



STRONGER TOGETHER

**CONGRESS**

Irish Congress of Trade Unions

Realising the  
Transformative Effect  
of Social Dialogue and  
Collective Bargaining  
in Ireland



**Route  
to Reform**





This document on Collective Bargaining is set out in two parts.

Part 1 sets out specific campaign demands of the Irish Congress of Trade Unions on Collective Bargaining and also summarises its practice in Ireland and other peer countries.

Part 2 is an Academic Support Paper on Collective Bargaining.

# PART 1

## Introduction

The Irish Congress of Trade Unions has, over many decades, campaigned to have legislation enacted which would give workers the legal right to compel their employer to engage in collective bargaining negotiations through their trade union. Historically, public policy in Ireland favoured collectivism in a voluntary industrial relations framework. The industrial relations architecture provided by the State was designed to encourage and facilitate the representation of both worker and employer interests through trade union organisation.

Uniquely in Europe since 1941, Ireland has a system by which such bodies are licenced to conduct collective bargaining and conclude collective agreements. The Industrial Relations Act 1946 which still provides the statutory framework for dispute resolution, was intended to assist trade unions and employers in fixing conditions of employment by collective bargaining.

In the 1980's and early 90's at a time of high unemployment, Government policy of encouraging inward investors to recognise

unions and conclude pre-production agreements ceased. The Industrial Relations (Amendment) Act 2001 followed on from the recommendations of a High Level Group. This Act preserved the voluntary framework of Industrial Relations and was the subject of judicial review proceedings against a decision of the Labour Court. Since then there have been a number of amending legislative enactments culminating most recently in the Industrial Relations (Amendment) Act 2015.

Congress now believes that the time has come for a more mature

and reflective debate about the positive role that stronger collective bargaining arrangements can play in our society and economy. We strongly believe that the benefits that would accrue from the

development of a more advanced system of collective bargaining would be transformative, responding not only to the growing problem of income inequality in Ireland but also unleashing the possibility of higher levels of productivity and innovation particularly at the level of the enterprise through more developed worker participation.

Issues Representative Employees Grievance Salaries Employment Health Protection Law Limits Work-life Balance Salary Regulate Contract Participate Productive Agreement Negotiation Process Collective Bargaining Working Hours Terms Rules Employer Union Wages Group Overtime Safety Establish Cost

In this short paper we will expand on the positive role that a reformed system of collective bargaining can play. We will describe the nature and form of the system of collective bargaining in Ireland pointing in particular to the weaknesses that exist in the current system. We will briefly examine the nature of collective bargaining systems in other countries and we will set out how we can refocus our efforts to advance the 'right to collectively bargain', seeking a resolution in a European context and more reflective of the European Model. We will also set out the amendments we believe are required to national legislation in this regard. It is our intention to campaign to win support for these reforms but also in a genuine way to seek to persuade the 'other side' of the value of what we propose.

## What is Collective Bargaining?

Collective bargaining is the process in which workers, through their trade unions, negotiate with their employers to determine their terms and conditions of employment, including pay, hours of work, holiday leave, sick pay and other benefits. Recognising the inherent power imbalance in the employment relationship the process of collective bargaining gives added weight to the expression of worker interest and as such the worker voice is recognised and respected. Collective bargaining is an essential part of a social market economy and without it there is no balance between Capital and Labour.



## How is Collective Bargaining Conducted in Ireland?

The Irish system of Industrial Relations is often described as both *voluntarist* and *adversarial*. Workers through their trade unions have traditionally gained the right to negotiate collectively with employers either through mutual agreement or the threat of industrial action. At the behest of the Government and employers national collective bargaining ended in 2009. Organisations such as the Workplace Relations Commission and the Labour Court often play a pivotal role in assisting the parties to resolve industrial disputes.

### Sectoral Collective Bargaining

Sectoral collective bargaining is provided for in the Industrial Relations (Amendment) Act 2012, through Joint Labour Committees (JLCs), covering eight economic sectors. However it is currently utilised in two economic sectors only, Contract Cleaning and Security Services.

The plain intention of the Oireachtas in enacting this legislation was to provide for sectoral regulation of pay and conditions of employment in certain sectors through a form of *de facto* sectoral level collective bargaining. That intention has been subverted by the concerted actions of employers in refusing to nominate employer members to those Committees. Their



actions in that regard have been tacitly accepted by Government.

Currently the process of making an Employment Regulation Order can only commence when proposals are formulated by employer and worker representatives negotiating through a JLC. Consequently, where, as in the case of the six dormant JLCs, employers abstain from participating in a JLC, the statutory process established by the Oireachtas is rendered inoperative.

The enactment of the Industrial Relations (Amendment) Act 2015 provided for the registration of enterprise level agreements by mutual consent between the parties. It also provides for the making of Sectoral Employment Orders (SEOs) which can set minimum terms and conditions of employment in an economic sector through a Labour Court recommendation endorsed by the Houses of the Oireachtas. Some have attributed the relatively slow take-up of the Industrial Relations (Amendment) Act 2015 to a number of factors, including the fact that unions have been unable to establish

the membership threshold necessary to obtain standing in order to take claims. While this legislation also provides for a statutory framework, whereby unions can process claims, through the Labour Court, for improvements in pay and conditions of employment in enterprises where the employer refuses to engage in collective bargaining, the process is cumbersome and is not as effective as was originally intended.

### Individual Employer Bargaining

Outside of the statutory framework described above, collective bargaining takes place at individual company level. There is a collective agreement covering all workers in the public sector, with the Government as the employer. The OECD currently estimates total collective bargaining coverage in Ireland to be between 40-50%.

## What are Ireland's Obligations in Relation to Collective Bargaining?

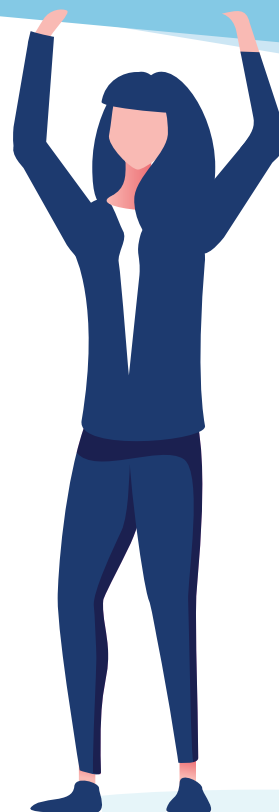
Successive Irish Governments have articulated the view that their role is 'to support a voluntarist system of industrial relations through a statutory framework supportive of collective bargaining'.

The international community has long recognised that the right to organise and collectively bargain are

fundamental principles and rights at work.

Ireland is committed to upholding this right under a number of international conventions and treaties it has signed and ratified. These include:

- The International Labour Organisation's (ILO) *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No.87).
- The ILO's *Right to Organise and Collective Bargaining Convention*, 1949 (No. 98).
- The European Social Charter (Article 6).
- The International Covenant on Economic, Social and Cultural Rights (Article 8).
- The European Convention on Human Rights (Article 11).



In addition, Ireland commits under the Treaty on the Functioning of the European Union (Article 152), to recognise and promote the role of the social partners at EU level, while under the Charter of Fundamental Rights of the European Union (Article 28), it is committed to respecting the right to collective bargaining and collective action in relation to EU law.

However, the position in Ireland remains somewhat unique in the developed world in that, while the Irish Constitution protects the right of freedom of association, trade unions have no legislative right to be recognised in the workplace for collective bargaining purposes, or to make representations to their employer through their union.

## How can Workers Benefit from Collective Bargaining?

A main goal of workers and unions is to achieve wage growth that outstrips increasing costs of living. We call this 'real' wage growth and it is necessary for improving living standards.

In the short-to-medium term, workers can achieve real wage growth by increasing the productivity of their labour or by negotiating a larger share of GDP through collective bargaining. In the long-term, an economy can only sustainably achieve high real hourly wages through high levels of

productivity. Therefore, an increase in the labour share of GDP tends to reduce the level of inequality in the economy by redistributing income away from the owners of capital.

The labour share is simply the share of national income or GDP accounted for by labour compensation in the form of wages, salaries and other benefits.

Trade unions can influence both the labour share and the productivity channels, to the benefit of workers. On one hand, unions increase the bargaining power of labour thereby enabling workers to negotiate a larger slice of the pie. At the same time, coordinated wage bargaining can impede cost competition strategies and encourage productivity enhancing measures, and in so doing push the economy towards a high wage and high productivity





*“Our key findings are that the decline in unionisation is related to the rise of top income shares and less redistribution, while the erosion of minimum wages is correlated with considerable increases in overall inequality”*

IMF (2015)

equilibrium.

The decline in collective bargaining in some countries has coincided since the 1970s with a decline in the ‘labour share’, along with a commensurate increase in the share of income going to capital in the form of rents and profits. The general decline in the labour share has fuelled a rise in inequality and may be a driver of rising populism in some countries.

## Collective Bargaining is Good for the Economy

There is no intrinsic tension between collective bargaining and economic efficiency. Alongside this, collective bargaining strength is positively associated with a higher labour share and with lower economic inequality.

Lower levels of inequality are associated with quality of life and well-being benefits for the entire population. Examples of such benefits range from improved health and longer life expectancy, lower levels of stress and less crime.

More equal economies and societies tend to be more stable and prosperous over the long-term. By reducing inequality, trade unions can play a vital role in sustaining long-run

*“It is also clear that unions and collective bargaining have an equalising effect on earnings’ distributions by compressing wage differentials. Research has shown that wage inequality falls during periods when union density is increasing and rises when union membership is in decline”*

World Bank (2013)

growth as well as the stability of the economic system itself.

The sectoral collective bargaining approach is valuable because it becomes much more difficult for individual employers to pursue a strategy of driving down pay to increase competitiveness. Instead of competitiveness, the high-road approach emphasises productivity. Tomasetti, William and Veersma (2018) point out that multi-employer coordination of collective bargaining has a positive impact on economic performance as this impedes wage competition and encourages firms to increase productivity in order to pay wages; over time, the economy shifts to a high wage and high productivity equilibrium.

## How is Collective Bargaining Conducted in Other Countries?

Recent OECD research has produced detailed information on collective bargaining over recent years. In an attempt to capture the role of collective bargaining for good labour market performance - in terms of employment, wages, working conditions, inequality and productivity – its 2018 research sought to look at the main features and actual functioning of collective bargaining systems. This research characterises collective bargaining systems in the private sector along four main building blocks:

The OECD characterises Ireland as having a largely decentralised collective bargaining system. Firm-level bargaining is the dominant form under this system but sector-level bargaining (or a functional equivalent), or wage co-ordination, also play a role and extensions are 'very rare'.

The OECD sees the 'largely decentralised' system it identifies in Ireland as producing better labour market performances compared to the fully decentralised systems it identifies in the UK, the US, Canada and various other OECD countries, where bargaining is essentially confined to the firm or establishment level. But, more significantly, it finds that Ireland's system produces an *inferior* labour market performance

Collective bargaining coverage	The share of workers covered by collective agreements. This is linked to membership of signatory employer organisations and trade unions, and to extensions of agreements to other firms and workers in a sector.
The level of bargaining	Whether collective agreements are negotiated at the firm, sector, or national level. Multi-level bargaining involves a combination of firm and higher-level collective bargaining.
The degree of flexibility	The ability of firms to modify terms set by higher-level agreements. In centralised systems, firms have little or no scope to modify terms whereas in fully decentralised systems, collective bargaining takes place only at the firm level. Between these two poles, organised decentralised systems allow sector-level agreements to set broad framework conditions but leave detailed provisions to firm-level negotiations.
The role of wage co-ordination	Between sector-level (or firm level) agreements, such as the setting of common wage targets, to take account of macro-economic conditions.



compared to the ‘*organised decentralised and co-ordinated systems*’ that operate in Austria, Denmark, Germany, the Netherlands, Norway and Sweden, where sector-level agreements play an important

role but where significant room exists for lower-level agreements to set standards and where there is strong coordination across sectors and bargaining units. It finds that:

OECD	“Overall, organised decentralised systems tends to deliver good employment performance, better productivity outcomes and higher wages. By contrast, other forms of decentralisation that simply replace sector-level with firm-level bargaining, without co-ordination within and across sectors, tend to be associated with somewhat poorer labour market outcomes”.
OECD	“...co-ordinated collective bargaining systems are associated with higher employment, lower unemployment, a better integration of vulnerable groups and less wage inequality than fully decentralised systems. Previous evidence also showed that these systems help strengthen the resilience of the economy against business-cycle downturns’ (OECD, 2018b)”.

Table 1: Collective Bargaining – what happens elsewhere (see section 2.4)

	Predominant level of collective bargaining	Centralisation/ Decentralisation of CB	Co-ordination of CB	Private sector density	CB coverage	Employment rate (20 to 64) 2017	Unemployment rate 2017	Youth unemployment rate (15-24) 2017	Income quintile share ratio 2016 <sup>1</sup>
France	Sectoral	Centralised	Low	5-10%	90%+	71	10.4	22.3	4.3
Italy	Sectoral	Centralised	Low	20-30%	80-90%	62	11.2	34.7	6.3
Portugal	Sectoral	Centralised	Low	10-20%	60-70%	73	9.0	23.8	5.9
Slovenia	Sectoral	Centralised	No	10-20%	60-70%	73	6.6	11.2	3.6
Spain	Sectoral	Organised decentralised	Low	10-20%	70-80%	66	17.2	38.6	6.6
Belgium	Sectoral/national	Centralised	High	50-60%	90%+	69	7.1	19.3	3.8
Finland	Sectoral/national	Centralised	High	50-60%	80-90%	74	8.6	20.1	3.6
Austria	Sectoral	Organised decentralised	High	20-30%	90%+	75	5.5	9.8	4.1
Denmark	Sectoral	Organised decentralised	High	60-70%	80-90%	77	5.7	11.0	4.1
Germany	Sectoral	Organised decentralised	High	10-20%	50-60%	79	3.8	6.8	4.6
Netherl'ds	Sectoral	Organised decentralised	High	10-20%	80-90%	78	4.9	8.9	3.9
Sweden	Sectoral	Organised decentralised	High	60-70%	90%+	82	6.7	17.8	4.3
Greece	Company/sectoral	Decentralised	No	10-20%	40-50%	58	21.5	43.6	6.6
Luxemb'g	Company/sectoral	Decentralised	No	20-30%	50-60%	78	7.1	15.3	5.0
Slovakia	Company/sectoral	Decentralised	No	10-20%	20-30%	71	8.1	18.9	3.6
Ireland <sup>2</sup>	Company/sectoral	Decentralised	No <sup>3</sup>	20-30%	40-50%	74	6.7	14.5	4.4
Czech Rep.	Company	Decentralised	No	10-20%	40-50%	80	2.9	7.9	3.5
Estonia	Company	Decentralised	No	< 5%	10-20%	79	5.8	12.1	5.6
Hungary	Company	Decentralised	No	5-10%	20-30%	73	4.2	10.7	4.3
Latvia	Company	Decentralised	No	5-10%	10-20%	75	8.7	17.0	6.2
Lithuania	Company	Decentralised	No	5-10%	5-10%	76	7.1	13.3	7.1
Poland	Company	Decentralised	No	5-10%	10-20%	71	4.9	14.8	4.8
UK	Company	Decentralised	No	10-20%	20-30%	78	4.4	12.1	5.1

Sources – *OECD Employment Outlook 2017* for predominant level of collective bargaining, centralisation/ decentralisation, coordination, private sector density, coverage and quality of labour relations (in 2015); *European Commission Employment and Social Developments in Europe Annual Review 2018* for employment and unemployment rates (in 2017) and income quintile share ratio (in 2016).

1 As per European Commission's *Employment and Social Developments in Europe Annual Review 2018*, S80/S20 income quintile share ratio refers to the ratio of total equivalised disposable income received by the 20% of the country's population with the highest equivalised disposable income (top quintile) to that received by the 20% of the country's population with the lowest equivalised disposable income (lowest quintile)

2 Since enactment of the Industrial Relations (Amendment) Act 2015..

3 Arguably yes in view of emergence of pattern bargaining.

## The Experience of Collective Bargaining Outcomes in Other Countries is Positive

Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) provide concrete examples of countries with high levels of collective bargaining alongside high levels of employment and high levels of productivity. These countries' high-road model shows that collective bargaining is consistent with high levels of productivity and strong economic performance.

One reason for the long-run success and stability of the Nordic countries is their collective bargaining systems. While there are differences between these countries' systems, they all involve inclusive trade unions and employer organisations focused on the long-term health of the economy along with a high-road approach to competitiveness based on driving productivity, rather than the low-road approach of cutting labour and other costs.

*"In conclusion...co-ordinated systems [as found in Austria, Denmark, Germany, the Netherlands, Norway and Sweden] are shown to be associated with higher employment, lower unemployment, a better integration of vulnerable groups and less wage inequality than fully decentralised systems [as found in the US and the UK]"*

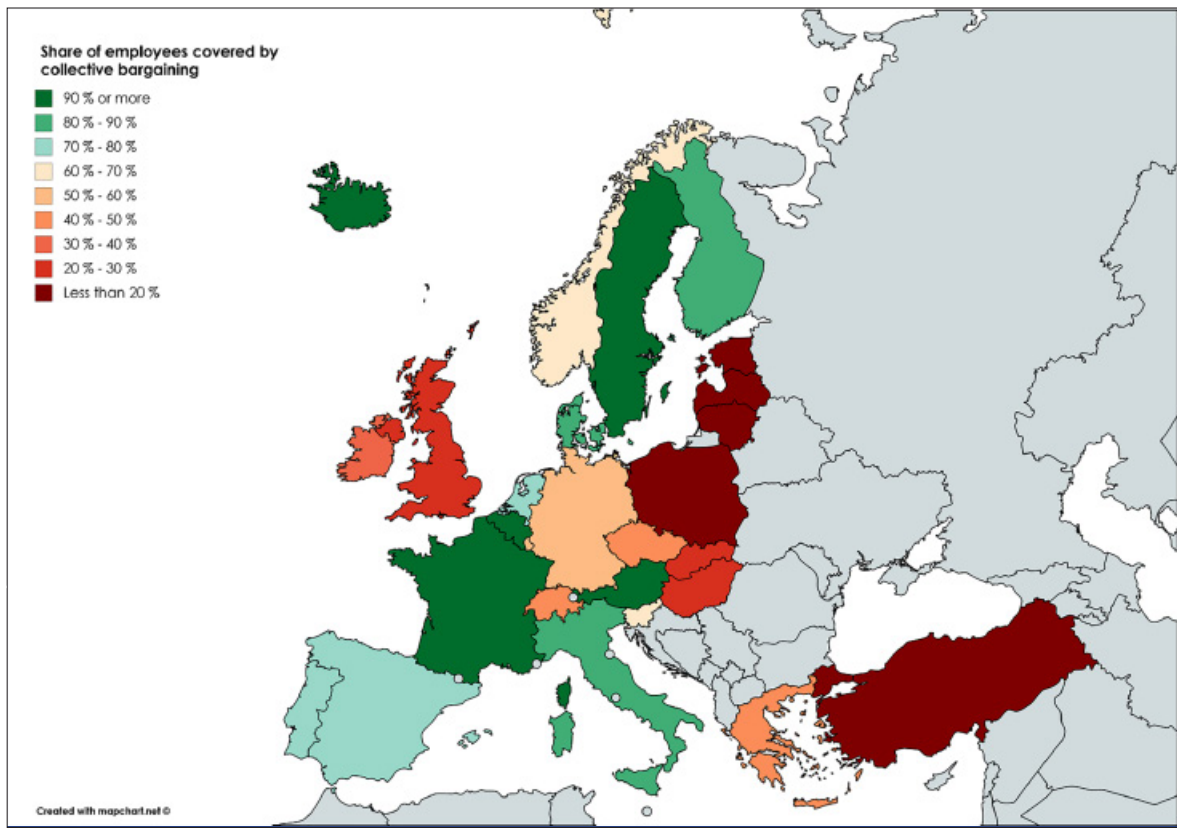
OECD

*"[The] best way of ensuring the inclusiveness of collective bargaining is by having well-organised social partners based on broad memberships. This allows social dialogue to be widespread at the firm-level among worker organisations and employers and to be based on representative social partners at higher levels (e.g. sector, country). To extend social dialogue to all segments of the economy, including small firms and non-standard forms of employment, Governments should put in place a legal framework that promotes social dialogue in large and small firms alike and allows labour relations to adapt to emerging challenges"*

OECD Jobs Strategy  
(December 2018)

## Social Dialogue in Ireland and Peer Countries

The Government has taken a number of initiatives over recent years to consult unions and employers on policy-making. These include the establishment of the National Economic Dialogue (NED) in 2015 and the Labour Employer Economic Forum (LEEF) in 2016. The aim of the former is to 'facilitate an open and inclusive exchange on the competing economic and social priorities facing the Government' while the latter



is described as a 'formal structure for dialogue with representatives of employers, and of labour on economic and social policies as they affect employment and the workplace'.

These initiatives may in part represent a response to discussions at European level on the role of unions and employers in policy-making. For example, EU guidelines for Member States employment policies have repeatedly over recent years urged Governments to involve social partners in policy-making. The 2015 guidelines urged Governments to "closely involve... social partners in the design and implementation of relevant reforms and policies" while the 2018 guidelines go further to state:

*"Building on existing national practices, and in order to achieve more effective social dialogue and better socioeconomic outcomes, Member States should ensure the timely and meaningful involvement of the social partners in the design and implementation of employment, social and, where relevant, economic reforms and policies, including through support for increased capacity of the social partners. The social partners should be encouraged to negotiate and conclude collective agreements in matters relevant to them, fully respecting their autonomy and the right to collective action".*

Irish initiatives in relation to this national social dialogue appears to fall short of practices in many other Member States, particularly those that the OECD now sees as the best performers in terms of the impact of collective bargaining systems on labour market performance (discussed below). For example, the European Commission's Country Report Ireland 2019 states:

"In 2015 the Government created a structured forum for national economic dialogue where social partners have the opportunity to raise concerns and share views ahead of the annual budget on key policy issues. However, they are rarely involved and consulted in relation to the European Semester process by the Government".

This Commission finding in relation to Ireland can be contrasted with its conclusions as set out in other 2019 country reports. For example, the Commission finds that the German model of social dialogue 'functions well, and the social partners are overall closely involved in policy-making'; that 'Austria has a system of social dialogue and industrial relations with a proven capacity to contribute to balanced socio-economic development'; and that Denmark's good performance as regards the European Pillar of Social Rights reflects its 'advanced welfare model, social protection system, well-established social dialogue, and focus on active labour-market policies'.

The practices of other Member States, particularly the OECD's best performers are useful in any consideration of how to improve the role of the social partners in policy-making in Ireland, as now recommended by the EU.



## Congress Route to Reform

### Through EU Directive

Congress will campaign for the adoption of an EU Directive on collective bargaining to establish a 'right to bargain' in Irish law. Congress will work, through the European Trade Union Confederation (ETUC), in seeking to have the laws of the EU Member States on collective bargaining harmonised by way of this European Union Directive.

The ETUC recently adopted a manifesto setting out its programme of work and campaign priorities including such a Directive. Congress will be working at national level to persuade the Irish Government to work within the EU institutions to support the adoption of this Directive and if it is developed, the doctrine of supremacy of EU law would overcome any lingering doubt around the Constitutionality of any legislative initiative in this sphere.

### Through National Legislation

In Ireland there is an almost total absence of any statutory protection for workers against penalisation on grounds of trade union membership or activity in employment. While the Unfair Dismissals Act specifically prohibits dismissal on those grounds, workers can be subjected to other forms of detrimental treatment on grounds of trade union membership or, more particularly, trade union activity.



**We will vigorously campaign for the Enactment of a statutory Trade Union Rights Act setting out a Charter of Rights for trade union members to include:**

- the right to collective bargaining
- the right to participate in trade union activities in the workplace
- the right to organise within the workplace
- the right to reasonable time off to engage in trade union training and representation activities
- the right of access for trade union officials to workplaces for the purpose of communication with members
- the right of access to key employer decision makers for the purpose of persuasion on matters in the interest of their members
- the right to protection against penalisation on the grounds of trade union membership or activities in line with the Protected Disclosures Act 2014



## Sectoral Bargaining

### Congress will campaign to achieve the following legislative amendments to strengthen collective bargaining at sectoral level:

- Amend the Industrial Relations (Amendment) Act 2015 to provide that where employers abstain from participating in a Joint Labour Committee for a specified period, the first stage in the process of making an Employment Regulation Order could be bypassed.
- Amend the Industrial Relations Amendment Act 1946 to the effect that where employers in a sector to which a Joint Labour Committee relates are provided with a full opportunity to participate in the Joint Labour Committee, and refuse to do so, the Labour Court could formulate a draft Employment Regulation Order for submission to the Minister. The draft Employment Regulation Order could then be placed before the Oireachtas, in accordance with the statutory scheme.
- Amend the Industrial Relations (Amendment) Act 2015, to review the current membership thresholds necessary to obtain standing in order to make an application.
- Amend Section 5 of the Industrial Relations Act 2001, to restore the original intentions of the statutory scheme provided by the enactment.
- Maximise the possibilities under existing EU procurement Directive 2014/24/EU and transposed into Irish Law in 2016, to promote collective bargaining through procurement.
- Article 18.2 provides that: *Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law, established by Union law, national law, collective agreements or by the international environmental, social and labour laws.....*
- Reintroduce the policy concerning trade union subscriptions which was abolished in 2011.
- The OECD points out that several countries, including countries it identifies as having the best performing collective bargaining systems, use fiscal incentives to promote trade union membership. It cites research which shows that the increase in the rate of the Norwegian tax relief for trade union membership was important between 2001 and 2012 for slowing the decline in trade union density. It also points out that Sweden has recently reintroduced a subsidy for union members, abolished in 2007, and that in Finland, union membership fees (and employer confederation fees) are tax-deductible. Other research cited by the OECD highlights the fact that tax subsidies for union membership also exist in France and even in the United States.

# PART 2

## 'ACADEMIC SUPPORT PAPER' ON COLLECTIVE BARGAINING.

### Collective Bargaining and Economic Performance

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# 1 Introduction

The standard of material wellbeing for most people living in the West today is superior in almost every respect to the living standards of even the wealthiest people just one hundred years ago. A simple consideration of developments in health, nutrition, education, communication, transport and entertainment bears this out. The improvements in living standards are the result of on-going technological change, innovation and scientific progress.

The huge difference in standards of living across countries is largely the outcome of long-term differences between countries in terms of productivity growth arising from the application of economically useful new ideas. From this perspective, achieving long-run productivity growth across the economy should be a core goal of workers and policymakers.<sup>4</sup>

This section looks at the importance of productivity for long-run economic performance and discusses how productivity relates to collective bargaining and wage growth. The decline in collective bargaining in some countries has coincided since the 1970s with a decline in the 'labour share', along with a commensurate increase in the share of income going to capital in the form of rents and profits.<sup>5</sup>

The general decline in the labour share has fuelled a rise in inequality and may be a driver of rising populism in some countries.

A main goal of workers and unions is to achieve wage growth that outstrips increasing costs of living. We call this 'real' wage growth and it is necessary for improving living standards.

In the short-to-medium term, workers can achieve real wage growth by increasing the productivity of their labour or by negotiating a larger share of GDP through collective bargaining. In the long-term, an economy can only sustainably achieve high real hourly wages through high levels of productivity.

Trade unions can influence both the labour share and the productivity channels, to the benefit of workers. On one hand, unions increase the bargaining power of labour thereby enabling workers to negotiate a larger slice of the pie. At the same time, coordinated wage bargaining can impede cost competition strategies and encourage productivity enhancing measures, and in so doing push the economy towards a high wage and high productivity equilibrium.

Competitiveness is consistent either with a 'high-road' approach based on driving productivity, or a 'low-road'

<sup>4</sup> As the Taoiseach Leo Varadkar noted at the Future Jobs Summit on 22 November 2018, *'Increasing productivity is the only long-term sustainable way of increasing the standard of living for our people. Ireland must take steps to increase the productivity of indigenous firms'*

<sup>5</sup> The labour share is simply the share of national income or GDP accounted for by labour compensation in the form of wages, salaries and other benefits.

approach based on driving wages and other costs as low as possible. However, only the high-road approach is consistent with inclusive growth.

Nordic countries provide concrete examples of countries with high levels of collective bargaining alongside high levels of employment and high levels of productivity. These countries' high-road model shows that collective bargaining is consistent with high levels of productivity and strong economic performance.

Therefore, there is no intrinsic tension between collective bargaining and economic efficiency. Alongside this, collective bargaining strength<sup>6</sup> is positively associated with a higher labour share and with lower economic inequality.

Lower levels of inequality are associated with less distributional conflict and greater aggregate demand in the economy, along with quality of life and well-being benefits for the entire population. Examples of such benefits range from improved health and longer life expectancy, lower levels of stress and less crime.

Overall, an economy with widespread collective bargaining is likely to have a higher standard of living for the average worker, to have lower levels of social conflict and to be more stable in the long-term.

## 1.1 Where Does Improving Living Standards Come From?

Most economists argue that economic growth is central to improving overall living standards. There are of course caveats. An economic system that generates highly unequal growth may not benefit much of society, will be inefficient at reducing poverty, may erode social capital and trust, and is unlikely to be stable over the long-run.

*"Productivity isn't everything but in the long run it is almost everything"*  
Paul Krugman  
(1999)

Other forms of growth are also undesirable. Most obviously, growth based on environmentally damaging practices will be costly for current and future generations. Such costs outweigh the benefits in the long-term.

There are other forms of unsustainable growth. For example, Ireland's economic growth between 2001 and 2008 was mostly based on unsustainable property speculation, tax cuts and cheap money. When the bubble inevitably burst there was a deep and damaging recession.

So growth for its own sake should not be the goal of workers. Instead, what workers are interested in is

<sup>6</sup> For the purposes of this paper we define collective bargaining strength as the percentage of employees covered by union wage bargaining (collective bargaining coverage) as a proxy for collective bargaining strength.

inclusive and sustainable growth. Inclusive and sustainable growth is synonymous with most of the long-lasting improvements in disposable income and living standards over the span of human history.

Inclusive growth means growth that is distributed reasonably equally across society and that minimises poverty. Sustainable growth means growth that is based on sustainable increases in the long-term productive capacity of the economy.

The size of the economy is determined by:

1. The proportion of the working-age population as a percent of the total population.
2. The percent of the working age population working for pay or profit.
3. The average number of hours worked per person working and;
4. The average output per unit of hours worked (i.e. labour productivity).

So, if we want to grow the economy we either need to generate A) more hours worked, or B) productivity gains arising from investment in capital goods, from efficiency gains, or from new technology and the spread of economically useful ideas.

However, the only sustainable form of growth comes from new ideas or 'innovations'<sup>7</sup> that drive improvements in labour productivity. All other forms of growth, for

example, total hours worked, are constrained in the long-run. For a more in-depth discussion of long-run growth, see McDonnell (2018).<sup>8</sup>

We can think of new ideas and technologies as the fodder that fuels growth. Therefore, to sustain long-run growth policymakers can invest in education and skills (human capital), in equipment and infrastructure (physical capital), and on R&D and incentives for knowledge production and technological change.

Within most countries, the spread and use of new ideas and technology, a process known as diffusion, is a much more significant driver of growth than new-to-the-world inventions. Fundamental to diffusion is communication. For this reason, knowledge flows between people and organisations are crucial.

The market and market players are important in determining economic outcomes but so are the institutional 'rules of the economic game' that constrain and facilitate behaviour. The configurations of these institutions matter in terms of power, interests, norms, and outcomes for firms, workers and households.

The system of wage bargaining is a crucial part of the rules of the economic game that conditions outcomes for households, firms and workers. Differences in the institutional set-up will result in different socio-economic outcomes. The system of wage bargaining will influence

<sup>7</sup> 'Innovation' is a shorthand to describe knowledge based economic change. What is an innovation? Innovation can manifest as a new method or application, a new product or service, a new process, a new market, a new source of supply, or even a new organisation.

<sup>8</sup> McDonnell, T. (2018) 'Innovation and Growth: Concepts and Policy Implications' NERI Working Paper No. 58.

productivity growth to the extent that it incentivises and facilitates, or otherwise, the production and diffusion of innovation.

We now consider the impact of trade unions and collective bargaining on long-run economic performance by examining their impact on employment and on productivity.

## 1.2 Does Collective Bargaining Influence Economic Performance?

What do we mean by good economic performance from the perspective of workers? Good economic performance is a situation where unemployment is low and where employment and real hourly wages are high.

Of course, other considerations will also inform our assessment of economic performance. These include the distribution of economic rewards, the extent of economic insecurity and poverty, the inherent volatility of the economy, and the impact of the economy on the environment.

### 1.2.1 Wage bargaining coverage and employment

Does collective bargaining have an influence on unemployment and

real hourly wages? Algan, Carlin, Bowles and Segal (2017)<sup>9</sup> use OECD data to compare the unemployment rates and wage rates of a group of advanced economies over the period from 1970 to 2010. They find that some of the best performers, such as Norway, Finland, Sweden and Germany, have powerful unions.<sup>10</sup> While this does not imply a causative relationship, it does at least suggest that collective bargaining is not a drag on economic performance.

In a study of the economic effects of collective bargaining coverage, Traxler and Brandl (2009)<sup>11</sup> find no significant impact on any of a range of measured labour costs, working hours, or the unemployment rate.

Visser (2016a)<sup>12</sup> examines wage bargaining coverage and average unemployment across the OECD over the period 2000 to 2014. He finds that several countries with high levels of collective bargaining<sup>13</sup> have averaged low unemployment, most notably Norway, the Netherlands and Austria. Spain stands out as the outlier country with a high level of collective bargaining coverage but also high unemployment. The situation for countries with a low level of collective bargaining is even more mixed. There are examples of countries with low levels of collective bargaining averaging high unemployment over the 2000 to 2014 period, for

9 Algan, Y., Carlin, W., Bowles, S. and Segal, P. (2017) 'Technological Progress, Employment, and Living Standards in the Long-run' in *The Economy: Economics for a Changing World*. Oxford University Press: Oxford.

10 They also note that some of the best performers also have generous unemployment benefits. Thus, the notion that a generous welfare system is a disincentive to work does not appear to be borne out by the evidence. In practice it is the design of the welfare system that is more important.

11 Traxler, F. and Brandl B. (2009) 'The Economic effects of Collective Bargaining Coverage: A Cross-National Analysis'. ILO: Geneva.

12 Visser, J. (2016a) 'ICTWSS: Database on Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts in 51 Countries between 1960 and 2014' Amsterdam Institute for Advanced Labour Studies.

13 Measured as the percentage of employees covered by union wage bargains.



example Poland and Slovakia, but also examples of countries with low levels of collective bargaining averaging low unemployment, for example Korea and Japan.

Overall, there is no clear relationship between collective bargaining and the unemployment rate. Is this surprising given the assumed role that trade unions play in keeping wages above the market-clearing rate.<sup>14</sup> How can we explain it? Understanding the incentives and strategic goals of trade unions and employers might be illustrative.

### 1.2.2 Forward-looking employers and trade unions

Employers do not generally pay the lowest possible amount as they have an incentive to pay above the minimum to attract and retain a motivated and productive workforce. At the same time, trade unions have an incentive not to bargain for a wage rate that would reduce profits at a firm to zero. Such a rate would reduce investment levels in the firm and may even cause the employer to exit the market.

If investment levels fall, then productivity growth will also fall and this will erode the long-term viability of the firm. However, it also reduces the potential for future real wage increases. This is because there is a link between the firm's capacity to pay such increases and the productivity of capital and labour inputs. Trade

unions therefore have an incentive to ensure the long-term wellbeing and competitiveness of the firm.

### 1.2.3 Worker voice

Related to this is the concept of worker 'voice'. If employers and workers can establish a constructive relationship then employers can benefit from a more cooperative, motivated and ultimately more productive workforce, while workers can benefit from better pay and conditions. Trade unions trade better working conditions in exchange for employers getting higher productivity, including from worker-led initiatives. Employers also gain from lower supervisory and learning costs, and from lower employee churn costs.

We can apply a similar logic at both the sectoral and the economy-wide levels. The labour market effect of worker voice is to shift the wage curve so that it is possible to maintain a given employment rate at a higher wage rate.

*However, there is no inherent reason to suppose that the union 'wage bargaining' effect (which raises wages) and the union 'voice' effect (which raises productivity and wages) will have offsetting effects. This means that the actual impact of collective bargaining and trade unions on employment is theoretically ambiguous, and as we have seen, the evidence is inconclusive.<sup>15</sup>*

<sup>14</sup> The market-clearing rate derives from the idea of a perfect and homogeneous market, which itself presupposes that none of the economic actors has the power to exert influence and set prices. In practice, power relations are always present, and, in the labour market, there is an asymmetry in power between business and labour. Therefore, the market-clearing rate that emerges does so in the context of this power imbalance – there is nothing 'natural' or 'efficient' about it. The presence of a trade union or collective bargaining agreement helps to counter this power imbalance and could, in theory, lead to a more efficient outcome.

<sup>15</sup> Another thing to consider is that the higher wages arising from the union wage bargaining effect act as an additional source of short-run demand in the economy. Faster wage growth should lead to higher levels of household consumption and household investment, as well as to higher revenue for firms. The short-run effect should therefore be

### 1.2.4 Inclusive trade unions

An inclusive<sup>16</sup> trade union or trade union body that represents many firms and sectors in the public and/or private sector will want the economy to grow quickly but sustainably and to have low rates of unemployment. This means they will want to avoid a high inflation dynamic and trade deficit.

Such a dynamic might provoke restrictive aggregate demand policies from Governments and central banks, whether in the form of fiscal contraction by Government (meaning lower public spending and higher taxation) or tightening monetary policy from central banks (meaning higher interest rates and less investment). Such policies lead to higher unemployment rates and would reduce or reverse the trade union's advantage in wage negotiations with employers.

Trade unions will also want to avoid a scenario whereby firms reduce their investment in capital goods and training as this would slow the rate of productivity growth and therefore real wage growth.

Trade unions also want low unemployment rates as a low rate gives them an advantage or 'leverage' over employers in wage bargaining. In terms of its medium-term strategy, the inclusive trade union will pursue

wage claims linked to productivity growth and consumer inflation, with an appropriate adjustment based on the perceived adequacy of labour's share of GDP.

### 1.2.5 Trade unions and productivity

Crucially, the potential for long-term real wage growth is equal to the economy's long-run potential to generate productivity growth. Trade unions are therefore highly incentivised to support measures that increase the productive capacity of the economy and of individual firms.

Traxler and Brandl (2009)<sup>17</sup> note that a collective approach to labour market regulation involving workers and employers can resolve collective-action problems related to skill formation, leading to an increase in vocational training and further training, and therefore to an increase in human capital. Similarly, Appelbaum, Hoffer Gittell and Leana (2011)<sup>18</sup> argue that workplaces with a trade union are more likely to demonstrate higher productivity work practices.

Acas (2015)<sup>19</sup> finds that countries with stronger participation rights, such as collective bargaining, do indeed tend to perform better on several productivity related measures, while Dromey (2018)<sup>20</sup>, using OECD data, finds a weak but positive relationship

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to increase employment. While the potential for wage growth will remain tied to productivity in the long-run, the labour share of GDP should be higher when collective bargaining coverage is higher.

<sup>16</sup> Inclusive trade unions are trade unions that take account of the medium-to-long-term health of the economy and labour market.

<sup>17</sup> Traxler, F. and Brandl B. (2009) 'The Economic effects of Collective Bargaining Coverage: A Cross-National Analysis'. ILO: Geneva.

<sup>18</sup> Appelbaum, E., Hoffer Gittell, J., and Leana, C. (2011) 'High Performance Work Practices and Sustainable Economic Growth' Researchgate Publication.

<sup>19</sup> Acas (2015) 'Building Productivity in the UK' ACAS Report.

<sup>20</sup> Dromey, J. (2018) 'Power to the People: How Stronger Unions can deliver Economic Justice' IPPR Discussion Paper.

between collective bargaining coverage and productivity. Studies by Bryson and Forth (2015)<sup>21</sup> and by Barth, Bryson and Dale-Olsen (2017)<sup>22</sup> showed that increases in union density were associated with improved productivity and wage performance.

The OECD's new Jobs Strategy (2018a)<sup>23</sup> finds that:

*“Empirical evidence on social dialogue and collective bargaining in the workplace suggests either no or small positive net effects on firm productivity, with considerable heterogeneity across workplaces, industries and countries...effects are likely to be more positive the better the quality of labour relations...and when collective worker representation in the workplace is present”.*

### 1.3 Two Paths in the Woods - ‘The High-road’ and the Low-road’ to Competitiveness

One reason for the long-run success and stability of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) is their collective bargaining systems. While there are differences between these countries’ systems, they all involve

inclusive trade unions and employer organisations focused on the long-term health of the economy along with a high-road approach to competitiveness based on driving productivity, rather than the low-road approach of cutting labour and other costs.

The Governments of these countries recognise trade unions and employers as key stakeholders in the management of the economy. For their own part, unions and employers consider demand-side (aggregate demand) and supply-side (competitiveness and productivity) impacts. Common wages are set that prevent race to the bottom dynamics. In a competitive globalised market, this advantages high-value added activities and more productive firms, and disadvantages low-value added activities.

In this environment, firms and workers each have an incentive to take steps to increase productivity. They also become key advocates in support of funding for education, occupational retraining and up-skilling, as well as research and development (R&D). Over the long run, a high-skill and high-wage equilibrium took hold in the Nordic countries as their comparative advantage shifted towards higher-value activities.

The high-road approach contrasts favourably with the alternative ‘low-road’ approach based on cutting wages and other costs. The low-road approach comes from the

21 Bryson, A. and Forth, J. (2017) ‘The UK’s Productivity Puzzle’ NIESR Discussion Paper No. 448.

22 Barth, E., Bryson, A. and Dale-Olsen, H. (2017) ‘Union density, Productivity and Wages’ IZA Discussion Paper No. 11111.

23 OECD (2018a) ‘Good Jobs for All in a Changing World of Work’, OECD: Paris. Bold added

idea that labour costs will influence competitiveness.<sup>24</sup> The low-road approach can be consistent with low average unemployment rates. However, it will be through lower wages and disposable income for workers than under a high-road model, along with greater market inequality.

The sectoral collective bargaining approach avoids the low-road trap because it becomes much more difficult for individual employers to pursue a strategy of driving down pay to increase competitiveness. Instead of competitiveness, the high-road approach emphasises productivity. Tomassetti, William and Veersma (2018)<sup>25</sup> point out that multi-employer coordination of collective bargaining has a positive impact on economic performance as this impedes wage competition and encourages firms to increase productivity in order to pay wages; over time, the economy shifts to a high wage and high productivity equilibrium.

### 1.3.1 Trade unions, inequality and the labour share

An important impact of collective bargaining is to increase the labour

share of GDP. Trade unions act to offset the power imbalance that exists in favour of employers by increasing the bargaining power of workers. The result is an increase in the average wage rate.<sup>26</sup>

There is invariably greater household wealth inequality in a given population than there is income inequality. Such is the concentration of wealth that Piketty (2014)<sup>27</sup> estimates the top 1% of households held 25% of total wealth in France, 30% of total wealth in the United Kingdom and 32% of total wealth in the United States.<sup>28</sup> Therefore, an increase in the labour share of GDP tends to reduce the level of inequality in the economy by redistributing income away from the owners of capital.

In addition, because trade unions act in the interest of all the workers that they represent, their presence tends to help ensure that the labour share is itself more fairly distributed between workers in the relevant firm or sector.<sup>29</sup> In other words, trade unions are interested not just in aggregate pay but also relative pay. The greater the scope of a collective bargaining agreement,

24 However, as Krugman (1994) points out in his book 'The Age of Diminishing Expectations', over the long term, it is productivity that matters for growth, rather than competitiveness based on cost.

25 Tomassetti, P., William, L. and Veersma, U. (2018) 'Collective Bargaining and Labour Productivity in Germany, Italy, the Netherlands, Poland, Spain and the UK: A Comparative Analysis to Unravel the "Productivity Puzzle". Report of the Bargaining for Productivity Project.

26 Bryson and Forth (2017) estimate a union wage premium of 5% after controlling for differences between union members and non-members (for example, the type of education and sector). See: Bryson, A. and Forth J. (2017) 'The Added Value of Trade Unions' UK Trades Union Congress.

27 Piketty, T. (2014) 'Capital in the Twenty First Century' Harvard University Press: Cambridge.

28 Wealth inequality measured as the percentage of wealth held by the top 1% or top 10% of households has been rising slowly since around 1970 in the United States and around 1980 in Europe. The rise in wealth inequality has coincided with a decline in union density in these regions.

29 In most cases, the median worker will earn less than the mean wage within a firm, sector or economy. This is because of greater compression at the bottom of a wage distribution than at the top of a wage distribution – in essence, high paid workers at the top skew the mean upwards. This means workers acting collectively through centralised bargaining will tend to vote in favour of a policy of wage compression, i.e. they will vote to reduce existing wage disparities. On the other hand, if there is no trade union presence, workers with higher skill levels may be able to leverage their more valuable skill sets into higher wages by acting individually. However, this will happen at the expense of other workers in the event that aggregate wages do not increase.

the greater the ability to compress relative pay within a sector.

Research from the IMF (Dabla-Norris et al, 2015)<sup>30</sup> finds that less prevalent trade unions and collective bargaining are indeed associated with higher market inequality, while Dromey (2018) uses OECD data to show that higher levels of collective bargaining are associated with lower inequality for OECD Member States. There has been a decline in the labour share and trade union density in most OECD countries since the 1970s with larger declines in the labour share tending to occur in those countries with higher falls in union density and collective bargaining coverage. Onaran et al (2015)<sup>31</sup> find that the decline in union density in the UK is responsible for a 4.4 percentage point decline in the labour share of GDP.

More equal economies and societies tend to be more stable and prosperous over the long-term. Research from the IMF (Kumhof and Ranciere, 2010<sup>32</sup>; Berg and Ostry, 2011)<sup>33</sup> and the OECD (2014)<sup>34</sup>

indicates that higher levels of inequality are associated with slower rates of growth and are a sign of economic inefficiency. Kumhof and Ranciere identify increasing levels of inequality in the years leading up to both the recent Great Recession and the Great Depression of the 1930s as having a key causal role in both crises. Berg and Ostry note that:

*“Equality appears to be an important ingredient in promoting and sustaining growth. The difference between countries that can sustain rapid growth for many years...and others that see growth spurts fade quickly, may be the level of inequality. Improving equality may also improve efficiency, understood as more sustainable long-run growth”.*

In other words, by reducing inequality, trade unions can play a vital role in sustaining long-run growth as well as the stability of the economic system itself.

30 Dabla-Norris, E., Kochhar, K., Suphaphiphat, N., Ricka, F. and Tsounta, E. (2015) 'Causes and Consequences of Income Inequality: A Global Perspective' IMF: Washington.

31 Onaran, O., Guschanski, A., Meadway, J., and Martin, A. (2015) 'Working for the Economy: The Economic Case for Trade Unions' Greenwich Papers in Political Economy, University of Greenwich.

32 Kumhof, M. and Ranciere, R. (2010) 'Inequality, Leverage and Crises' IMF Working Paper.

33 Berg, A. and Ostry, J. (2011) 'Inequality and Unsustainable Growth: Two Sides of the Same Coin' IMF Working Paper.

34 OECD (2014) 'Focus on Inequality and Growth' OECD: Paris.

## 2. Social Dialogue and Collective Bargaining in Ireland and Peer Countries

### 2.1 Collective Bargaining as a Fundamental Right Under International Law

The international community has long recognised that the right to organise and collective bargaining are fundamental principles and rights at work (Visser, 2016a).<sup>35</sup>

Ireland is committed to upholding this right under a number of international conventions and treaties it has signed and ratified. These include:

- The International Labour Organisation's (ILO) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87).
- The ILO's Right to Organise and Collective Bargaining Convention, 1949 (No. 98).
- The European Social Charter (Article 6).<sup>36</sup>
- The International Covenant on Economic, Social and Cultural Rights (Article 8).<sup>37</sup>
- The European Convention on Human Rights (Article 11).<sup>38</sup>

In addition, Ireland commits under the Treaty on the Functioning of the European Union (Article 152), to recognise and promote the role of the social partners at EU level, while under the Charter of Fundamental Rights of the European Union (Article 28), it is committed to respecting the right to collective bargaining and collective action in relation to EU law.<sup>39</sup>

Under Article 40.6 1° (iii) of the Constitution of Ireland, the State guarantees liberty for the exercise (subject to public order and morality) of the right of citizens to form associations and unions, and provides that laws may be enacted for the 'regulation and control in the public interest' of this right.

### 2.2 National Social Dialogue in Ireland and Peer Countries

The Government has taken a number of initiatives over recent years to consult unions and employers on policy-making. These include the establishment of the National Economic Dialogue (NED) in 2015 and the Labour Employer Economic Forum (LEEF) in 2016. The aim of the former is to 'facilitate an open and

<sup>35</sup> Visser, J. (2016b), 'Whatever happened to collective bargaining during the great recession?', *IZA Journal of Labor Policy*, Vol.5/1, p.2

<sup>36</sup> Ireland ratified both ILO conventions in 1955. Ireland ratified the European Social Charter (1961) in 1964 and the Revised European Social Charter (1996) in 2000.

<sup>37</sup> Ratified by Ireland in 1989.

<sup>38</sup> Incorporated into domestic law through the European Convention on Human Rights Act 2003.

<sup>39</sup> The Treaty on the Functioning of the European Union and the Charter of Fundamental Rights both came into effect in 2009.

inclusive exchange on the competing economic and social priorities facing the Government<sup>40</sup> while the latter is described as a 'formal structure for dialogue with representatives of employers, and of labour on economic and social policies as they affect employment and the workplace.'<sup>41</sup>

These initiatives may in part represent a response to discussions at European level on the role of unions and employers in policy-making. For example, EU guidelines for Member States employment policies have repeatedly over recent years urged Governments to involve social partners in policy-making - the 2015 guidelines urged Governments to 'closely involve... social partners in the design and implementation of relevant reforms and policies'<sup>42</sup> while the 2018 guidelines go further to state:<sup>43</sup>

*"Building on existing national practices, and in order to achieve more effective social dialogue and better socioeconomic outcomes, Member States should ensure the timely and meaningful involvement of the social partners in the design and implementation of employment, social and, where relevant, economic reforms and policies, including through support for increased capacity of*

*the social partners. The social partners should be encouraged to negotiate and conclude collective agreements in matters relevant to them, fully respecting their autonomy and the right to collective action".*

Irish initiatives in relation to this national social dialogue appears to fall short of practices in many other Member States, particularly those that the OECD now sees as the best performers in terms of the impact of collective bargaining systems on labour market performance (discussed below). For example, the European Commission's Country Report Ireland 2019<sup>44</sup> states:

*"In 2015 the Government created a structured forum for national economic dialogue where social partners have the opportunity to raise concerns and share views ahead of the annual budget on key policy issues. However, they are rarely involved and consulted in relation to the European Semester process by the Government".*

This Commission finding in relation to Ireland can be contrasted with its conclusions as set out in other 2019

40 Government of Ireland (2016) National Reform Programme 2016.

41 Government of Ireland (April 2019) *National Reform Programme April 2019*.

42 COUNCIL DECISION (EU) 2015/1848 of 5 October 2015 on guidelines for the employment policies of the Member States for 2015.

43 COUNCIL DECISION (EU) 2018/1215 of 16 July 2018 on guidelines for the employment policies of the Member States.

44 SWD(2019) 1006 final, 27.2.2019

country reports. For example, the Commission finds that the German model of social dialogue 'functions well, and the social partners are overall closely involved in policy-making'; that 'Austria has a system of social dialogue and industrial relations with a proven capacity to contribute to balanced socio-economic development'<sup>45</sup>; and that Denmark's good performance as regards the European Pillar of Social Rights reflects its 'advanced welfare model, social protection system, well-established social dialogue, and focus on active labour-market policies'.

The practices of other Member States, particularly the OECD's best performers are useful in any consideration of how to improve the role of the social partners in policy-making in Ireland, as now recommended by the EU. Recent work by the European Employment Policy Observatory (EEPO) on the role of unions and employers' group in policy making across the EU is useful in this regard.<sup>46</sup>

The first point to be made is that there is no single model of social dialogue in the EU (EEPO, 2016:2). EEPO therefore distinguishes between: Bi-partite social dialogue involving organisations representing labour and employers only and Tri-partite social dialogue involving organisations representing labour, employers and public authorities. It also classifies bipartite and tripartite social dialogue institutions that involve other stakeholders, such as other civil

society groups or academics, as bipartite+ and tripartite '+ '.

Social dialogue across the EU can take the form of negotiation (e.g. collective bargaining to reach binding agreements at firm, sector, national level etc.); consultation (i.e. a non-binding structured process whereby public authorities invite social partners' views); or simple information sharing.

Across the EU as a whole, EEPO found that the power of unions and employers to reach negotiated settlements are largely present in bipartite fora dealing with their 'core' functions, i.e. wage-setting and other employment-related terms and conditions.

This can be through collective agreements and/or minimum wage mechanisms; in their role as administrators of joint funds (e.g. for social insurance, unemployment benefits, training funds); as joint programme managers; or as representatives supporting arbitration and conciliation between workers and employers.

In a number of countries, the social partners are involved in institutions charged with the binding negotiation of legislation and/or policy. For example, in Denmark, bipartite Regional Labour Market Councils monitor regional labour market policy, support cooperation between different actors and exercise some executive powers; in Germany, the Tripartite Minimum

<sup>45</sup> Though it warns that recent decisions by the Austrian Government 'are likely to reduce this capacity'. See also *Power in Austria: from labour to capital* <https://www.socialeurope.eu/power-in-austria>

<sup>46</sup> The European Employment Policy Observatory (July 2016), *The role of social partners in the design and implementation of policies and reforms*



Wage Commission determines the minimum wage while its bipartite Collective Bargaining Committee and the Collective Bargaining Commission and the Tripartite Collective Agreement Extension Committee negotiate collective agreements and decide on their extension; in the Netherlands, the bipartite Foundation of Labour is involved in wage-setting (and informally advises on economic and social policy).

Many countries also have institutions with social partner representation that play a consultative role.<sup>47</sup> For example, the Dutch Social-Economic Council (SER) is frequently asked to provide advice on socio-economic policy, particularly labour market and social security policy. There is no legal obligation on the Government to ask the SER for advice and any advice it gives is not binding. However, its advice is rarely ignored as this risks the threat of public conflict (EEPO, 2016:9). Similarly, the Danish tripartite+ Economic Council provides independent analysis and policy advice to policy-makers and monitors the budget law. These reports always set out short and medium-term economic forecasts and typically forecasts concerning particular topics, such as fiscal policy or labour market issues (EEPO, 2016: 9-10).<sup>48</sup>

Some countries also have institutions that play an advisory role, whereby

institutions provide advice on their own initiative. For example, the tripartite Bad Ischier dialogue in Austria, which involves a two-day meeting of social partners that produces a policy paper, setting out a common position on a given topic and a framework for negotiations on political reforms. The Austrian bipartite+ Advisory Council for Economic and Social Affairs issues studies and report on economic and social issues containing joint recommendations, addressed to the Government and policy-makers (EEPO, 2016:11).

In some countries, the social partners have the right to initiate legislation on working conditions. In Austria for example, the social partners can submit proposals and draft legislation on issues of interest, such as on labour law. Whether such proposals are taken on board depends on the Government of the day (EEPP, 2016:18).

In some countries, formal tripartite bodies have reached binding agreements in a variety of different areas, so-called 'tripartite co-decision'.<sup>49</sup> For example, the 2013 Dutch Social Pact sets out policy guidance on the future of the labour market and social security. This agreement was followed by a series of 'ad hoc' pacts concerning pensions, health care, housing, education policy and industrial policy. Each of these agreements, some of

47 EEPO says that Ireland's National Economic Dialogue 'provides a forum for various stakeholders to provide input regarding economic and social policies. The Government is not bound by the inputs to this consultation process. Other agencies also provide policy advice and consultancy services to the Irish Government (e.g. the Economic and Social Research Institute (ESRI) and the Low Pay Commission'. (EEPO, 2016, footnotes)

48 These could be contrasted with Ireland's National Economic Dialogue, which EEPO says 'does not take the form of traditional tripartite negotiations but instead is designed to listen to the views of various stakeholders.'

49 In relation to Ireland, EEPO says that such tripartite co-decision came to an end in Ireland following the collapse of social partnership in December 2009 (EEPO, 2016, footnotes).

which were agreed at a regional and/or a sectoral level, included a large variety of stakeholders, including local Government and educational institutions. In Germany, a pact focussing specifically on vocational training was reached in 2014. This replaced a previous training pact which had included employer organisations, but not trade unions (EEPO, 2016:19 & 42).

Elsewhere, informal tripartite negotiations can lead to policy change. In Austria, the social partners were involved in negotiations that led to a 2016 tax reform, while a 2013 law on Occupational Safety and Health at Work for Employees, which focused on mental health, was based on an agreement between the social partners, as was a new criteria-based immigration scheme for third country nationals (EEPO, 2016:20-22). While there is no legal obligation in Sweden providing for consultations between the Government and the social partners, regular consultations are considered a key element of Government policy on actions related to social and employment policies. The social partners are usually represented on parliamentary and Government committees responsible for drawing up social and employment policies as well as on commissions of inquiries, and are given an opportunity to input and respond to reports.<sup>50</sup> For example, tripartite negotiations

between the social partners and the Swedish public employment service reached agreement on so-called fast track measures for the integration of newly-arrived immigrants/refugees into the Swedish labour market.<sup>51</sup>

Finally, EEPO also points out that in other Member States where Government unilateralism is possible (e.g. as was done in Ireland in 2009 concerning public sector pay), it is not usually used. For example, the long-lasting Danish tradition for social dialogue means that Government unilateralism is not the dominant form of policy-making, and when it has been used over recent years, some of the policies introduced have been reversed, after a change of Government (EEPO, 2016:25). Furthermore, in Germany, while there may be few formal consultation procedures and tripartism has not traditionally played a major role, informal consultation procedures do exist and informal channels of communication are important (EEPO, 2016, 26).

## 2.3 Collective Bargaining in Ireland and Peer Countries

Roche and Gormley (2018)<sup>52</sup> make the point that the years after 2011 have seen the emergence of 'pattern

<sup>50</sup> EEPO points out that when a commission of inquiry has submitted a report, the social partners are given an opportunity to express their views.

<sup>51</sup> It is worth noting that the OECD has said that Sweden's bipartite Job Security Councils '*offer a very attractive model for managing layoffs, [but this] is not a realistic choice for countries where collective bargaining coverage is low or employers and unions do not have a tradition of collaborating in the management of restructuring.*' (OECD Employment Outlook 2018:178)

<sup>52</sup> Roche, W. and Gormley, T (2018) 'The advent of pattern bargaining in Irish industrial relations', *Industrial Relations Journal* 48:5-6, 442-462.

bargaining' in Ireland.<sup>53</sup> They say this arose from the strategic objective of unions operating in the private sector to restore collective bargaining over pay rises after several years of concession bargaining. The variant of pattern bargaining that has developed in Ireland since 2011 has involved firm-level pay increases in major firms in exporting sectors setting a pay-norm that has been followed by unions across the private and commercial State sector. In the conditions of gradual and uneven recovery, adhering to a pay norm allowed unions to keep their members' pay rises in line with the general trend while focusing on challenges in different sectors. Unions also explicitly offered flexibility with respect to the length of pay deals, allowing employers to tailor agreements to commercial and product market conditions. Roche and Gormley conclude however that the future of pattern bargaining in Ireland 'hangs in the balance' so it remains to be seen which way Ireland's system will develop.

## 2.4 Comparing Collective Bargaining Systems

Recent OECD research has produced detailed research on collective bargaining over recent years, including in the OECD Employment Outlook 2017 and the OECD Employment Outlook 2018. Its principal findings are outlined in Table 1 (page 37). In

an attempt to capture the role of collective bargaining for good labour market performance - in terms of employment, wages, working conditions, inequality and productivity – its 2018 research sought to look at the main features and actual functioning of collective bargaining systems (OECD, 2018b).<sup>54</sup> This research characterises collective bargaining systems in the private sector along four main building blocks:

- Collective bargaining coverage – the share of workers covered by collective agreements. This is linked to membership of signatory employer organisations and trade unions, and to extensions of agreements to other firms and workers in a sector.
- The level of bargaining – whether collective agreements are negotiated at the firm, sector, or national level. Multi-level bargaining involves a combination of firm and higher-level collective bargaining.
- The degree of flexibility – the ability of firms to modify terms set by higher-level agreements. In centralised systems, firms have little or no scope to modify terms whereas in fully decentralised systems, collective bargaining takes place only at the firm level. Between these two poles, organised decentralised systems allow sector-level agreements to set broad framework conditions but leave detailed provisions to firm-level negotiations.

<sup>53</sup> This is generally understood as a form of coordinated collective bargaining in which unions establish a key wage bargain in one or more firms, or covering a specific sector, with a view to establishing a 'pattern' or going rate of increases that is then extended to other firms and/or sector through collective bargaining (see Roche and Gormley, 2018).

<sup>54</sup> OECD (2018b), 'The role of collective bargaining systems for good labour market performance' in *OECD Employment Outlook 2018*, OECD: Paris.

- The role of wage co-ordination between sector-level (or firm level) agreements, such as the setting of common wage targets, to take account of macro-economic conditions.

The OECD characterises Ireland as having a 'largely decentralised collective bargaining system'. Firm-level bargaining is the dominant form under this system but sector-level bargaining (or a functional equivalent), or wage co-ordination, also play a role and extensions are 'very rare'.

The OECD sees the 'largely decentralised' system it identifies in Ireland as producing better labour market performances compared to the fully decentralised systems it identifies in the UK, the US, Canada and various other OECD countries, where bargaining is essentially confined to the firm or establishment level. But, more significantly, it finds that Ireland's system produces an inferior labour market performance compared to the 'organised decentralised and co-ordinated systems' that operate in Austria, Denmark, Germany, the Netherlands, Norway and Sweden, where sector-level agreements play an important role but where significant room exists for lower-level agreements to set standards and where there is strong coordination across sectors and bargaining units. It finds that:

*"Overall, organised decentralised systems tends to deliver good employment performance, better productivity outcomes and higher wages. By contrast, other forms of decentralisation that simply replace sector-level with firm-level bargaining, without co-ordination within and across sectors, tend to be associated with somewhat poorer labour market outcomes".*

And

*"...co-ordinated collective bargaining systems are associated with higher employment, lower unemployment, a better integration of vulnerable groups and less wage inequality than fully decentralised systems. Previous evidence also showed that these systems help strengthen the resilience of the economy against business-cycle downturns' (OECD, 2018b)".*

Table 1 Collective bargaining – what happens elsewhere (see section 2.4)

	Predominant level of collective bargaining	Centralisation/ Decentralisation of CB	Co-ordination of CB	Private sector density	CB coverage	Employment rate (20 to 64) 2017	Unemployment rate 2017	Youth unemployment rate (15-24) 2017	Income quintile share ratio 2016 <sup>55</sup>
France	Sectoral	Centralised	Low	5-10%	90%+	71	10.4	22.3	4.3
Italy	Sectoral	Centralised	Low	20-30%	80-90%	62	11.2	34.7	6.3
Portugal	Sectoral	Centralised	Low	10-20%	60-70%	73	9.0	23.8	5.9
Slovenia	Sectoral	Centralised	No	10-20%	60-70%	73	6.6	11.2	3.6
Spain	Sectoral	Organised decentralised	Low	10-20%	70-80%	66	17.2	38.6	6.6
Belgium	Sectoral/national	Centralised	High	50-60%	90%+	69	7.1	19.3	3.8
Finland	Sectoral/national	Centralised	High	50-60%	80-90%	74	8.6	20.1	3.6
Austria	Sectoral	Organised decentralised	High	20-30%	90%+	75	5.5	9.8	4.1
Denmark	Sectoral	Organised decentralised	High	60-70%	80-90%	77	5.7	11.0	4.1
Germany	Sectoral	Organised decentralised	High	10-20%	50-60%	79	3.8	6.8	4.6
Netherl'ds	Sectoral	Organised decentralised	High	10-20%	80-90%	78	4.9	8.9	3.9
Sweden	Sectoral	Organised decentralised	High	60-70%	90%+	82	6.7	17.8	4.3
Greece	Company/sectoral	Decentralised	No	10-20%	40-50%	58	21.5	43.6	6.6
Luxemb'g	Company/sectoral	Decentralised	No	20-30%	50-60%	78	7.1	15.3	5.0
Slovakia	Company/sectoral	Decentralised	No	10-20%	20-30%	71	8.1	18.9	3.6
Ireland <sup>56</sup>	Company/sectoral	Decentralised	No <sup>57</sup>	20-30%	40-50%	74	6.7	14.5	4.4
Czech Rep.	Company	Decentralised	No	10-20%	40-50%	80	2.9	7.9	3.5
Estonia	Company	Decentralised	No	< 5%	10-20%	79	5.8	12.1	5.6
Hungary	Company	Decentralised	No	5-10%	20-30%	73	4.2	10.7	4.3
Latvia	Company	Decentralised	No	5-10%	10-20%	75	8.7	17.0	6.2
Lithuania	Company	Decentralised	No	5-10%	5-10%	76	7.1	13.3	7.1
Poland	Company	Decentralised	No	5-10%	10-20%	71	4.9	14.8	4.8
UK	Company	Decentralised	No	10-20%	20-30%	78	4.4	12.1	5.1

Sources – OECD Employment Outlook 2017 for predominant level of collective bargaining, centralisation/decentralisation, coordination, private sector density, coverage and quality of labour relations (in 2015); European Commission Employment and Social Developments in Europe Annual Review 2018 for employment and unemployment rates (in 2017) and income quintile share ratio (in 2016).

<sup>55</sup> As per European Commission's *Employment and Social Developments in Europe Annual Review 2018*, S80/S20 income quintile share ratio refers to the ratio of total equivalised disposable income received by the 20% of the country's population with the highest equivalised disposable income (top quintile) to that received by the 20% of the country's population with the lowest equivalised disposable income (lowest quintile)

<sup>56</sup> Since enactment of the Industrial Relations (Amendment) Act 2015..

<sup>57</sup> Arguably yes in view of emergence of pattern bargaining.

### 3. Promote a European Directive on Collective Bargaining

There is another approach which the trade union movement could usefully consider in seeking to establish a 'right to bargain' in Irish law. Congress could work, through the ETUC, in seeking to have the laws of the EU Member States on collective bargaining harmonised by way of a European Union Directive.

As discussed above Article 28 of the Charter of Fundamental Rights of the European Union guarantees the rights of workers and employers to engage in collective bargaining. Since the adoption of TFEU (the Lisbon Treaty) the Charter of Fundamental Rights has the same status as the Treaty itself.

An advantage of such an approach is that it would overcome any possible constitutional impediments to national legislation in this field. In this regard, it is well established under the principle of the primacy of European Union law, that national law, including constitutional law, cannot be relied upon to defeat laws enacted to implement EU legislation. Given the prevalence of collective bargaining as the normal mode of determining pay and conditions of employment in most Member States, this approach might be a viable objective. While some opposition could be expected from Nordic countries, which currently have sophisticated collective bargaining arrangements that go beyond those of other Member

States, there may be a concern that harmonisation could dilute those arrangements. It should however be remembered that the EU law principle of non-regression means that harmonisation cannot result in a reduction in protection already existing in any Member State. Equally, EU law cannot be used as an excuse for not adopting more favourable provisions for workers.<sup>58</sup>

Duffy suggests exploring the idea of a possible EU directive on collective bargaining, pointing out that if such a solution was to be found, any doubts about the domestic constitutionality of any legislative initiative in this sphere would be overcome and that since such legislation would apply across the entire EU, any concerns about the possible impact on FDI in Ireland could be allayed.

Article 153 of the Treaty on the Functioning of the European Union authorises the EU to adopt directives setting 'minimum requirements for gradual implementation' that 'support and complement' the activities of the Member States in nine social policy fields.

One of these is the 'representation and collective defence of the interests of workers and employers, including co-determination' (Art.153(1)(f)), (subject to the provision that any such legislation 'shall not apply to pay, the right of association,

<sup>58</sup> For example, the aim of the 2002 Information and Consultation directive 'is to establish minimum requirements applicable throughout the Community while not preventing Member States from laying down provisions more favourable to employees'. This legislation also includes the provision that the transposition of this legislation 'shall not be sufficient grounds for any regression in relation to the situation which already prevails in each Member State.'

the right to strike or the right to impose lock-outs' (Art.153(5)).

An additional challenge is that this field (and three of the other nine social policy fields covered by Art.153) require the unanimous agreement of all Member States. This makes the adoption of any legislation in these areas very difficult.<sup>59</sup>

The treaties do provide however that the EU may move from unanimity voting to QMV voting if all Member States unanimously agree. The European Commission has been discussing such a move over recent months, arguing that it is necessary 'to enable the EU to keep pace with the rapid economic and social developments affecting the world of work and social protection systems'.<sup>60</sup> A public consultation on it held between late 2018 and early 2019 indicated support for such a move from the ETUC<sup>61</sup> as well as from the European Social Platform - the network of around 50 European civil society organisations who in turn represents over 2,000 national civil society organisations<sup>62</sup>.

BusinessEurope outlined its opposition to any move from unanimity to QMV in the social field. ICTU could echo the ETUC's support for such a move at national level in advance of discussions at EU level on this issue.

### 3.1 Strengthening collective bargaining at sectoral level

In most other western European countries, particularly those the OECD identifies as the best performers, bargaining takes place mainly at a sectoral level, and is augmented with enterprise level bargaining in employments not covered by sectoral collective agreements. Sectoral agreements have normative effect and, once concluded, they are binding and enforceable on all employers and workers to which they are expressed to relate.

The normal negotiating unit for sectoral bargaining in most EU Member States comprises employers' federations representing the sectors and unions representing workers in the sectors.

Where enterprise level bargaining occurs, the normal negotiating unit is a works council, which most employers, in accordance with the laws of the Member State in question, are required to establish and support. This model of industrial relations was established in many European countries following WWII. It is a

<sup>59</sup> During the adoption of the draft directive establishing a general framework for informing and consulting employees (Directive 2002/14/EC), the UK and Irish governments argued that unanimity was required for this proposal. This argument wasn't accepted by other Member States, by the Commission or by the European Parliament. It should also be noted that the draft directive concerning discrimination in the provision of goods and services has been blocked in Council since 2008 because of this unanimity requirement.

<sup>60</sup> European Commission roadmap (2018) More efficient law-making in social policy: identification of areas for an enhanced move to qualified majority voting. This particular Commission initiative is parallel but separate to other Commission initiatives about moving from unanimity to QMV in taxation and on certain foreign policy areas.

<sup>61</sup> The ETUC also sought assurances that any move from unanimity to QMV would not change the role of the European social partners under the treaties (e.g. to be

<sup>62</sup> Including Irish organisations such as the National Women's Council, the Children's Rights Alliance, the National Youth Council, Focus Ireland, the Irish Council for Social Housing, the Peter McVerry Trust, the Simon Communities, the Co-operative Housing Ireland, EAPN Ireland, the Disability Federation of Ireland, amongst others.

system that is very different to that traditionally followed in Ireland and the UK, although echoes of those types of arrangements can be seen in the Industrial Relations Act 1946. That Act established Joint Labour Committees and Joint Industrial Councils which were, in effect, sectoral negotiating units. That Act introduced the notion of Employment Regulation Orders (EROs) and Registered Employment Agreements (REAs), which were intended to give normative mandatory effect to the outcome of collective bargaining conducted through those sectoral structures. It also established the Labour Court, which was given power to interpret EROs and to enforce the terms provided by REAs.

Sectoral bargaining has now practically ceased to exist although, notionally at least, there are eight Joint Labour Committees (JLCs) established under the Industrial Relations Act 1946, as amended by the Industrial Relations (Amendment) Act 2012. These JLCs were reconstituted following a review of the JLC system undertaken by Kevin Duffy and Dr Frank Walsh in 2011 and a subsequent review undertaken by the Labour Court in 2013. The eight JLCs that currently stand appointed under the Act are: -

1. Agricultural Workers.
2. Catering (excluding Dublin City and Dun Laoghaire).
3. Catering (Dublin City and Dun Laoghaire).
4. Contract Cleaning.
5. Hairdressing.
6. Hotels.

7. Retail, Grocery and Allied Trades.
8. Security Industry.

A further review of the JLCs was undertaken in April 2018 by the Labour Court, pursuant to section 41A of the 1946 Act, as amended. While noting that all but two of these Committees (Contract Cleaning and Security Industry) have failed to meet for the purpose of formulating a draft ERO since their reconstitution, the Court recommended that they should continue to exist.<sup>63</sup>

The plain intention of the Oireachtas, in enacting the Industrial Relations (Amendment) Act 2012, was to provide for sectoral regulation of pay and conditions of employment in certain sectors through a form of *de facto* sectoral level collective bargaining. That intention has been subverted by the concerted actions of employers in refusing to nominate employer members to those Committees. Their actions in that regard have been tacitly accepted by Government.

Currently the process of making an Employment Regulation Order can only commence when proposals are formulated by Employer and Worker representatives negotiating through a JLC. Consequently, where, as in the case of the six dormant JLCs, employers abstain from participating in a JLC, the statutory process established by the Oireachtas is rendered inoperative.

<sup>63</sup> The Labour Court has also recommended that the two catering JLCs be amalgamated. This proposal is currently with the Minister.



This state of affairs could be overcome by a legislative amendment which would allow this first stage in the process to be bypassed in circumstances in which employers deliberately combine to frustrate its operation.

A further amendment could be made to the 1946 Act, to the effect that where employers in a sector to which a JLC relates are provided with a full opportunity to participate in the JLC, and refuse to do so, the Labour Court could nonetheless formulate a draft ERO for submission to the Minister and the Draft ERO could then be placed before the Oireachtas in accordance with the statutory scheme.

Arrangements could be put in place which would allow the Labour Court to consider submissions from interested parties before formulating a Draft ERO, or to consult with the Low Pay Commission. If such an arrangement were provided for by statute a likely effect would be to encourage abstentionist employers to participate in the process envisaged by the Oireachtas.

## 3.2 Revise the Concept of 'Representativeness' under the Industrial Relations (Amendment) Act 2015

The Industrial Relations (Amendment) Act 2015 provides a statutory framework within which trade unions can apply to the Labour Court for a Sectoral Employment Order fixing pay and conditions of employment of workers in the sector to which the Order relates. It is a condition of precedent to unions standing to make such an application that it be 'substantially representative' of the workers in respect to whom the application is made. Relatively few applications have been made under this provision of the 2015 Act.

Duffy attributes this to a number of factors, including the fact that unions have been unable to establish the membership threshold necessary to obtain standing in order to make an application.<sup>64</sup> This requirement may be worth reviewing and the experience in some other European countries may be worth considering here. For example, the OECD points out that if Swiss unions can prove to public authorities that it is particularly complicated to organise workers in a particular sector (e.g. because of a high presence of non-national or migrant workers or because of security issues that restrain the

<sup>64</sup> Duffy, Kevin, 'The Elusive 'Right to Bargain – Is it attainable and what does it mean?', paper for IRN Conference, 7<sup>th</sup> March 2019.

possibility to reach and organise workers on their workplace), there is a possibility to derogate from the criterion requiring that signing unions meet the membership threshold under Swiss law. While the relevant Swiss threshold (i.e. 50% of membership) is, in practise, higher than Ireland's, unions in Ireland face the unique obstacle of operating within a legal framework that does not enable access to the workplace; Murphy (2016) cites research by D'Art and Turner which found that three out of four employers in Ireland refuse union organisers access to their workplaces.<sup>65</sup>

Given this hostile legal framework, it is worth noting that the new OECD Jobs Strategy also recommends that in the 'absence of broad-based social partners':

*"...another way of promoting the inclusiveness of collective bargaining is through the use of administrative extensions that extend the coverage of collective agreements beyond*

*the members of the signatory unions and employer organisations to all workers and firms in a sector".*

In this regard, a 2016 Eurofound study<sup>66</sup> identified Ireland as a country where 'representativeness' is determined by membership levels and official recognition. This study also identified a range of other formal criteria accepted in other

European countries, including multi-occupational coverage, multi-sector presence, electoral success, financial and organisational independence, territorial coverage, material conditions (e.g. premises and staff), and length of institutional existence, as well as informal criteria such as recognition of a 'leading role', 'reputation', and 'influence', capacity to reach, sign and implement agreements, collective bargaining as a declared objective, voluntary membership, democratic structures, presence in a significant economic sector, existence of mandates from constituents, ability to influence terms and conditions of employment, endorsement of legitimacy by other social partners, and custom and practice.

The Industrial Relations (Amendment) Act 2001 provides a statutory framework within which a trade union may seek a binding determination by the Labour Court fixing the pay and conditions of employment in employments in which it is not the practice of employers to engage in collective bargaining. The Act was substantially amended by the Industrial Relations (Amendment) Act 2015.

A factor limiting the utility of this enactment, as amended, is the obligation placed on the Labour Court to have regard to non-negotiated conditions of employment in analogous employments in determining cases brought under the Act. That requirement was introduced in the

<sup>65</sup> Murphy, Caroline (2016) *Fear and Leadership in Union Organising Campaigns: An Examination of Workplace Activist Behavior*. *Journal of Workplace Rights*.

<sup>66</sup> Eurofound (2016), 'The concept of representativeness at national, international and European level'

amendment of section 5 of the 2001 Act, by the Industrial (Amendment) Act 2015.

The purpose of the statutory scheme introduced by the 2001 Act, was to afford workers who do not have access to collective bargaining rates of pay and conditions of employment broadly in line with those to which they could aspire if they had such access. It follows that in evaluating the fairness of conditions of employment in non-union employments the Labour Court should attach considerable weight to negotiated rates and conditions in preference to those rates and conditions that are unilaterally imposed in other non-union employments. That approach was endorsed by the High Court in *Ashford Castle v SIPTU* [2006] 17 ELR 201.

Section 5 of the 2001 Act should now be amended to restore the original intentions of the statutory scheme provided by the enactment.

### 3.3 Protect Trade Union Members and Activity

Whereas the Unfair Dismissals Act specifically prohibits dismissal on the grounds of trade union membership or activity, workers can be subjected to other forms of detrimental treatment on grounds of trade union membership or activity, and the 'fundamental difficulty that they face is

in recruiting and retaining members in employments that are hostile to trade union involvement' (Duffy, 2019). It is clear beyond argument that many workers who would wish to have the benefit of trade union membership are deterred from joining for fear of retaliation by their employer. Murphy (2016) cites research by D'Art and Turner who highlighted that the tactics used by employers to suppress union organisation have become more sophisticated and intense, including the victimisation and sacking of union activists and threats of closure or relocation<sup>67</sup> and who concluded that the 'representation gap' between the proportion of employees who see unions as a 'necessary protection' and the numbers who actually are members was as a result of employer opposition.<sup>68</sup>

The most effective means of recruiting workers is by trying to build organisation internally through committed activists. Workers who engage in trade union activity within a hostile workplace are subjected to isolation, intimidation and other forms of adverse treatment. As an essential component of any strategy to advance trade union organisation, adequate measures are necessary to combat this type of behaviour.

Again, in contrast to other EU Member States, Irish law affords very limited protection to workers against penalisation by an employer on grounds of trade union membership or lawful trade union activity, other than in respect of dismissal. There

<sup>67</sup> D'Art, D., & Turner, T. (2005). Union recognition and partnership at work: A new legitimacy for Irish trade unions? *Industrial Relations Journal*, 36, 121-139, cited in Murphy, Caroline (2016) *Fear and Leadership in Union Organising Campaigns: An Examination of Workplace Activist Behavior*. *Journal of Workplace Rights*.

<sup>68</sup> Turner, Thomas and Daryl D'Art. 2008. "Is There a Potential 'Representation Gap' in the New Irish Economy? An Examination of Union Density Levels and Employee Attitudes to Trade Unions." *Irish Journal of Management*. 29:65-86.

is wide protection, with varying degrees of robustness, available to workers who engage in other forms of protected activity.

For example, any form of detrimental treatment of a safety representative is prohibited by the Safety Health and Welfare at Work Act 2005. There is also broad protection against victimisation provided by the Employment Equality Acts 1998-2015 for seeking to oppose by lawful means any form of unlawful discrimination. There are also anti-penalisation provisions in the Health Act 2007, and in the Central Bank (Supervision and Enforcement) Act 2013.

The most robust protection against penalisation is that provided for by the Protected Disclosures Act 2014, where compensation of up to 260 weeks' remuneration can be awarded for penalisation of a whistleblower.<sup>69</sup> There is also the availability of injunctive relief, from the Circuit Court, to prevent penalisation.

Some EU legislation could, in theory, afford protection to trade union membership and activity in prescribed circumstances. For example, Article 7 of the Information and Consultation Directive provides that 'Member States shall ensure that employees' representatives, when carrying out their functions, enjoy

adequate protection and guarantees to enable them to perform properly the duties which have been assigned to them'. Section 13 of the Employees (Provision of Information and Consultation) Act 2006 in turn provides that 'An employer shall not penalise the employees' representative for performing his or her functions in accordance with this Act'. Eurofound points out however that other countries have more extensive protections in place in relation to these provisions of the I&C directive. In France for example, the protection covers not only the employees' representatives but also employees having a 'representative function', such as a 'mandated employee' and an employee's adviser as well as any employee who has asked for elections to be held and candidates standing for election.

Other European countries have put in place substantive measures that explicitly seek to tackle discrimination on the basis of trade union membership and activity. For example, anti-discrimination rules apply to employees' representatives as a 'general principle' in the Netherlands<sup>70</sup>, while the 2014 Finnish Non-Discrimination Act prohibits discrimination on the grounds of trade union activity (as well as on other grounds not covered

<sup>69</sup> The Protected Disclosures Act 2014 may need to be revised to take account of the new Directive concerning the protection of persons reporting breaches of EU law (the "Whistleblowers directive"), agreed in March 2019 and which is due to be transposed by 2021. This new directive provides that trade union representatives or workers' representatives should be afforded the protection provided under this legislation both where they report in their capacity as workers and where they have provided advice and support to the reporting person.

<sup>70</sup> Ales, Edoardo (October 2007), Studies on the implementation of Labour Law Directives in the enlarged European Union: Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community.

by Ireland's equality legislation).<sup>71</sup> The ILO also points out that other countries have adopted measures that seek to protect trade union members and trade union activity include Lithuania and Canada.

As part of an integrated strategy in this area, Congress should seek to have Trade Unions Rights legislation enacted, containing a Charter of Rights for trade unions and trade union members. Those rights should include robust and effective protection against penalisation. It should also include the right to penalisation on grounds of trade union membership or activities and should be in line with the Protected Disclosures Act, 2014, the right to participate in trade union activities in the workplace, the right to organise within the workplace, the right to reasonable time off to engage in trade union training and representation activities, and the right of access for trade union officials to workplaces for the purposes of communication with members.

the right to protection against penalisation on the grounds of trade union membership or activities in line with the Protected Disclosures Act 2014

### 3.4 Public Procurement

There may be scope under Directive 2014/24/EU on public procurement, which was transposed into Irish law in 2016, to promote collective bargaining through public procurement.

Recital 37 of this directive provides that

*"...obligations stemming from international agreements ratified by all Member States and listed in Annex X should apply during contract performance. However, this should in no way prevent the application of terms and conditions of employment which are more favourable to workers".*

Art. 18 (2) provides that

"2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X".

Annex X in turn lists the eight core ILO conventions, including the *Freedom of Association and Protection of the Right to Organise* Convention, 1948 (No.87), and the *Right to Organise and Collective Bargaining* Convention, 1949 (No. 98).

<sup>71</sup> European Union Agency for Fundamental Rights (2016), *Fundamental Rights Report 2016*

Art.57(4) provides that:

*“Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations: (a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2)”.*

Promoting compliance with these obligations would seem to depend on the extent to which they are ‘applicable obligations’ under Irish law.

### 3.5 Re-introduce the Policy Regarding Union Subscriptions Abolished in 2011

Congress’s pre-budget 2019 submission called for the re-introduction of the policy concerning the tax treatment in respect of trade union subscriptions. Such a scheme operated between 2001 and 2011 and, at its peak, cost approximately €27 million a year.

Reintroducing this scheme would end the discriminatory treatment of trade union members compared to members of professional and business lobbies, of expenses incurred by the self-employed and

even of subscriptions to specialist sectoral publications.

The OECD points out that several countries, including countries it identifies as having the best performing collective bargaining systems, use fiscal incentives to promote trade union membership. It cites research which shows that the increase in the rate of the Norwegian tax relief for trade union membership was important between 2001 and 2012 for slowing the decline in trade union density and points that Sweden has recently reintroduced a subsidy for union members that had been abolished in 2007, and that in Finland, union membership fees (and employer confederation fees) are tax-deductible.<sup>72</sup> Other research<sup>73</sup> cited by the OECD highlights the fact that also point out that tax subsidies for union membership also exist in France and even in the United States.

The Department of Finance has said that it is unclear what specific policy objective would be achieved by reintroducing this measure, unless the state ‘wishes to incentivise trade union membership’.<sup>74</sup> Given the findings of international research cited above on the positive role unions play in reducing inequality, encouraging union membership is a reason in itself for re-introducing this measure.

<sup>72</sup> OECD Employment Outlook 2018:102

<sup>73</sup> Barth *et al* (see OECD)

<sup>74</sup> Department of Finance: Report on Tax Expenditures, October 2016





STRONGER TOGETHER

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