agree. Where a situation is considered to be sufficiently grave, the Government is empowered to guarantee the provision of minimum services during a strike by means of a procedure called civil requisition. The air passenger transport sector is most likely not obliged to provide a minimum level of service.

266. The employer is **prohibited** from employing new workers during a strike or from **replacing workers** on strike.

4.1.23 Romania

267. In Romania, the right to strike is guaranteed in the Constitution and regulated in the Law on Social Dialogue and the Labour Code. The right to strike is considered an individual right, meant to be exercised collectively. Case law works out the remaining questions. Collective agreements often foresee in peace obligations that need to be respected.

268. Strikes should concern collective labour disputes. Solidarity strikes are permitted, but they are governed by their own rules. There are no provisions for picketing, most likely it is allowed if done peacefully.

269. The **ultima ratio** notion applies also in Romania: there exists a **mandatory conciliation procedure** that needs to be exhausted, with arbitration and mediation as voluntary options. Afterwards, a **warning strike** of maximum 2 hours should take place before each regular strike. Strikes may be called by representative trade unions involved in the collective labour dispute, with the **written approval** of at least half of the members. Where there are no trade unions, it is up to the employees' representatives, with approval of at least ¼ of the members. **Notice** must be given two days before the beginning of the strike. The strike organisers are bound to ensure the protection of goods and the continuous operation of machines and equipment in respect of services whose interruption could endanger the life or health of the population.

270. In the **essential services**, which do not include the aviation sector, a minimum level of service of at least 1/3 of the normal activities must be ensured. In the public sector, there are restrictions on the right to strike for personnel in air transportation services, who may not call a strike starting with the moment of departure on mission until its completion.

271. Employers may **not employ outside-workers** to replace those on strike, however, during a strike, the employer has the right to continue work operations with non-striking employees.

4.1.24 Slovakia

272. The right to strike is guaranteed in the Slovakian Constitution and laid down in the Act on Collective Bargaining. The right to strike is exclusively awarded to trade unions. Collective agreements usually foresee peace obligations, that need to be respected.

273. The right to strike should be used to strive towards the conclusion of a collective agreement. Solidarity and warning strikes are permitted, but governed by their own rules. Picketing is allowed insofar it takes the form of moral persuasion alone.

274. Strikes are only accepted as an **ultima ratio**, when the conclusion of a collective agreement and proceedings before a **mediator** have failed and arbitration has been turned down. Only then, a strike may be called by trade unions via **secret ballot**, in which all employees may and at least half of them must participate. It must be approved by a majority

of the employees taking part in the ballot. The trade union body must **notify** the employer in writing at least three working days in advance, specifying when the strike will commence, the reasons for and objectives of the strike, and the list of the names of the representatives of the trade union body authorised to represent the striking workers.

275. There does not exist a statutory list on what sectors and services are considered '**essential services'**, nor is there a clear definition of what constitutes minimum services.

276. The use of strikebreakers **hired outside the workplace is not permitted**. Employees not participating in the strike can, however, carry out their work as usual.

4.1.25 Slovenia

277. In Slovenia, the right to strike is guaranteed in the Constitution and regulated in the Strike Act. The right to strike is considered an individual right, meant to be exercised collectively. There is very little case law and there exist no peace obligations.

278. The right to strike is not limited to the conclusion of a collective agreement, it can be exercised in disputes relating to work, but also to economic or social rights. Picketing is allowed insofar it does not prevent non-strikers from going to work.

279. Strikes may be called by trade unions or a **majority of workers**, the decision thereto must specify the workers' demands, the starting time, date and location of the strike, as well as information on the composition of the strike committee. This **notice** should be given prior to the start of the strike, five days in the private sector, ten for activities of special importance for society or the state, such as transport, though it remains for the courts to see if **air passenger transport** is included in this notion. A strike must be organised and carried out in such a manner as to safeguard people's health and safety and ensure the protection of property, as well as to enable the continuation of work after the strike has ended.

280. The Strike Act specifies that the 'social partners' must cooperate to provide a minimum level of services, the details of which often worked out in collective agreements. As there is no statutory list, the power to define what are considered 'activities of special public importance' and 'essential services' lie with the courts and the government.

281. Slovenia **prohibits the use of non-striking employees**, sub-contractors or newly-hired replacements during a strike.

4.1.26 Spain

282. The right to strike is guaranteed in the Spanish Constitution and laid down in the Decree on Labour Relations. Usually, trade unions call the strike, but when the disputes affects a single employer, workforce representatives or groups of workers also possess that right. Collective agreements often foresee peace obligations, that need to be respected.

283. Strikes are legal as long as they are not intended to alter, within the period it its validity, the agreed terms of a collective agreement or the provisions of an award. Solidarity strikes are

permitted, but are governed by specific rules. Picketing is allowed as long as it is done peacefully and does not entail coercion and intimidation.

284. Workers must establish a **strike committee** of no more than twelve representatives and must provide written **notice** to both the other party and the Ministry of Employment, at least five days in advance. The strike notice shall contain the objectives of the strike, the steps taken to resolve the differences, the date on which the strike initiate and the composition of the strike committee. Afterwards, both parties are legally **bound to negotiate**. In order to end a strike, an agreement – having the same legal value as a collective agreement – must be concluded, except in the event of possible harm to the national economy, then, the Government may end a strike through compulsory arbitration.

285. As there is no statutory list, the power to define **essential services** and sectors lies with the government and case law. When the strike is declared in companies responsible for the provision of public services of any genre or services of recognized and unavoidable need and particularly serious circumstances exist, the governing authority may decide on the necessary measures to ensure the functioning of the services.

286. Generally speaking, **strike breakers may not be used** by the employer, the only exception being where the strike committee fails in its obligation to maintain the plant and the machinery in good order.

4.1.27 Sweden

287. The Swedish Constitution considers the right to strike a fundamental right, guaranteed to trade unions, because of their significant role in the labour market. The general rules on the exercise of the right to strike are laid down in the Co-Determination Act and are further worked out in case law. Peace obligations automatically apply between two parties, bound by a collective agreement.

288. The general rule is that collective action must be undertaken to exert pressure on the other party in a work- or labour- related dispute. This is widely interpreted and most likely also includes picketing.

289. There exists a general obligation to negotiate that stems from the law as well as from collective agreements. Usually, there are also collaboration agreements, which lay down rules for mediation and conciliation. The party that intends to undertake collective action is obliged to forward a written **notice** to the other party and to the **National Mediation Office** at least seven working days in advance, this may be waived if there is a valid impediment (and when it concerns payment of outstanding wages). If the National Mediation Office considers that there is a risk that a labour dispute may result in collective action, they may appoint mediators, even if the parties do not consent, the Mediation office can then postpone the strike for up to 14 days. Also, the by-laws of major employee organisations require that their executive board approve any collective action.

290. As there does not exist any statutory provision stipulating which services or sectors are to be considered as essential, the determination of this concept will be up to the Labour Courts. A **minimum level of service** is then established through collective bargaining agreements.

291. There is no legal obstacle for employers to temporarily replace workers on strike. However, this provokes **strong response** among trade unions and is therefore usually avoided. Also, the powerful Swedish Trade Unions will urge their members not to enter into employment in the company concerned.

4.2 COLLECTIVE REPRESENTATION RIGHTS: HOW TO ENTER INTO COLLECTIVE BARGAINING AT COMPANY LEVEL

292. Every EU Member State has its own national system of social dialogue and collective bargaining at company level. Below we give an overview per EU Member State of the main rules and conditions for social dialogue bodies and collective bargaining at company level as well as the answer to the question whether member of the trade union can receive specific days or hours of to address their worker representation tasks. This overview only focusses on the company level, not on social dialogue and collective bargaining at sector (also called "industry") or national level.

293. The country specific information is kept concise, while often the organisation of workplace representation is a complicated measure. The information provided below is to a large extent based on the excellent **data base on Worker Participation** of the **ETUI** (European Trade Union Institute), which can be freely accessed on the website: https://www.worker-participation.eu/National-Industrial-Relations. This database is kept up-to-date and contains much more detailed information on social dialogue and collective bargaining per country. When national legal issues concerning worker representation and collective bargaining arise, we therefore recommend to also have a look at the ETUI database (of which the below overview is often a mere summary) and where necessary, consult a legal expert.

294. Not in every EU Member State collective bargaining at company level is very common and there is usually one dominant level which is the most important for concluding CBA's. In countries where collective bargaining is more common, often the industry level will be the main level of bargaining. The strength of worker representation and collective bargaining often depends on the trade union density (the part of the working population which is member of a trade union) and is translated in the collective bargaining coverage (the rate of the working population which is covered by at least one CBA). The Scandinavian countries, Belgium and Cyprus have the highest trade union density, but in general, almost all Western and Southern European Member States know a high collective bargaining coverage (even with a low trade union density). In Eastern-European Member States the coverage is the weakest and in practice worker representation at company level is often rather limited in these countries. Below we offer a Quick overview in a schedule of the key data per country (data comes from the ETUI database "worker-participation.eu").

Level /Country	Trade Union Density	Collective bargaining Coverage	Principal level of collective bargaining	Union delegation	Works council
Austria	28%	95%	Industry		X
Belgium	50%	96%	National & industry	X	X
Bulgaria	20%	30%	Company	X	
Croatia	35%	61%	Industry & company	X	X
Cyprus	55%	52%	Industry & company	X	
Czech Republic	17%	38%	Company	X	X
Denmark	67%	80%	Industry	X	

Estonia	10%	33%	Company	X	
Finland	74%	91%	Industry	X	
France	8%	98%	Industry & company	X	X
Germany	18%	62%	Industry		X
Greece	25%	65%	Industry	X	(X)
Hungary	12%	33%	Company	X	X
Ireland	31%	44%	Company	X	
Italy	35%	80%	Industry	X	
Latvia	13%	34%	Company	X	
Lithuania	10%	15%	Company	X	X
Luxembourg	41%	50%	Industry & company		(X)[79]
Malta	51%	61%	Company	X	
Netherlands	20%	81%	Industry		X
Poland	15%	10-15%	Company	X	(X)
Portugal	19%	92%	Industry	X	(X)
Romania	33%	36%	Industry & company	X	
Slovakia	17%	35%	Industry & company	X	X
Slovenia	27%	90%	Industry	X	X
Spain	19%	70%	Industry		X
Sweden	70%	80%	Industry	X	

4.2.1 Austria

295. In Austria, employees can establish a **works council** as soon as there are five employees in the company. The number of members of the council depends on the number of employees. The council is **independent of the trade union**: all workers elect and can be elected (for five years), regardless of whether they are affiliated to the (sole) Austrian trade union or not.

In enterprises with at least five employees under 18 (21 in case of apprentices) a **youth council** can be established. In enterprises with at least five employees with a disability, **representatives for persons with a disability** may be appointed. Both categories of representatives attend the works council in an advisory capacity and can make suggestions.

296. The **powers of the works council vary** according to the category of the issue at hand:

[79] In Luxembourg the sole worker representation body is the employee delegation, which however can be seen as a sort of works council.

- social issues, which cover the concerns of the whole workforce;
- personnel issues, which affect individual employees; and
- economic issues, which relate to how the company is run.

The powers of the works council are generally greatest in social issues, slightly less in personnel issues, and much less in economic issue. In some cases the works council has a **veto power** (co-decision right), in other case the works council also has a co-decision right but the agreement of the works council can be replaced by a decision of an **arbitration** body and in other cases the works council just needs to be **consulted or informed**.

297. The social areas where power of the works council is the strongest and the employer **requires the agreement** works council before acting are:

- the introduction of a workplace disciplinary procedure;
- the introduction of detailed staff questionnaires that go beyond questions collecting general information on individuals and their technical skills;
- the introduction of monitoring and surveillance systems, where they affect human dignity; and
- the introduction of payment systems, based on piece rates or some other form of performance measurement, which can be statistically assessed.

In all these areas, if the works council does not agree, the company cannot act. It is not possible to take the issue to arbitration. There are also a series of social areas, where the employer can act without the agreement of the works council. However, the works council can ask that an agreement be reached, and if this is not possible take the issue to arbitration. Works councils also have the power to negotiate a social plan in case of restructuring and the legislation allows the works council to negotiate agreements with the employer in a wide range of other social areas, including, holiday arrangements, expenses, work organisation, pension arrangements and measures to improve the position of women. However, these agreements are entirely voluntary and do not provide for the possibility of taking the issue to arbitration. However, the main level of **collective bargaining** is done at industry level and the company level agreements can never provide for worse working conditions than the agreements at industry level. Collective bargaining regarding pay at company level is rare.

298. Regarding personnel issues, the works council is most important concerning dismissals. In all types of **dismissals**, as well as in disciplinary sanctions, promotions,... the works council must be informed. If it contests a dismissal, the dismissal is taken to the labour court. Members of the works council may only be dismissed with the permission of the labour court.

The works council meets at least once a month without management representation. There is also a meeting with management representation at least once every three months. Members of the council receive **paid time-off** for the time needed to perform their duties. In large companies, some member of the works council may dedicate their entire working time on the council.

299. **Collective bargaining** takes place, in principle, on an annual basis between the trade union and the economic chambers, to which all employers are obliged to belong. The agreements are therefore very broad. **At company level**, agreements can also be negotiated between the employer and the works councils, but this is rather **exceptional**.

4.2.2 Belgium

300. There are **three internal representation bodies** at company level, the works council, the Committee for Prevention and Protection at Work (also called Health & Safety Committee) and the Trade Union Delegation:

- **Works Council:** This body must be established when the company counts at least 100 employees. In the absence of a works council, the CPPW takes over some of the competences of this body. The members of the works council are elected every 4 years during the social elections by the employees. Only the 3 representative union confederations can nominate candidates. The Works Council is the main organ for social dialogue within the company, this organ should be informed every time the management takes an important decision that can have a significant impact on the working conditions of the employees. It should also receive information at regular times regarding the economic situation of the company. In case of restructuring, closing, transfer of undertaking, etc. the works council plays an important role and should be consulted. Sometimes the works council has co-decision rights, e.g. when amending the internal work rules.
- The **Committee for Prevention and Protection at Work** should be established if the company counts 50 employees or more. Its members are also elected during the social elections for 4 years by the employees. Its main task is to discuss the health & safety plans and prevention measures at the company.
- **Trade union delegation:** a trade union delegation should be established in a company as soon as this is requested by a representative trade union or according to the specific rules which are laid down by a CBA per sector. Sometimes these delegates are appointed, sometimes they are elected (depending on sector rules). The trade union delegates can assist employees in case of disputes with the employer and if they receive a mandate from the trade union they represent, they can enter into collective bargaining with the employer.

301. All the members of the Works Council, CPPW and Trade Union Delegation are protected against dismissal or retaliation relating to their function. **Collective bargaining** at company level does not take place within the works council or CPPW but between the company and the trade union delegation. Collective bargaining agreements at company level may not derogate from industry level agreements (nor from national CBA's), unless if these allow it. For the rest, company level CBA's can concern any topic regarding working conditions or remuneration.

302. The amount of **paid time off** provided to the trade union delegation will depend on the size of the workforce. In a company with between 300 and 500 employees, it would be usual for three people to have full-time release from their normal duties. Members of the Works Council and CPPW do not receive union leave but are exempted from work during the meetings of their internal representation bodies (the duration of these meeting is considered working time).

4.2.3 Bulgaria

303. In many companies, the **unions** will be the only body representing employees. The law also foresees in the possibility for employees to hold a **general meeting** to defend employees' social and economic interests or to elect **employee representatives** with the same function

(which usually only happens in companies without trade union presence). In order to implement the EU directive 2002/14/EC, Bulgarian law further added the possibility to elect separate '**information and consultation representatives'**, although their tasks can be given to the trade union or the general meeting (or elected employees). The **three bodies** can co-exist within the same company, but as said above, often there is only the local union.

304. The representative organs have the right to be **informed and consulted** in case of inter alia large-scale redundancies and change of working hours. Trade unions specifically have more extensive rights such as participation in the redaction of company rules, or the defence of employees in legal disputes with the company. However, none of the representative bodies have real co-decision rights.

305. Except as regards the information and consultation representatives, Bulgarian law foresees little thresholds, numbers of representatives or procedures regarding elections. These are mostly determined by the trade unions or the company. In case information and consultation representatives are elected, the Law provides a threshold of 50 employees in a company or 20 employees in a workplace.

306. Representatives have a right to **paid time off** if this is necessary to enable them to fulfil their functions – either through reduced working hours or additional leave. The chair of the union at the workplace has a minimum right to 25 hours a year.

307. **Collective bargaining** mostly takes place at company level (there is also some industry level bargaining), between the employer and the unions present in the company whether or not they are affiliated to a representative trade union. Where there are several unions in a company, the legislation encourages them to present a common claim. Where this is not possible, the legislation states that the employer should reach an agreement with the union, or group of unions, whose claim has been approved by a majority of employees at a general meeting, or by a majority of those elected as delegates of their fellow employees, if it is not possible to arrange a general meeting of all employees. It is also possible for an employer to reach agreement with a general meeting of all employees or their delegated representatives. Company level collective agreements are normally more detailed than industry level CBA's and cover qualifications, working time and leave, pay rates, health and safety, social insurance, trade union activities in the company, disputes procedures and the mechanism whereby non-union members can join the agreement.

4.2.4 Croatia

308. **Trade unions** can be active in companies either through external union officials or through employees. Employees can even set up their own union as soon as they are at least with ten members. In companies with at least 20 employees, there is a right to establish a **works council** and an obligation to appoint **employee safety representatives**.

309. The number and appointment of union representation within the company is not defined by law but depends on the union. However, the law does place a limit on the number of representatives who are protected against dismissal. Unlike the union representatives, the number and the election of works council members is set out by law. Elections are held every four years.

310. The works council has a right to **information and consultation** in matters related to inter alia working time, redundancy and adoption of employment rules. In some matters, the employer is required to have the works council's approval (e.g. dismissal of members of the works council, dismissal of disabled workers, collecting data about employees etc.). Although on all the topics covered by this obligation, a decision by the court can replace the works council's agreement. The works council can also challenge a dismissal with extraordinary notice (without notice or compensation) before the courts, in which case the employer has to retain the employee during the procedure. The works council can also **negotiate binding agreements** with the employer. In absence of a works council, the tasks and rights are taken on by union representatives. This is very common.

311. There are no legal rules regarding **time off** for union representatives, except in the case where they take on the tasks of the works council, in which case they (just as the members of the works council) have a right to six hours paid time off a week. Individual members can transfer these hours between them. In this case, one member may be full time exempted from his normal duties.

312. **Collective bargaining** exists mainly at company level but also at industry level. In case of contradictory agreements, the most favourable to the employees will apply. If there is only one union present, it will be entitled to negotiate, In case there are multiple unions present and the unions cannot reach a common position, only "representative" unions (i.e. with more than 20% of the unionised employees) may negotiate. The agreements are binding and cover both union and non-union members. Collective agreements can cover a very wide range of topics. There is no specific catalogue of issues, although they frequently cover methods for calculating a wide range of pay additions, such as bonuses or special supplements.

4.2.5 Cyprus

313. All companies with more than ten employees must elect a **committee for health and safety**. The most important representation comes, however, from the **unions**. Employee representation is very little regulated in Cyprus: there are no to few rules on aspects such as the number and appointment of trade union representatives, as well as their way of working and tasks.

314. Cypriot law does foresee, however, that unions should be **consulted** in decisions which may adversely affect the employees. Union workplace committees will typically deal with issues such as health and safety, work organisation, discipline and the implementation of the collective agreement. The industrial relations code says that in the specific area of large-scale redundancies the employer should notify the union as soon as possible and begin consultation (in line with EU law).

315. There no precises rules but trade union representatives should receive **enough time** to fulfill their duties.

316. **Collective bargaining** takes place at industry level and company level, which are both important. At company level, the parties are the employer and the local trade union, generally through the full-time union official (not an employee) with the involvement of the union

representatives within the company. Unions have a right, under certain conditions, to compel individual employers to negotiate with them. Agreements cover pay, working time, holidays, travelling and other allowances, as well as procedural issues such as trade union facilities and dismissal procedures.

4.2.6 Czech Republic

317. The main (and often only) representative body within companies are **trade unions**. Only when at least one third of the workforce asks for it, a **works council** or **health and safety representatives** must be appointed.

318. Works councils should have between three to fifteen members, the precise number to be determined by the employer. Members are elected by employees and serve for three years.

319. Both the local union and the works council have the right to be informed and/or consulted regarding inter alia structural or business changes, redundancies and key working condition concerns. These rights are more limited if the company counts less than ten employees. Local union also have more extensive information and consultation rights that the works council. The union and the works council are also involved in drawing up the written schedule for taking leave. Finally, the employer needs the approval of local union for the use of any funds established to meet cultural and social needs, and changes to the company's work rules. This co-decision right is not granted to the works council.

320. Employee representatives must be given as much **paid time off** as needed. Depending on the number of trade union members within the company, some representatives may receive full exemption from their normal duties.

321. **Collective bargaining** in Czech Republic can take place both at industry and company level, the latter being more popular. Only the trade unions have a right to negotiate on behalf of the employees but this is not limited to 'the largest union'. Pay is the main subject of collective bargaining although there are also negotiations on other issues such as working time, work organisation, health and safety, work-life balance and employers' contributions to pensions.

4.2.7 Denmark

322. The **trade union representatives** are the main basis of workplace representation in Denmark. The election procedures and term of office and other rules depend on the union and agreements at industry level. These collective agreements often also set out the further details of the representation rights and tasks of the trade union representatives.

In companies with 35 or more employees and where this is requested by the employer or by a majority of the employees, a **cooperation committee** must be set up. This body is the equivalent of a works council, consisting of both employees and management representatives. Union representatives are often also members of the committee.

323. The cooperation committee is the main **information and consultation** body, regarding inter alia reorganisations, impact of new technology and production issues, but it does not have a veto right. The committee meets at least six times a year. It can also set up

subcommittees, which can be either temporary or permanent. Next, the role of trade union representatives includes: ensuring that the existing collective agreements are properly applied; taking up individual issues with the employer; acting as a focal point for union activity, such as campaigns and recruitment; and, increasingly, being involved in workplace level negotiations.

324. Trade union representatives benefit from **paid time off** for their duties and for trainings. Members of the cooperation committee benefit from paid time off to attend the meetings.

325. **Collective bargaining** is important as it covers a lot of issues that elsewhere are often dealt with by legislations (including pensions, working time and funds for maternity leave). The bargaining takes place at three levels: national, industry and company level. At company level, the negotiations are between the trade union representatives and company management.

4.2.8 Estonia

326. Worker representation in Estonia is provided by the **trade union representatives** an/or by **employee representatives**. The number and structure of union representation at the workplace depends on the rules of the union. If either 10% of the employees or the majority of union members requests this, employee representatives will be elected for a term of three years. Estonian law does not prescribe numbers or thresholds, nor how often they should meet. But the representatives will have more extensive rights when the company counts 30 or more employees.

327. The main task of union representatives is collective bargaining ensuring that labour legislation is complied with at the workplace, whereas the main right of employee representatives is **information and consultation** regarding several topics such as redundancies, business transfer or lack of work. However, employees' representatives can be involved in **collective bargaining** if there is no union, and vice versa, union representatives have acquired the same information and consultation rights as the employee representatives over time.

328. At least one trade union representative and one employee representative are entitled to **paid time off** to carry out their duties. More representatives can benefit from time off upon the approval of the employer. All representatives are entitled to paid trainings, although the days paid are limited to two for trade union representatives.

329. In general, collective bargaining in the private sector is not that common (hence the law coverage rate of 18.6% in private companies). Legislation provides for **collective bargaining** at three levels: on national level, industry level and company level. In practice the most important level is company level bargaining. At company level negotiations take place between the union in the organisation and the employer. The law also allows elected employee representatives to undertake collective bargaining, where there is no union present (see above) Collective agreements cover pay, working conditions, including working time, health and safety, arrangements for lay-offs and guaranteed pay and the arrangements in case of redundancies.

4.2.9 Finland

330. The law does not impose setting up specific structures. Employee representation within the company mainly takes place through **trade union representatives**, elected by the union members in the workplace. The number of trade union representatives is set out in agreements at industry or company level. The workplace union representative together with his or her colleagues has the information and consultation rights, which in countries like Germany or Austria are exercised by works council members. Employees who are not union members, however, can ask for the elections of their 'own' (non-trade union) **representatives**. Apart from this, in companies with more than ten employees, **safety representatives** must be elected.

331. Depending on the topic, trade union representatives have a right to **information, consultation** – through involvement in cooperation negotiations – and, in some limited cases, they take the **decisions**, although within budgets set by the employer.

332. '**Cooperation negotiations**' take place between the employer and an individual employee or, if several employees are involved, the representative of the group of employees concerned. If the issues to be discussed relate to more than one group of employees, there should be a joint meeting. If desired, parties can decide to set up a more permanent cooperation committee. These negotiations are required for some types of issues (e.g. regarding recruitment and the use of temporary agency workers) and are more strict depending on the issue (e.g. transfers that will entail loss of jobs). With a few exceptions, there is no requirement for an agreement to be reached on these issues, implying that the employer meets his obligation by discussing the issue.

333. Trade union representatives and any other employee representatives enjoy 'sufficient' **paid time-off** to undertake their duties and follow trainings.

334. **Collective bargaining** regarding pay took mainly place at national level until 2007 but afterwards shifted to industry level. Below industry level there are company negotiations, which have become more important in recent years, and are generally conducted within the framework of industry level agreements rather than as stand-alone settlements. They can produce improvements on the industry settlement, but may also involve other changes. Employers have for some time pressed for greater flexibility at company level, and this has been accepted in some cases. Negotiations at company level are held between employers and local union organisations.

4.2.10 France

335. French law is very detailed as regards both the trade union and directly elected structures in the workplace.

336. Irrespective of the number of employees, trade unions can set up **trade union sections** within a company, which bring together their members within the company. If a trade union is 'representative' withing the company (i.e. more than 10% support among the

employees), the trade union can appoint **delegates** with specific powers. These union delegates have the role to both represent the union and all employees.

337. The representation of the whole of the workforce is provided by the **Social and Economic Committee** (CSE), which unites what used to be three different bodies (the employee delegates, the works council and the health and safety committee). This committee must be set up as soon as the company has eleven or more employees. Its members are elected by the whole workforce, and its number varies according to the workforce. Priority is given to candidates put forward by the trade unions.

In companies with 11 to 49 employees, the role of the CSE is relatively limited (presenting individual and collective complaints and claims to the employer and monitoring the company's compliance with labor regulations). In companies with 50 or more employees, the role of the CSE goes further as it has **information and consultation** rights regarding several issues. Depending on the number of employees, the CSE will be divided into different sub-committees (health, safety and working conditions; economic; equality;…).

The CSE should meet at least once a month, or once every two months when there are less than 300 employees.

Companies with fewer than 11 employees are covered by regional bodies made up of equal numbers of employer and union representatives, with the members drawn from these very small companies.

338. The role of the **trade union delegate** is to negotiate new **collective bargaining agreements**. Unions can, however, agree to set up a **Company Council**, which is in fact a CSE with extended powers (i.e. including collective bargaining at company level, which is a task normally carried out by union delegates). The trade union delegates will then lose their collective bargaining powers in favour of the Company Council. In certain cases, the employer will need to find the Council's **approval** before passing on certain decisions.

339. **Collective bargaining** takes place at three levels: national, industry and company level. Historically, the most important level is industry level, although recent legislation gives company-level agreements priority. Negotiation on company level is mandatory for certain topics: pay, working time and the distribution of the value added in the company; equality between men and women; and long-term staffing plans and career development.

4.2.11 Germany

340. In Germany, the worker representation takes place in the **works council**. According to the Works Constitution Act (Betriebsverfassungsgesetz), a works council can be set up in all private sector workplaces with at least five employees, but they are most common in larger enterprises. Works councils are not trade union bodies, but trade unions play a major role in it.

In companies with more than 100 permanent employees, the law requires the setting up of another body, the **economic committee**. This committee is consulted on economic and financial issues. This committee is chosen by the works council and under certain circumstances the works council can take over its tasks. Members of the works council also seat in a separate

health and safety committee in workplaces of over 50 employees (sometimes the threshold is 20).

341. Nominations to the works council are made either by groups of individual employees – in most cases 5% of those eligible to vote – or from any trade union with at least one member in the workplace. Hence the importance of unions in the works council. The elections take place every four years, and, depending on the size of the workplace, are organised either on the basis of individual candidates or competing lists.

Trade union representatives, where they exist separately, are chosen in line with individual union rules or guidelines, normally by election at the workplace.

342. The works council has four types of powers:

- **Enforceable co-determination** – where the works council must agree before the employer can go ahead, unless the employer can persuade the "conciliation committee" (Einigungsstelle) to accept his or her proposals: e.g. drafting of work rules, working hours, time and method payment, holiday arrangements etc.
- **Opposition and refusal of consent** – where the works council can block the employer's plans, although this opposition can be set aside by a decision of the labour court: most notably this is the case for **dismissals**, where the works council can oppose a dismissal if it finds that the employer has e.g. failed to take sufficient account of social issues. In this case, the employer can bring the dismissal before the labour court.
- **Consultation** e.g. on planned restructuring, modification of working conditions, the appointment of safety delegates, etc.
- **Information,** eg on the economic situation of the company.

343. Works council members must be given **time off** at their normal level of earnings to carry out their duties - such as attending meetings or giving advice. In workplaces with fewer than 200 employees, the details of this are not laid down by law. As from 200 workers, there is at least one member who should be freed from his normal work.

344. Collective bargaining mainly takes place at industry level between unions and employers' organisations. Works councils are in principle not legally able to negotiate collective agreements. They can, however, reach agreements with individual employers on issues not covered by collective agreements, often concerning employment security, the organisation of working time, rules on internet use or working from home. These can also include some aspects linked to earning, such as bonus rates, performance-related pay and pay supplements, like long-service payments.

Works councils are also able to negotiate over areas covered by collective agreements where the agreement itself contains a so-called "opening clause", specifically allowing the works council to negotiate on the issue. Sometimes these opening clauses also allow company level agreement with conditions to the detriment of the workers (to allow flexibility).

4.2.12 Greece

345. In principle, worker representation is organised by the **local union** ("primary level union organisation"). **Wors councils** can exist next to the local union in companies with more than 50 employees, but in practice only a few large companies have such a body. If there is no union presence at the company, the employees can set up an "**association of persons**" if this represents more than 60% of the employees. In addition to these bodies, **health and safety delegates** should be elected in workplaces with more than 20 employees and a **health and safety committee** should also be set up in workplaces with more than 50 employees.

The local union is represented by a union committee (elected by the members every three years) which can meet as much as it wants but the employer must meet the union committee once a month. A works council (elected by the full work force every two years) should meet at least once a month and should meet the employer at least once every two months. An association of persons (also elected but there are no specific rules) must count at least two representatives.

346. A **local union** has negotiation rights and **information and consultation** rights. Issues where the union representatives should be consulted in advance include large-scale redundancies, changes in the legal form of the business, and changes in working conditions, and the two sides should try to reach an agreement through negotiation. It should be informed regarding the economic situation of the company. It can also discuss collective or individual **disputes** regarding the workers with the employer. In the absence of a union, the **association of persons** takes over the right to negotiate collective bargaining agreements.

The **works council** has similar information and consultation rights, but it has no power to negotiate. On the other hand, it has a co-decision right regarding e.g. training, work regulations, holiday arrangements, health and safety etc. In case both a union and a works council exists, the union's consultation rights take precedence (hence the absence of works councils in many companies).

347. The president, vice-president and general secretary of the union in a workplace are each entitled to three days a month **time off** if there are less than 500 employees in the workplace. In workplaces with 500 employees or more, this goes up to five days a month. However, this time off is unpaid. The chair and all other members of the works council are entitled to two hours off a week for works council business. There are no specific time-off rights for representatives of an association of persons.

348. **Collective bargaining** has lost much importance since the economic and financial crisis at national, industry and company level with a significant decrease in the number of agreements. Collective bargaining, in most cases, takes place between employers' federations or individual employers on one side and the unions on the other. Each agreement is signed by the most representative union in the company or industry, defined as the union with the largest number of voting members. Since the crisis, also associations of persons can negotiate and sign a collective agreement. Negotiations can cover a wide range of topics, including issues like training or works regulations, as well as pay.

4.2.13 Hungary

349. In Hungary, worker representation is provided by the **local trade union** and by the **works council**. The structure of the workplace trade union body depends on the internal rules of the union, while the law sets out the rules for the works council which should be established in companies with 50 employees or more. In companies of between 15 and 50 employees, a single works representative is elected. The works council member are elected by the workforce for a mandate of five years. It size depends on the size of the company and it should meet at least two times per year.

350. The works council has **information and consultation rights**. The information concerns fundamental issues affecting the employer's economic position, developments in wage and salary payments and the number of teleworkers and agency workers. Consultation concerns inter alia restructuring, outsourcing, health and safety, employee surveillance, etc. The Labour Code states that consultation should take place "with a view to reaching agreement", but there is no obligation to reach agreement. In practice, the works council has a limited impact on decisions taken by the employer.

351. Regarding **time off**, the union representatives at the workplace are entitled to one hour per month release from normal duties for every two members. Works council members are to be released from their normal duties for 10% of their monthly working time, with 15% for the chair of the works council.

352. **Collective bargaining** takes place at all levels, but the company level remains the dominant level. Negotiations at both company and industry level are in most cases between employers or employers' associations and the unions. However, works councils can negotiate agreements with the employer where there is no union at the workplace and it is not covered by a collective agreement. The one important exception is that these agreements cannot cover pay. Trade unions can now only conclude collective agreements at company level if their membership exceeds 10% of those employed at the company. Collective agreements typically cover pay, working conditions and procedural issues.

4.2.14 Ireland

353. Ireland lacks a statutory system of worker representation. In most cases in Ireland, employees are either represented through their **unions**, or not represented at all. Union representatives (also called "shop stewards") are elected by their trade union colleagues at the workplace or appointed by the union in line with the rules and practices of individual unions and agreements between companies and unions. In case there are multiple trade unions present, they could assemble in a joint union committee. The EU legislation regarding information and consultation led to the implementation of a new procedure where, if 10% of the workforce demands it, employee representatives (incl. trade union representatives) in companies with at least 50 employees will receive the right to start negotiating with the employer to set up a body which need to be informed and consulted. However, this possibility is complex and not commonly used.

354. Another issue is that the employer does not have an obligation to recognise a union, even if employers may be required to improve the terms and conditions of their employees as a result of a dispute with a union

355. The lack of a statutory framework means that there is **no precise schedule of the tasks and rights of employee representatives**, which applies across the country. Typically a shop steward will have at least two roles: representing the union to members and potential members at the workplace; and taking up members' concerns with the employer both on an individual and collective basis. Union representatives may also be involved in collective bargaining. Finally, in case no special body is set up for information and consultation, the fallback option is that the trade union is informed or consulted. If there is no union, those facing redundancy or transfer are instead represented by "a person or persons chosen by such employees from among their number to represent them".

356. Trade union representatives should be given the **time necessary** to carry out their tasks. The amount of paid time off depends from company to company.

357. Ireland has a difficult history with recognising the right to **collective bargaining**, but under pressure of the case law of the ECtHR and ECSR it has introduced new legislation in 2015 to regulate collective bargaining better. Negotiations at company level are typically undertaken by shop stewards (workplace union representatives), although often with the support of a full-time union official. It is also possible for negotiations to take place with an "excepted body", a group of employees in a single employer who come together to negotiate their own pay and conditions and must be independent of the employer. Negotiations at company level cover pay and a wide range of conditions issues, including pensions, sick pay, maternity and paternity arrangements and other conditions issues like leave.

4.2.15 Italy

358. In theory, worker representation is provided by the **RSU**, which a single representation body that assemblies all the trade unions present withing the company. However, in many companies they still have **RSA**'s, which are representation bodies for a single trade union and in some companies the RSU and RSA exist next to each other. In any case, worker representation is provided by the trade unions in a RSU and/or RSA and thus not by a works council. RSU and RSA's can be established in companies with at least 15 employees.

359. Where a part of the RSU used to be directly appointed by the trade unions, now all members are elected by the workforce, but they can only be nominated by the unions. Only the three main Italian unions (or their affiliations) and trade unions which have reached a formal agreement at industry level can nominate candidates. The members of the RSU are elected for three years. In a RSA, the members are directly appointed by the union (also for three years).

360. The key **function of the RSUs** is to negotiate with the employers at workplace level. RSUs are intended to act as the workplace representatives of the trade unions and the agreements, which set them up, give them the power to negotiate binding agreements for their workplace as part of the bargaining structure. Employers must by law inform and consult with employee representatives on health and safety, the use of public funds for industrial restructuring, large scale redundancies, and business transfers. But most of the RSU's rights to

be informed and consulted on specific issues depend on agreements reached at industry and sometimes company level.

361. RSU members are legally entitled to **paid time-off** on the basis of a formula set out in the Workers' Statute.

362. Although the industry level is dominant for **collective bargaining**, company level bargaining is also common. Pay negotiations at company level should provide a mechanism for the employees to take account of particular company-level developments, such as improved productivity on the one hand or the risk of job losses on the other. In addition, company level negotiations also deal with changes introduced by the company such as the introduction of new working methods. Union-employer framework agreements and legislative changes have, since 2011, increased the importance of company level bargaining in the regulation of a range of issues. At company level it is the elected union committee, the RSU, which normally negotiates, although very often full-time officials from the unions are also involved. When there is an RSU, a company agreement is valid if approved by a majority of RSU members. In companies, where there is are RSA's instead of a RSU slightly different rules apply. Here, the agreement must be approved by representatives, who together or separately have the support of a majority of union members in the company. In addition, all employees can be required to vote on the agreement if this is called for by either one of the unions involved or 30% of the workforce. For this vote to be valid more than 50% of those eligible to vote must take part and the agreement can be rejected by a simple majority of those voting.

4.2.16 Latvia

363. Worker representation in the company is mainly provided by the **trade union**, as the legal alternative to elect **authorised workplace representatives** (passible in companies with at least 5 employees) is not widely used. There are also elected representatives in the area of health and safety. Trade union representatives (elected according to union rules) and authorised workplace representatives are both legally considered to be "employee representatives", and both have essentially the same tasks and duties. Both are involved in information and consultation and both may be involved in collective bargaining, although, non-union representatives may only negotiate a collective agreement if there is no union.

364. The employer should **inform and consult** with employee representatives on issues that may materially affect pay, working conditions and employment and they should be involved in the organisation of working time, internal works regulations and health and safety at the workplace. Employee representatives should also be given information about the economic and social situation of the company or organisation. There are specific rules regarding collective redundancies and business transfers. However, in practice, information and consultation of employee representatives often remains absent.

365. Collective agreements may provide for **time off and** specific resources for employee representatives. There are no statutory provisions.

366. **Collective bargaining** is mostly popular in the public sector (less in the private sector) and the company level remains the key bargaining level. At company or organisation level the employer negotiates with the union representing the employees or "authorised employee

representatives" (see section on workplace representation), if the employees are not members of a union. Where there are several unions, or unions and authorised employee representatives, they must undertake joint negotiations and draw up a common position. Latvian legislation defines the issues that collective agreements are to cover – including the organisation of work, pay and internal work procedures. In practice, agreements usually cover pay and bonuses, holidays and working time – particularly total working time – as well as issues related to dismissals, particularly collective redundancies.

4.2.17 Lithuania

367. Since 2017, employers with 20 or more workers are required to initiate the setting up of a **works council**, and large numbers have been established. However, where an **employer-level union** has more than a third of the company's employees in membership, it takes over from the works council (exercising all its tasks). A employer-level union can be set up provided that it has at least 20 employees as members, or its members account for at least 10% of the total workforce, provided there are at least three. For the rest the establishment of an employer-level union depends on the rules of the represented trade union. Finally, employers with fewer than 20 employees can choose to have a single elected employee representative – an **employee trustee**, although the employer is not obliged to initiate this process.

368. The size of **works council** depends on the size of the undertaking. It's members are elected by secret ballot by all employees. A majority of the employees must participate for the election to be valid. The members are elected for three years. There are no rules on when the works council should meet.

369. Unless if the **employer level union** takes over the function of the works council, its function is limited to conducting collective bargaining as well as to promoting the union. It also defends the interests of its members and represents them in individual cases relating to their employment. The primary role of the **works council** (or the employee trustee), on the other hand, is to participate in information and consultation procedures with the employer and influence the employer's decisions on economic, social and labour issues relevant to employees. The works council has the right to convene a meeting of employees, although the date must be coordinated with the employer. It must also inform employees annually on its activities through an annual report or in some other equivalent way. The works council can also reach written agreements in areas to promote cooperation between the employer and the works council, although it may not negotiate pay, working time or other issues covered by collective bargaining. It has the right to take a case to a labour dispute commission if it considers that the employer has not complied with the law or agreed arrangements.

370. Members of employer-level trade union management bodies and work councils as well as the employee trustee have the right to up to 60 hours **paid time off** a year undertake their duties. However, the number of members of the employer-level trade union benefiting from time off is linked to the number of employees.

371. Lithuania distinguishes collective bargaining at company level and **collective bargaining** at workplace level (only possible when stipulated in a CBA at industry or company level and therefore seldom used). At employer or workplace level, negotiations are between the employer and the union operating in that employer or workplace, or with a joint union

representation if there are several unions. Where there is no union presence at an employer, the employees may, at a general meeting, authorise a union to negotiate on their behalf. At employer and workplace level, agreements can cover the details of employment contracts, pay, working and rest time, health and safety, the mutual provision of information, information and consultation procedures (although without reducing the rights of the works council), important working, social and economic issues and procedural issues linked to the signing, validity and length of the agreement. Company level agreements cannot set inferior conditions than set by higher level agreements.

4.2.18 Luxembourg

372. In companies with 15 employees or more, the employees have a right to representation at work. This is provided through the **employee delegation**, which is directly elected by all employees. There is no legally backed trade union presence at the workplace, but trade union influence in the system is effectively safeguarded by the fact that trade unions have a range of rights in the election (by way of nomination rights) and operation of the employee delegations. In addition, many members of the employee delegations are union members (around 40%).

373. The size of the employee delegation, which consists entirely of workers, varies with number of employees. The employee delegation must meet at least six times a year and can meet once a month in works time. It must meet the employer three times a year. Participants are the elected members (serving a mandate of five years), the head of the company (or representatives) and sometimes advisers and experts.

374. The employee delegation has to "**safeguard and defend the interests**" of the employees. In companies with more than 150 employees, it also participates in certain decisions taken by the employer. It is the responsibility of the employee delegation to:

- avoid and resolve individual or collective disputes between the employer and employees;
- pass on to the employer any complaints that may arise – both individual and collective;
- to refer disputes that cannot be resolved to the labour inspectorate as well as concerns that laws, regulations and collective agreements are not being properly observed.

The employee delegation must ensure the employer complies with the need for equal treatment in terms of access to employment, occupational training, pay and working conditions.

The head of the business must give the employee delegation the **information** it needs to perform its duties and which is likely to improve the delegation's understanding of the progress and operation of the business (including recent and likely changes in its activities, and financial position). Further, the employee delegation has all kind of specific information and consultation rights, especially when measures can lead to substantial changes of working conditions. These rights are often extended when the company counts more than 150 employees.

The employee delegation also has a **co-decision rights** concerning e.g. health and safety measures, general criteria for recruitment promotion, transfer and dismissal of staff, general criteria for assessment, etc.

375. Members of the employee delegation have a right to carry out their duties in works time and be paid as normally during this period. Meetings of the employee delegation are also considered working time. In addition, they have a specific right to paid time off. The number of hours depends on the size of the company. Only specific members, appointed by the delegation, will enjoy such a right.

376. The employee delegation has no right to enter into **collective bargaining**. Only representative unions can negotiate and sign collective agreements. A negotiating committee is formed on the union side, made up of unions who are representative. These unions must be part of the negotiating committee, as must any other union which has got the support in elections for employee representatives of at least 50% of the employees covered by the collective agreement under negotiation. Unions who do not meet these conditions can be admitted into the negotiating committee, but only if the unions already present unanimously agree to do so.

Ideally all the unions involved should sign the agreement. However, if this is not possible, the agreement can be signed by one or more of the unions, provided that they also invite the other unions to sign. If the other unions are unwilling to sign, the unions wanting to do so can go ahead, provided that individually or together they have the support of at least 50% of the employees covered by the agreement, as shown in the most recent election for employee representatives.

The agreements cover the whole range of industrial relations issues, including both pay and working conditions. The 2004 legislation sets out a range of issues which must be included in the agreement and, as well as pay, working time and holidays, agreements must cover the level of premia for night work, additional payments for particularly difficult or unpleasant work, the mechanisms for ensuring equal pay and the way that sexual harassment and bullying will be tackled.

4.2.19 Malta

377. Workplace representation in Malta is primarily through the (representative) **union**. Only where there are no unions present does the legislation provide for an **alternative**. In this case a representative must be elected by the non-unionised employees by means of a secret ballot (organized by the authorities). This addition is in large part to meet the requirements of EU directives covering the provision of a general framework for information and consultation, as well as information and consultation in cases of redundancy and business transfer. However, in practice it seems that this alternative system is not widely used.

378. The law lays down the rules for the recognition of **representative unions**. In broad terms, where a union can show that more than 50% of the employees of an organisation are its members the employer must recognise it. In some cases, there is a further ballot of union members if there are more than one union present (there can only be one union recognized as representative). In two specific instances, covering collective redundancies and business transfers, also non-recognised unions have to be informed and consulted by the employer (next to the non-unionised employee representative which can be elected by the non-unionised employees). However, in reality, employee workplace representation in Malta takes place through the union or it does not take place at all.

379. The **key tasks** of the **local union workplace organisation** are to discuss and deal with day-to-day issues with management as well as representing union members facing difficulties with the employer. The union representative also takes an active role in **collective bargaining** and may be one of the signatories or a witness to the signature of a collective agreement. Collective bargaining in Malta takes place at company level at least in the private sector. With no industry-level bargaining, there is no mechanism to extend the terms of collective agreements to employers who did not sign them. However, wage regulation orders fulfil a broadly similar purpose in setting minimum pay and conditions in several specific industries. Agreements cover a wide range of issues including pay, working time, health and safety, grievance and disciplinary procedures, bonuses and sick pay.

As a result of the transposition of EU directives, union representatives should also be informed and consulted on a range of issues (restructuring, collective dismissals, TUPE, changes of major significance…).

380. Collective agreements may provide for **time off** and specific resources for trade union organisations. Otherwise there is no general provision.

4.2.20 The Netherlands

381. Every undertaking in the Netherlands with at least 50 workers is obliged to set up a **works council** with a range of information and consultation rights. In addition, undertakings with between 10 and 50 employees are required to set up a personnel delegation, a body with some of the powers of the works council, if a majority of employees request it, although this is relatively rare.

The works council is the main employee representation body. Works councils are not **trade union bodies**, although the unions have nomination rights (see below) and many works council members are also union members. Trade union bodies do not have specific legal rights and facilities at the work place (besides the general right to organize) but sometimes (depending on CBA's) they have specific rights.

382. Works council members are **elected** as part of a list of candidates, with the choice made according to the percentage of votes which each list receives. Lists can be proposed either by unions (if they meet certain conditions) or by a single employee or group of employees. All employees with a seniority of 6 months can vote. The works council member usually serve for three years.

383. The law provides the **works council** with **three main types of right**: information rights (specific and general information, regular and ad hoc); consultation rights and approval rights. In addition, the works council has powers to make proposals to which the employer must respond – the right of initiative. Works councils are not normally involved in collective bargaining on pay, although there are some exceptions and they also have a role in agreeing how some aspects of industry agreements, particularly those relating to working time are implemented at enterprise level (see section on collective bargaining).

On certain issues where the works council has consultation rights (e.g. relocation, major investments, technical changes,…) the employer must seek the views of the works council and delay taking action for at least a month if the works council disagrees with the proposal. If the management disagrees with the works council's views, it must set out its reasons in writing.

During this period, the works council can appeal to the Companies Chamber of the Court of Appeal in Amsterdam, and if the court considers that the employer's decision is unfair it can forbid the employer for acting or require that actions that have already been taken be reversed.

The approval rights of the works council concern amongst others: pension insurance, working hours, pay and job grading systems, working conditions, rules on staff appraisal, complaint procedures etc. This right means that the employer needs to receive the approval of the works council before he can change the existing rules.

384. The **trade union group** at company level mainly represent their trade union and backs its candidates in the works council (in bigger companies there can be trade union meetings prior to the works council meeting in order to discuss the trade unions view or strategy). The trade union group also has a role in **collective bargaining**, at least when it is conducted at company level. This is still primarily left to union full time officials, but they are often accompanied by representatives of the trade union groups who have an input into the claim and help decide whether or not it is acceptable to the members. Works councils do not normally negotiate pay increases with employers, although they are involved in negotiations to implement elements of industry level agreements such as pay structures and the organisation of working time.

385. The exact amount of **paid time-off** for works council duties is left to be agreed between the works council and the employer. But as a minimum, works council members are entitled to 60 hours' time off a year, in addition to time off for meetings. In practice, in larger companies, some works council members have substantially more. The exact rights of the trade union group depend on the collective agreement covering the workplace. Typically, they include a number of hours paid time-off, time-off to attend union conferences or union training, although this may be subject to an overall limit.

386. Regarding **collective bargaining**, there are few rules governing those who are entitled to bargain. The only requirement placed on trade unions is that the union should have a legal personality and that its rules should give it authority to bargain. This lack of restrictions on trade unions' freedom to negotiate is matched by similar freedoms for the employers. Dutch employers and employers' organisation have no legal obligation to negotiate with trade unions. Collective agreements between unions and employers depend entirely on both sides' willingness to negotiate. Normally bargaining is conducted on the union side by the full-time trade union officials, with the involvement of lay union representatives. There are no rules on which unions have the right to take part in negotiations and sign agreements. It is for the parties to decide who they want to negotiate with. Collective agreements in the Netherland cover a wide range issues. Normal pay and conditions agreements deal with pay, hours and holidays, as well as linked topics like salary systems, overtime and shift rates, working time arrangements and special leave.

4.2.21 Poland

387. Workplace representation in Poland is primarily through the **workplace trade union organisations**. Due to a low rate of unionisation, most companies do not know a union presence. When Poland implemented the EU Directive on information and legislation, it also created a **works council** in companies with more 50 employees (since 2006). Its members must be elected by the whole workforce. However, its rights and tasks are entirely limited by

the scope of the EU Directive (receiving information on economic issues and being consulted on employment and work organisation issues). Where initially many works councils were created, in many cases they have ceased to exist, as they were not deemed necessary in case of a trade union presence at the work place or it was too difficult to find candidates. Therefore, the number of works councils remains very low. Other pieces of legislation also refer to the possibility of setting up non-union representative structures (on an ad-hoc basis). This is the case, for example, of the law on large-scale redundancies passed in 2003.

A works council can only be set up at the written request of at least 10% of the workforce. All members must be employees and the size depends on the size of the company. Members are elected for four years. The legislation does not state how often it should meet.

388. The legislation states that the rights of **workplace trade union organisations** cover: matters concerning individual employees, employees' collective rights and interests, the observance of employment law provisions, co-operation with the labour inspectorate and the position of former employees who are now pensioners. Trade unions also have the exclusive right to sign **collective agreements** and to organise industrial action. The workplace trade union organization also has some information rights (e.g. in case of changes in employment conditions), consultation rights (e.g. in case of restructuring) and co-decision right regarding the rules on pay and bonusses. In smaller companies, these rights are often ignored by employers.

389. All employees have a right to be **released from normal duties** to fulfil their trade union functions, although it is not required that this be paid except where it is a temporary activity which cannot be undertaken outside work time. In addition, members of the executive committee of a "representative union" at company or workplace level have more extensive time off rights (often full time in bigger companies), usually paid (at the request of the trade union).

Works council members have the right to paid time off to carry out their duties if these cannot be undertaken outside working time and the individual concerned is not already benefiting from other time-off rights.

390. **Collective bargaining** at individual company level that is more important than multi-employer bargaining, although overall the impact of collective bargaining is limited. The limited extent of multi-employer collective bargaining makes any discussion over the relationship between company-level and multi-level bargaining largely theoretical. There is no obligation on employers to negotiate a collective agreement.

4.2.22 Portugal

391. There are three bodies for workplace representation:

- trade union delegates, representing trade unionists, who may come together in a trade union committee or joint trade union committee;
- the works council, representing the whole workforce;
- Health and Safety representatives.

392. The **establishment of a works council** requires a majority of employees to vote in favour, in a ballot requested by 100 employees or 20% of the workforce. The rules of the works

council must also be approved in a vote. In practice, works councils are relatively rare. Works councils consist only of employee representatives. There is no management involvement (but the works council meets the management at least once a month). The number of members of the works council varies with the size of the company. The members are elected by the workforce for a mandate of (at least) four years (only workers can be candidate). Nominations must be supported by at least 100 employees or 20% of the workforce, and voting is on the basis of a list system. Unions have no special nominating rights in these elections, but the lists of candidates are often linked to one of the union groupings.

393. It is up to the trade unions and the members in the workplace to decide on the number of **trade union delegates** they want to elect (via secret ballot). However, there are legal limits on the number who can benefit from specific legal rights and protections (depending on the size of the company). If there are sufficient union delegates (however there is no legal minimum) they come together in a committee. Where there are several unions in a workplace they may form a joint union committee, provided it has at least five union delegates for all the separate union committees in the workplace. These committees adopt their own rules of procedure.

394. The health and safety representation of employees in Portugal is provided by specially elected **health and safety representatives**. They should meet the employer at least once a month and have the right to be consulted in writing and in advance and in good time on a range of issues at least once a year. Joint employer/employee health and safety committees can be set up where there is a collective agreement to that effect. If there are no health and safety representatives, the works council will take up its tasks.

395. The main task of trade union delegates is to represent the unions at company level and to ensure that CBA's (usually negotiated and a higher level) are properly applied (the trade union delegate rarely is involved in collective bargaining itself, see below). The trade union delegation has the right to be informed in accordance with EU Directive 2002/14/EC (restructuring, measures with significant impact, etc.). If there is no works council, it has extended information and consultation rights. The union delegation also has the right to call the employees to a meeting (max. 15 hours per year).

396. The works council has in general the right to

- receive the information necessary to carry out its activities;
- exercise some control over the company's management;
- participate, with others, in company restructuring, in the preparation of occupational training plans and reports and in procedures related to changes in working conditions; and
- manage or participate in the management of the company's social provision (such as canteens).

It has **information rights** regarding various issues including economic and financial information of the company and must be **consulted** in advance about changes in employee classification and employee promotion, relocation of the company, anything that could significantly reduce the number of employees or worsen the working conditions and regarding the dissolution or insolvency of the company.

The works council also has a limited control over management as it can do suggestions, issue opinions or promote measures regarding, the company's budget and its implementation, training, use of equipment, administrative simplification, appropriate use of technical human and financial resources etc.

In case of restructuring, it has extended information and consultation powers.

Finally, just like the trade union delegation the works council can call the employees together for a meeting (employees have a right to max. 15 hours per year for such meetings).

397. According to the Labour Code, in principle the negotiating parties in **collective bargaining** are the unions (not at company level) and the employers, either individually or in employers' federations, and the union leadership signs the agreements. Since 2009 unions can delegate the power to negotiate company-level collective agreements to employee representatives in the company: either works councils or company level union bodies. This is only possible in companies with more than 150 employees. In general, as the union must agree to delegate its negotiating rights company-level bodies rarely enter into negotiations.

398. Trade union delegates are entitled to five hours a month **paid time off** – eight if they are in a joint committee with several unions. In addition, members of the executive of a union body, from local unions to national confederations, are (in general) entitled to four days paid time off per month. Works council members are entitled to 25 hours paid time-off a month, but only half this in very small companies. In companies with more than 1,000 employees, the members of the works council can agree that the total amount of time off, worked out on the basis of each member having 25 hours a month, which can be divided as they wish (without being more than 40 hours per week per representative. Time-off rights cannot be accumulated between the three different types of employee representation.

399. Concerning **collective bargaining**, where there are competing CBA's, single company agreements (AEs) take precedence over multi-company agreements (ACs) and industry-level agreements (CCs). He Labour Code does not include rules on the representativeness of unions, establishing which have a right to negotiate and sign agreements. All officially registered unions can negotiate and sign agreements, provided the employer is willing engage with them. However, the majority of agreements are signed by unions linked to the two main confederations, CGPT and the UGT. Agreements concentrate on pay rates and increases. However, they also cover many other issues. These include working time, including the possibility of banking hours, night work, overtime and shift work, as well as the associated premia, temporary transfers, geographical mobility, occupational training, arrangements for ending or revising agreements, flexibility and additional social benefits.

4.2.23 Romania

400. Employee representation at the workplace is provided either through a "representative union organisation" or through elected employee representatives. Both have similar rights, and both are involved in collective bargaining.

A union can only be set up by at least 15 individuals in the same company. However, if there is no representative union organisation at the workplace and it has more than 20 employees, the employees are entitled to elect representatives at a general meeting (the number should be agreed with the employer). A union needs to have a majority of employees (50% plus one) at a workplace as members in order to be "representative", a threshold which is often not

reached. Employers also have no legal obligation to ensure that employee representatives are elected.

401. The representative workplace union and the elected employee representatives both have **rights in relation to collective bargaining and information and consultation**, although if there is a representative union organisation, no employee representatives can be elected. The general rights and tasks are:

- to ensure that employees' rights are complied with;
- to participate in drawing up the company's internal rules;
- to promote the interests of employees in relation to pay, working conditions, working time and rest time, employment stability and other professional, economic and social interests;
- to notify the Labour Inspectorate of any breaches of regulations; and
- to negotiate collective agreements.

402. There is a general obligation on the employer to **consult** with the union or the employee representatives on decisions likely to affect substantially their rights and interests. There are also a number of specific issues where the representative union organisation or the employee representatives must be consulted (e.g. collective redundancies, work schedules, health and safety measures, work rules etc.)

403. The rights of the elected leaders of the representative union organisation at the workplace to **time off** depend on a collective agreement at company level, and this time off is not paid. The time off for elected employee representatives must similarly be fixed in a collective agreement or through direct agreement with the employer. Also here there is no right for paid time off.

404. Concerning **collective bargaining**, at company level, there is a legal obligation to negotiate – although not to reach agreement – where the company has 21 or more employees. Companies with fewer than 21 employees – a substantial proportion in Romania – are not obliged to negotiate and generally do not do so. Agreements at a lower level cannot contain clauses providing for worse conditions than those negotiated at a higher level. Collective agreements, by law, must be in writing and should be registered with the appropriate authorities – at county level in the case of company agreements.

405. At company level unions must represent at least 50% plus one of the employees of the company, in order to be representative and entitled to negotiate. Where there is no representative union, because the union present does not have enough members, company level negotiations can be undertaken by the union federation with members there, provided it itself is representative within that industry, although it must work with elected employee representatives. If this is not the case, either because there is no union or the union federation is not representative, negotiations are undertaken by elected employee representatives. Finally, ules setting out what a collective agreement should cover and requiring employers to negotiate on issues such as job classification were abolished.

4.2.24 Slovakia

406. The Slovak Republic knows two types of employee representation at company level: local union bodies and work councils. Very few companies have both bodies present. In case there is a strong union presence at the company, there will likely not be a works council and vice versa. In the rare occasions that both bodies are present, a representative of the union body can attend meetings of the works council if an absolute majority of the works council's members are in favour. In any case the local union boday and works council are obliged to cooperate closely.

- **Local union body:** unions at the workplace can represent employees provided they have least three members. This is the minimum number required to set up a workplace union organisation, and a list of all union members must be provided to the employer. The representatives are elected within the union for typically 2 to 5 years (depending on union rules).
- **Works council:** The threshold for setting up a works council, is at least 50 employees, although in smaller workplaces a "works trustee" can be elected, provided there are at least three employees. The election of a works council or works trustee is not automatic. It must be requested in writing by at least 10% of the employees. Members are elected by the whole work force (minimum seniority of three months) for a mandate of 4 years.

407. Both organs have more or less the **same tasks** (which also is the reason why so few companies have both bodies), including **collective bargaining** with the employer. Sometimes there is an obligation to negotiate with the goal of achieving an agreement, relating to e.g. restructuring, future employment when it is under threat, decisions leading to changes in the contractual employment terms, measures to prevent accidents, etc. They also have co-decision rights (e.g. setting up the work rules, health and safety rules, introduction of flexible working time, overtime arrangements, etc.). **Information rights** cover the more general issues on which there should be negotiations, such as planned an future levels of employment, and employee representatives are also entitled to information on the economic and financial situation and future prospects of their employer. There is also a right to carry out **inspections or monitoring activities** to ensure that employers are compliant with labour law and CBA's. Deficiencies in health and safety rules can be reported to the labour inspectorate.

408. Employee representatives have **rights to paid time off** – union representatives to perform trade union activities and works council members (or the works trustee) to undertake their works council duties. The amount can be agreed between the employer and the representatives, but if there is no agreement, the representatives are entitled to a total of 15 minutes per month per employee. This total is then divided between all the employee representatives, both those from the union and the works council. The employer has the right to check whether the time off is being used for the purpose for which it was provided.

409. Regarding **collective bargaining** at local level, the two negotiating sides are the employer and a union representative (normally from the workplace union group). Other bodies such as the works council have no right to negotiate collective agreements. If there are several trade unions in the company or organisation, they are required to act in absolute agreement if they are negotiating for the whole workforce, unless some other arrangement has been agreed. If they cannot agree, the employer has the right to negotiate with the union with the largest number of members at the workplace, or with a group of unions, if together they have more

members than the union with the highest number of members. The collective agreement reached covers the whole workforce. The key issue for negotiations, particularly at company level, is pay. However, negotiations also cover other issues such as, hours and holidays, special leave, working conditions, health and safety, training arrangements, trade union rights and facilities, severance pay and, at company level, the use of the social fund, which is paid for by contributions from the employer.

4.2.25 Slovenia

410. In Slovenia, there are **two types of employee representation** at company level:

- **Trade union representatives:** local union structures may appoint or elect a trade union representative to represent it with the employer. A union must inform the employer who has been elected or appointed, and where no representative has been chosen, the union is represented by its president. he numbers and structures of trade union representatives at the workplace are set by the unions themselves.
- **Works council:** in companies with more than 20 employees a works council will be established. Its members are often trade union members. The members are elected for four years by the employees with at least 12 months seniority in a secret ballot. Candidates can be proposed, either by a representative union in the company or by a number of employees. The size of the representatives will depend on the size of the workforce. In companies with 20 or fewer employees there is a right to appoint a workers' trustee.

411. At company level the negotiating parties in **collective bargaining** are the individual employer and the representatives of the local trade union. A trade union trustee also has the right to ensure and protect the rights and interests of trade union members with the employer, and the employer is also obliged to provide the trade union with access to the information necessary for carrying out trade union activity.

412. Under the Worker Participation in Management Act, the **works council**'s general powers are described as: ensuring that laws and collective agreements are properly implemented and reaching agreements with the employer; proposing measures for the benefit of workers; accepting initiatives from employees, and, where justified, taking them into account when negotiating with the employer; and assisting disabled, older and other workers receiving protection to integrate into employment. The works council must also be informed and consulted in advance in case of important changes within the company. In some areas the agreements of the works council is necessary to take certain decisions (arrangement of annual leave, performance assessment criteria, use of social facilities, …).

413. The 2013 Employment Relations Act requires that the employer should **give trade union representatives** "conditions … for the rapid and efficient performance of trade union activities in accordance with the regulations protecting the rights and interests of workers". However, the details are often settled through collective agreements. The works council's rights to **paid time off** and the resources necessary for their duties are regulated in Articles 62 to 67a of the Worker Participation in Management Act. The works council meets during working time and members are guaranteed five hours paid time a month to attend these meetings. In addition, they are entitled to three hours paid time a month for consultation with workers. Agreements with the employer can improve on these rights.

414. Industry and local level are both important for **collective bargaining**. Company level can only in some exceptional statutory cases worsen the conditions for workers in comparison with agreements concluded at a higher level. At company level the negotiating parties are the individual employer and the local trade union. There are no specific representativeness rules affecting unions' right to bargaining. As well as pay, negotiations cover working conditions and working time, absence arrangements, redundancy terms, training and a range of procedural issues such as dispute resolution, trade union facilities and information arrangements.

4.2.26 Spain

415. There are two types of employee representation at company level in Spain: **individual delegates** and **works councils**. Individual delegates represent workers in companies or worksites having up to fifty (50) workers. Where the company or the worksite has more than fifty (50) workers, workers will appoint a works council. Its members are elected in a secret vote. Works councils and delegates are entitled to preside over and organise assemblies, take legal and administrative action and raise legal disputes. They are also entitled to overview and control the company's fulfilment of its obligations regarding safety, security, and any other regulations in force. Works councils and delegates are entitled to receive information on the company's performance, the market and particularly on employment. They are entitled to consultation in situations affecting a number of employees exceeding the threshold (around 10% of workforce), namely relocation of a worksite, change of employment terms, collective redundancy or mass layoffs, mergers, etc. The size of a works council depends on the size of the company.

416. The works council has specific **information and consultation** rights, as well as the right to right to receive copies of employment contracts as well as notification of the extensions and terminations within 10 days of their taking place or to produce reports prior to the employer implementing proposals (e.g. in case of reduction of working hours or work force restructuring.

417. At the company level the appropriate negotiating bodies for **collective bargaining** are the employer and the works council, although union sections at company level can sign agreements, if they hold a majority of seats in the works council. Also, a worker may request the presence of an employee representative when signing a document stating that an employment contract is officially ended.

418. A **trade union section** within a company can function as a forum for discussing and promoting union policies in the workplace, as well as ensuring the payment of union subscriptions and their rights include holding meetings, collecting contributions and distributing trade union material. Outside the workplace the union sections play a part in the decision-making structures of the union. A key task for the trade union section is to back its union's candidates in the works council elections and discuss the policies the works council should pursue. Trade union delegates also have the right to be heard by the employer before action is taken against workers in general and their own union members in particular, especially where there is a possibility that union members may be dismissed. They are thus in a stronger position than the works council as the employer is only required to inform it after the event.

419. Depending on the size of the work force, employee representatives will receive **paid time off** per month to devote to their representation activities. This varies from 15 hours to 40 hours (i.e. full time).

420. National and industry **collective bargaining** has always been important in Spain, during the financial and economic crisis, company agreements were giving complete and explicit precedence in key areas, even if the provincial-level agreement covering their industry is still in force. Company agreements can set terms on wages, hours, grading and other issues, such as work-life balance, irrespective of those in industry-level agreements. At the company and plant level the appropriate negotiating bodies are the employer and the works council, although union sections at company level can sign agreements, if they hold a majority of seats on the works council. Lower-level agreements normally cover pay and working time, but also other issues like training, pension arrangements, job classifications, etc.

4.2.27 Sweden

421. Normally, the local trade unions elect one or more representatives to represent the employees at a workplace, under the provisions of the **Trade Union Representatives Act**. However, this right only applies if the employer is bound by any collective bargaining agreement. Employees who are trade union representatives may not be prevented from carrying out union work during working hours, may not be discriminated against due to their union activities and are entitled to a **reasonable leave of absence** to carry out their union activities. There are no limitations on the number of representatives in a workplace. The number of representatives vary and is largely determined by the trade unions represented at the workplace, based on the number of employees. The local trade unions appoint representatives at the workplace.

422. The **Co-Determination Act** contains the general provisions governing the relationship between the employers and the unions in such areas as association, information, negotiations, industrial actions and labour stability obligations. According to the Co-Determination Act, an employer has certain consultation and information obligations towards the trade unions. For example, prior to any decision to reorganise the business and prior to any decision to terminate employment contracts, the employer must call for and conduct consultations with the trade unions under the applicable collective bargaining agreements (both at a local and a national level, if applicable). Even if the employer is not bound by any collective bargaining agreement, the employer is obliged to consult the planned reorganisation and potential redundancies with any trade union of which a concerned employee is a member.

423. **Negotiations at company or organisation level** on the implementation of industry-level deals take place between the individual employer and the local union organisation ("the club"). However, where there is no union club, a union official from the local or regional branch of the union will often negotiate how the deal is to be implemented. In addition, in some cases, pay increases will be decided in discussions between the employer and the individual employee. The National Mediation Office describes this as the "salary interview model".

5 RELEVANT ECA DOCUMENTS ON INDUSTRIAL RELATIONS

5.1 POSITIONS

5.1.1 "Pay to Fly" in pilots' training

March 2015, updated December 2021

Definition

'Pay to fly' schemes are an aviation industry practice whereby a professional pilot, whether in training or not, operates an aircraft in commercial service, i.e. on a regular revenue-earning flight – as any other qualified crew member – but instead of receiving a salary he/she pays for the cost of gaining flight experience. Such schemes also extend to pilots who do not have much flying experience (usually under 1500h) and want to gain experience on a specific aircraft type to increase their employability.

Executive summary

- A pilot should not be required to pay for the initial type-rating or for the qualification for a different type of aircraft (type-rating course). Training a pilot for a new aircraft type is an investment for the airline to allow for an optimal use of the different types in its fleet which do not provide the pilot any officially recognised certifying title. Therefore it is the airline that should bear entirely the related costs.
- The employee shall never pay for the required line training, as the pilot is already productive when operating as a regular pilot on revenue-earning flights.
- It is not acceptable that a pilot has to pay for the flying hours he/she performs on line-training – thereby replacing a fully qualified pilot in the cockpit. ECA also opposes the practice whereby training organisations and/or airlines propose pilots to 'buy' packages of extra hours to increase their experience on a specific type of aircraft.
- Pilots who are offered a conversion of aircraft within their company should not have to pay the cost of the related type rating training as it increases the airlines' flexibility.
- The European Parliament expressed its concerns about the use of pay to fly schemes in its resolution of 11 November 2015 and in 2017[80] asked the Commission to regulate where necessary to ensure aviation safety, paying particular attention to pay to fly among other types of atypical employment. On its resolution of 16 September 2016 the Parliament called on the Commission and the Member States to *review rules on initial training and on the licensing of aircrew with a view to eliminating shortcomings leading to the exploitation of pilots, such as pay-to-fly contracts.*[81]

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[80] European Parliament resolution of 16 February 2017 on an Aviation Strategy for Europe (2016/2062(INI))
[81] European Parliament resolution of 14 September 2016 on social dumping in the European Union (2015/2255(INI))

5.1.2 Atypical employment in European Aviation

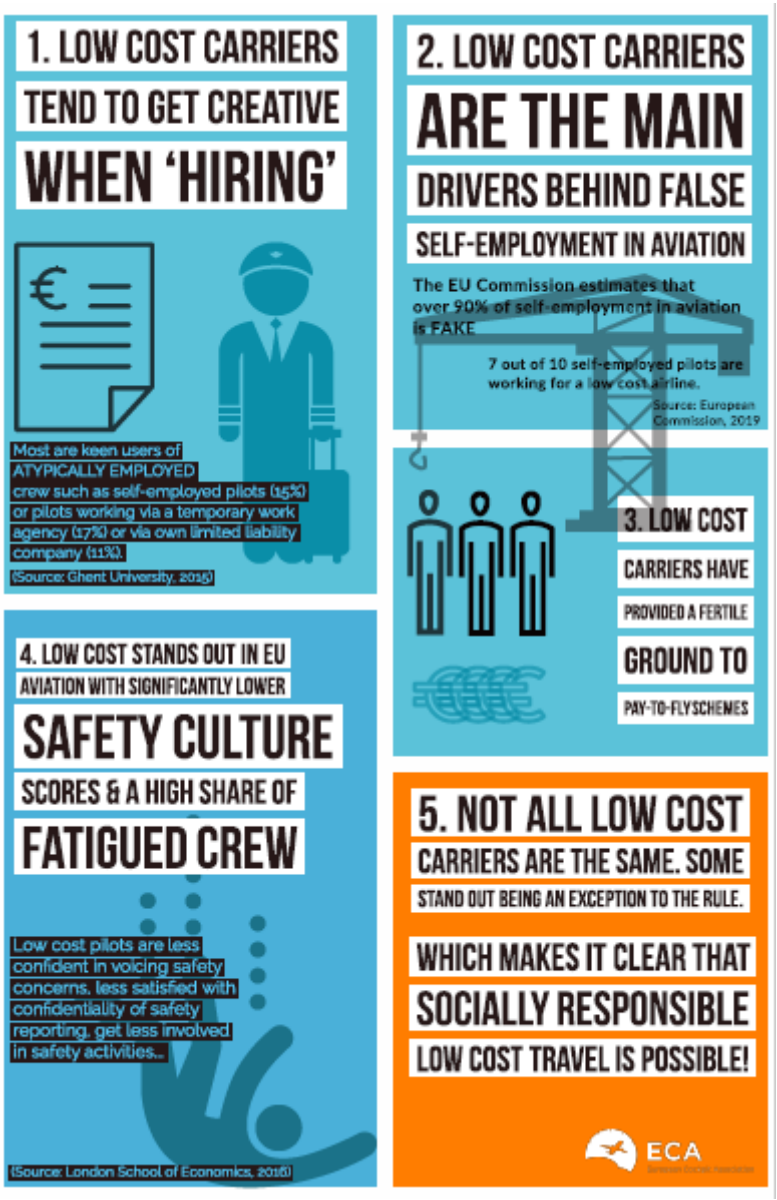
November 2017

Definition

When using the term 'atypical employment', ECA refers to all forms of contractual relations between an airline and a crew member for the provision of work that is not in the form of direct indefinite employment, including, amongst others, self-employment, fixed-term work, work via temporary work agencies as well as zero-hour contracts and pay-to-fly schemes. Atypical employment is not necessarily illegal, it is the abuse of such contracts that is questionable and detrimental to both fair competition and workers' rights.

Executive Summary

- Direct and indefinite employment contracts should remain the general form of employment relationship between employers and workers. Abuse and illegal use of atypical employment create precariousness, reduce workers' rights and downgrade their working conditions
- Wet-lease must be monitored and controlled both by the authority of the country of the lessor and the country of the lessee. Compliance with labour law of the country where the wet-leased aircraft will be operated habitually must be verified including compliance with the posting of workers' directive.
- Pay to Fly (P2F) should be banned through EU-wide and/or national legislation.
- Labour inspections should prosecute airlines (EU-based airlines and foreign airlines checked through SAFA & during ramp inspection) performing these practices in the territory of the EU.
- Aviation authorities should suspend operation certificates of airlines using P2F.
- Labour inspections should prosecute any organisation recruiting pilots to fly under P2F conditions as necessary contributors to deeds of human trafficking. This includes flight schools that engage in or facilitate (directly or indirectly) such P2F schemes.
- The determination of what is "temporary" in Temporary Agency Work is not codified in European legislation and differs amongst Member States. It is important to: restrict use as much as possible in safety regulations, clarify rules on the existing restrictions in different countries, and clarify rules on when aircrews are considered to be posted in a Member State other than the one in which they habitually work.
- Regulations should introduce clear, harmonised restrictions on the use of fixed-term contracts. Both labour and aviation authorities should prevent, monitor and punish abuses. In addition, abuse of successive fixed-term contracts between the same employer and employee for the same work has to be prevented.EU law and, if not possible, national regulations should establish a refutable presumption of direct employment for mobile staff in civil aviation.
- Around a dozen EU countries have banned zero-hours contracts (Zero-hours contracts are not allowed in Austria, Belgium, Czech Republic, Denmark, France, Germany, Hungary, Italy, Netherlands, Poland and Spain). The whole EU should ban this type of contracts for mobile staff in civil aviation.


1. LOW COST CARRIERS
TEND TO GET CREATIVE
WHEN 'HIRING'
Most are keen users of ATYPICALLY EMPLOYED crew such as self-employed pilots (15%) or pilots working via a temporary work agency (17%) or via own limited liability company (11%).
(Source: Ghent University, 2016)
2. LOW COST CARRIERS
ARE THE MAIN
DRIVERS BEHIND FALSE
SELF-EMPLOYMENT IN AVIATION
The EU Commission estimates that over 90% of self-employment in aviation is FAKE
7 out of 10 self-employed pilots are working for a low cost airline.
Source: European Commission, 2019
3. LOW COST
CARRIERS HAVE
PROVIDED A FERTILE
GROUND TO
PAY-TO-FLYSCHEMES
4. LOW COST STANDS OUT IN EU
AVIATION WITH SIGNIFICANTLY LOWER
SAFETY CULTURE
SCORES & A HIGH SHARE OF
FATIGUED CREW
Low cost pilots are less confident in voicing safety concerns, less satisfied with confidentiality of safety reporting, get less involved in safety activities...
(Source: London School of Economics, 2016)
5. NOT ALL LOW COST
CARRIERS ARE THE SAME. SOME
STAND OUT BEING AN EXCEPTION TO THE RULE.
WHICH MAKES IT CLEAR THAT
SOCIALLY RESPONSIBLE
LOW COST TRAVEL IS POSSIBLE!
ECA

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5.1.3 Crew Interoperability - the bigger picture

July 2018

Definition

In aviation, 'interoperability' can be considered as the capability of two or more networks, systems, components or applications to exchange information and to be able to use this information for technical or operational purposes, so enabling them to operate effectively together. Airlines and training schools aim to translate this concept – which in principle is designed for "networks, systems, components or applications" – to people, and invented the concept of "Crew Interoperability." Crew Interoperability would refer to the possibility for a flight crew member to fly for two or more AOCs through crediting of training already performed.

Executive Summary

- Crew Interoperability enables the possibility for a flight crew member to fly for two or more AOCs without undergoing an Operator Conversion Course (OCC).
- There are several fields where Crew Interoperability facilitated by EASA rules could create legal challenges and obstacles and entail potential risk. In particular, Social & Legal, Safety, Data Protection, Anti-Competitive and Oversight & Accountability Aspects could be affected.
- Crew Interoperability being a form of employee sharing, this would be illegal from a Labour law aspect in many EU Member States and can be described as Atypical Employment.
- Transnational interoperability could contribute to social dumping through the facilitation of letter box companies / regulatory forum shopping and the absence of clarity on applicable law to aircrew. It can also be abused to downgrade crews' working conditions.
- Crew Interoperability raises not only legal & social questions, but also many safety issues that need to be addressed in a holistic, consistent manner. These are related to human factors, rostering and fatigue prevention, corporate safety culture, processes and procedures, aircrew training, etc. – as well as the implications for the crew's private and family lives.
- Crew Interoperability poses a strain for operators, crews and national aviation authorities alike as compliance and oversight is complex and can involve several different national laws.
- The use of a single national AOC is the only and best solution for the operational challenges like maintaining an adequate level of efficiency and safety in an "interoperational" environment and constraints for the operator concerning e.g. similarity of manuals, procedures and corporate culture.
- The alternative approach is the use of case-by-case exceptions based on AltMoCs with targeted and adequate guarantees of workers' rights and oversight on safety, social and legal aspects.
- Any potential future rulemaking must be done under a dedicated RMT, involving relevant expertise (incl. from the social, legal and social security side), and involve an in-depth Impact Assessment, as the topic is complex and its implications and impacts must carefully and comprehensively be assessed.

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5.1.4 Pilot Supply

September 2018

Definition

The 'pilot shortage' debate is an oversimplified way to brand the 'coverup' of many structural problems in the industry. What may be perceived – or portrayed – by some of the industry as a 'pilot shortage' is in fact part of a complex discussion on accessing pilot supply, including by weakening regulation to unlock pilot supply for certain airlines at lower cost, and more profitable for some training organisations. The terms 'pilot shortage' and 'pilot supply' are often used as a euphemism – a wrapper for a package of wishes to weaken regulation on licensing, training and workload. All this in order to make the access and use of the pilot supply cheaper for airlines, at the further expense of professional standards.

Executive Summary

- Ensuring an appropriate supply of skilled, talented flight crews is crucial to underpin Europe's aviation sector.
- There is no issue with the availability of licensed pilots in most European countries. There is however a growing issue with the employer's perceived quality of pilots graduating from the flight schools.
- Attracting, properly selecting and training the right candidates are the core challenges that need to be considered when discussing pilot supply.
- The industry must seek early-stage engagement with the next generation of professional pilots, to create enthusiasm, motivation and explain the opportunities that are out there.
- Pilot organisations must be present at study information days and aviation job fairs to advocate an objective storyline to young people interested in joining a flight school.
- Offering future and current pilots an attractive work environment, incl. optimal work-life balance and stability of employment and home base, rather than precarious atypical forms of contacts used by certain airlines in the industry, are extremely important for a candidate to decide to become a professional pilot – and subsequently to stay within the profession.
- Paying the training costs of new desired pilots and a modest wage (e.g. airline sponsored schemes) is also an important factor the candidates consider when choosing their career.
- Any alleged 'pilot shortage' claims must not be used to weaken European regulations on pilot training, flight time limitations for instructors or examiners, or other relevant safety legislation.
- The pilot training syllabus must be brought into the 21st century providing pilots with a real 'education' that encompasses management, economic, leadership and people skills.

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5.1.5 (Bogus) Self-employment in aviation

February 2020

Definition

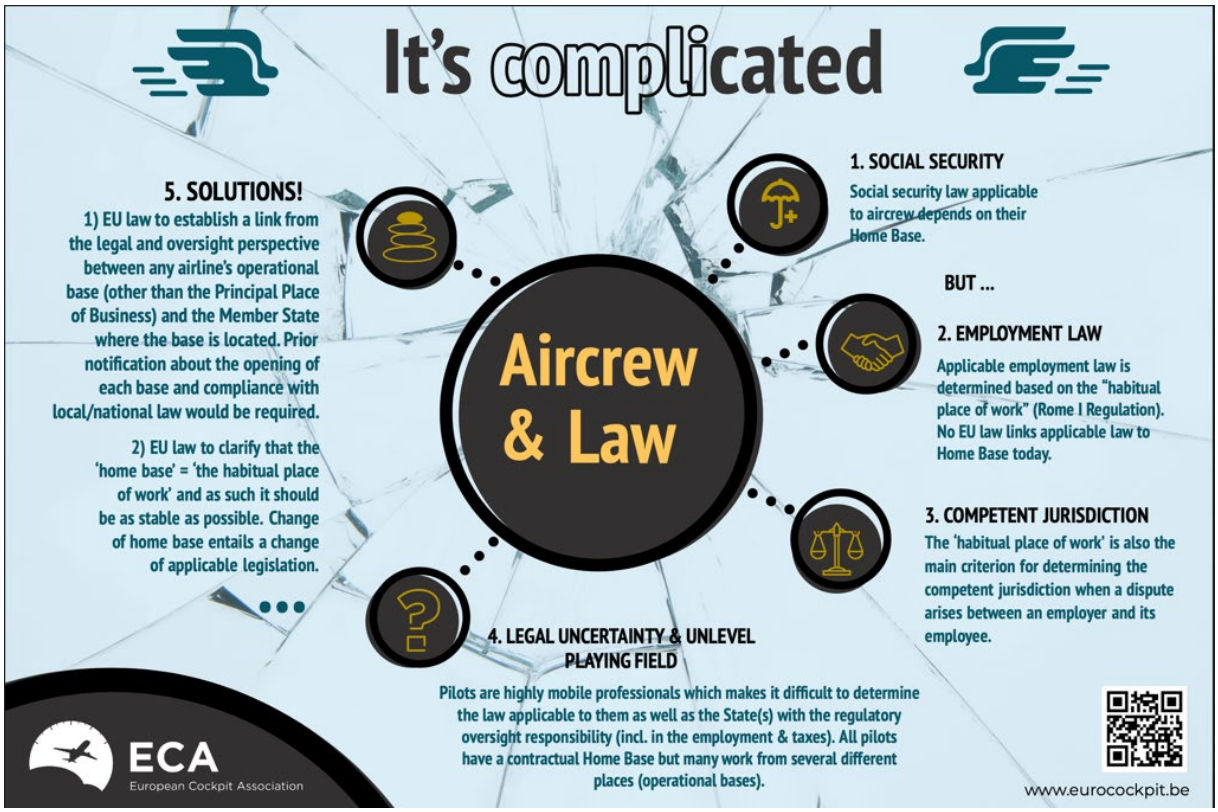
As defined by Eurofound, [82]Bogus self-employment refers to business activities that do not include any managerial or proprietary tasks and which possess the attributes of an employment relationship but without entitlement to the corresponding labour law protections. Employers resort to such practices in order to reduce or avoid tax and social and health insurance contributions for employees. In addition to the lower cost of labour, this strategy of hiring self-employed workers transfers the business risk onto the subcontractor. (…) An increase in bogus self-employment translates into losses for the state in terms of tax payments as well as health and social insurance contributions. At the same time, there is a risk that these individuals may lack adequate social security arrangements, as the law only allows them to take part in the social insurance system to a limited degree.

Executive summary

- A commercial airline pilot cannot exercise his/her profession without the continuous supervision and monitoring by the operator, as required by EASA Regulations. The pilot does not have control over cost and pricing, neither owns the aircraft she/he flies or decides (how), when and where to fly. Such regulatory and organisational facts show a clear link of subordination and an absence of own risk for the pilots. This is incompatible with the status of self-employed no matter the formal arrangements organised by the carrier and or the intermediaries.
- Self-employment creates an undue competitive advantage to airlines using this type of contracts. When tolerated by authorities it could constitute illegal state aid. (Bogus) self-employment has an impact on crew's social protection and on aviation safety. The liability of self-employed pilots in case of accidents is also a concern.
- The workers under bogus self-employment contracts are denied fundamental rights such as health assistance, sick leave, unemployment or parental/maternity leave and the right to collective bargaining and to take part in industrial action.
- The use of self-employment is an issue of European dimension that needs to be addressed urgently and jointly by the Member States and by the EU. The paper provides full analysis and supporting documentation on the issue, including best practices and some avenues to address the identified problems.

[82] https://www.eurofound.europa.eu/publications/article/2008/bogus-self-employment-found-to-be-on-the-rise


BOGUS
SELF-EMPLOYMENT
IMPACTS SOCIAL PROTECTION AND SAFETY.
Bogus self-employment is preventing the good functioning of the European aviation market.
Authorities have difficulties to fight bogus self-employment in aviation, face with complex social engineering where several jurisdictions might be involved.
SELF-EMPLOYMENT IN COMMERCIAL AIR TRANSPORTATION IS UNLIKELY TO EXIST
Pilots work under the direction & supervision of airlines and bear no financial risk.
AIRLINE PILOT = REGULATED PROFESSION WHICH EXCLUDES SELF-EMPLOYMENT
CONCERNS
THE INTERNAL MARKET DISRUPTION
Bogus self-employment gives an unfair competitive advantage to the carriers using this type of employment over socially compliant carriers.
LIABILITY
Self-employed pilot is responsible for the damages to persons and property?
SAFETY
Self-employed pilot could be not in a position to fully exercise the professional judgment.
FUNDAMENTAL RIGHTS ARE DENIED
Bogus self-employment prevents the correct application of national and European social related legislation.
TIME
ACTION IS NEEDED NOW! The practice is growing and the lack of action over 10 years has given operators using it a feeling of impunity and damaged fair competition in aviation irreparably.
MORE INFORMATION AND DOCUMENTATION: VIEWS ON (BOGUS)
SELF-EMPLOYMENT IN AVIATION
ECA



5.1.6 Out of the COVID crisis: Pilots' flight plan for Europe

July 2020

Executive summary

To get through COVID – and to prepare for future crises and shocks – Europe needs a resilient aviation sector that is socially and environmentally sustainable and provides high-quality connectivity for its citizens and regions. The need to preserve aviation as an essential strategic infrastructure serving the public interest should guide Europe's recovery strategy. This requires a holistic approach, including:

1. Socially & environmentally sustainable aviation sector for those who work in it and for the citizens, taxpayers and the wider society:

- Social responsibility: all stakeholders must manage the crisis in a socially responsible manner by (a) retaining staff (incl. using state support) & maintaining skills and crews' employability; (b) managing cuts in jobs & conditions through genuine social dialogue; and (c) eradicating precarious atypical employment (bogus self-employment, broker agency set-ups, Pay-to-Fly etc.).

- Environment: we must take concrete & credible measures and pathways towards decarbonisation of aviation and towards EU climate goals. Sustainable Aviation Fuels – especially electro fuels – to play a key role.

- Public interest conditionality: any public aid and alleviations must come with conditions attached that protect the public interest, incl. strict social & environmental criteria.

2. Single Market free of distortion & a strong global player:

- Level playing field: priority must be given to repairing the pre-existing distortions in the Single Market, created by social engineering, rule shopping and atypical employment by certain players & countries. Law enforcement (incl. posting & temporary agencies), applicability of local law where an Operational Base is set up, and a presumption of direct employment for crew are key measures to be taken.

- Strong, truly European global player: the EU external aviation policy must promote & defend Europe's aviation, more than ever. Further market opening must be suspended, no intra-EU 5th freedom rights must be granted, 3rd country wet-leasing must be exceptional & strictly limited in time; current O&C rules must remain in place & be enforced to prevent 3rd countries from taking over strategic European infrastructure assets.

3. Resilience based on safety, skilled workforce and advance planning:

- Aviation safety must be restored, maintained & increased, by tightened public safety oversight, enhanced safety management by operators and crew fatigue prevention.

- Measures to be taken to retain skilled workforce, recency, employability & re-skilling.

- Develop ready-made packages of emergency measures for different crisis scenarios; consider minimum liquidity requirements; focus on what serves the public interest.

A holistic approach, guided by the public interest: predatory behaviour, whereby some players try to strive at the expense of the others will derail the recovery. Aviation is an 'eco-system' where everybody depends on the health of the others. This includes the aviation professionals who will be asked to deliver a safe & successful recovery. Only if all stakeholders work together will aviation come out of this crisis stronger, more resilient and truly sustainable.

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5.1.7 Revision of Regulation 1008/2008, The pilot's views on changes for a socially sustainable EU aviation

May 2022

The liberalisation of aviation and the Covid crisis have had serious impacts on aircrew employment and working conditions.

ECA main concerns:

- Over the last decades pilots faced a decrease in their terms and conditions and the increase of atypical employment. This was favoured, amongst other factors by the difficulties of national authorities in enforcing national and EU labour and social legislation. The non-application of labour and social legislation has created distortions in the market and a downwards social spiral.

- It is now commonly admitted that the lack of a clear definition of operational base is one of the main obstacles for the enforcement of European and national labour and social legislation in aviation.

- Wet leasing and the leasing of Aircraft, Crew, Maintenance, and Insurance (ACMI) are now generally used as a flexibility option for airlines needing to adapt to constantly changing market circumstances. This can create a very complex setting involving many different jurisdictions and creating further difficulties for the enforcement of employment and social legislation to the aircrew involved. The authority's monitoring of wet leasing operations is necessary to ensure the airlines fitness and avoid subcontracting chains that blur the obligations and responsibilities of operators regarding safety, passengers, cargo and employees. Furthermore, the local authorities should be informed when wet leasing operations will take place on operational bases outside the country authorising it.

- The granting of fifth freedom rights and beyond in national and EU air services agreements, and the possibility of international wet leasing, make of third-country carriers EU internal market operators. The operations of third-country carriers in the EU internal market constitute new business opportunities for these carriers and the revised regulations must clarify that, in those cases, the local rules of the markets where they operate apply.

ECA proposes:

- Inserting a definition of Operational Base
- Defining the obligations of carriers and authorities when opening operational bases outside the airline's principal place of business
- Defining how the airline will ensure that sufficient crew members will be employed in each base to ensure the sound and fit development of the operations.
- Clarify that third country carriers cannot have a more favourable treatment than EU carriers and that they should comply with local laws when operating through operational bases or wet leasing.
- Maintain a close monitoring of wet leasing operation by authorities and insert the obligation to inform local authorities when the wet leased operations will take place outside the principal place of business.
- Enlarge the scope of fitness checks beyond financial considerations to ensure transparent airline structures that will ensure proper allocation of obligations and responsibilities

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5.2 REPORTS AND GUIDANCE

5.2.1 Becoming a pilot: good or bad career choice?

September 2017

The path to becoming an airline pilot in Europe has changed dramatically in the past twenty years. The profession is much more accessible due to a rise of private training schools and new types of training & licensing schemes. This however comes at a price: the cost of pilot training varies between 70.000 and 140.000 EUR.

Most airlines choose no longer to invest in pilot training. As a consequence, the cost and risk of becoming a pilot now falls primarily on the individual's shoulders. ECA set up the website – www.becomingapilot.eu – as a tool to help aspiring pilots and their parents assess the training and career options, and the everyday reality of being a pilot today.

Often aspiring pilots underestimate how volatile and hard-to-access the aviation job market is. For instance 'wanna-be' pilots do not know the difference in job perspectives depending on the chosen flight school. And a pilot license no longer guarantees you a flying job. It might leave you unemployed and with a huge debt. And even if you do find a job, atypical and precarious employment schemes are particularly frequent among young pilots at the beginning of their careers, with a negative impact on their income and ability to plan their future. So before taking the plunge, aspiring pilots and their parents need to take an informed decision.

5.2.2 TNA Handbook

November 2018

An ECA project formally named "Strengthening organisation of Trans-national airline pilots in the EU" was accepted for financing by the EU Commission. The project aims at strengthening the organisation and representation of transnational airline (TNA) pilots and supporting ECA Member Associations (MAs) in this task by offering them effective and handy tools, deepening the knowledge of transnational negotiation and cross-border bargaining tools in the EU (including their limits), and investigating the impact of atypical work on TNAs.

Within the framework of this project, ECA organised two TNA seminars on solutions that fit TNA pilot groups in optimizing the way they work together on their common challenges and coordinate across borders and jurisdictions. The conclusion of the project is this TNA handbook which provides an overview of the current legal and social framework in Europe, describes the current experience of transnational collective bargaining and crossborder negotiation in the EU (in aviation and other sectors) and a toolkit of templates, coordination tools and reference documents.

In the first part of the Handbook, we will set the scene looking at the trends that were identified with the questionnaire filled out by TNA company councils and how they compare with the previous findings from the Ghent University study of 2015. Part 1 also describes different contractual set ups and legal framework challenges in the European Union. Part 2 of the handbook is dedicated to the sharing of experiences, gains and challenges from different transnational pilot groups.

We hope these will provide valuable insight for future TNA pilot groups to come that hurdles will be inevitable but can be overcome. Finally, we hope that part 3 will provide useful tools and ideas to support TNA pilot groups along the different stages of their set-up, as well as some experiences on transnational representation in other sectors which can be used as avenues to be explored in aviation.

Transnational pilot groups are no luxury but a much-needed answer to the organisation and tactics of the multinational airline company.

Lien Valcke, University of Ghent

Pilots, their national unions and ECA have developed many different ideas on Transnational Airline Pilot Groups in the past to assure that the borders of labour laws are not the borders of our representation.

Dirk Polloczek, ECA President

The complexity of evolving in a transnational environment has created loopholes that have been used by some airlines to reduce costs by choosing each time the most convenient legal framework and have had negative consequences for pilots whose pay and working conditions are being constantly threatened.

Ignacio Plaza, ECA Deputy Secretary General

No two transnational pilot groups experiences are alike. Each TNA pilot group has a different background, a different history, and a different type of management to deal with but as the following testimonies will show, one element is always central: unity. The breakthroughs that have been achieved at times when managements have sought to play pilots, their associations and countries against each other were possible because the workforce stuck together as one family in unison and solidarity.

Sarah Kamer, ECA Industrial Policy Advisor

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5.2.3 Should Aircrew Be Declared Posted? Van Olmen & Wynant Report

April 2020

Which is the labour law applicable to aircrew? A clear answer to this question is fundamental for ensuring the protection of aircrew rights and for the good functioning of the internal market. The European Court of Justice recently issued a judgement giving guidelines to determine habitual place from where aircrews work (case C-168/16, Nogueira). This judgement is very useful, however, the question of aircrew's legal situation when they are not at their habitual place of work is still open.

The action responds to the sector's need for professional external support to determine if pilots and cabin crew, who by nature are highly transnational workers should be declared as posted workers. During the revision of the Posting Directive, it was stated that the Directive on Posting applies to International transport except for the Maritime. The application to road transport is explicitly mentioned and the application of the new posting provisions will only cease to apply to that sector when the EU adopts a more specific tool. But what happens with Aviation?

Applying literally the directive would not be feasible as airlines cannot notify every day the authorities of all the countries where their crews will be operating. Therefore, the following questions arise: should aircrew be declared as posted? When? When not?

Key results

The Van Olmen & Wynant Report has gathered complete information on the implementation and enforcement of posting laws applicable to aircrew at all levels including, for the first time, a complete response from the 28 Member States.

The presentation of the Van Olmen & Wynant Report triggered strong reactions both on the employers and employee side. Thanks to this action, the Social Partners realised that there are many different views on what is posting and what isn't. Some question the findings of the report. The Report has been on the agenda of each partner and created controversial debates. The fact that the Report has triggered such reactions show the need for such Report.

The Report shows a high level of incertitude and divergence on the use, knowledge, applicability and enforcement of posting rules. The Report has proposed some tools for the clarification of the situation. However, with such degree of legal uncertainty some partners think that strong actions are needed. The social partners were critical with the proposals in the report but a discussion on why those proposals are criticised and proper evaluation of the proposals might constitute a way to find joint tools and/or specific legislative initiatives.

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5.2.4 *Preparing for the post-COVID19 pilot job market*

June 2020

This guide, which was prepared while waiting for the COVID-19 crisis to pass, provides pilots with some essential tips on how to prepare for a highly competitive pilot job market.

It is is natural to feel worried and frustrated during any crisis, with pilots having just been hired by an airline and fearing they will be the first out. Others having been in-between jobs when a crisis hits and subsequently landing in a holding pool. Atypically employed crews receiving nothing more than an email that their contract is terminated. Students often graduate into a difficult market for low-hour cadets and where they are prime targets for atypical employment contracts.

With all these factors, it may be difficult to think of the pilot job market with positivity. This guide is aimed at remaining optimistic yet realistic and is a good tool for any job seeker.

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5.2.5 *Data Protection Law and the Exercise of Collective Labour Rights KU Leuven Study*

September 2021

The main purpose of this study is to find out whether and how the European Cockpit Association (ECA) and workers' representatives can challenge employers who decline to provide information on the grounds of data protection legislation or on the grounds of commercial confidentiality.

This study concentrates on data protection laws and principles, mainly departing from the perspective of the 'General Data Protection Regulation', known as the GDPR, and brings it in connection with collective labour rights and industrial relations, mainly from the view of the right to information and consultation as well as the right to collective bargaining.

Within the main project study and scope, the main research question can be summarised as: to what extent can data protection laws and regulations (in particular the GDPR) pose limits to the exercise of the right to information in a collective labour rights context where trade unions face employers or groups of employers in a transnational context.

Key findings

- Personal data can be disclosed to workers' representatives in conformity with the GDPR
- In all cases, workers' representatives should demonstrate the necessity of personal data in order to be able to effectively exercise their right to information
- Data minimization is key, so maximize: anonymization, pseudonymization, limiting data access, and other safeguards
- Workers' representatives should use the Toolbox and Data Flow Chart in order to assess GDPR compliance

- Involve employers and reach agreement on conditions and standards applicable to HR personal data disclosures

In addition to the full study, a comprehensive executive summary is available here.

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5.3 REFERENCE STUDIES

5.3.1 Ghent study on Atypical Employment

2015

The liberalisation of Europe's aviation market and the emergence of new business models – incl. Low Fares Airlines – has given rise to numerous new trends in employment relations for pilots and cabin crew. The study 'Atypical Employment in Aviation' (2015) – carried out by Ghent University (Belgium) – assesses the extent of these so-called "atypical" relationships. The study is the result of a survey among 6.633 European pilots and in-depth interviews with stakeholders from 11 countries, incl. air crew, airline representatives and labour inspectors.

According to the survey, more than 1 in 6 pilots in Europe are "atypical" employees, i.e. working through a temporary work agency, as self-employed, or on a zero-hour contract with no minimum pay guaranteed.

According to the researchers, self-employment is one of the most prevalent types of atypical employment. 7 out of 10 of all self-employed pilots work for a low fares airline. Yet, self-employment is sometimes used to disguise what is in reality regular employment. This creates an unfair competitive advantage for those airlines that use it and severely distorts the aviation market.

The study also reveals the safety implications of bogus self-employment: nearly half of self-employed pilots struggle to amend instructions of the airline based on safety or liability objections. Casualisation of labour in aviation is more than just about avoiding social security and taxes. It raises serious concerns about the safety of the industry.

Young pilots are the ones who are most affected by such casualisation of labour. 40% of 20-30 year old pilots are flying without being directly employed by the airline. While finding a job is difficult for young pilots in the first place, they also face situations where they end up subsidising their airline, e.g. by paying the airline to fly its aircraft in order to gain flight experience ("pay-to-fly" schemes). This creates potential conflicts of interests for an independent safety professional, and constitutes straight financial exploitation.

Much of this is possible because the existing legislation has loopholes or is not enforceable. Social security legislation, labour rules, and safety regulations must be adapted to ensure that employment models and management modes do not harm fair competition, nor damage the wellbeing or safety of passengers and crew.

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5.3.2 *LSE study on European pilots' perceptions of safety culture in European Aviation*

2017

Low cost and cargo airlines stand out in European aviation – with significantly lower safety culture scores and a high number of fatigued pilots in the cockpit – compared e.g. to network airlines. These are among the findings revealed in the largest ever independent study among pilots in Europe, carried out by the London School of Economics and Politics (LSE) and EUROCONTROL (Nov. 2016) within the framework of the European Commission's Horizon 2020 (Future Sky Safety programme).

The survey among 7.239 pilots reveals that European aviation can pride itself with a generally good safety culture. Using 11 dimensions to define "safety culture", researchers polled pilots about their perceptions to build a total score for the level of safety culture across European airlines.

All in all, Low Cost Carriers and Cargo airlines score worse on all 11 dimensions measured by the researchers, indicating that airlines' safety practices may differ according to their business model.

While the LSE study sheds light on the many positive aspects of safety culture in Europe's aviation, with the results showing that pilots are confident in flying, encourage their colleagues to speak up and believe in their colleagues' commitment to safety, it is also a warning signal to authorities and airline management that many things need to be improved.

5.3.3 *High-flying Risks*

2018

The Swedish Karolinska Institutet study 'High-flying Risks' analysed the link between the 'safety climate', working conditions and safety behaviours within an organisation. It concluded that worsened working conditions, problematic health & safety behaviours of crews and the prevalence of a 'high-risk safety climate' within an airline are closely related.

The study was conducted among Swedish pilots and it was later decided to adapt it to European pilots. This latest study is currently (2022) underway and will investigate the effects of 'new business models' and working conditions on pilot health, fatigue and flight safety. The study has also been adapted to cover the new pandemic-related changes & challenges. The Results are expected some time in 2023.

5.3.4 *'Ricardo Study' on employment and working conditions*

2019

In 2017-2018, the EU Commission initiated a thorough research into the employment and working conditions of aircrew in Europe. Researchers from the consultancy 'Ricardo Energy & Environment' polled around 6000 pilots, 2200 cabin crew, 9 labour inspectorates, 12 employment ministries, 27 airlines, and did targeted interviews & case studies. Not a single broker agency however participated, despite having been invited by the researchers.

Key numbers

1 out of 5 is atypically employed, according to the latest study.

Around 9% of pilots are self-employed. This figure varies among countries, type of air carrier and business model. The majority (88%) are contracted through an intermediary and 75% of all self-employed work for a low-cost carrier.

The self-employment "champions" are Ryanair with almost 60% of its pilots being 'self-employed', followed by Wizzair (3.6%). But the researchers are doubting if even a small number of those pilots are genuinely 'self-employed'.

93% of self-employment in aviation is fake.

The vast majority of self-employed pilots – 90% – are not free to work for more than one airline in parallel, and 93% have no flexibility to decide when or how many hours to fly. Both are major criteria when defining if someone is indeed genuinely self-employed. This effectively means that almost all self-employed pilots are misclassified regular employees.

8% of European pilots are hired or working through a sort of intermediary or a broker. The study suggests that given the high level of complexity of defining if a broker agency is a Temporary Work Agency (in the sense of the EU Directive 2008/104/EC), it is likely that brokers are not compliant with EU and national laws. They do not, or only rarely respect EU Posted Workers rules, they provide bogus self-employed crew to their client airlines or offer consecutive short-term employment contracts to avoid hiring crew on a direct, long-term basis.

Up to 6% of all pilots have been involved in pay-to-fly schemes, whereby young pilots pay the airline for the privilege of gaining flight experience on its aircraft during regular revenue-earning flights. The research shows that pay-to-fly is more common among charter airlines (12%) and low-cost air carriers (8%), compared to 3% of pilots flying for traditional scheduled air carriers.

Posting of workers is also rarely applied in the aviation. While 11% have been posted in another EU Member State, only one fifth of them say the Posting of Workers rules have been applied to them.

The study shows that there is still too much confusion about which labour law applies to air crew. During the study, researchers were faced with airlines still holding on to the wrong practice of applying the labour law of the Principal Place of Business country, instead of the country where the crew have their Home Base. On top of that, few if any labour inspectors and national authorities were aware of the latest very significant and long-awaited European Court of Justice decisions on this subject. The Court concluded that the Home Base is the most relevant factor to determine the aircrew's applicable labour law (not the nationality of the aircraft registration, or where the Principal Place of Business is located).

This was also a common thread throughout the entire study report: the lack of information and knowledge by labour inspectors, ministries and authorities about the actual labour and employment practices and set-ups in the aviation sector, which is considered as a major stumbling block to addressing the problems adequately.

6 CONTACT DETAILS

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6.2 PARTICIPATING ECA MEMBER ASSOCIATIONS

Austria	Austrian Cockpit Association (ACA)
Belgium	Belgian Cockpit Association (BeCA)
Croatia	Croatian Airline Pilots Association (CRO-ALPA)
Cyprus	Pancyprian Airline Pilots Union (PALPU)
Denmark	Danish Airline Pilots Association (DALPA)
Finland	Finnish Pilots Association (FPA)
France	Syndicat national des Pilotes de Ligne (SNPL)
Germany	Vereinigung Cockpit
Hungary	Hungarian Airline Pilots' Association (HUNALPA)
Iceland	Félag Íslenskra Atvinnuflugmanna (FIA)
Ireland	Irish Airline Pilots Association (IALPA)

Italy	Associazione Nazionale Professionale Aviazione Civile (ANPAC)
Latvia	Latvian Aviation Union
Luxembourg	Association Luxembourgeoise des Pilotes de Ligne (ALPL)
Malta	ALPA-M
Netherlands	Vereniging van Nederlandse Verkeervliegers (VNV)
Norway	Norsk Flygeerforbund (NF)
Portugal	Associação dos Pilotos Portugueses de Linha Aérea (APPLA)
Serbia	Serbian Cockpit Association (SCA)
Spain	Sindicato Español de Pilotos de Líneas Aéreas (SEPLA)
Sweden	Svensk Pilotförening (SPF)
Switzerland	AEROPERS
Turkey	Turkey Airline Pilots' Association (TALPA)
United Kingdom	British Airline Pilots Association (BALPA)
Israel	Israel Air Line Pilots Association (ISRALPA)
Ukraine	UALPA

7 ANNEX - TEMPLATE COLLECTIVE BARGAINING AGREEMENT

INTRODUCTIONARY NOTE TO USING THIS TEMPLATE OF A COLLECTIVE BARGAINING AGREEMENT

The purpose of this template of a collective bargaining agreement is to give trade union negotiators in the civil aviation industry a good overview of the most important and common clauses in collective bargaining agreements (CBA) between worker representatives (trade unions) and employers (air carriers), which they can use to negotiate and draft their own CBA. This CBA takes into account EU law and therefore could be used as a template for transnational collective bargaining agreements. However, it is important to consider that many aspects of employment and social security law are still mostly regulated by the national legal systems of EU Member States. Therefore, it is very difficult to use one single transnational collective bargaining agreement which would apply to workers in different countries. E.g. many EU Member States will demand that the CBA is drafted in a national language and every national system sets different minimum standards which would have to be taken into account and specified. It could be recommended that one CBA is concluded per Member State, while the structure and core content of the different CBAs can remain similar, based on this template. Such a similar structure and content makes it easy to compare the different CBAs.

Every different situation can lead to a different CBA with different clauses. There is no one single standard version of a CBA. The template below offers examples of common provisions and gives concise explanations in italic regarding the content of each clause, the main possibilities and options and it highlights the dangers and risks of which the trade union negotiators have to be aware when negotiating and drafting a CBA.

Yellow = To be amended according to the situation
Green = Optional

[COLLECTIVE BARGAINING AGREEMENT]

BETWEEN

[●]

AND

[●]

AND

[●]

[DATE]

TABLE OF CONTENTS

COLLECTIVE BARGAINING AGREEMENT

(the "**Agreement**")

THIS AGREEMENT is dated on [DATE].

BETWEEN:

(1) [**CORPORATE/AIR CARRIER NAME**] [**CORPORATE FORM**], a [public][private][cooperative] limited liability company incorporated and existing under the laws of [country]), with registered office at [postal code] [city], [street] [number], registered with the number [number] in [official register]), hereby duly represented by [Mr.][Mrs.] **[name SURNAME]**, in his/her capacity as [function].

hereinafter referred to as "[**Name AIR CARRIER**]";

AND:

(2) **[TRADE UNION NAME 1]**, having its principal place of business at [postal code] [city], [street] [number], hereby duly represented by [Mr.][Mrs.] **[name SURNAME]**, in his/her capacity as [function],

hereinafter referred to as "**[ABREVIATION TRADE UNION 1]"**;

AND:

(3) **[TRADE UNION NAME 2]**, having its principal place of business at [postal code] [city], [street] [number], hereby duly represented by [Mr.][Mrs.] **[name SURNAME]**, in his/her capacity as [function],

hereinafter referred to as "**[ABREVIATION TRADE UNION 2]"**;

Each of them individually referred to as a "**Party**", and together as the "**Parties**".

WHEREAS:

(A) [●];

(B) [●]; and

(C) [●].

In the preliminary remarks, it is possible to set out the context of the agreement, e.g. referring to new legislation, referring to negotiations, referring to previous agreements, referring to new policies by the air carriers, referring to economic strategies and decisions taken by the air carrier etc. (e.g. restructuring), referring to specific situations like a pandemic, an economic crisis, etc.

THE FOLLOWING HAS BEEN AGREED:

DEFINITIONS

1.1. The concepts defined in this Clause shall be used in the Agreement in accordance with the following meaning:

"**Agreement**"	means this Agreement, including its Annexes;
"**Clause**"	a clause of this Agreement;
"**Schedule**"	a schedule to his Agreement;
"Pilots"	[●]
"Captain"	[●]
"First Officer"	[●]
"Junior First Officer"	[●]
"Second Officer"	[●]
"Basic pay"	[●]
"Sector pay"	[●]
"Working day OFF"	[●]
["X"]	[●]

The parties can add as much definitions as they want, but this is mostly useful for important concepts which are regularly used in the Agreement. Please note that every air carrier can have its own separate concepts and definitions, e.g. to describe the different functions of aircrew and pilots.

1.2. Other than the above, concepts are possibly defined elsewhere in this Agreement, and the concepts defined in the singular will have the same meaning when they are used in the plural, and vice versa.

1.3. If the Agreement refers to days, reference shall be made to calendar days, unless stated otherwise in the Agreement.

PERSONAL AND TERRITORIAL SCOPE OF APPLICATION

In this clause the parties can define and limit the scope of application to certain pilots or workers/employees of the whole air carrier or to specific branches or subsidiaries of the air carrier. E.g. This Agreement is applicable to all pilots of [name air carrier]. The parties can also include specific exceptions.

In case specific aspects of the agreement will only apply to specific groups of pilots, the parties can state that the agreement in principle applies to all pilots, except when a clause explicitly deviates from this principle.

In this clause the parties can also define in which countries or to which branches of the air carrier the Agreement will apply. The personal scope of application and the territorial scope of application are often put together in one clause, especially if the CBA only applies to the aircrew or pilots in one country, which is often the case (see the examples below).

1.4. Examples:

This agreement covers all Pilots, excluding management pilots and Base Captains who remain outside the scope of this agreement.

OR

The agreement will cover all Germany based Air carrier X employed Pilots (including any Mobile Pilots operating on a German employment contract) for all aircraft types and variants including any new German airport bases opened throughout the duration of this CBA.

OR

This agreement has been entered into for the Pilots employed in France by Air carrier X. it covers the bases of Roissy, Charles de Gaulle, Orly, Toulouse, Nice and Lyon.

MATERIAL SCOPE OF APPLICATION

In this clause, the parties can define the material scope or content of the Agreement.

1.5. Examples:

This agreement covers all aircraft types or variants including the Boeing 737-800, MAX-200 and any other type or variant that may be introduced in the future.

OR

This agreement lays down the rules regarding the wages and benefits / working time / working conditions /….

OR

This agreement replaces the existing X agreement.

APPLICABLE LAW

In this clause the parties choose the applicable law which will govern the Agreement. This means that the binding rules of the chosen applicable law will apply to the contract. Please be aware that it is not possible to escape the application of the mandatory overriding provisions of a law which would normally apply if the parties would not have chosen this law (based on the rules of the Rome I Regulation). Therefore, it is recommended to choose the application of the law of the country which coincides with the base of the persons defined under the personal and territorial scope of the Agreement. This means that if the Agreement only applies to pilots hired via German employment contracts and who are based in German airports, the parties should preferably opt for German law as the applicable law, as it will in any case be impossible to derogate from overriding mandatory provisions of German law. Most employment and social security law provisions are usually considered to be overriding mandatory provisions. Beware of air carriers trying to stipulate that a specific legal system (e.g. Irish law) applies although the pilots or aircrew are not based in that country or do not have a significant connection with this country.

1.6. Example:

This Agreement is governed by X law.

COMMENCEMENT AND DURATION

In order to avoid confusion, it is recommended to be clear about the start and expiration date of the agreement. It is also possible to provide for several phases according to which the Agreement will take effect. Sometimes, if the parties want to include this, there can also be a termination option, this is usually only the case if there is no definite duration.

1.7. Examples:

This Agreement is concluded for a definite duration that runs from 1 January 2023 to 31 December 2025. This Agreement may not be terminated before 31 December 2025. All collective bargaining agreements previously in place between the same parties are no longer valid and are replaced by this Agreement. *These are: (list of previous CBAs).*

OR

This Agreement commences on date and expires on date and will be implemented in two phases:

- Phase 1 : date – date: explanation of phase 1.
- Phase 2 : date – date: explanation of phase 2.

OR

This Agreement commences on date for an indefinite duration. This agreement may be terminated by either party by giving 3 months' notice by registered letter to the other party.

OR

This agreement has a duration of 24 months, it becomes effective on 1 January 2023 and expires on 31 December 2025.

A CBA could also provide a clause which stipulates that the CBA will be tacitly renewed in case the parties do not undertake any action to prolong or cease the application of the CBA at the end of its term. However, be aware of the fact that in same states a possibility to provide for a tacit renewal or prolongation is limited by national rules.

This Agreement is concluded for a term of 3 years, starting on 1 January 2023. The duration of this Agreement will be tacitly renewed at the end of its term for the same duration of 3 years, unless if the Parties agree otherwise. The tacit renewal is [unlimited/limited to 1/2/3 renewal(s)].

FORMALITIES OF EMPLOYMENT CONTRACTS

Some CBAs contain provisions on the content and formalities of the employment contracts of the employees. These rules usually lay down the obligation that the contract has to be in writing and sums up the types of clauses or information that should be included.

1.8. All Air carrier X employment contracts will be concluded in writing once countersigned by the Company and will contain the following information and clauses :

- Pilot's personal data;
- His/her qualification or job title and rank;
- His/her workplace (home base)
- Effective start date and duration, if with a fixed term;
- Working time, whether full time or part-time;
- Duration of the probationary period, if any;
- Amount of the gross annual/monthly combined basic salary;
- Other benefits and additional pay;
- Reference to this CBA.

This clause can also contain an obligation for the employee to provide information.

1.9. Employment is conditional upon receipt of the documents evidencing the eligibility to work in country X and in the other European countries and of the following documents:

- current and valid passport;
- his address and contact details
- tax code or social security number (where applicable);
- current and valid EASA license issued by X;
- any other documents required by the Company in order to be compliant with regulations and with requirements set by this CBA.
- X

1.10. The Pilot is obliged to notify the Company of his address of habitual residence in the vicinity of the airport, so as to allow him to reach the airport within 90 minutes. The Pilot agrees and undertakes to reach the home base at the scheduled times, regardless of any weather and circumstances, except for force-majeure events.

1.11. Any change in address of permanent residence or habitual abode and in (fixed and/or mobile) telephone numbers will have to be promptly notified, in compliance with corporate procedures and regulations.

This clause can also include a provision regarding the probationary period (trial period during which the employment contract can be ended with no or less formalities) for pilots. Please be aware that in some countries probationary periods are not allowed and they are usually restricted in time and certain formalities need to be respected. In light of EU law, it should never last longer than 6 months.

1.12. Example:

The employment relationship may require a probationary period, which shall last no longer than 6 months and shall be agreed in writing. During the probationary period, either party may terminate the agreement at any time, with immediate effect and without prior notice obligation or obligation to pay any substitutive indemnity to the other party. In case of international transfer (i.e. a new hiring on the Italian Branch of a pilot coming from a non-Italian branch), the probationary period will not be normally requested, unless the transfer is done during the probationary period. In this circumstance, the remaining period against a total of 6 months will be completed in Italy.

This clause can also include an obligation for the air carrier to advertise job openings (direct employment contracts) to contractors. This can be a good opportunity to help contract pilots obtain direct employment contracts which might give them more work security and benefits, if they wish so.

1.13. Beginning of every season (starting on [date]) Air Carrier X will advertise openings for direct pilot employment contracts and it agrees to evaluate all applications for direct employment contracts from contractors upon application subject to availability. Trade Union X recognises

that not all pilots based in Country X wish to be directly employed and some prefer to provide their services as a contract pilot.

A final possibility is a clause to limit the possibility for the air carriers to use types of flexible employment or to outsource work to subcontractors etc.

6.7 Air Carrier will only make use of temporary agency workers and/or sub-contracting of the work force (including wet-leasing) during the summer season (June-August), the end-of-the year period (Week before Christmas until New Year). For any other use of temporary agency work and/or subcontracting of the work force (including wet-leasing), the prior permission of the works council / trade union delegation is required and the air carrier needs to demonstrate the objective need for the use of temporary agency work or sub-contracting. The total number of Full-Time Equivalent (FTE) temporary agency workers or other workers which are employed through sub-contracting or wet-leasing cannot, in any case, supersede 5% of the normal FTE work force of the air carrier.

In all circumstances, the works council / trade union delegation will be consulted regarding the use and working conditions (incl. pay and working time) of temporary agency work or outsourcing work in advance (even when its permission is not requested).

Air Carrier X will limit subcontracting to one single level of sub-contractors, thereby preventing that sub-contractors will further sub-contract their obligations or services to other sub-contractors. Air Carrier X will ensure that the temporary agency workers are treated equally in comparison to the employees with fixed contracts and that sub-contractors respect decent working conditions that do not substantially differ from the working conditions of its own fixed contract staff.

WAGES AND BENEFITS

1.14. Remuneration, pay structure and pay increases

The payments are usually a very important aspects of CBAs, especially when the negotiations involve pay increases or the payment of bonusses or allowances. There are endless possible variations, we provide some of the most important ones, without being exhaustive.

1.14.1. Basic salary and method/term of payment

The CBA can define the composition of the salary, naming all the components of the remuneration, e.g; basic pay + flight allowance + sector pay + ….

This Clause can also include a salary structure to give an overview of the basic salary of every function (i.e. salary scales).

Next it can set a term and method for the payment, e.g.

Air carrier X implements payment into German or SEPA bank accounts from 1 January 2023 (upon receipt of pilots preferred bank account details).

The calculation period for the basic pay and the other components of remuneration is the calendar month. Annual payments are made in 12 monthly instalments on the 28th day of the month (pay day) for the current calendar month to a German or SEPA bank account designated by the employee. Payments that are not fixed in monthly amounts are due on the payday of the second calendar month following the situation on which the payment is based.

1.14.2. Sector pay

Sector pay does not refer to remuneration or a bonus as stipulated by the aviation sector in a certain country but refers to a flight allowance (usually including a meal allowance) normally paid on the basis of the sectors flown as a crew member. The sector pay factoring differs depending on the length and duration (and stops) of the flown sectors, e.g. it can be calculated on the basis of scheduled block hours which are flown (this means the planned flight duration as set out in the roster and actually flown by a pilot). Often the sector pay will constitute out of a percentage or they will refer to a standard (nominal) sector pay (which will then be adapted if the sector is longer or shorter). A CBA can define different kinds of sectors and award a corresponding pay to it.

Example:

Short sectors are those with a great circle distance 400km or less and these attract sector pay at a rate of 0.8 of the nominal rate.

Medium sectors are those with a great circle distance of 401km to 1,000km inclusive, and these attract sector pay at a rate of 1.2 of the nominal rate.

Long sectors are those with a great circle distance of 1,001km to 1,500km, and these attract sector pay at a rate of 1.2 of the nominal rate.

Extra-long sectors are those with a great circle distance of 1,501km or more, and these attract sector pay at a rate of 2.5 of the nominal sector rate. The amounts of nominal sector pay for each job title are indicated in the annex. Starting from the 35th medium sector in a month, the payment is increased by 100%.

1.14.3. Pay increases

If remuneration is involved in the negotiations, pay increases are often a key element. The CBA will have to clarify which functions or persons (personal scope) will receive which increases, the composition of the increases (fixed, variable, allowances,…) and the timing of the increases.

Captain basic salary increases to €100.000 gross (incl. €12.000 productivity bonus), which will become effective on 1 April 2023 with sector pay adapted accordingly.

Basic pay increases apply for all German based First Officers employed by Air carrier X as a First Officer within Germany prior to 31/12/2022.

1.15. Other payments

1.15.1. Bonuses

Air carriers can pay all kinds of bonuses (i.e. variable pay, usually depending on achieving targets, performance or productivity.

*An important example is a **performance bonus** or **productivity bonus**, which is awarded based on the achievement of certain commercial targets or performance targets, usually laid down in a bonus scheme by the air carrier. It can be seen as an annual variable pay. Sometimes air carriers pay a productivity bonus to pilots who volunteer to do extra shifts (e.g. on their free days off). Below we give an example where the bonus is based on the number of sectors flown, but also other performance elements can be taken into account.*

Example:

The bonus, subject to the Air Carrier X Scheme Rules, is payable in December as a percentage of combined basic pay earned in the Air Carrier X financial year (1st October to 30th September).

Any additional indemnity to the combined basic salary is not eligible for bonus, nor any variable pay element.

The amount fully accrues in the month of the payment being made and no payment is due if by that date the employee has given or been given notice of dismissal / resignation.

The pilot starting in Italy during the financial year will receive a prorated bonus based on the actual period of work under Italian contract, upon the condition of having worked for at least 3 months in the financial year.

Pilots on part-time contracts shall be paid the bonus pro rata. The bonus shall be paid pro rata (on the basis of the months of actual work) in case of use of unpaid leave or absences over the relevant period the payment is based on (i.e. the financial year).

The basic performance bonus, called Structure 1 is due to:

- Captains
- Co-pilots hired before 1 April 2019

Threshold	On Target	Stretch
0,4%	2%	4%

The bonus will depend on the number of sectors flown by the pilot. The Threshold is the minimum amount in order receive a (minimal) bonus, below this number, pilots will not receive a bonus. The 'On Target" is the main goal for pilots and "Stretch" means that the pilot is overperforming, which is translated in a double bonus compared to the 'On Target" bonus. The number of sectors necessary for each bonus category will be communicated by the Air Carrier before 1 February of each year[, after consultation/agreement with [the signing trade union(s)].

*Another example is a **loyalty bonus**, which is usually awarded to crew which was under contract with the air carrier before a certain date, in order to award them for their loyalty to the air carrier and as an encouragement not to leave the air carrier's employment.*

1.15.2. Working day off payment (WOFF)

This is a financial compensation of an employee who commences a duty period on a day which is rostered as a day off, at the request of the air carrier. This is called a Working day OFF or a WOFF. Sometimes this additional pay is replaced by a productivity bonus. A CBA can set the conditions for awarding such a payment, the personal scope, the formalities, the discretion of the employee to accept a WOFF or not, etc (see also working time).

1.15.3. Training allowances

There are allowances awarded to (usually) pilots who have training qualifications and therefore can offer trainings to other pilots/ act as a trainer on behalf of the air carrier. As these trainings will take away their flight time, air carriers usually award training allowances to compensate the loss of flight allowances, sector pay etc. A CBA can lay down the amount, personal scope and conditions of a training allowance. These allowances are sometimes also called instructor or examiner allowances.

1.15.4. Out of base

A CBA can grant an allowance for costs occurred during the time the pilots/aircrew are not at work but are also not at their home base. Usually this consists out hotel costs and meal compensation. This can also be called a "nightstop allowance". (Also see article 9)

1.15.5. Flight allowance for successful volunteers on flexible roster (extraordinary flexibility flight allowance)

Pilots/aircrew can volunteer to work flexible rosters/schedules. As a compensation for their flexibility they can receive and additional flight allowance (of e.g. 10% of the basic pay per month worked on a flexible roster). The additional allowance will only be paid if the volunteer actually works a certain percentage during the month (e.g. 50%)

1.15.6. Flight day allowance

The flight day allowance is a lump-sum reimbursement of the expenses incurred when on duty, paid by the Air carrier for each day (usually from 00:00 to 23:59) of work as a crew member, in case of positioning, or for each day of simulator or ground training (sometimes ground training falls under a separate category of allowances). The CBA can further determine the scope and amount of this pay. Sometimes these costs are already covered by sector pay (see above).

1.15.7. Reimbursement of expenses

Pilots and aircew usually receive lump-sum allowances to cover expenses. However, it is possible that they need to make additional expenses. Most airlines have a reimbursement policy.

By example:

The reasonable travel and accommodation expenses and the professional expenses incurred in Air carrier A interest and covered by the expense reimbursement policy can be reimbursed upon presentation, by the pilot/aircrew, of a valid expense report and receipts. The reimbursement claims must be received within a maximum of three months from the effective expenses date. All later requests will not be reimbursed.

1.15.8. Allowance for medical check-up

The CBA can grant the reimbursement of the costs for the yearly renewal of a medical certificate by the pilot, as required by EASA and or national legislation.

1.15.9. Legal costs / liability insurance

The Air carrier can enter into an insurance policy to cover the legal liability of aircrew and costs arising from claims or legal proceedings relating to the performance of the aircrew's duties. Usually the insurance will be capped to a certain amount. Also see legal protection.

1.15.10. Car parking costs

The CBA can grant a right to aircrew to use the parking facilities of the air carrier free of charge or, when there are no parking facilities provided by the air carrier, the reimbursement of car parking costs against receipt.

1.15.11. Staff travel

The CBA can grant favourable conditions for (private) flights purchased by aircrew and their family. Usually the CBA refers to an internal policy which sets out the conditions.

WORKING TIME / ROSTERS

1.16. Roster patterns

The CBA can lay down the accepted standard roster patterns, which usually include the on and off duty days. By example: 5 days on-duty followed by 4 days off-duty. A common alternative is 6 days on-duty followed by 3 days off-duty.

On-duty days can be divided in work shifts, e.g. early shifts and late shifts.

A CBA can contain a clause which states that in order to remain flexible, the roster can be adjusted to cope with operational efficiency and operational requirements.

The rosters need to comply with EASA rules, as set out by the company flight time limitations.

1.17. Rostering arrangements

Every aircrew needs to be allocated with a roster. The CBA can lay down the procedures and rules for the allocation and the adjustment of the rosters. These can include:

- *The day on which draft rosters will be issued to the aircrew;*
- *The day on which final rosters are communicated;*
- *The method of communicating rosters and to request swaps or changes;*
- *The procedures for working on a day off (WOFF);*
- *Limitations to flying duties (e.g. 5 consecutive days);*
- *Rights of refusal for aircrew in case their roster/shift is changed;*
- *Requests for specific days of off-duty or/and annual leave;*
- *Swaps of shifts between aircrew (in advance);*
- *Procedure when flight time limits are reached;*
- *Change of rosters;*
- *Consequences of medical incapacity for flying duties;*
- *…*

1.18. Alternate time

Some aircrew work on an "alternate time" basis, which means that they work on the basis of alternating scheduled periods of work and scheduled periods of inactivity according to a set regime. This usually means that the aircrew is not working on a full-time basis. A CBA can lay down the definition and contractual modalities relating to this schedule.

Example:

Definition
Alternate Time involves scheduled periods of work and scheduled periods of inactivity, without pay, distributed over the calendar year by periods according to a set regime. During the periods of inactivity, the contract of employment is suspended. Periods of inactivity are not subject to any remuneration.
All the rights, guarantees and conditions of employment for full-time Pilots shall also apply to Pilots under Alternate Time except the following provisions.

Contractual modalities
Any promotion shall result in a return to full-time work. Promotion is defined as an appointment to a higher position.

In case of a promotion to a training appointment when being on alternate time, the subsequent return to full time will be on 5-4-5-3 pattern.

Any provision, secondment, temporary assignment or transfer of base shall result in a return to full-time work, unless there is a requirement for a specific agreement between the parties, such as a base downsizing or closure. The addendum to the employment contract specific to alternate time will precisely mention those two points above

Remuneration
During periods of activity, the remuneration rules for full-time Pilots remain applicable for Pilots with an Alternate Time employment.

At the end of each month Pilots will receive any variable pay elements accrued during the preceding month

Other benefits
During periods of inactivity, Pilots under Alternate Time employment shall continue to benefit from:

- Social activities of the works council;
- Access to the company's intranet,;
- Insurance against temporary loss of licence;
- Complimentary health insurance scheme;
- Staff travel;
- Continuous length of service within the company.

1.19. Standby / on-call shifts

Some CBA's also contain rules regarding on-call or standby shifts. This standby duty can be an "Airport standby duty' in which case the aircrew needs to remain available at the airport. According to case law of the Court of Justice of the EU, this on-call time will be qualified as working time. Another option is that the aircrew remains reachable by phone or via another communication tool in order to respond to a call from the employer to start working, but he/she does not need to remain present at the work place or another specified place. It will depend on the length of the time the aircrew receives to return to the work place and the frequency of the interventions in order to see whether this is working time. Often the on-call time will be remunerated with a specific compensation (lower than the normal hourly wage). It is possible that national or sector rules lay down a minimum compensation. In case the on-call time constitutes working time and if the national rules, company or sector does not lay down a (minimum) compensation for on-call time, it could be and idea not to provide for a specific remuneration in the CBA, as this would normally mean that the employees will receive their normal remuneration. In case the on-call time does not constitute working time, it is better to specify a remuneration (otherwise the company might unilaterally impose a very low compensation).

Example:

When called from standby, a crewmember is required to use his best endeavours to report as soon as possible, however no crew member will take more than 90 minutes from call out to crew room report. When a dispute exists over travelling time from home to base, the AA website route planner which gives 'travelling time in normal traffic conditions' will be used as an arbitrator. Despite this arbitration, if a particular pilot develops a history of reporting late when called from standby, then the management reserve the right to subjectively review the matter.

It is the pilot's responsibility to ensure that he remains within reach by telephone during periods of standby, and when away from a landline, this includes responsibility for remaining within adequate mobile phone network coverage.

1.20. Working Time Off (WOFF)

A Working day Off, Working time off or a WOFF is a day during which the air crew was initially not scheduled to work, but at the request of the employer d-he/she does perform a shift. A CBA can set the conditions for awarding payment, the personal scope, the formalities, the discretion of the employee to accept a WOFF or not, etc.

Example:

Flat Rates are €600 gross for Captains and €300 gross for First Officers for all German bases per WOFF. WOFF payment will only apply where a pilot commences a duty period (operating commercial flights) at the Company's request on a rostered day off. WOFF can only be agreed upon with the prior consent of the employee.

OR

The pilot has the sole discretion to accept a request to commence a new flight duty on a day that was rostered as an off day (WOFF). Acceptance of such a duty will trigger a working day off payment

LEAVE

A CBA can contain clauses regarding the annual leave or regarding specific types of leave (e.g. because of personal reasons like a wedding or study leave, in order to take an exam). These rules may contain the procedure for aircrew to request leave days or refer to the national minimum provisions for annual leave or specific types of leave. Take into consideration that in any case a full-time employee will have a right to 20 annual leave days per year (on top of national holidays) and that employers should not excessively restrict the possibilities for aircrew to request leave. The CBA can also explain how a leave day is paid. Also provisions regarding unpaid leave can be provided.

Example:

The annual leave consist out of one calendar month plus 10 ad hoc days:

- Ad hoc leave days may be allocated before and after days off.
- A Pilot must have successfully applied for at least 3 ad hoc days during each of the first three quarters orthese days will be allocated in the subsequent quarter.
- Efficient and well-planned allocation of annual leave is critical to the company's operation. Annual leave administration/application will be as per procedures published on the intranet. These procedures will include the company's right to allocate annual leave when pilots have not successfully applied for annual leave in

the timeframes outlined on the intranet. If annual leave dates were applied for but rejected/denied/cancelled by the company, the company will contact the individual pilot to try and accommodate suitable alternative dates rather than allocating days, with consideration for the company's.

- Applications to swap allocated leave days or months will be considered and may be granted or denied at the sole discretion of the company.

OUT OF BASE GUIDELINES

If a pilot or aircrew does not return to his/her home base to stay overnight, the Air carrier will provide for a stay in a hotel in the airport or city where the aircrew can rest. Expenses for this hotel, meals and transportation from and to the airport are usually covered by the Air carrier. A CBA can lay down specific rules regarding this Out of base stay (OOB).

Example:

When a Pilot is assigned out of base duties the below process will be followed:

- The rostering department will assign an out of base duty which will trigger both the payment of a €75 per diem per night and the requirement for suitable hotel accommodation.
- The operations department or API will book the individual pilots suitable hotel accommodation and forward the confirmation to the individual Pilot.
- A hotel on the airport grounds or with shuttle bus services to the airport is preferred, however where a shuttle bus service is not available pilots can claim reasonable transport expenses for trips to and from the airport/hotel.
- Pilots should then complete the relevant expenses form available on ...
- Mileage and taxi expenses can both be claimed as per the above point for out of base duties. Taxis and company mileage claims should only be used where necessary to complete contractual duties and must be approved in advance.
- Where a pilot arrives to their out of base duty and where there are issues with the hotel or transport, they should immediately call crew control. If pilots believe the hotel accommodation is not to a suitable standard, they should inform the company immediately, and the company will then determine if the accommodation is satisfactory.
- Pilots who operate out of base will receive accommodation in accordance with the company procedure at that time.

SOCIAL PROTECTION, INSURANCES AND SICK LEAVE

A CBA can include provisions regarding aspects of social security, e.g. explain the applicable national rules for maternity leave and child birth, paternity leave, mandatory insurance against occupational accidents.

Most important are the rules regarding sick leave, which can include the obligation for the aircrew to notify the employer and prove his absence due to sickness with a medical certificate. Often the clause will also explain how the aircrew will be indemnified/paid during his sick leave, but this heavily depends on national legislation.

Example:

> Any illness or injury must be immediately notified by the aircrew to the Company as soon as sickness arises, both at the beginning and in case of continuation.
> The absence must be notified by the aircrew at least 90 minutes before the expected appearance, so as to enable the Crewing Department to arrange for the necessary substitution.
> The aircrew should provide to the company a certificate of illness, issued by a doctor, before the second day after the beginning of the absence due to sickness or accidents or its continuation.

PENSION SCHEMES / RETIREMENT

Air carriers may offer their aircrew an additional pension scheme (e.g. supplementary pension fund). The CBA can lay down the conditions for joining such a pension scheme and the rules regarding the contributions as well as what happens to the pension scheme when the aircrew leaves the company or when other changes occur.

Next, the CBA can also provide the rules for aircrew on how to apply for their retirement (which usually depends on the national legislation).

A final option is that a CBA would include the obligation for the air carrier to provide a supplementary pension scheme which can be transferred to another country when the pilot or aircrew starts to work from another country or to create an EU-wide supplementary pension scheme. The details of such a scheme should not be included in a CBA but in the pension scheme plan.

TRANSFERS AND TERMINATIONS

A CBA can lay down the rules for transfers of aircrew to another home base. These rules may include a notification term and provisions regarding the costs of moving to another base. In some countries, such a transfer will only be legally possible with the consent of the employee, or if this transfer possibility was explicitly provided for in the employment agreement.

Example:

> The company may order the transfer of an aircrew to another base. The transfer will be notified upon prior notice of at least 30 days, in respect of the rosters publication. Except for more favorable terms and conditions possibly agreed between the parties, possible furniture removal and travel expenses shall be reimbursed by the Company, within limits to be agreed in advance. The reimbursement does not apply to any transfer on request by the employee.

Should a base be closed, its staff will be offered the transfer to another base in Italy or abroad, subject to corporate needs and individual requirements. In case of transfer abroad, the employment contract with the Italian branch shall however be terminated.

Sometimes, the CBA also explains the options for terminating the employment contract of the aircrew, however this is usually regulated by national employment law (and therefore should reflect the applicable national legislation).

PILOT DUTIES – EXCLUSIVITY

A CBA could include general provisions regarding the duties of aircrew, including a prohibition to work for competitors and/or to work exclusively for the Air carrier. Such clauses are often regulated by national employment law and should take into account national rules. As from 2 August 2020, the national transpostions of the Transparent and Predictable Working Conditions Directive will have to prohibit pure exclusivity clauses unless if the prohibition or conditions for parallel employment (multiple jobs at the same time) is based on the basis of objective grounds, such as health and safety, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interests. National laws can go further than the Directive. In many cases, exclusivity clauses will be illegal and should not be included in the CBA.

Example:

The pilots' duties are defined in the Company's operations manuals. In addition to the provided obligations and responsibilities, the pilot shall:

- devote all the necessary time and attention to his duties with the company, serving the company and its clientele faithfully to the best of his knowledge and experience, and use his best efforts to promote the company's interests and development;
- refrain from undertaking other activities that may harm or be detrimental to the due execution of the undertaken obligations;
- perform the assigned tasks with all due care and diligence, faithfully observing all the applicable regulations as set out by the company and by the law.
- properly and successfully attend all training courses and keep his qualification timely and fully updated.

The below Exclusivity clause will normally be considered as illegal:

Exclusiveness : Pilots are required to work for the Company on an exclusive basis. Should the pilot want to take on any additional job, he will have to notify the Company and to apply for an appropriate written authorization. The authorization will not be granted in relation to activities likely to interfere with the performance of the pilot's tasks or to damage the Company's reputation among its customers and suppliers.

UNIFORM

An Air carrier often is characterised by the aircrew's uniform. A CBA can lay down the rules regarding the obligations to wear and take good care of these uniforms and the costs.

Example:

A full pilot uniform will be supplied to all Pilots, including new entrants irrespective of their previous employer. The company is in charge of the yearly top up of items. The staff will be required to maintain the uniform in good condition and to ensure the compliance with the company's standards. The uniform remains the company's property and must be returned at the end of the employment relationship.

For this reason, no allowance is paid for purchase and/or maintenance of the uniform.

Co-pilots with an ATPL license and 2,000 or more company factored block hours will wear 3 stripes. Any co-pilot not meeting this criterion will wear 2 stripes.

Factored hours are calculated according to the definitions provided by the Company Operations Manual.

Wearing uniforms during the periods of inactivity related to Alternate Time is not permitted.

DRUGS AND ALCOHOL

A CBA could lay down rules regarding the prohibited consumption of drugs and alcohol, controls and possible consequences:

Example:

The parties consider safety as their main priority, with no compromises. Accordingly, there is no tolerance for the consumption of drugs or alcohol while on duty and during working days and for those who arrive at workplace under the influence of drugs or alcohol.

Should the Company be informed by the pilot about any drug addiction problems, they will be treated confidentially and sympathetically.

Should the pilot be suspected of arriving at workplace or appearing under the influence of drugs or alcohol during a working day, insofar as possible and in compliance with the national laws currently in force, he/she will be checked. Should the inspection detect any influence of drugs or alcohol, this fact will also be considered as a significant disciplinary matter.

The parties agree to comply with the current corporate policy.

LEGAL PROTECTION

A CBA can contain the provision of access to legal representation in case a crew member runs into legal difficulties (personal liability issues) while on duty. Often this legal protection will be limited to a certain amount.

Example:

> The Company will provide quick access to expert legal advice (to a limit of 150.000 euro) for representations and services in statutory enquiries in civil and military courts in relation to the pilot carrying out company duties.
> This facility will not be available for any pilot with legal claims against the Company. The provision of access to expert legal advice will at all times be at the absolute unfettered discretion of the company. Where the company agrees to provide legal advice, the choice of advisor will be at its discretion and it reserves the right to monitor the amount and quality of legal advice provided. The agreement by the company to provide legal advice is no way implied or suggests that the company condones, accepts or acquiesces in any way the pilot's behaviour in respect of which the legal advice was sought nor does it suggest that the company indemnifies the pilot concerned in respect of which the legal advice was sought.

SOCIAL PEACE AND INTERNAL DISPUTE RESOLUTION

The negotiation and conclusion of a CBA between the company and the trade union(s) is the expression of good industrial relations and is an important instrument to avoid collective conflicts between the employer and the employees. Therefore, the CBA can include provisions to give a further structure to industrial relations and regarding the acceptance and respect of the parties regarding the negotiated provisions of the CBA. The CBA could impose a social peace obligation for the signatory trade unions to respect and defend the agreed upon clauses and not to start a new social conflict, possibly accompanied by strikes regarding the content of the CBA during the duration of the CBA. In the example below, the last paragraph contains a "peace obligation" for the signing trade unions.

Next, the CBA can also provide for an internal dispute resolution mechanism to avoid social conflicts or interpretation issues regarding the provisions of the CBA.

The peace obligation and the formalisation of the dispute resolution process are in principle solely in the interest of the air carrier, but they often constitute the necessary quid pro quo for the employer to give in into trade union demands or to offer them a bit of certainty that the trade unions will not reopen a social conflict once the agreement is concluded. Therefore, it is recommended to first wait for the demands of the air carrier before proposing a text for this clause. The less is formalised, the more freely a trade union can operate. In some cases, an employer will be satisfied with the implicit promise of trade unions that a conflict is solved by signing a CBA and will not request any explicit provisions on dispute resolution procedures or social peace. This would be the ideal outcome. However, if the air carrier does wish to include such a provision, the signing trade unions should ensure that the proposed provisions and procedures do no limit their possibilities of action too much.

Example:

The Parties recognise the need to develop an effective industrial relations system, achievable through effective and regular communication with each other. They shall aim to work collaboratively with the long-term interest of the sustainability of both the company's business model and the aircrews' careers.

The Parties agree that they have negotiated in good faith and have reached a mutually acceptable agreement and agree not to take any action during the term of this agreement with the aim of undermining or modifying this CBA (unless of the provisions of the CBA are not respected).

The provision could stop here, or could include an internal dispute resolution mechanism. This mechanism should be tailored to the specific situation of the company, so this is just an example. This procedure provides an informal dialogue phase followed by a formal phase in two parts. The procedure can be less complicated or more detailed, but trade unions should always ensure that the stages do not take too much time (with long delays) as this could negatively impact their power to mobilise the work force for social action.

The Parties' Representatives recognize the importance of having an effective internal dispute resolution process. If for any reason, all attempts to resolve the dispute fail, the escalation process as defined below shall be followed by the parties, in order to:

- Assess if the impasse or dispute can be re- evaluated and avoided;
- Mediate if the situation requires it;
- Evaluate alternatives, where applicable;
- Refer to the next level in the dispute resolution process, should that be required.

In the event that it is not possible to resolve the dispute through informal dialogue between de parties, either party shall start the formal two-stage dispute resolution process.

In the event that it is not possible to resolve the dispute through informal dialogue between the parties, either party shall start the formal two-stage dispute resolution process. The two stages must be concluded prior to any industrial action being declared by [signing trade unions]:

1. The first stage of the process can be initiated by either party through a formal letter addressed to the HR Manager for the Air Carrier, setting out the details of the "issue" or "impasse".
As part of the first stage, within 5 working days following receipt of the aforementioned letter detailing the "issue" or "impasse", the Air Carrier will arrange a formal meeting in order to attempt to resolve the dispute. This meeting will take place within 5 calendar days from the date of receipt of the first letter.

2. In case of failure to agree at the first stage, a second stage of the dispute resolution process must be formally initiated. The second stage meeting shall take place within 5 calendar days following the conclusion of the first stage - the first stage will have deemed to have concluded if either party advises (the other party) in writing that the second stage of the dispute resolution process should be initiated (but only following a first stage meeting having taken place). In order to facilitate the resolution of the dispute, when required and considered appropriate by both parties the second stage may include the attendance of higher level management compared to the first stage. The parties may request the level of management appropriate to the second stage

meeting and the other party will endeavour to accommodate such request. The second stage may not be blocked by either party in the case that certain levels of management cannot attend the second stage of the dispute resolution process for any reason.

If either party is unavailable to attend a meeting as per the deadlines outlined in points 1 and 2, the meetings will be rescheduled at the earliest opportunity and no later than 10 working days from the date initially proposed. The parties may agree to extend the above timelines whenever this is considered useful to facilitate a resolution of the "issue" or "impasse". It is intended that all communication will be exchanged between [signing trade unions] and the [Air Carrier Place X Office].

Industrial action declaration process shall be started by [signing trade union] only following the conclusion, without success, of both formal stages of the process outlined above.

AGREEMENT ACCEPTANCE AND IMPLEMENTATION

Sometimes a CBA still requires the approval of certain worker representation bodies or of company bodies before it becomes legally valid and it can be implemented. Sometimes the implementation of the provision also require the adjustment of individual employment contracts and therefore the consent of the employees. Next, it is also possible to explain how the agreed upon measures will be implemented and when.

Example:

Following acceptance of this CBA by the Parties, all terms of this agreement will be implemented from 1 August 2019. Phase 1 will include the introduction of a new fixed flight pay structure which will benefit domestic flying and the company will propose alternative AOC structures by 31 March 2019 if the Irish Finance Act continues to apply at year end (2018).
Individual pilots' who wish to avail of the benefits of the new fixed flight pay structure as per section 3.D will be required on an individual basis to accept in writing that their contractual basic salary and current pay structure will be amended to incorporate the new fixed flight pay structure. Where individual pilots' do not confirm in writing their agreement to move to the new fixed flight pays structure they will remain on their current pay structure. Once individual pilots transition to the new flight pays structure they cannot return to the old pay structure and where a pilot delays their transition to the new fixed flight pay structure there will be no retrospection of same.

OR

Upon approval of the CBA by ballot/general assembly, on March 29th at the latest, the Company will immediately implement the financial terms of the agreement, subject to any payroll administration constraints which may require changes to be implemented in April and backdated. Parties agree that neither of the parties will announce that the parties have entered into the present CBA until Trade union X has approved the CLA.

TO BE NEGOTIATED

Negotiating a CBA takes effort and time and it can be preferrable to conclude a CBA regarding priorities or urgent issues while postponing other measures to further and future negotiations. It is possible to include an intention to further negotiate regarding issues that were not solved by the current CBA.

Example:

> The parties will make all reasonable efforts to negotiate further CBAs by 30 July 2023 governing the following topics :
> - Annual leave
> - Working regulations
> - Union Delegation
> - Base reductions/closures.

SEVERABILITY

1.21. If any provision or obligation in this Agreement is null or unenforceable, or would be contrary to a provision of mandatory law, but would be valid if some part of the provision were deleted or restricted, the Parties will amend this relevant provision with such deletion or restriction as may be necessary to make it valid.

1.22. The nullity or non-applicability of any provision of the Agreement shall not affect the validity or applicability of other provisions of the Agreement, which shall remain in full force and effect.

AGREEMENT

This agreement contains all agreements and commitments of the Parties concerning the subject of this Agreement and replaces all previous agreements, declarations of intent or arrangements between the Parties in respect of its subject.

AMENDMENTS

This agreement may only be amended, supplemented, or replaced with the written consent of all Parties.

[JURISDICTION] / [ARBITRATION]

The CBA can choose the competent jurisdiction, however in social affairs it will be very difficult to derogate from the competent jurisdiction which follows from the Brussels Ibis regulation. Therefore, it is recommended to choose the competent jurisdiction in accordance with the Brussels Ibis regulation (just like the applicable law). In short, this means that if the CBA covers German pilots, or pilots who are habitually flying from Germany (home base), the competent courts will normally be the labour courts of Germany.

1.23. In the event of a dispute, the Parties shall undertake all possible efforts to reach an amicable settlement.

1.24. If the disputes arising out this Agreement cannot be settled amicably, they will be settled by the courts of [competent jurisdiction].

1.25. The language of the procedure is [language].

[OR]

1.26. All disputes arising out of or relating to this Agreement, will be settled according to the arbitration procedure set out below, by one of more arbitrators appointed pursuant to this Agreement.

[IF APPLICABLE]

1.27. The arbitral tribunal will consist of [one or three] arbiter[s], approved by the Parties to this Agreement

1.28. The place of arbitration is [Brussels].

1.29. The language of arbitration is [LANGUAGE].

1.30. The applicable law is [●].

1.31. The Parties expressly exclude any claim for annulment of the decision of the arbitrators.

LANGUAGE

Be aware that many countries strictly regulate the use of language between employers and employees. Therefore it is possible that the official text of the CBA cannot be English but another language. According to the case law of the Court of Justice of the EU, it should be possible to have an English translation (in companies with an international character, which is certainly the case for air carriers).

The language of this Agreement is [language] and all notices, requests, representations, certificates and other documents or communications issued on the basis of this Agreement are to be made in [language], unless agreed otherwise.

* *
*

[the signature page follows on the next page]

THIS AGREEMENT has been signed by the Parties (or their duly authorized representatives) at [●] on [date].

[CAPACITY PARTY],

[●], permanently represented by [●], [managing][director]	[●], permanently represented by [●], [managing][director]

[CAPACITY PARTY],

[●], permanently represented by [●], [managing][director]	[●], permanently represented by [●], [managing][director]

[CAPACITY PARTY],

[●], permanently represented by [●], [managing][director]	[●], permanently represented by [●], [managing][director]