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IMPROVING SOCIAL DIALOGUE IN WORKING LIFE

# Extension in European Union Member States and Recommendations for Turkey

Assoc. Prof. Dr. Gaye BAYCIK

2019

ANKARA



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### **Assoc. Prof. Dr. Gaye BAYCIK**

Gaye Baycık is an associate professor in the Department of Labour and Social Security Law in Law Faculty of Ankara University. Since January 2013, she has worked as the vice legal advisor of Ankara University. In May 2016, she was assigned as legal advisor and Coordinator of Law&Legislation in Ankara University. Her books entitled "Mine workers in terms of labour and social security law", "Formative rights in labour law" and "Responsibility of workers in Turkish-Swiss Law" are published. She is interested in law of occupational safety and health, individual labour law, collective labour law and social security law. She is fluent in French and English. She has an intermediate knowledge of German.

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## Extension in European Union Member States and Recommendations for Turkey

## FOREWORD

Social dialogue is a core value and an ultimate goal of the International Labour Organization (ILO). The Ministry of Family, Labour and Social Services is well aware of the value and significance of social dialogue across the country in policy-making and implementation. Social dialogue is a proven record of generating sustainable solutions including in times of crises and recovery. Recognising the importance of social dialogue for economic development and social peace, the International Labour Organization for Turkey and the Ministry of Family, Labour and Social Services are implementing the “Improving Social Dialogue in Working Life” Project within the EU Instrument of Pre-Accession Funds. The overall objective of the project is to improve social dialogue in Turkey at all levels.

This work is a part of the research studies conducted under the Project. The objective of the study is to propose recommendations on the changes required to transform the extension practice, which has not been implemented for a long time in our country, in line with economic and social realities of the country and thereby into an effective practice (which does not cause unemployment, allows for flexibility without violating the free and voluntary collective bargaining rights while also ensuring equal pay and working conditions for workers with similar interests and thereby ensuring equality and preventing unfair competition among employers) by taking into account the practices in EU Member States.

We thank many institutions and persons who contributed to the research including particularly our valuable professor Assoc. Prof. Dr. Gaye Baycık who undertook the study. We further thank to all social parties who supported and contributed at all stages of the research, academicians contributing to interviews and the Ministry of Family, Labour and Social Services, Social Dialogue and Tripartism Unit (DIALOGUE) and International Labour Standards Unit (NORMES) at Geneva and the Project Management Team at ILO Office for Turkey.

### **NURCAN ÖNDER**

Ministry of Family, Labour and Social Services  
General Director of Labour

### **NUMAN ÖZCAN**

Director of the ILO Office for Turkey

## I. PREPARATION AND BACKGROUND OF THE REPORT

In preparation for this report, first the extension methods implemented in European Union (EU) Member States were examined in light of the current legislation and recent legal amendments. To this end, reports on OECD countries as well as academic studies and ILO publications were reviewed. Since extension practices in EU Member States were presented with their advantages and disadvantages in the comparative reports about OECD countries as well as many academic studies, these resources were very useful in terms of developing recommendations for our country.

The aim of this report is to propose recommendations on the changes required to transform the extension practice, which has not been implemented for a long time in our country, in line with economic and social realities of the country and thereby into an effective practice (which does not cause unemployment, allows for flexibility without violating the free and voluntary collective bargaining rights while also ensuring equal pay and working conditions for workers with similar interests and thereby ensuring equality and preventing unfair competition among employers) in the scope of the Improving Social Dialogue in Working Life Project carried out by ILO and the Ministry of Family, Labour and Social Services by taking into account the practices in EU Member States.

To this end, at the preparation stage of the report, not only the studies on OECD and EU Member States but also reviews on the topics of collective bargaining level in our country, determining authorised unions, determining sectors and extension were examined as well as the principles laid down in ILO Recommendation No. 91 which is important document in terms of extension adopted in 1951 by ILO as a Recommendation instead of a convention in order to be easily applicable and allow flexibility.<sup>1</sup>

## II. METHODOLOGY AND ANALYTICAL FRAMEWORK

Extension constitutes one of the legitimate tools which has social and economic effects and is in fact used by governments to keep socio-economic relations in balance and effectively regulate them. Extension enables States to decide on the implementation of an agreement accepted by social parties and is therefore legitimate across a certain region or across the country or in a sector or multiple sectors as in France (élargissement) instead of implementing direct legal regulations and regulate working life in a way that will not obstruct the sustainable growth of the national economy, in contrast, will support it and therefore ensure equal working conditions and fair wage distribution.<sup>2</sup> Therefore, principles and procedures for implementation of extension should be in line with the economic and social conditions of each country in order for it to reach accurate and effective results. Accurate and effective results do not refer solely to increasing the number of workers who benefit from collective labour agreements. In addition, another goal which is as important is for extension to ensure equal distribution of income and support stable national growth. Therefore it is justifiably argued that extension should enhance and equalise working conditions and pay levels without causing unemployment while also providing employers with a certain level of flexibility and allowing them to be subject to different rules depending on the size, age and geographic location of the enterprises.<sup>3</sup>

Therefore, while preparing this report, extension practices in EU Member States were included by particularly examining the practical impact in countries such as Portugal, Greece, Romania, Slovenia, Slovakia, Germany and France which recently had amendments in their legislation about extension. Since some of these amendments such as those in France, Portugal and Slovakia are very recent, it is difficult to reflect their socio-economic impact properly at this

1 Hayter-Visser, 5.

2 OECD-Annual Report 2018, 104 et seq., OECD-Annual Report 2017, 127 et seq., Hamburger, 154-157. Hayter-Visser, 2 et seq., Schulten, Extension, 1-2, 5-6. Sur, 105 et seq., Kılıç, 6 et seq.

3 Hayter-Visser, 6 et seq. OECD-Annual Report 2017, 143 et seq. OECD-France, 5 et seq.



moment. However, to this end, research was undertaken in the scope of this study and the French system, which has a high percentage of workers covered by one collective labour agreement (over 90%)<sup>4</sup> despite its very low levels of union membership (around 5 to 10%) and regulates in its legislation not only the extension of a collective labour agreement to other enterprises in the same sector (extension administrative) but the extension to other sectors (élargissement), was specially examined. In this regard, amendments made in the French Labour Code in 2017 and 2018 were examined and a Continental Europe country, which had a low level of union membership similar to our country while also having a high level of coverage of collective labour agreements and therefore succeeded in increasing the coverage of collective labour agreements without disrupting economic growth or causing unemployment, was examined as an example for our country.

Since the principles and implementation methods of extension need to comply with economic and social characteristics of the country, interviewees were selected among persons who have conducted long-lasting studies about the unionisation and collective bargaining system of our country and have always been able to identify what needs to be done in this area as jurists. Therefore it was ensured that they contributed in our recommendations about the extension system in line with the conditions of our country. Interview questions and responses are presented under the section on recommendations for our country.

In addition to interviews and substantive legislations of countries, comparative reports and studies on OECD countries, extension related regulations in EU Member States and results and development of these as well as the socio-economic conditions of our country were evaluated together and as a result, an extension system proposition was developed which was believed to be effective and accurate for our country.

### III. CONCEPTS

In order for explanations about the extension system and its implementation to be understood better, first the concepts used in the collective bargaining and collective labour agreement systems and have international validity should be briefly explained. This is the case because, these concepts will be frequently used in this report.

#### 1. Extension

It is obvious that the first concept to be explained in terms of the subject of this report is the concept of “*extension*”- “*extension administrative*”. Section IV of ILO Recommendation No. 91 of 1951 is entitled “*Extension of Collective labour agreements*” and Article 5 provides both the definition of extension and the fundamental principles adopted by ILO. Accordingly, each country shall commit to taking measures to be determined by national laws or regulations and suited to the conditions of each country to extend the application of all or certain stipulations of a collective labour agreement to all the employers and workers included within the industrial and territorial scope of the agreement.

As is seen, extension is regulated as applying all or certain parts of a collective labour agreement to all employers and workers included within the industrial and territorial scope of the agreement. Expectations from the concept of extension, which is agreed upon in the ILO Recommendation, include ensuring equality in working conditions and wages for the employers who are included in the same sector, profession and territory under an existing collective labour agreement and therefore are subject to the same market and economic conditions as well as the employees they employ under this scope who therefore share common professional interests, and thereby implementing fair distribution of income and wage equity principle via the equality principle; while also preventing unfair competition

<sup>4</sup> OECD-Annual Report 2017, 164 ([https://read.oecd-ilibrary.org/employment/oecd-employment-outlook-2017/collective-bargaining-in-a-changing-world-of-work\\_empl\\_outlook-2017-8-en#page40](https://read.oecd-ilibrary.org/employment/oecd-employment-outlook-2017/collective-bargaining-in-a-changing-world-of-work_empl_outlook-2017-8-en#page40))

and social dumping against employers who provide decent work and modern working conditions and saving on the time, money and efforts spent for transferring employees and establishing labour relations.<sup>5</sup>

However, in the international literature, in the most widespread and technical sense, extension does not refer to disseminating an existing collective labour agreement on the national level in a way to cover more than one sector; but to extending all or certain parts of a collective labour agreement existing in a sector or workplace or enterprise to cover other employers who are in the same sector but are not members of the employers' organisation who has signed the agreement, or if the agreement has been signed by employers, to cover employers who have not signed the agreement.<sup>6</sup>

As presented below, in EU Member States, extension results in applying a collective labour agreement signed within a certain sector to other enterprises included in that sector. Therefore, in a technical sense, extension is making all or certain parts of an existing and applicable collective labour agreement binding for workers and employers in other workplaces in the same sector. Extension may be practiced on a national level as well as only being applicable to workplaces within the same sector which are located in a certain territory. As presented below in detail, extension may be decided to cover certain workplaces which are located in the same territory, have a certain size or have been operating for a certain time period or it may cover all workplaces in a given sector on a national level without any limitation. The important issue here is the similarity between the economic and social conditions of the workplaces to be included in the extension and the employer(s) or employers' organisations who have signed the collective labour agreement. Hence, ILO Recommendation No. 91 lays the condition to be "*within the industrial and territorial scope of the agreement*" when defining extension.

As a matter of fact, the French Labour Code defines extension (*extension administrative*) as making a collective labour agreement in a sector or profession applicable to other workplaces in the same sector or profession (CT L.2261-15); while defining expansion (*élargissement*) as making a collective labour agreement which has already been extended in a sector or territory binding in other sectors, territories or professions (CT L. 2261-17, L.2261-18) and therefore separates these two institutions. The Code requires stricter terms for expansion compared to extension. This is the case because, under these circumstances, an agreement with an expanded field of application is applied in a foreign field outside its scope which does not share the same professional interests. For expansion, the field to be included in the expansion should have conditions similar to the sector in which the agreement subject to expansion was signed or if the expansion is in a professional sense, then there should be professional similarity.<sup>7</sup>

Extension enables the working segment who cannot benefit from the right to free and voluntary collective bargaining and collective labour agreement under the right to association which is considered as a fundamental human right, to at least benefit from a collective labour agreement accepted by social parties and therefore signed upon collective bargaining or maybe a strike. Therefore, extension is regarded as a practice which ensures that constitutional right to collective labour agreement is exercised by more employees.<sup>8</sup> As the number of workers in a country who benefit from collective work agreements increase, that country achieves modern and equal working conditions, fair wage distribution, labour peace, stable economic growth, consistency in the number of employees who benefit from collective labour agreements as well as stability in collective labour relations. Therefore, increasing the number of workers who exercise the right to collective labour agreement which is a fundamental human right, is protected on a

5 **Hayter-Visser**, 1 et seq., 5-6. **Oesingmann, 59-61. Eurofound 2011**, 1. **Sur**, 105 et seq., **Kılıç**, 6 et seq.

6 **OECD-Annual Report 2017**, 141. **Sur**, 105 et seq.

7 For detailed information on previous French regulations about extension and expansion, See **Sur**, 117 et seq.

8 **Güzel**, 894 et seq.

constitutional level and has significant socio-economic impact on the country level should be one of the fundamental objectives of every State.<sup>9</sup>

Factors which affect the scope of collective labour agreements are the association rate of workers, association rate of employers, the *erga omnes* rule and extension practices. In countries such as Denmark (67%) and Sweden (70%)<sup>10</sup> which do not have any regulations or applications about extension but have highly unionised workers due to providing certain rights such as unemployment insurance only to unionised workers, it is easier for strong unions to cover employees under collective labour agreements without any need for additional extension practices. In fact, according to OECD data of 2015, number of workers in Denmark and Sweden who are covered by collective labour agreements are around 85% and 90% respectively.<sup>11</sup> On the other hand, extension is applied in countries which have low association rates of workers or in countries such as Iceland, Finland and Belgium which have high rates of association (85%, 55% and 55% respectively) but aim to increase the coverage of collective labour agreements. Moreover, in countries such as Austria and Slovenia (until 2006) extension is applied in a very limited scope, instead, mandatory membership to unions and chambers of trade which are authorised to sign collective labour agreements is prescribed in the law for employers. As a result of this obligation, employers are directly covered by signed collective labour agreements without any need for extension.<sup>12</sup> It should be noted however that the system in Austria and Slovenia is criticisable for being contrary to individual negative freedom of association adopted as a core freedom in ILO Conventions No. 87 and 98. Introducing an obligation either for a worker or an employer to be a member of trade union or professional organisation violates the freedom of not being a member of any organisation/trade union as prescribed in ILO Conventions No. 87 and 98. Therefore, the recommendations made for our country in the following sections will not include an opinion to that end. Obviously however, it is necessary to note that those two countries have such a system, and that it has an impact of expanding the coverage of collective labour agreements. In countries where worker union density is low, the association rate of employers is not high and therefore the culture of consensus is not widespread or employers do not organise voluntarily, the scope of collective labour agreements in terms of people can only be expanded via extension or the “*erga omnes*” practice which will be explained below.<sup>13</sup> As a matter of fact, as a result, other than six EU Member States, all other Member States have the extension institution regulated by law and the Article 5 of ILO Recommendation No. 91 also provides extension regulations and gives a recommendation to States by pointing out the necessity of establishing legislation on extension.<sup>14</sup> However, as mentioned below, each country needs to incorporate extension regulations in line with its own conditions. Terms of extension should be stricter in some countries and more flexible in others. This depends on the characteristics of sectors in the country, its socio-economic structure and whether it has been through the historical courses which lead to the development of an autonomous and free collective bargaining and the culture of consensus.<sup>15</sup>

## 2. “*Erga omnes*” Rule

All studies about extension strongly emphasize that the *erga omnes* rule and extension should not be confused with each other. In contrast with the “*double affiliation principle*” which refers to the relativity of the agreement, in countries which apply the “*erga omnes*” rule which argues that the agreement applies to all, not only to its parties, the employer

9 **Schulten**, 5-6. **Güzel**, 894 et seq., 897 et seq. **Oesingmann**, 62-63.

10 **OECD-Annual Report 2017**, 164. **Oesingmann**, 62.

11 **OECD-Annual Report 2017**, 164. **Oesingmann**, 62.

12 **Oesingmann**, 63. **Schulten**, 2-5.

13 **Güzel**, 184 et seq. **Oesingmann**, 63. **Sur**, 145 et seq.

14 **Sur**, 123.

15 **Güzel**, 899 et seq. **Hayter-Visser**, 6 et seq.

who signs the collective labour agreement or is a member of the signatory organisation is obligated to apply the agreement to all workers at the workplace without making any distinction on the basis of whether they are union members or not.<sup>16</sup>

According to OECD data of 2015, the *erga omnes* rule is applied in Austria, Belgium, Czech Republic, Denmark, Finland, France, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Norway, Spain and Slovak Republic, whereas in Germany, Portugal, Sweden and our country, collective labour agreement only applies to the members of signatory workers' unions; however there are also options to get covered by the agreement (*opt-in*) with certain conditions such as the solidarity fees in our country.<sup>17</sup>

### 3. Unit Levels of Collective Labour Agreement and of Association

The unit level of association refers to the smallest unit of association for workers' unions allowed by law. Although ILO Convention No. 89 clearly governs that unit levels of association of employees should not be limited in domestic law, in our country, workers' unions can only be established on the sector-level and public servants' unions can only be established on the level of service branches. Similarly, union membership is a right only entitled to those who work in that sector/service branch. The reason for limiting the unit level of association to sectors and service branches is the current socio-cultural structure of our country as well as its negative unionisation history. There were no amendments in the legislation on sector level association due to the failure of workplace level unions to gain the power to engage in collective bargaining against employers, the perception about regional unionisation being a risk and the perception about profession-based unionisation being an obstacle for strong unions and therefore Law No. 6356 only allowed for sector-level association just like Law No. 2821.<sup>18</sup> While the unit level of association refers to the smallest unit of association for workers' unions; the unit level of collective labour agreement refers to the lowest level where a collective labour agreement can be concluded. Therefore, two concepts are different.

While the unit level of association in our country is sectors, the unit level of collective labour agreement for workers is not the sector but the workplace. That the collective labour agreement is at workplace level means that the workplace is the smallest unit where a collective labour agreement can be signed, and the authorisation is granted at the workplace level. Then, a workers' union and an employer or employers' union authorised at workplace level shall have the right to conclude a collective labour agreement based only on that workplace. Therefore, workplace level collective labour agreements cover less workers than sector-level collective labour agreements do. What is meant by a sector-level collective labour agreement is an agreement signed by the unions authorised at the sector level (workers' union with highest representativeness and employers' union with highest representativeness) to be applicable to that sector. In this case, the authority is determined at sector level. Unions that fulfil the authorisation condition prescribed in the legislation (e.g. 30% for workers and 50% for employers) sign a single collective labour agreement applicable to that sector. In this case, the collective labour agreement shall apply to works and employers who are members of the respective unions. However, employers who are not members of that union shall not be covered by the said collective labour agreement even if they operate in the sector in question. This is where extension has room for application and the sector-level collective labour agreement is extended to the workplaces of employers who are not members of that union. In the absence of extension, the sector-level collective labour agreement applies to employers who are members of that union; where extension applies, the said agreement becomes binding on all employers in that sector.

<sup>16</sup> Hayter-Visser, 2. OECD-Annual Report 2017, 140. For explanation about the arguments that extension and the *erga omnes* rule reduce the unionisation of workers, see OECD-Annual Report 2018, 101-102.

<sup>17</sup> OECD-Annual Report 2017, 140-141.

<sup>18</sup> For detailed information, see Güzel, 906 et seq., Baycık, 211 et seq.

While group collective labour agreements defined in Article 34 of the Law No. 6356 are similar to sector-level collective labour agreements, they are nevertheless different than the latter in respect of unit level and possibility of concluding more than one group collective labour agreement with more than one workers' union. Since the group collective labour agreements which are particularly observed in the metal sector in our country are not concluded with only one workers' union, there emerge more than one group collective labour agreement. This is clearly where group collective labour agreements differ from sector-level collective labour agreements. The group collective labour agreement is a collective labour agreement signed, not at the sector level, but by the workers' union authorised in that sector and the employers' union in which employers operating in that sector are members based on the wills of social parties. In this case however, more than one group collective labour agreement may be signed in the same sector with all agreements having different provisions. In this case, the authority will be determined again at workplace level, and a union which is authorised at the workplace can conclude a group collective labour agreement if it manages to obtain authorisation in more than workplace. The sector-level collective labour agreement on the other hand is signed by one single workers' union authorised in that sector and the one single employers' union authorised in the same sector. By this way, all employers who are members in that employers' union will be bound by the said collective labour agreement and apply the agreement to their workers. If the *erga omnes* rule applies in the country, employers will be obliged to apply the collective labour agreement with which they are bound to all of their workers regardless of union affiliation. If the *erga omnes* rule does not apply in the country, employers apply the collective labour agreement signed by their union only to the workers who are members of the signatory workers' union.

For the reasons explained, caution should be made against any misconception that the group collective labour agreement as practiced in our country and as governed in Article 34/3 of the Law No. 6356 leads to the same results as does the sector-level collective labour agreement. Group collective labour agreements can be concluded based on the willingness of the parties, targeting "workplaces" and/or "enterprises" in the same sector. The conclusion of group collective labour agreements depends entirely on the discretion of parties as well as cover only those employers who are members of the employers' association which wishes to sign a group collective labour agreement, thus the common interests at workplace level, not all employers in that sector. The sector-level collective labour agreement in contrast is established as the primary level of collective labour agreement in many Western European countries, and recognised to cover all workplaces in that sector. Therefore, sector-level collective labour agreements are signed by workers' and employers' unions with highest representativeness in that sector;<sup>19</sup> and the agreement so signed applies to all workers and employers who are members of the signatory unions provided that they operate in the sector in question. Thereby, uniform rules are achieved which apply at national level (or at regional level in some countries in respect of certain sectors) and cover all workers in the sector. Sector-level collective labour agreements differ from group collective labour agreements in that all interests of the workers in that sector are determined at national level considering the characteristics of that specific sector. This is why the labour law doctrine in our country has long been stating that sector-level collective labour agreements should be concluded.<sup>20</sup>

It is believed that the fact that collective labour agreements are allowed not at sector level but at workplace level is a problem which lowers the number of workers who benefit from collective labour agreements. In fact, following the Memorandum signed by Troika and the Greek Government, the Law No. 4024 of 2011 made radical changes in the Greek collective bargaining and agreement system and abolished the "*principle of favourability*" applied between the sector-level collective labour agreements and workplace level collective labour agreements; and in cases where there is no workplace level unionisation, worker representatives who represent 3/5 of the workers were provided with the opportunity to engage in workplace level collective labour agreements and the extension practice was ceased.<sup>21</sup> After

19 For more details on the methods used in EU countries to identify unions with highest representation, see **Güzel**, 915 et seq.

20 **Güzel**, 933 et seq. **Doğan Yenisey**, Akademik Forum, 428.

21 For detailed information, see **Schulten**, Greek Collective Bargaining, 2 et seq.

these changes which resulted in a significant decrease in the number of sector-level collective labour agreements, the number of workers who were covered by collective labour agreements also decreased significantly. Similarly in Portugal, which signed a Memorandum, following legal changes, there were significant decreases in terms of the scope of collective labour agreements.<sup>22</sup>

In fact, OECD reports also identify collective labour agreements at sectoral or national level and thereby bind more than one employer (*multi-employer agreements*) as the primary tool for achieving and keeping a broad scope for collective labour agreements in terms of people.<sup>23</sup> Another tool in this regard is, as mentioned above, accepting the extension practice and the *erga omnes* rule. On the contrary, in countries such as ours where collective labour agreements are made on the workplace level, the coverage rate of collective labour agreements move in parallel with the unionisation rates of workers or remains at an even lower level.<sup>24</sup> Workplace level collective labour agreements decrease the coverage rate of collective labour agreements while also decreasing the union density and the rate of signing collective labour agreements. This is the case because, employers in countries where workplace level collective labour agreements are signed fight much harder to prevent workplace level unionisation and move away from the culture of consensus in order to prevent workplace level unionisation. However, employers in countries where sector-level collective labour agreements prevail, employers do not have any motive to hinder unionisation since they will be included in the scope of the sectoral collective labour agreement either way.<sup>25</sup> In such countries where sector-level collective labour agreements are signed, employers are more inclined to reach consensus and sign collective labour agreements. This is the case because under these circumstances, employers foresee that the rules applied to them will also be binding for other employers in the same sector, labour costs will not cause competitive conditions and so they sign agreements for modern working conditions and high wages and know that other employers will not benefit from any social dumping.<sup>26</sup> In fact, it is clearly demonstrated that moving collective labour agreements from sector-level to workplace level which is called “*decentralisation*” results in a significant decrease in the number of workers covered by collective labour agreements.<sup>27</sup> Therefore, instead of “*decentralisation*” which refers to replacing sectoral collective labour agreements with workplace level collective labour agreements, it is argued that “*organised decentralisation*” which provides for engaging in workplace level collective labour agreements to the extent allowed by sectoral collective labour agreements is a better method and thereby provides flexibility by applying workplace-specific rules while also protecting the coverage rate of collective labour agreements.<sup>28</sup>

Pursuant to the “*free and voluntary*” collective bargaining principle regulated by Article 4 of the ILO Convention No. 98 and Article 4 of the ILO Recommendation No. 163, ILO Committee of Experts and Committee on Freedom of Association stipulate that the authority to determine the collective bargaining level should essentially be given to social parties and that it is against the convention for the collective bargaining level to be imposed by law or administrative authorities. As such, domestic law should not hinder sector-level collective bargaining and the power to determine coordination among sector-level collective labour agreements and workplace-enterprise-profession level or regional or national level collective labour agreements may be given to social parties or, this coordination may be ensured by according priority to a certain level collective labour agreement by law or by introducing a principle of favourability for workers or, collective labour agreements may include *opening clauses* or *opting-out power-temporary suspension (derogation)*

22 Oesingmann, 61.

23 OECD-Annual Report 2017, 126-127.

24 OECD-Annual Report 2017, 126-127. Güzel, 893 et seq., Doğan Yenisey, Akademik Forum, 428.

25 Doğan Yenisey, Akademik Forum, 428.

26 OECD-France, 7 et seq. Doğan Yenisey, Akademik Forum, 428.

27 OECD-Annual Report 2017, 126 et seq. OECD-Annual Report 2018, 104.

28 OECD-Annual Report 2018, 104.

provisions.<sup>29</sup> Similarly, Article 28 of the Charter of Fundamental Rights provides social parties with the freedom to determine the collective bargaining level as they “*deem appropriate*”.

Although the subject of this report is about extension, in order to increase the number of workers covered by collective labour agreements in our country, sector-level collective labour agreements should be allowed, and as mentioned below under the section on recommendations for our country, rather than extending a workplace level agreement to other workplaces in the same sector, extension of sector-level collective labour agreements should be allowed<sup>30</sup>, however opening clauses or temporary suspension (opt-out) options should be provided to ensure flexibility for employers and such workplace level collective labour agreements should be allowed to have provisions against the sectoral collective labour agreement provided that they are in favour of workers (*principle of favourability*). By doing so, first the number of workers who benefit from collective labour agreements will be increased by changing the collective labour agreement level and then by extending these agreements, the sectoral collective labour agreement which takes into account the common interests of the whole sector will be subject to extension and provisions not unfamiliar to employers will become widespread.

## IV. ATTRIBUTES AND CONSEQUENCES OF THE EXTENSION SYSTEM AND AN OVERVIEW OF EXTENSION METHODS

### 1. PRINCIPLES PRESCRIBED IN ILO RECOMMENDATION NO. 91

Paragraph 5/2 of ILO Recommendation No. 91 of 1951 governs the principles to consider in order to apply extension without violating free and voluntary bargaining. While the free and voluntary bargaining governed in Article 4 of ILO Convention No. 98 regulates collective bargaining autonomy; with extension decision, collective work agreements begin to be implemented in areas outside their scope with an administrative decision and with the aim to apply them to other workers and employers who are not parties to this agreement. In this regard, instead of an agreement decided freely and agreed upon by social parties, it becomes a collective labour agreement which has a scope of application expanded via administrative action. Moreover, while it is accepted that the extended text still preserves its agreement status and therefore the extension practice also ends when the collective labour agreement expires; it is also justifiably acknowledged that when the agreement is amended via extension, the extended text also assumes an administrative decision status rather than being an agreement and it assumes a mixed status.<sup>31</sup> Expansion of the scope of application of a collective labour agreement without the will of social parties by a court decision or law or administrative action is a violation of the autonomy of collective labour agreements and the principle of free and voluntary collective bargaining.<sup>32</sup> However it is possible to prevent this violation by minding certain principles.

Paragraph 5/2 of ILO Recommendation No. 91 in this regard provides certain principles that should be taken into account while resorting the extension method. However, before mentioning these principles, we need to clarify the matter which, in our opinion, deserves the most attention in terms of preventing any violation of the autonomy of collective labour agreements. Although it is not included in the mentioned Recommendation, we think that attention should be paid primarily to the fact that extension should not undermine the operation of the authority for collective labour agreement. This is even more important in countries like ours where only workplace level collective labour agreements are signed. This is the case because in systems like the French law where multi-level collective bargaining systems

<sup>29</sup> For detailed information, see **Güzel**, 935 et seq.

<sup>30</sup> **Oğuzman**, 105. **Sur**, 137.

<sup>31</sup> **Sur**, 148 et seq.

<sup>32</sup> **Sur**, 145 et seq. **Kılıç**, 60 et seq.

are implemented, extension of a sector-level collective labour agreement does not hinder a separate workplace level collective labour agreement and problems in conflicting provisions about many issues are resolved by the principle of favourability for workers. However, in our law system, which only allows for workplace level collective labour agreements and does not allow a new agreement before the previous one expires (Law No. 6356, Art. 35/4) and therefore, although being repealed by the Constitution of 2010, in practice, still does not permit the application of more than one collective labour agreement at the same time at a workplace, when authorisation actions are initiated for a workplace level collective labour agreement, an extension decision should not be allowed for said workplace (however as mentioned below, we think that a multi-level collective bargaining system should also be introduced in our country). Similarly, in a workplace included in the extension scope, social parties should always be provided with the opportunity to make collective labour agreements and extension should not hinder acquisition of authorisation, collective bargaining and collective labour agreements processes or even strikes.<sup>33</sup> Otherwise, it is obvious that extension will violate the free and voluntary collective bargaining principle and the collective labour agreement autonomy. While Article 11 of the Law No. 2822 governs that an extension decision may not be taken only after an application has been lodged for authorisation, Paragraphs 6 and 7 of Article 40 of the Law No. 6356 appropriately lays down the provision: *“No extension may be decided for workplaces in this scope after an application for authorisation has been lodged and until this action is concluded or as long as the authorisation continues after an authorisation document has been obtained. An application for authorisation may always be lodged for authorisation in workplaces or enterprises which were covered in the scope of the extension of a collective labour agreement and the extension automatically ends when a new collective labour agreement is concluded”* and transformed in favour of the autonomy of collective bargaining. However, it should be kept in mind that this risk only applies to countries like ours where, as mentioned above, only workplace level collective labour agreements are provided for and a multi-level collective bargaining system is not accepted.

Moreover, paragraph 5/2 of ILO Recommendation No. 91 stipulates that extension may be subject to specific conditions. Accordingly, the collective labour agreement to be extended should cover a number of employees and workers concerned which is, in the opinion of the competent authority, sufficiently representative; as a general rule, the request for extension of the agreement should be made by one of the parties to the agreement; and the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations. As is seen, with this regulation of the Recommendation, in terms of the decision for extension, priority is given to the will of both the parties of the agreement and the social parties to be covered by the application. The goal in doing so is to prevent the violation of free and voluntary collective bargaining and the autonomy of collective labour agreements.<sup>34</sup>

## 2. ATTRIBUTES OF EXTENSION SYSTEMS

Extension is applied, as different from relative and peremptory rules prescribed by the law-maker or from the minimum wage which is determined by law in some countries, is implemented not by the legislative body but generally by the Ministry of Labour or as in our country, by the President or by an authority/committee/board that is also independent from the enforcement body or by a judge's or arbitrator's decision or directly by an automatic system prescribed in the law.<sup>35</sup>

There should be an existing and valid collective labour agreement for extension to be implemented. Therefore, different from the peremptory rules imposed by the law-maker and legal minimum wage, extension disseminates a system which ensures that working conditions and wages are determined by social parties in a free and voluntary manner in

<sup>33</sup> cf. Kılıç, 60 et seq.

<sup>34</sup> Sur, 123 et seq. Hayter-Visser, 4-6. OECD-France, 5.

<sup>35</sup> Hayter-Visser, 1. Sur, 106.



line with the autonomy principle and therefore has legitimacy in terms of the social parties; allows for fast adaptation in times of economic or technological troubles; and since the extended agreement is usually signed at the sectoral or professional level, complies with and meets the characteristics, needs and conditions of the sector and profession and tries to balance the common interests of workers and employers within the sector or profession. Therefore, extension is justifiably defined as a system that is based on legitimacy, ensures fast adaptability and is customisable based on the characteristics of the profession or sector.<sup>36</sup>

The worker-employer disputes that emerged intensely after World War I and threatened the peace of the society were taken under control when Germany and Austria regulated extension in their laws. As a result of this practice, employers' resistance against engaging in bargaining with workers' unions was also broken and afterwards working conditions were regulated with the "peace agreement" signed by confederations of workers' and employers' unions.<sup>37</sup>

The recession of early 1930's made the extension practice widespread across the world.<sup>38</sup> During this period, extension practices resolved the worker-employer tensions and disputes in all countries, provided very positive results for States and resulted in economic relief and growth.<sup>39</sup> However, upon the economic crisis that began in 1980, "decentralisation" of collective labour agreements was brought up in the agenda; the idea that employers should be able to make collective labour agreements that are suited for their own specific conditions in order to survive during the time of economic depression became dominant; extension practices were suspended in some countries like Greece and was subject to strict terms in countries like Romania and Portugal; also the practice of making workplace level collective labour agreements instead of sector-level agreements and prioritising them over sectoral agreements became prominent; and the principle of favourability was abandoned in some countries like Greece and Spain.<sup>40</sup> This was caused by the arguments that sectoral or professional level collective labour agreements and the extension practice enabled large scale enterprises to pressure small scale workplaces using collective labour agreements and thereby forced small scale or young workplaces out of the sector and this caused an increase in dismissals and therefore unemployment and resulted in unfair competition against small-sized workplaces.<sup>41</sup> Replacing sector-level collective labour agreements completely by workplace level collective labour agreements is called "disorganised decentralisation", whereas allowing for workplace level collective labour agreements to the extent allowed by sector-level collective labour agreements and implementing the principle of favourability in this regard is called multi-level collective labour agreements system or "organised decentralisation".<sup>42</sup> However, disorganised decentralisation of the collective bargaining system via extension, on the contrary, reduced the union density even further, worsened the wages and working conditions due to the shrinkage in the number of workers covered by collective labour agreements and therefore weakened the purchasing power and contracted the economy even further, lowered the motivation of employers as well towards association and ended the strong stance (resilience) against the economic crisis. Due to these reasons, today it is acknowledged that the power of social dialogue is even more important during times of economic crisis; countries with strong social dialogue and high collective labour agreement coverage overcome economic crises faster and more easily; extension practices provide support to this process as well and therefore if arranged in line with the conditions of the country, extension lowers unemployment and provides stable economic growth.<sup>43</sup> However, in order to reach these results and get the expected utility from extension, country-specific conditions (business structure, weight of tax burden which is

36 Hayter-Visser, 2. Sur, 106 et seq.

37 Hayter-Visser, 4.

38 Hamburger, 163. For detailed information on the historical development of extension around the world, see Hamburger, 163 et seq.

39 Hamburger, 163 et seq.

40 OECD-Annual Report 2017, 147-149.

41 Hayter-Visser, 3. OECD-Annual Report 2017, 147 et seq. Oesingmann, 61.

42 OECD-Annual Report 2017, 147.

43 OECD-Annual Report 2017, 130 et seq. Schulten, 5 et seq. Same author, Greek Collective Bargaining, 4 et seq. Villanueva, 4 et seq.

labour cost) should be properly identified and extension terms (representativeness condition and ratio or an alternative option) and methods (flexibility, opt-out or opening clauses, principle of favourability, multi-level collective bargaining system) suitable for these conditions should be applied. Otherwise, it will result in unwanted unemployment and unfair competition.<sup>44</sup>

### 3. LEGAL AND SOCIO-ECONOMIC CONSEQUENCES OF EXTENSION

Extension is a social policy tool for applying an existing and valid collective labour agreement to employers as well as the workers who work at workplaces belonging to them who have not been included in the collective bargaining process for drafting the said agreement and therefore are not parties to the agreement, at a sectoral, professional, regional or national level. The greatest impact of extension on social dialogue is that it enhances the inclusiveness of the collective labour agreement as well as the motivation of employers to sign the agreement:<sup>45</sup> This result and impact emerge at a very high level in countries with low worker union density. Using this method, the State regulates the rights and conditions of employees who are not covered by the scope of unionisation and collective bargaining through collective labour agreements that were previously accepted within the framework of social autonomy and therefore gained legitimacy instead of using coercive and top-down rules that require constant monitoring and thereby ensures a balance in working life for a while.<sup>46</sup> Extension ensures the permanence of labour peace and collective labour agreement regime created by the coverage rate of collective labour agreements in countries with decreasing unionisation. In these countries, there would be no decrease in the percentage of employees benefiting from collective labour agreements even when union density decreases.<sup>47</sup>

Extension not only ensures uniformity of wages and working conditions, but also leads to the use of certain funds for vocational training and mobility of workers, provision of additional social security and therefore dissemination of good practices in occupational safety and health, vocational training, personnel management, technology use and social security and ensures that all employees in the sector or profession benefit from these.<sup>48</sup> Extension practices, which have been implemented in European countries to this end for long years, were abandoned, suspended or subjected to severe terms in certain countries due to the impact of the economic crisis of 2008.<sup>49</sup> However, as mentioned above, these restrictions and suspensions have not provided the expected results in terms of economic growth or quality of life.<sup>50</sup> Therefore advantages and disadvantages of extension should be well known and the socio-economic cost-benefit analysis of the extension conditions and methods to be selected should be conducted in line with country-specific conditions and thereby a system suited for the conditions of the country should be preferred and the aim should be to achieve more benefits than losses.<sup>51</sup> In this regard, consequences of extension should be evaluated globally in all countries.

Extension provides uniform and modern working conditions and fair wage distribution throughout the same sector or profession, or in exceptional cases such as France, across more than one sector. Wage balance is ensured not only among workers who undertake the same work but also among qualified-unqualified workers, foreign-citizen workers, temporary-permanent workers, borrowed-permanent workers and male-female workers. This also prevents the

44 Villanueva, 4 et seq.

45 Schulten, 5 et seq. Villanueva, 4. Oesingmann, 61 et seq. Naumann, 106.

46 Hayter-Visser, 1-4.

47 Schulten, 6.

48 OECD-France, 7. Hayter-Visser, 2-3. OECD-Annual Report 2017, 142.

49 Oesingmann, 61. Hayter-Visser, 3.

50 Schulten, Greek Collective Bargaining, 2 et seq. Naumann, 99 et seq.

51 OECD-France, 8.

practice implemented by some employers of employing foreign or temporary workers using the free movement and cross-border temporary employment relations implemented within EU and achieve social dumping. Similarly, gender based wage unfairness is unfortunately still an existing and known reality even in European countries. Extension also results in the prevention of this imbalance. As such, extension methods lead to the dissemination of various additional interests and good management practices in favour of workers such as vocational training, occupational safety and health, personnel management, working hours, days on leave and additional social security and ensure fair distribution of interests and the income generated by employers across the society.<sup>52</sup> Fair distribution of interests and income results in high and fair wages, modern working conditions as well as an increase in the quality of life across the country and protection of labour peace.<sup>53</sup>

Extension is advantageous not only for workers but also for employers. First of all, extension prevents unfair competition caused by labour costs which may not be in favour of employers who provide modern working conditions and high and fair wages. In this case, employers would have the motivation to sign collective labour agreements. This is the case because under these circumstances, they would know that the same conditions will be provided by other employers as well and therefore labour costs will no longer be an element of competition.<sup>54</sup> This result becomes even more prominent particularly during times of economic crisis. Because, during times of economic crisis, employers first resort to measures involving lowering labour costs and may thereby create unfair competition against other employers. However, this could be prevented via extension practices.<sup>55</sup>

As such, applying similar working conditions and wages across a profession or sector using extension also prevents workers from switching from one job to another. This will lead to the elimination of inefficient labour caused by constant switching of workers.<sup>56</sup> It is obvious that workers will work more efficiently in time under continuous work relations. Similarly, extension therefore eliminates the loss of labour, money and time spent during negotiations for signing agreements with workers as well as termination costs.<sup>57</sup>

Extension also contributes in employers' association. Next time, employers want to implement an agreement signed after a bargaining process in which they had a voice instead of implementing an agreement signed after a collective bargaining process in which they were not involved. Therefore, extension usually results in an increase in membership in employers' organisations as well.<sup>58</sup> Same results may not always be reached in terms of workers' association. As a matter of fact, due to both the sector-level collective bargaining system and the extension practice in France, it is known that workers do not become union members and union density remains around 8 to 9%. Moreover, it is also possible that extension in particular may not have any after effects (in fact, this also exists in France as well), workers may want to have a voice in the preparation stage of the collective labour agreement which covered them via extension or the unionisation culture may become widespread through extension and there might be an increase in worker union membership. However, it should be noted that this only remains as a benefit that is actually a wish. Because, it has never been observed in country practices or OECD reports on this matter that extension resulted in an increase in worker unionisation and in fact, it was pointed out that it decreased worker unionisation and only increased employer unionisation.<sup>59</sup>

52 **Schulten**, 5 et seq. **Hayter-Visser**, 2 et seq. **Villanueva**, 3 et seq.

53 **Oesingmann**, 63.

54 **Naumann**, 106.

55 **Kılıç**, 7.

56 **Kılıç**, 8-9.

57 **OECD-Annual Report 2017**, 142.

58 **Oesingmann**, 63.

59 **OECD-Annual Report 2018**, 101 et seq. **Oesingmann**, 63. cf. **Kılıç**, 9.

Extension may also have certain disadvantages in addition to its advantages. First and foremost, it should be pointed out that terms of an extended collective labour agreement may be too heavy for usually small scale or new employers which were not included in the collective bargaining system during the process of signing the agreement and this may result in dismissals, closing down workplaces or downsizing and therefore an increase in unemployment. As such, organised employers involved in the collective bargaining process may use extension as a tool for preventing other employers from entering their sectors and thereby obtain unfair competition in their favour. This result emerges in a faster and more effective way particularly during times of economic troubles and when large scale enterprises are included in the organisation. In fact, studies conducted in France, Spain and Portugal clearly demonstrated that extension caused an increase in unemployment.<sup>60</sup> Therefore it is obvious that the unemployment it creates must be balanced out by the benefits it brings and conditions for minimising this increase in unemployment should also be ensured and it should provide macro level benefits.

Extension causes unemployment particularly more in countries where the difference between net and gross wages is high due to taxes. This is the case because a net increase in worker wages will result in higher costs for employers and the extension practice, which aims to enhance and extend the quality of life of workers, will cause more dismissals compared to the number of workers whose wages were increased and the amount of this increase and therefore cause more harm than benefit.<sup>61</sup> Therefore a macro cost-benefit analysis should definitely be conducted about extension and extension should be applied in a manner that its harm will not exceed its benefits and necessary measures should be taken in this regard. Otherwise, socio-economic effects of extension will cause an increase in unemployment and recession instead of its expected benefits. Because, an increase in unemployment will also impair the purchasing power and this will obstruct economic growth.<sup>62</sup> Hence, while conducting a cost-benefit analysis about extension, economy of the country, sector or profession should be approached as a whole and it should be examined whether there is a balance among the workers left unemployed in total and the wage increase of workers who continue working, or in summary, whether worker wages in total increased when accounted for the unemployed as well. However, extension systems which have this result enhance quality of life, ensure labour peace and support economic growth. As such, in favour of small or newly-founded employers, there should be a choice to engage in workplace level collective labour agreements or deviate from the extended agreement on certain matters or during certain periods and possible negative effects of extension on small or newly-founded employers should be avoided as well as unemployment and recession.<sup>63</sup>

In addition to its advantages such as ensuring uniform working conditions and wage balance in the same sector or profession, eliminating unfair competition among employers and creating stable economic growth, on the contrary, extension may also turn into a tool that increases unemployment, disrupts economic growth and causes unfair competition among employers if not based on principles and methods that are suited to the conditions of the country. Therefore, socio-economic structure and attributes of the country should be taken into account when determining the conditions required (representativeness-legitimacy) to expand the coverage rate of collective labour agreements via extension which is the goal in all countries as well as ours in order to ensure modern working conditions for workers, wage balance and fair distribution of interests and income, as well as when determining whether some provisions of the extended agreement could be suspended when necessary (during times of economic or technological problems)

<sup>60</sup> Oesingmann, 63. Villanueva, 5-6. Naumann, 98 et seq. Kılıç, 11.

<sup>61</sup> Villanueva, 4-6.

<sup>62</sup> Villanueva, 4 et seq.

<sup>63</sup> Villanueva, 4 et seq. OECD-France, 7 et seq.

or not only in terms of special difficult times, but also whether opening clauses that enable workplaces to determine conditions specific to them within a certain level of flexibility would be included in the agreement, whether the principle of favourability for workers would be applied, whether the agreement could be retroactively extended and whether the extended agreement would have any after effects when it expires.

Otherwise, in terms of small workplaces which have limited economic power or newly-founded workplaces that have to make investments a while longer and acquire a permanent position and grow in their sector or those that have to benefit from certain privileges due to their territory; extension, rather than its benefits, will result in high unemployment caused by the process that ends in recession, unfair competition for these workplaces and therefore dismissals which are all in contrast with the actual goal of extension. Under these circumstances, it is obvious that unionisation will also be affected negatively. Due to these reasons, it is clear that these issues should be taken into account while developing the system proposed for our country below.

#### 4. EXTENSION PRACTICES IN EUROPEAN UNION MEMBER STATES

Extension regimes around the world vary based on the principles prevailing in the industrial relations traditions of countries. Legal (automatic) and semi-automatic extension usually stems from prevalent law-making traditions of countries, whereas supportive regimes indicate the importance attached to social dialogue by countries in the past. On the other hand, extension is governed by restrictive regimes in countries which have low unionisation and a view of powerful State.<sup>64</sup>

Under the automatic regime, collective labour agreement parties may request extension or it may be implemented by the Ministry or competent administrative authority without any request. Automatic and semi-automatic regimes are still used in Finland, France and Spain and have been used until 2010 in Greece. On the other hand, in the supportive regime, a request for extension is required from at least one of the parties to the collective labour agreement; however, the conditions prescribed for the application of extension upon this request aim to implement extension as much as possible and do not make it harder to reach this goal. The coverage rate of collective labour agreements in these countries is also high due to this reason. Supportive regimes are applied in Croatia, Slovenia, Germany, Luxembourg, the Netherlands, Portugal (restrictive regime between 2012-2014) and Belgium.

Restrictive regime differs from supportive regime in terms of implementation. This regime also requires an extension request from at least one of the parties to the collective labour agreement; however, there are also some conditions for extension. This limits the implementation of extension and it assumes an exceptional nature. Restrictive regimes are considered to be present in Bulgaria, Czech Republic, Estonia, Hungary and Latvian Republic as well as Romania and Slovakia since 2011, in addition to Ireland and Norway (not an EU member) which implement extension in certain sectors in which foreign workers are widely employed which may cause social dumping.<sup>65</sup> With the exception of Norway, which is not an EU member but mentioned in this study to demonstrate another conclusion, the coverage rate of collective labour agreements does not exceed 50% in any of the countries which apply a restrictive regime. In fact, this rate is below 30% in Lithuania, Latvian Republic, Estonia, Hungary and Bulgaria. The reason for the broad scope of collective labour agreements in Norway is, with the extension practice being an exception, the fact that unionisation rates of workers and employers are 30 to 40% and 60 to 70% respectively and that the *erga omnes* rule is applied.<sup>66</sup> As a

64 Hayter-Visser, 6 et seq.

65 For detailed information, see Hayter-Visser, 6-16.

66 OECD-Annual Report 2017, 164.

matter of fact, in order to have a broad scope of collective labour agreements in a country, either association, especially employers' unionisation rates should be high along with sector-level centralised or sector-workplace level organised decentralised collective labour agreement regimes, or extension mechanisms should be used.<sup>67</sup>

On the other hand, in countries like ours as well as Poland and Lithuania where there is an extension regime but it is not implemented or has been suspended like in Greece, the coverage rate of collective labour agreements drop dramatically. Indeed, this rate is around 9 to 13% in our country, whereas it is around 5 to 10% in Lithuania and 10 to 20% in Poland. As for Greece, suspension of the extension practice started showing its negative impact in terms of the coverage rate of collective labour agreements as the extended agreements started expiring and this rate, which is obviously going to decrease even further, is currently at around 65%.<sup>68</sup>

There are no extension regimes in some EU Member States such as Italy, Denmark, Cyprus, Malta, Sweden or United Kingdom.<sup>69</sup> Moreover, Greece has suspended the extension practice in mid 2011 after signing the Troika Memorandum and has not put it back into practice yet.<sup>70</sup> In Belgium, France, Finland, Luxembourg and Spain on the other hand, extension practices are quite widespread. Romania and Portugal, which are considered in this scope, have been included in the countries where extension is implemented on an exceptional or restricted base respectively since 2012 after the Troika Memorandum. Furthermore, although there is no extension regime in Italy, the minimum wage determined by labour courts on the sector-level is also applied to other employers and this introduces an alternative method for extension. A similar situation is relevant for Austria as well which implements extension in a very restricted manner. Because, in Austria, it is obligatory for employers to be registered in chambers of commerce. Since the chambers of commerce comprise the employers side of sector-level collective labour agreements in Austria, all employers get covered by the collective labour agreements without any extension as they are all registered in the chamber. Extension can be implemented for a very limited number of employers who are not obligated to register in chambers of commerce. Same practice had been present in Slovenia until 2006 when the obligation for employers to register in chambers of commerce was repealed. Therefore, Slovenia has been included among countries with restricted extension since 2006.<sup>71</sup> As such, Lithuania, Poland, Latvia, Hungary and Estonia as well as Romania since 2012, just like our country, are among the countries which have an extension regime but it is almost non-existent in practice.<sup>72</sup>

Before proposing recommendations for an extension model for our country, current extension regimes in EU countries will be briefly reviewed. However, since the extension practices in certain countries such as Portugal, France, the Netherlands, Finland and Germany will be approached with more attention in the recommendations to be developed below for our country, extension regimes of these countries will be elaborated in more detail compared to other EU countries and the fundamental principles and rules about the extension regimes in other countries will be mentioned only adequately. Finland and France are important as they implement automatic and semi-automatic extension regimes respectively but have differences in extension procedures; the Netherlands for being a good example of a supportive regime; and Portugal and Germany for demonstrating the consequences of the legal amendments made about the extension regime.

67 **Schulten**, 2-3. In fact **OECD-Annual Report 2017**, Table 4.10, 164 also clearly demonstrates this conclusion.

68 For detailed information and tables, see **Oesingmann**, 62. **OECD-Annual Report 2017**, 164. **Hayter-Visser**, 10 et seq.

69 Extension practices were not included in the scope of Trade Union Act as well which was recast and entered into force on 01.03.2017, <http://www.legislation.gov.uk/ukpga/2016/15/contents/enacted>. <https://www.eurofound.europa.eu/publications/report/2018/annual-review-of-working-life-2017>

70 [http://cbnarchive.eu/?commit=Search&page=2&query%5Bcountries%5D%5B%5D=Greece&query%5Bfrom\\_date%5D=&query%5Bkeywords%5D=&query%5Bto\\_date%5D=&utf8=%E2%9C%93](http://cbnarchive.eu/?commit=Search&page=2&query%5Bcountries%5D%5B%5D=Greece&query%5Bfrom_date%5D=&query%5Bkeywords%5D=&query%5Bto_date%5D=&utf8=%E2%9C%93)

71 However, as noted above, it is obvious that the obligation to be a member of trade union or professional organisation violates the freedom of not being a member of any organisation/trade union as prescribed in ILO Conventions No. 87 and 98.

72 **Schulten**, 2 et seq. **Hayter-Visser**, 7 et seq. **Eurofound 2011**, 9.

## a. Finland

In Finland, national, sector- and workplace level collective labour agreements are undertaken. Moreover, both workers and employers have high unionisation rates in the country with 60% and 80% respectively. As such, the coverage rate of collective labour agreements in the country is also around 90%. This is primarily caused by the collective labour agreements undertaken on the national and sector-level. However, in addition, extension is an automatic institution in Finland. In other words, no application is required from social parties for extension, only the applicability of the collective labour agreement on the national and sector-level and whether it represents the required majority needs to be determined.<sup>73</sup>

Finland increases the coverage rate of collective labour agreements, which is already high due to the unionisation rate and national and sector-level collective labour agreements, even further via extension. It is indicated that an additional 16% of total labour force was covered by collective labour agreements with the extension practices implemented in 2014.<sup>74</sup> Extension has been governed by law in the country since 1970 and is currently regulated specifically by Act No. 2001/56 Act on Confirmation of the General Applicability of Collective labour agreements.

In the Finnish system, which is referred to as the most flexible model across EU countries,<sup>75</sup> collective labour agreement needs to be representative enough to be able to be extended; however this criterion of *“being representative enough”* is determined according to a couple of alternative situations.<sup>76</sup> First and foremost, collective labour agreement needs to be already covering at least 50% of the workers in the sector to which it will be extended. In this case extension occurs automatically. However, in cases of failure to cover the majority, representativeness of the parties to the collective labour agreement (unionisation rates) or the significance of the collective labour agreement in the past or in practice may be taken into account. Using more than one alternative criteria for determining the extendibility of the collective labour agreement provides discretion over making extension decisions according to the socio-economic conditions of the sector and attributes of collective bargaining and therefore the system is considered to be positive.<sup>77</sup> As a matter of fact, for example in the construction sector and the truck transportation sector, there are mostly small and medium scale employers and therefore the percentage of the workers employed by the employer who signed the sectoral collective labour agreement does not reach 50%, however the commission considered the collective bargaining tradition in these sectors and the 70% association of workers as an adequate reason for extension.<sup>78</sup> There are no separate conditions prescribed for public interest in Finland; however, as mentioned, the commission is provided with discretion. In our opinion, instead of stipulating a direct *“public interest”* criterion in law and allowing it to be used for political purposes, an evaluation by such an independent commission about the criterion of *“having adequate representativeness”* and providing the commission with the opportunity to justify it provides a level of flexibility that will prevent very restricted implementations of extension while also eliminating the *“public benefit”* criterion which may be abused completely in political evaluations. In addition to determining the representativeness of the collective labour agreement, it should also be applicable on the national level and contain provisions that cover the sector in order to be able to implement extension.<sup>79</sup>

73 **Brunn**, 122 et seq. <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Finland/Collective-Bargaining>

74 **OECD-Annual Report 2017**, 142.

75 **Schulten**, 4.

76 **Eurofound 2011**, 5. **Schulten**, 3-4.

77 **Schulten**, 4. **Brunn**, 122-123.

78 **Visser**, 42.

79 **Brunn**, 122.

Since 2001, extension decisions in Finland have been made by a tripartite commission which have been operating under the Ministry of Social Affairs and Health but is an independent commission that is comprised of social parties and the State.<sup>80</sup> The Commission determines whether the aforementioned conditions are satisfied and if they are satisfied, it directly publishes the extension decision on the Ministry website. Employers or employers' organisations may bring an action against this decision at the labour court. Court decision is final. In workplaces covered by extension, workers and employers or workers' unions and employers can only violate the national sector-level collective labour agreement by bringing provisions which are in more favour of workers. Moreover, just like Norway, only the provisions of the national sector-level collective labour agreements that regulate working conditions and wages and other payments of workers, in other words determines the workers' rights, can be extended in Finland. Therefore, obligating provisions or those which bring debt and obligation on workers are governed outside the scope of extension.<sup>81</sup> The reason for this practice is the fact that, as different from the Netherlands or France, extension emerges in Finland and Norway with the goal to equalise working conditions and socio-economic rights and apply the minimum working conditions in the country to all workers without making any distinction between foreigners and citizens and thereby prevent social dumping. On the other hand, in other European countries, extension aims to both equalise rights and ensure labour peace by applying the conditions determined through free collective bargaining to the whole sector. In fact, due to this reason, in EU countries such as the Netherlands and France, in addition to working conditions and wages, there are also provisions included in collective labour agreements on other matters that require funds such as vocational training, occupational safety and health and social security payments and these provisions are also covered by extension. On the contrary, regulations in this regard are not included in the scope of extension in Norway and Finland. Because, the goal of extension in these two countries is only to equalise worker rights and prevent social dumping.<sup>82</sup>

The regime in Finland is considered to be positive in segments in which large scale employers in general and in particular are organised, while it is also criticised since it does not provide any flexibility in favour of small and medium scale employers. This is the case because there are no options or procedures whatsoever for these employers to be exempt from extension within the extension regime of the country. Besides, when social parties to the national sector-level collective labour agreements govern the issues in which provisions in less favour of workers may be prescribed via workplace level collective labour agreements, principle of favourability for workers can only be eliminated by workplace level collective labour agreements. This was criticised by small and medium scale employers. Because, they think that since the worker unionisation rates are low in small and medium scale workplaces, there are no opportunities to engage in collective labour agreements; on the contrary, such workplace level collective labour agreements can be signed in large scale workplaces and therefore the option to deviate from the extended collective labour agreement is actually only provided to large scale workplaces. However, the defence against this criticism argues that the goal is to protect the workers as workplace level collective labour agreements which may emerge at small and medium level workplaces may be under the risk of being dictated by the employer due to the weak worker association.<sup>83</sup>

### b. France

According to 2015 data, France has the highest level of collective labour agreement scope among EU countries.<sup>84</sup> As such, unionisation rate of employers is around 75%. On the other hand, union density of workers is around 8%.<sup>85</sup> This

<sup>80</sup> Visser, 42.

<sup>81</sup> Brunn, 123.

<sup>82</sup> Visser, 47.

<sup>83</sup> For discussions on this matter, see Brunn, 123-124.

<sup>84</sup> EU-Social Dialogue, 12. Oesingmann, 62.

<sup>85</sup> Oesingmann, 62.



high coverage rate of collective labour agreements in France is caused by the workplace level collective bargaining regime; implementation of the *erga omnes* rule (which enables all workers, who work at a workplace belonging to a member of an employers' organisation that signed a collective labour agreement, to directly benefit from the collective labour agreement even if they are not union members); provision of a lot more flexibility to workplace level collective labour agreements achieved through the amendments<sup>86</sup> of 2017 and 2018 in particular on certain matters thanks to organised decentralisation; and the widespread implementation of extension for long years.

Extension is practiced semi-automatically in French law. This regime is described as such because, in addition to the opportunity provided to the parties to the collective labour agreement to lodge an extension request, the Ministry can also initiate an *ex officio* extension process. There are no conditions for the collective labour agreement to represent a certain portion of workers, in other words, about the representativeness of the agreement, for parties to lodge an extension request; however what matters is the "representativeness of parties" who signed the agreement. This is justified by the argument that unions and employers' organisations not only represent the current interests of their own members, but they also play a regulatory role for the whole society.<sup>87</sup> Therefore, what matters in the French collective bargaining system is the success rate of the workers' union in the election among workers in order to be able to sign a collective labour agreement (30%)<sup>88</sup> and that there are no written and reasoned objections against extension from employers organisation(s) which have as their members the employers who employ at least 50% of the workers in that sector (L.2261-24).<sup>89</sup>

Extension, which is governed by Article L. 2261-15 and following articles of the French Labour Code, is a quite widespread practice in France. In addition to extension, the French Labour Code also regulates "*expansion*". "*Expansion*", which is a very exceptional and extraordinary method compared to extension, refers to applying an extended collective labour agreement to other sectors or territories and it is laid down with very severe conditions in the law so that it would only be used as an exception and without violating the right to free collective bargaining.

Extension should be considered separately from expansion and for extension, first the agreement to be extended should be an agreement signed for a sector or profession or multiple professions (L.2261-15). Therefore, extension of workplace level collective labour agreements is not legally possible. As such, the agreement should govern all matters laid down in the Paragraph 1 of Article L. 2261-22 of the Code. A request for the extension of an agreement may be lodged by the parties to the agreement or the Ministry of Labour may initiate an *ex officio* extension process. However, in the end, Ministry of Labour makes the extension decision and this decision is published in the Official Gazette.

Nevertheless, the Minister is not authorised to make a direct extension decision on his/her own. First, the agreement must be discussed at the Commission established with the continuous and equal participation of social parties for each sector pursuant to Article L.2232-9 of the Code and it should be decided that the agreement is suitable for extension. Therefore the extension process begins with the Minister's call for meeting to the commission. Where there are requests from both social parties, joint commission should be called for meeting (L.2261-19). Pursuant to Article L.2261-23, when there are no sectoral collective labour agreements on the national level, in the presence of other conditions, a sector-level collective labour agreement implemented in other territories could be extended to be binding for the workplaces in the same sector but located in other territories. However it is also governed in the same article that under such circumstances, necessary changes would be made on the agreement to be extended.

<sup>86</sup> See Eurofound's explanation on this matter: <https://www.eurofound.europa.eu/publications/article/2017/france-government-unveils-plans-to-reform-labour-laws>.

<sup>87</sup> **Schulter**, 4.

<sup>88</sup> **Schulter**, 4.

<sup>89</sup> Also see: Comparative table, **Hayter-Visser**, 10 et seq. **OECD-France**, 14.

In order for a sectoral collective labour agreement to be extended upon request from one of the parties or by the ex officio action of the Ministry of Labour, it needs to obtain positive and reasoned opinions from both the commission established with the equal participation of social parties as regulated by Article L.2261-19 of the French Labour Code and the National Collective Bargaining Commission laid down in the Article L.2261-15 of the Code. Then, before the extension decision is made, the Minister publishes the opinion on this matter in the Official Gazette. If employers' union(s) which consist of employers who employ at least 50% of workers in that sector lodge a written and reasoned objection within a month following the publication of the extension opinion in the Official Gazette, extension decision is not made. Otherwise, the extension decision is made and enters into force by publication in the Official Gazette.

Pursuant to the Article L.2232-10-1 added via the amendments made in the French Labour Code in 2017, sectoral collective labour agreements can provide flexibility by presenting "*accord type*" options on certain matters to employers with less than fifty workers. Under these circumstances, the employer can unilaterally declare that it has chosen one of the accord types provided that it informs its worker representatives, if any, or else its workers. The same condition is also stipulated in Article L. 2261-23-1 of the Code with the amendment made in 2017 on extended agreements.<sup>90</sup> Moreover, it is clearly laid down in the provision that, in order for the sectoral labour agreement to be extended for employers with less than fifty workers, it should contain accord types that provide flexibility for these employers. Thus, small scale workplaces were provided with flexibility and protection against severe conditions of extension.

The Committee established via the amendment in 2017, which was also recommended in OECD reports<sup>91</sup> and is comprised of experts to evaluate the economic and social consequences of extension is separately governed by Article L.2261-27-1 of the Code. However it is not mandatory to appoint this committee in terms of extension and it depends on the discretion of the Minister or the request from the unions which have representativeness in said sector (30% of the votes in election for workers' union; comprising of employers who employ at least 50% of the workers in the sector for employers' union). Minister is obligated to appoint the experts group if there is a request in this regard.

Article L.2261-25 of the French Labour Code regulates the conditions under which the Minister can reject an extension request. Accordingly, the Minister, after obtaining the reasoned opinion of the National Collective Bargaining Commission, can reject the request to extend a collective labour agreement on the basis of having unlawful provisions; while also being authorised to reject extension that violate "*general interests - intérêt général*" such as free competition conditions or the political goals in that sector. Similarly, rather than rejecting the extension of the whole collective labour agreement, the Minister can also decide on an extension in a way that will not affect the general contents of the collective labour agreement, provided that provisions that can be excluded from the agreement remain separate. Nevertheless, according to the OECD report, extension requests are usually accepted in France and those rejected are not accepted based on unlawfulness rather than socio-economic reasons.<sup>92</sup>

Finally, we believe that it is also necessary to mention the "*expansion*" practice governed by Articles L. 2261-17 and 2261-18 of the French Labour Code. Expansion practice, which has a higher probability of violating the free and voluntary collective bargaining principle compared to extension and is therefore implemented as an exceptional method, enables the Ministry of Labour to expand all or certain parts of a previously extended sectoral or interprofessional collective labour agreement, ex officio or upon request from relevant workers' or employers' unions with representativeness (workers: 30%, employers: 50%) and provided that more than half of the members of National Collective Bargaining Commission does not give a negative opinion, to another territory or another sector or to another professional branch which is not covered by the interprofessional agreement. It is clearly governed in the Code that in order for an agreement to be expanded to another territory or sector, territory or the sector of the agreement to be expanded should have attributes similar to the territory or sector subject to the expansion.

<sup>90</sup> As a matter of fact, it was previously pointed out that such a change was necessary to protect small-sized workplaces against negative conditions of extension, **OECD-France**, 6.

<sup>91</sup> **OECD-France**, 9 et seq.

<sup>92</sup> **OECD-France**, 6.

Furthermore, certain extraordinary conditions are required for the expansion practice. These two provisions of the Code base expansion on the failure to make the collective labour agreement despite all efforts. In this regard, in cases when the association required for a collective labour agreement is lacking or failing to exist in a certain sector, territory or profession which refers to the failure to sign collective labour agreements for at least five years or to change the existing signed agreement for at least five years, it becomes possible to expand the collective labour agreement to other territories, sectors or professions. As is seen, these conditions are extraordinary and only under these conditions can an agreement not concluded for that field (profession, sector or territory) be expanded to another field (profession, sector or territory) with similar conditions yet being foreign. As regulated by Article 4 of ILO Convention No. 98, just like making collective labour agreements, the failure or inability to make them is also a consequence of the free and voluntary operation of the collective bargaining process by social parties. Therefore the Code stipulates a condition of five years even for the inability to make collective labour agreements so that the free and voluntary collective bargaining principle is not violated. As a matter of fact, expansion poses a threat against unions that struggle to operate in that field and parties show effort to sign collective labour agreements due to the pressure that a collective labour agreement from other field will be expanded to cover them. Therefore, expansion is considered as a practice that encourages social parties to engage in collective labour agreements.<sup>93</sup> Finally it should be noted that, when an extended or expanded collective labour agreement expires in France, it does not have any after effects for the workplaces to which it was extended and also there are no retroactive extensions.

### c. The Netherlands

Extension of collective labour agreements is based on the criterion of either the representativeness of the collective labour agreement or the parties to the collective labour agreement. Representativeness of the collective labour agreement was laid down as the primary criterion by the amendment in 2012 in Portugal, whereas the representativeness of the parties to the collective labour agreement was added as an alternative criterion by the amendment in 2014. As mentioned above, in France, what matters is the representativeness of the parties to the collective labour agreement. As for the regime in the Netherlands, in contrast with France, Belgium, Spain and other Western European countries<sup>94</sup>, representativeness of the collective labour agreement requested to be extended is regarded as the criterion. Moreover, the doctrine states that taking into account the representativeness of the parties to the collective labour agreement rather than the collective labour agreement itself is a method that facilitates extension since achieving 50% worker coverage, which is usually the percentage prescribed in terms of the representativeness of collective labour agreements, is usually a difficult condition to fulfil.<sup>95</sup>

The collective bargaining system in the Netherlands is based on organised decentralisation. Employers' unionisation rates are around 80 to 90% with workers' around 10 to 20%; whereas collective labour agreements cover around 80 to 90% of the workers in the country.<sup>96</sup> The reason for such a high coverage rate of collective labour agreements in the Netherlands is the very high association rate of employers, the fact that many agreements are signed on the sector-level and the presence of the *erga omnes* rule.<sup>97</sup> Thus, the collective labour agreements signed by employers' unions can be applied directly at the workplaces belonging to member employers.<sup>98</sup> However, in addition, extension is also implemented widely in the Netherlands.<sup>99</sup>

93 **Sur**, 120.

94 **Schulten**, 3-4.

95 **Schulten**, 2-5.

96 **OECD-Annual Report 2017**, 164. Also see: <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Netherlands/Collective-Bargaining>

97 **Hijzen-Martins-Parlevliet**, 10.

98 <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Netherlands/Collective-Bargaining>

99 **Hayter-Visser**, 11.

It is pointed out that in the Netherlands, a total of 701 collective labour agreements registered at the Ministry of Labour in 2013 covered 84% of workers; these agreements were about wages and working conditions; 182 of them were on the sector-level and covered 82% of workers whereas 519 agreements were on the workplace level and only covered 7.8% of workers. Moreover, it was indicated that signatories of workplace level collective labour agreements in Netherlands were large employers such as Philips and Shell and also workplace level collective labour agreements were signed within the framework drawn by sector-level collective labour agreements.<sup>100</sup>

There are no special authorisation thresholds stipulated in the Netherlands for workers' unions or the employers side (union or the employer itself) to sign collective labour agreements. If the workers' union is vested with legal personality and authorised in its internal regulations to engage in collective labour agreements, it is able to engage in collective bargaining with the employer. Therefore, collective labour agreements are signed upon the agreement between the workers' union and the employer with their own free will. The "*erga omnes*" rule is applied in the country, which means that employers are obligated to apply the provisions of a sector or workplace level collective labour agreement signed by the union of which they are a member, also to workers who are not union member. This results in an expansion of the scope of the collective labour agreement and moreover, upon a request from one of the parties to the agreement and a non-binding opinion from the "*Bipartite Council*", the agreement can also be extended to other employers in the sector which are not members of the employers' organisation that is a party to the agreement, with a decision by the Ministry of Labour.

This enables the coverage rate of collective labour agreements to reach 84% across the country. However, as mentioned above, the primary and essential reason for this wide scope of collective labour agreements in the country is the high unionisation rates of employers and the sector-level agreements as well as the *erga omnes* rule; extension is only a practice that increases the coverage rate of collective labour agreements even further as the final step. According to the OECD data of 2015, percentage of workers covered additionally due to extension constitute 9.3% of all workers.<sup>101</sup> Obligating provisions of collective labour agreements are excluded from extension in the country, whereas provisions regulating the obligations of workers and employers towards their organisations can be included in the scope of extension.<sup>102</sup> However, as different from Norway and Finland, provisions of the extended agreement that provide rights to workers as well as those that impose debts or obligations are also automatically included in the scope of extension in the Netherlands; only the provisions that result in discrimination among the members of the workers' union and those who are not are excluded from extension and therefore the freedom not to become a member of a union (freedom of negative association) is protected.<sup>103</sup>

In extension practices, countries usually require the collective labour agreement requested to be extended to cover a certain percentage of workers or, the parties to the agreement to represent a certain percentage of workers; whereas others resort to the "*public interest*" criterion in addition to the mentioned representativeness criterion or as separately from it (e.g. France<sup>104</sup>). The public interest criterion is not a widely used method since it can be used for political

<sup>100</sup> <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Netherlands/Collective-Bargaining>

<sup>101</sup> **OECD-Annual Report 2017**, 142.

<sup>102</sup> **Visser**, 45.

<sup>103</sup> **Visser**, 46.

<sup>104</sup> Ministry of Labour of France is vested with the right to reject extension requests which he/she deems as not in general interest pursuant to Article L.2261-25 of the Law. This provision which stipulates that general interest particularly refers to conditions of competition was amended in 2017 and in addition to conditions of competition, political goals in that sector were also added. However it is pointed out that extension is never rejected on the basis of these reasons in France and the failure to use this provision is criticised, **OECD-France**, 6. In fact, this criticism was taken into account and via the amendment in French Labour Code in 2017, it was regulated that a committee of experts would be appointed to evaluate the socio-economic consequences of extension upon the request from the Minister (L.2261-27-1).

purposes and it is difficult to determine its scope.<sup>105</sup> However, the public interest criterion can be used separately in the Netherlands while deciding for extension.<sup>106</sup> Despite the requests from politicians in this regard, the Ministry of Labour does not resort to the public interest (general interest) criterion very often in order to avoid any harm on the autonomy of social parties and the free collective bargaining system.<sup>107</sup> However, the Ministry sometimes feels the need to explicitly or implicitly remind social parties of the public interest criterion to prevent collective labour agreements from bringing heavy financial burdens and thereby aims to achieve reasonable agreements by creating a threat that the agreement to be signed may not be extended in the future.<sup>108</sup>

The essential matter of consideration in the Netherlands for deciding on extension is whether the collective labour agreement requested to be extended is covering the “*meaningful majority*” of workers in that sector. Meaningful majority is defined by the Ministry of Labour of the Netherlands as employers who are members of employers’ union member and employ at least 60% of the workers in the sector.<sup>109</sup> In addition, when the need for extension in that sector as well as the socio-economic conditions require, 55% is also accepted as meaningful majority. However, when required by public interest, Ministry of Labour can also make an extension decision for collective labour agreements that cover 50 to 55% of workers.<sup>110</sup>

The practice in the Netherlands provides workplaces with a certain level of flexibility in sector-level collective labour agreements and their extension. Flexibility is provided within the country practices by either being completely or partially exempt from extension or by incorporating temporary opt-out clauses or permanent opening clauses in the collective labour agreements.<sup>111</sup> Permanent opening clauses are not allowed in the Netherlands but the issues that can be governed by workplace level collective labour agreements are determined in the workplace level collective labour agreement by social parties by definitely providing for a lower limit<sup>112</sup> and temporary opt-out clauses can only be stipulated in sector-level collective labour agreements during times of economic crisis. Temporary opt-out clauses may be governed by suspending certain provisions of the collective labour agreement or by making these provisions subject to collective bargaining again.<sup>113</sup>

Through an amendment made in 2014 in the Netherlands, the condition was added to the conditions for extending workplace level collective labour agreements that the conditions and procedures of being exempt from extension must be objectively and clearly governed in the agreement.<sup>114</sup> Therefore, it is mandatory for the employer to have signed a workplace level collective labour agreement in order to be exempt from extension.<sup>115</sup> Moreover, employers hold the right to lodge a request to the Ministry of Labour to be excluded from the scope of extension after the extension decision is made. However, in such a case, the employer must have a workplace level collective labour agreement it has signed with a workers’ union and also prove that extension conditions are in line with its workplace conditions and

105 **OECD-Annual Report 2017**, 144.

106 **OECD-Annual Report 2017**, 143-144. **Hayter-Visser**, 11.

107 **Hijzen-Martins-Parlevliet**, 11.

108 **Hijzen-Martins-Parlevliet**, 11.

109 **Schulten**, 3. **Hayter-Visser**, 11. **OECD-France**, 15. **Hijzen-Martins-Parlevliet**, 11. **Visser**, 39.

110 **Visser**, 39. **Hijzen-Martins-Parlevliet**, 11.

111 **OECD-Annual Report 2017**, 149.

112 **Visser**, 57.

113 **OECD-Annual Report 2017**, 149.

114 **Hijzen-Martins-Parlevliet**, 13.

115 **Visser**, 44-45.

therefore justify being exempt from extension. While having signed workplace level collective labour agreements used to be enough to benefit from this facility until 2007, an obligation was imposed with the amendment made in 2007 to also prove reasoned justifications for exemption. This is the case because during the time period up to 2007, employers have been observed to abuse this provision and sign very fast workplace level collective labour agreements which they have dictated to benefit from this exemption using yellow unions.<sup>116</sup> The Ministry has rejected 77 of a total of 191 exemption applications between 2007-2015.<sup>117</sup>

Furthermore, the principle of favourability for workers in the Netherlands, in other words the rule that the provisions of sectoral collective labour agreements cannot be amended to the detriment of workers using workplace level collective labour agreements or individual employment contracts, is left to the discretion of social parties. Therefore, in sector-level collective labour agreements in the Netherlands, lower limit is determined in terms of working conditions and wages and other payments which can be decided via workplace level collective labour agreements which are at a low level across the country with 8% as well as frequently signed individual employment contracts and it is prohibited to determine working conditions and payments worse than the lower limit set in the sector-level collective labour agreement. Therefore, the principle of favourability for workers in the Netherlands as well as its limits, fields of application and the conditions for extension and being exempt from sectoral collective labour agreements are all left to the discretion of social parties.<sup>118</sup> Although there is the opportunity to engage in workplace level collective labour agreements in the country, the fact that there is room for regulation for workplace level collective labour agreements as much as there is for sector-level collective labour agreements indicates clearly that there is organised decentralisation.

An exemplary practice from the Netherlands to show other countries in terms of flexibility in extension is the two separate sectoral collective labour agreements in the metallurgy sector. Two separate sectoral collective labour agreements were signed in the country for employers in the metallurgy sector with less than 35 workers and with 35 or more workers and then these agreements were extended. In fact, in the OECD report, it was pointed out that France also needs to provide such flexibility via reforms it is going to undertake and making distinctions based on the size of employers, their seniority in the sector as well as their territory should be allowed.<sup>119</sup> In fact, via the amendments made in 2017 in the French Labour Code, a condition was added on incorporating derogating provisions both in the sector-level collective labour agreement and the agreement to be extended, for employers with less than fifty workers. Finally, it should be noted that, extended collective labour agreements in the Netherlands are considered not to have any after effects for the workplaces to which they were extended. As such, they are also not implemented retroactively.<sup>120</sup>

### d. Portugal

Portugal, which was one of the countries that signed the Troika Memorandum after the 2008 economic crisis, made a commitment in this regard to also make reforms about the extension of collective labour agreements and made the extension conditions heavier via the reform of 2012. Extension practices were suspended in June 2011 after the Troika Memorandum and were recast by the reform of 2012 and then amended in 2014 and finally by the Law No. 82/2017 of 18.5.2017.<sup>121</sup>

<sup>116</sup> Visser, 45. Hijzen-Martins-Parlevliet, 12-13 and 20.

<sup>117</sup> Hijzen-Martins-Parlevliet, 13.

<sup>118</sup> Hijzen-Martins-Parlevliet, 11-15. OECD-Annual Report 2017, 140-151.

<sup>119</sup> OECD-France, 11.

<sup>120</sup> Hijzen-Martins-Parlevliet, 18-21.

<sup>121</sup> <https://www.eurofound.europa.eu/publications/article/2017/portugal-latest-working-life-developments-q2-2017>.

Until the reform of 2012, there were no conditions for the implementation of extension such as a certain level of representativeness of parties to the agreement to be extended (representativeness of the parties) or a certain level of coverage of the agreement in terms of workers (representativeness of the agreement). As such, during that time, there were no thresholds for social parties to sign collective labour agreements either. Therefore, any willing workers' union had the opportunity to sign collective labour agreements with employers or employers' organisations.<sup>122</sup> In the Portuguese system, which stipulates no threshold for the authorisation for collective labour agreements, similar lack of a threshold for extension resulted in the extension of collective labour agreements signed even by unions without any representativeness to other workers and employers in that sector. This caused the emergence of a legitimacy problem for extended agreements.<sup>123</sup> During this time period, just like the extended agreements, the decision for extension used to be published in the Official Gazette as well by the General Directorate of Labour Relations and Employment under the Ministry of Economy and Employment and enter into force. An extension request from any of the parties to the agreement published in the Official Gazette was deemed sufficient for an extension decision, provided that the agreement requested to be extended had no unlawfulness. However, workers' unions or employers which were not parties to the agreement had the option to request an exemption from extension from the Ministry. Since there were no special conditions prescribed in this regard, such requests from employers or workers' unions were accepted by the Ministry. However, there have been only a few requests for exemption in Portugal. In this semi-automatic regime, the coverage rate of collective labour agreements in Portugal were around 50% in 2010. This was also caused by the fact that employers in Portugal preferred the opt-in method in which they implemented the sector-level collective labour agreements to their workers with their own initiative even without extension.<sup>124</sup> However, after the reform in 2012, the coverage rate of collective labour agreements dropped down to 8% in 2013.<sup>125</sup>

Since the employers who were motivated to sign and implement collective labour agreements in Portugal were the organised employers, a threshold practice was first introduced by the reform in 2012 for extension by taking into account the coverage rate of the collective labour agreements signed by employers' organisations rather than those by workers' organisations.<sup>126</sup> According to the amendment made pursuant to Law No. 2012/90, in order for the parties to the collective labour agreement to request extension, employers who are members of employers' organisation that signed the collective labour agreement must be employing more than 50% of the total labour force in that sector or if this condition is not satisfied, then the extension request should exclude the small and medium scale employers in that sector.<sup>127</sup> Suspension of the extension practice in 2011 and the severe extension conditions imposed by the reform of 2012 dramatically decreased the motivation of employers to sign collective labour agreements as they thought the non-extended agreements would cause unfair competition against them and therefore the rate of signing collective labour agreements and thereby the coverage rate of collective labour agreements dropped significantly.<sup>128</sup>

In June 2014, due to the pressure from employers' and workers' unions, another reform was made via Law No. 2014/43 and an alternative was incorporated in addition to the 50% threshold as having 30% small and medium scale employers as members for employers' organisations which failed to pass this threshold. As a result, the ratio of extended collective labour agreements over total number of collective labour agreements increased to 26% in

<sup>122</sup> Naumann, 98.

<sup>123</sup> Naumann, 98.

<sup>124</sup> Naumann, 98-102. Hijzen-Martins-Parlevliet, 10 et seq.

<sup>125</sup> Naumann, 102.

<sup>126</sup> Naumann, 101.

<sup>127</sup> Naumann, 105-106. Hijzen-Martins-Parlevliet, 10-17.

<sup>128</sup> Naumann, 106-107. For example, while 50% of all collective labour agreements in the country were being extended in 2010, this rate dropped down to 10% in 2012. For a detailed table by years, see Naumann, 99. Also see OECD-France, 8-9.

2014. This was the case because it was very easy to fulfil the second alternative condition in the country.<sup>129</sup> Moreover, evaluations on this progress conducted in the doctrine point out that the changes made in Portugal called as reforms were imposed by outside forces in a way not suitable for the conditions of the country and therefore were not even capable of reaching the goals of adapting existing agreements to current conditions, providing flexibility for wages in line with the requirements of the sector and decentralisation of collective labour agreements; on the contrary, they made the collective bargaining system weaker and froze the wages and these should not be the results expected from reforms.<sup>130</sup> As such, it was also pointed out that, in order to base extension applications and results on a more transparent and therefore legitimate ground, it would be more appropriate for parties requesting the extension to separately demonstrate their representativeness and to publish this in the Official Gazette as attached to the extension decision and this would provide a more legitimate and transparent extension procedure.<sup>131</sup>

In order for an extension system to succeed in a country, it needs to create more benefits compared to the unemployment therefore the harm it causes; however while doing so, it should interfere with the autonomy of collective labour agreements as little as possible. Therefore, conditions for extension should be determined by taking into account the conditions of the country and in a “*sufficiently and necessarily severe*” manner.<sup>132</sup> To this end, extension conditions were amended once more in Portugal in 2017 and an evaluation by the committee, which was established by the last legal amendments and prescribed to be appointed permanently, was stipulated before deciding on extension.

This extension procedure was introduced by Law No. 82/2017 effective from 18.05.2017. The aim of the last amendment was to put into practice the Constitutional rule known as social justice, gender equality and equal pay for equal work of collective labour agreements. Accordingly, the extension decision will no longer be taken only by the General Directorate of Labour Relations and Employment under the Ministry of Labour but by a permanently appointed technical committee that is comprised of this general directorate as well as the Strategy and Planning Office from the same Ministry. Extension decision must be made and enter into force within 7 weeks (35 days) following the date of the request including the technical evaluation and the process of publication in the Official Gazette. Criteria for the extension decision to be considered from now on are the impact of extension on wages and the economy, its contribution in wage increases, impact on the wage scale, impact on reducing unemployment, worker percentages to be covered by the scope of the extension in total and as disaggregated by gender as well as the rate of women’s utilisation of the extension.<sup>133</sup> Finally, it should be noted that, in Portugal, considering the heavy financial burden caused by retroactive implementation of extended agreements on small or newly-founded workplaces, this retroactive extension practice was also abolished by the amendments made in 2012.<sup>134</sup> However, extended or not, all collective labour agreements have after effects for 12 months unless decided otherwise in the agreement.<sup>135</sup>

### e. Germany

Unionisation rate of workers varies between 10 to 20% in Germany, whereas the employers’ unionisation rate is around 50 to 60%. The coverage rate of collective labour agreements in the country is around 50 to 60% as of 2015.<sup>136</sup> Moreover, a new union membership type has recently emerged in Germany in which employers are able to maintain

129 Naumann, 108-109.

130 Naumann, 111.

131 Naumann, 113.

132 OECD-France, 8-9.

133 <https://www.eurofound.europa.eu/publications/article/2017/portugal-latest-working-life-developments-q2-2017>. Naumann, 112.

134 Hijzen-Martins-Parlevliet, 20.

135 Hijzen-Martins-Parlevliet, 18-19.

136 OECD-Annual Report 2017, 164.



their union membership without being bound by sector-level collective labour agreements. This practice is caused by employers' tendency to quit union membership in order to be excluded from the scope of sector-level collective labour agreements. Despite this option, union memberships have started decreasing among employers in Germany. In addition, since employers have lost their motivation to sign collective labour agreements as well, there has been a significant shrinkage regarding the scope of collective labour agreements in the country. The coverage rate of collective labour agreements in Western Germany dropped from 70% in 1996 to 52% in 2013. As such, extension practice is also implemented at a very low level.<sup>137</sup> Therefore, a legal amendment has been undertaken in 2015 and eased extension conditions; however it became mandatory to have requests from both social sides in order to engage in extension.

Collective labour agreement level in Germany can be sector or workplace level. However, sector-level collective labour agreements constitute the majority and can be subject to extension. These sector-level collective labour agreements usually have a regional nature. National level sectoral collective labour agreements are very rare in Germany. As such, due to the principle of favourability for workers in Germany, lower level collective labour agreements or the agreements signed with worker councils can provide provisions which are more in favour of workers. However, in order for workplace level collective labour agreements or the agreements signed with worker councils to violate the sector-level collective labour agreements to the detriment of workers, such an authority should be provided by the sector-level collective labour agreement. Such temporary opt-out provisions are prescribed for and implemented during times of economic crisis. In addition to these, a rule has been put into practice by the amendment in the Collective Bargaining Law in 2015 which stated that employers would be bound by only one collective labour agreement for a certain group of workers. Accordingly, if workers' unions do not act together and fail to sign a single collective labour agreement with the employer and the signed agreements conflict with each other, it is clearly governed in the law that the agreement signed by the union with the highest number of workers as its members will be applied. In the action for annulment brought claiming that this was against the Constitution, the Constitutional Court ruled in July 2017 that said provisions were not against the Constitution however the legal measures required for protecting the right to collective bargaining and strike of small professional groups and workers' unions should be taken by the end of 2018.<sup>138</sup>

Germany is the first country in the EU to regulate national level extension in its Collective Bargaining Law of 1918. However, the *erga omnes* rule accepted in many EU countries is not recognised in the German law. Despite the absence of the *erga omnes* rule, employers in Germany apply the provisions of collective labour agreements to all workers de facto whether they are union members or not. Since the mid-2000s, as the number of workers covered by collective labour agreements decreased, solutions were sought and at first efforts were made to provide workers unions with the power to persuade employers to sign collective labour agreements; however when this ended in failure, legal amendments were stipulated in this regard in the light of the experiences of other European countries where extension practices were widespread. While a request from one of the parties to the agreement and the *predominant importance* of the agreement used to be enough for extension in the Collective Bargaining Law of 1918, extension was re-arranged by Article 5 of the new Collective Bargaining Law which entered into force in 1949. Accordingly, in order for a sector-level collective labour agreement to be extended on a national or regional level, collective labour agreement should be covering at least 50% of the workers in that sector and extension should be accepted by the majority of votes at the Bipartite Collective Bargaining Committee. Committee is comprised of three representatives each from the workers' and employers' unions in the country with the highest number of members. Since the majority of votes is required in the committee with three representatives each, social parties are provided with the *de facto* power to veto

<sup>137</sup> See <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany/Collective-Bargaining>. **Schulten**, 3 et seq. **Same author**, Germany, 66 et seq. **OECD-France**, 14. **Hayter-Visser**, 11

<sup>138</sup> <https://www.eurofound.europa.eu/publications/report/2018/annual-review-of-working-life-2017>. <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany/Collective-Bargaining>

the extension. In addition, despite not being stipulated by law, Ministry of Labour *de facto* seeks for public interest before deciding on extension.<sup>139</sup>

Furthermore, wage imbalance in the country as well as the decrease in the coverage rate of collective labour agreements in time resulted in a need to make a change in extension rules and the amendment made in 2015 lightened the conditions of extension. Because, social parties argued that a legal minimum wage determined by means other than collective labour agreements was against the right to free collective bargaining.<sup>140</sup> Therefore, after lightening of extension conditions was brought up in the agenda, various bills were put forward. Since the employers' union memberships have also decreased since mid-2000s, it became very difficult to fulfil the condition prescribed for extension requiring the employment of at least 50% of the workers in that sector and extension could not be implemented. In this regard, the first step was to eliminate this condition. Another issue that hindered the application of extension was the composition of the committee and the employers' power to veto with the majority of votes. Since 2000, every year, 18% of extension requests have been rejected solely based on this reason. Also 30% of applications were cancelled to avoid vetoes. Therefore, many workers who could have benefited from collective labour agreements within the scope of extension were deprived of this opportunity. While workers' unions argued for the facilitation of extension during the reform process, employers' unions argued that dissemination of extension would cause an intervention in the right to free collective bargaining and decrease the association of workers and employers and therefore extension should be an exception rather than a rule.<sup>141</sup>

Article 5 of the Collective Bargaining Law was amended in July 2014. This amendment aimed to support the extension system to strengthen the autonomy of the collective labour agreements and the collective bargaining system and ensure that minimum wage is determined by social parties rather than laws on the national level. Therefore, 50% threshold required for extension was abolished and instead the public interest criterion was put into practice. The presence of public interest is accepted when the collective labour agreement to be extended has predominant importance, in other words, when the percentage of workplaces in which the agreement is considered *de facto* is high within the sector or when extension is required to prevent undesirable economic consequences or when there is a need to combine social funds on the sector-level.<sup>142</sup> Elimination of the threshold and determination of the limits of the concept of public interest in the law provided the Ministry of Labour with more flexibility to make the extension decision. However, while the condition which stipulates that extension must be accepted by the majority of votes at the Collective Bargaining Committee was not abolished, in fact, another obligation was imposed that requires requests from both parties for extension.<sup>143</sup>

Despite the reform, there have been no major changes in the coverage rate of collective labour agreements. This is considered to be caused essentially by the *de facto* implementation of the 50% threshold by the Ministry of Labour while also using the public interest criterion. However, in addition, another main reason for this is the employers' unilateral right to veto in the Collective Bargaining Committee and the fact that they keep using it constantly. Even when employers' organisations in Germany that have signed the sectoral collective labour agreement and operate at the sector-level lodge a request for extension, regional level employers' organisation representatives in the committee use their right to veto and hinder extension. In contrast with the employers' supportive opinions regarding extension in EU Member States where sector-level collective labour agreements are signed, this opposite tendency of employers

139 Schulten, Germany, 71-72. Eurofound 2011, 6.

140 Schulten, Germany, 79-80.

141 Schulten, Germany, 82-83.

142 Schulten, Germany, 83. Same author, 3-4. OECD-France, 14.

143 Schulten, Germany, 83-84. Same author, 3-4. OECD-France, 14.

in Germany is caused by the opportunity to become union members without being bound by the agreements signed by the union which is called by employers' unions as OT membership. Therefore extension has a completely opposite nature compared to this membership system and serve completely opposite purposes.<sup>144</sup>

Due to these reasons, workers' unions in Germany point out that there is need for change regarding three issues in order to disseminate extension practices. First is to make the "public interest" concept more concrete and cease the de facto implementation of the threshold. To this end, the "predominant importance" concept should be completely eliminated and the basis for public interest should be whether equitable working conditions are provided and whether the permanence of the collective bargaining system is ensured. This matter is mentioned in the doctrine and it is stated that numbers should no longer be taken into account in terms of the representativeness of collective labour agreements and the necessity for extension.<sup>145</sup> Moreover, workers' unions also argue that committee's right to veto should be abolished and this will automatically increase the extension requests. Finally, workers argue that employers' unions should eliminate the OT membership and that the only way to widen the scope of collective labour agreements is to abandon this approach.<sup>146</sup>

Extension of sector-level collective labour agreements in Germany can be implemented on federal or regional level. As such, there might be temporary opt-out provisions in the agreement which are prescribed for times of economic problems as well as opening clauses. When opening clauses are included in the agreements, changes can be made in contradiction with the agreement and to the detriment of workers via not only workplace level collective labour agreements but also the agreements signed by worker councils with employers.<sup>147</sup>

#### f. Austria

The unionisation rate of workers varies between 20 to 30% in Austria, whereas the unionisation rate of employers as well as the coverage of collective labour agreements is around 90 to 100%.<sup>148</sup> Extension is applied in a very limited manner in Austria. This is the case because employers in this country are obligated to register in the chambers of commerce and the fact that sector-level collective labour agreements are signed between chambers of commerce and workers' unions makes extension almost unnecessary. Since employers are registered in chambers of commerce by obligation, they are automatically covered by the signed sector-level labour agreements and they have to implement the agreement at their workplaces. Moreover, since the *erga omnes* rule is implemented in the country, employers are obligated to apply a collective labour agreement signed by the chamber of commerce of which they are a member, to all workers at their workplaces.<sup>149</sup> On the other hand, extension can be used for a few professions and sectors in which there is no obligation to register in chambers of commerce. A request is required from one of the parties to the collective labour agreement to do so and the committee comprising of worker-employer and State representatives should make the extension decision. Collective labour agreement should be covering at least 50% of the workers in that sector (predominant importance) in order to make this decision, however the public interest criterion is not considered additionally.<sup>150</sup>

144 **Schulten**, Germany, 85.

145 *Preis and Peramoto*, **Schulten**, Germany, 86.

146 **Schulten**, Germany, 86.

147 <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany/Collective-Bargaining>

148 **OECD-Annual Report 2017**, 164.

149 **OECD-Annual Report 2017**, 141. **Schulten**, 2 et seq. **Hayter-Visser**, 10.

150 **Hayter-Visser**, 10. **CESifo**, 1. **Schulten**, 2.

### g. Belgium

In Belgium, where the extension system is widely implemented and 14% of workers<sup>151</sup> were additionally covered by collective labour agreements via extension according to the OECD data of 2013, unionisation rate of workers and employers is around 50 to 60% and 80 to 90% respectively and the coverage of collective labour agreements is around 90 to 100%.<sup>152</sup> Collective labour agreement level in Belgium is primarily national. The national level collective labour agreement which covers all private sector workers is done biennially whereas workplace level collective labour agreements are also signed. Workplace level collective labour agreements are also allowed and these agreements can stipulate provisions on matters not governed by higher level agreements.<sup>153</sup> As such, sector-level agreements can also be signed within the limits allowed by the national collective labour agreement. Moreover, since the principle of favourability for workers is implemented in Belgium, lower level agreements can put forward regulations that are more in favour of workers.<sup>154</sup> As such, since the *erga omnes* rule is also implemented in the country, the rate of utilisation of workers of the signed collective labour agreements is high even without extension and even if they are not union members because their employers are union members. Extension increases the coverage of collective labour agreements by an additional 14%.<sup>155</sup>

There must be a request from the parties to the sectoral collective labour agreement for an agreement to be extended in Belgium. Moreover, sector-level collective labour agreements in the country are drafted within groups which are called “*joint industry committees*” and comprised of representatives from top three workers’ and employers’ organisations with the highest number of members and are binding for the whole sector as well as its sub-sectors.<sup>156</sup> This committee or a union or workers’ organisation which have representatives in this committee can also lodge a request for extension. Since the request is lodged by one of the unions or employers’ organisations with the highest number of members or the parties to the agreement or the committee, there are no additional investigations of representativeness and the extension is implemented via the enforcement body without examining public interest either.<sup>157</sup>

### h. Bulgaria

In Bulgaria, where the unionisation rate of workers is around 20%, coverage of collective labour agreements is approximately 30%.<sup>158</sup> While both workplace and sector-level collective labour agreements can be signed in the country, recently, workplace level labour agreements became particularly prominent. However, extension is almost non-existent in the country. Until the legal amendment in 2012, it used to be necessary for all workers’ and employers’ unions to sign the sector-level labour agreement in order for the Ministry to make an extension decision and both parties had to lodge requests for extension.<sup>159</sup> The representativeness criterion was eased with the amendment in 2012 and it was considered acceptable for the workers’ union-confederation to cover 25% of workers in the sector instead of 50% in order to sign a sectoral collective labour agreement.<sup>160</sup>

151 OECD-Annual Report 2017, 142.

152 OECD-Annual Report 2017, 164.

153 <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Belgium/Collective-Bargaining>

154 OECD-Annual Report 2017, 149.

155 OECD-Annual Report 2017, 141 et seq.

156 Eurofound 2011, 4. <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Belgium/Collective-Bargaining>

157 Hayter-Visser, 11. Eurofound 2011, 4. CESifo, 1.

158 EU-Social Dialogue, 12. <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Bulgaria>

159 CESifo, 1. Hayter-Visser, 13. <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Bulgaria/Collective-Bargaining>

160 <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Bulgaria/Trade-Unions>

### i. Czech Republic

Although the unionisation rate of employers in Czech Republic is around 60 to 70% and the *erga omnes* rule is implemented, the coverage rate of collective labour agreements varies between 40 to 50%.<sup>161</sup> Collective bargaining level is both sector- and workplace level whereas the principle of favourability for workers is also accepted.<sup>162</sup> Extension is used as an exception. The ratio of workers who were covered by collective labour agreements via extension over the total labour force in 2013 was 5.7%.<sup>163</sup>

Extension decision is made by the Ministry of Labour and Social Affairs in Czech Republic. However, for such a decision, workers' and employers' unions with the highest number of members in the sector to be subject to extension must lodge a joint request. Extended collective labour agreements are not applied to employers with less than 20 workers even when they are in the same sector. Due to the severity of these conditions, extension is only implemented in a limited way in construction, textile, leather, glass and porcelain sectors in the country.<sup>164</sup>

### j. Estonia

In Estonia, where the unionisation rate of employers is around 20 to 30%, unionisation rate of workers is less than 5% with collective labour agreement coverage around 10 to 20%.<sup>165</sup> Collective bargaining level in Estonia is mostly workplaces. Therefore, workplace level collective labour agreements signed between workers' unions and employers are implemented. However, it is also possible to make national and sector-level collective labour agreements.<sup>166</sup>

Extension is implemented very exceptionally in Estonia. As a matter of fact, collective labour agreements were extended only in four sectors between 2004-2008.<sup>167</sup> If there is an opening clause in the sector-level collective labour agreement for extension, Ministry of Labour automatically makes the extension decision; however if there is no such provision, extension decision can only be made upon a request from one of the parties to the sectoral collective labour agreement. However, the collective labour agreements to be extended must be about wages, working conditions and resting periods. Since the sector-level collective labour agreements are recently only made in healthcare and transportation sectors, extension is also implemented only in these sectors.<sup>168</sup>

### k. Croatia

Extension is widely implemented in Croatia, where the unionisation rate of workers is 35% and the collective labour agreement coverage is 61%. Nevertheless, since the collective labour agreements in the country are not officially recorded, this rate of 61% was determined based on the public opinion polls. Principle of favourability for workers is implemented between workplace and sector-level labour agreements and employment contracts in Croatia.<sup>169</sup>

161 OECD-Annual Report 2017, 141, 164.

162 OECD-Annual Report 2017, 149. Eurofound 2011, 4.

163 OECD-Annual Report 2017, 142.

164 <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Czech-Republic/Collective-Bargaining>. Eurofound 2011, 4-5. Hayter-Visser, 13. CESifo, 1.

165 OECD-Annual Report 2017, 164.

166 <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Estonia/Collective-Bargaining>

167 Eurofound 2011, 5.

168 <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Estonia/Collective-Bargaining>. Hayter-Visser, 13.

169 <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Croatia/Collective-Bargaining>

In order to implement extension in Croatia, both sides of the sector-level collective labour agreement must be the confederations with the highest representativeness and one of the parties must lodge an extension request. Upon this request, the National Tripartite Economic and Social Council must issue an opinion stating that the extension is in public interest. Only under these circumstances the Ministry of Labour can make an extension decision.<sup>170</sup> While extension used to be a widespread practice across the country in 2008, it started losing its popularity in 2015.<sup>171</sup>

### I. Ireland

There is no administrative extension procedure in Ireland indeed. There are however efforts to practise two different methods in the collective bargaining system that lead to results as does extension. Still, the desired coverage rate of collective labour agreements fails to come by, stuck at 40 to 50%.<sup>172</sup> The first method is that parties to the collective labour agreement file a request to the labour court for extension. However, it was decided that this method was unconstitutional.<sup>173</sup>

The other method in practice in Ireland is that joint work committees take a decision to that effect. In 2011, this method was also interpreted as exceeding the powers of such committees, and the Court of Cassation decided that the agreements so extended would not be binding. Upon that, the said committees were given the authority explicitly by law. However, the committees can decide on extension provided that such comply with the interests of employers and necessities of competition. It is also possible that certain employers can be excluded from extension during the times of economic crisis. The extension procedure in Ireland is implemented rarely, and in sectors which generally receive migrant labour to prevent social dumping, and the unit level of collective bargaining remains mostly as the workplace.<sup>174</sup>

### m. Spain

There is no administrative extension procedure in Spain indeed. Instead, the automatic extension prescribed by law is the system that is similarly effective in increasing the coverage rate of collective labour agreements to 70 to 80% despite the association rate of workers standing around 10 to 20% in the country. For this, there is no need for the Ministry to take a decision or any application for extension. Collective labour agreements signed at sector level applies by law to all employers and workers in that sector.<sup>175</sup>

### n. Italy

There is no administrative extension procedure in Italy either. Instead, the judicial process is operated, which is widespread and effective in obtaining the desired coverage rate of collective labour agreements. This is because Article 36 of the Italian Constitution which prescribes equitable wage is taken into account by all labour courts and a wage scale applied at a sector is extended to all workers through labour courts.<sup>176</sup>

170 <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Croatia/Collective-Bargaining>. **Hayter-Visser**, 11.

171 **Hayter-Visser**, 11.

172 **OECD-Annual Report 2017**, 164.

173 <https://www.worker-participation.eu/index.php/National-Industrial-Relations/Countries/Ireland/Collective-Bargaining>

174 <https://www.worker-participation.eu/index.php/National-Industrial-Relations/Countries/Ireland/Collective-Bargaining>

175 **Schulten**, 3-4. **Hayter-Visser**, 10.

176 **Hayter-Visser**, 11. **Schulten**, 2 et seq. **Eurofound 2011**, 7. **CESifo**, 2.

## o. Latvia

While the legislation in Latvia allows concluding collective labour agreements at region, sector and workplace level; it is known that regional agreements do not take place, agreements at workplace level are made, but the prevalent form is collective labour agreements at workplace level.<sup>177</sup> It is observed that collective labour agreements at sector level are usually concluded in the public sector. However, it is reported that while the association rate of workers is around 5 to 10%, and that of employers is around 40 to 50%, the coverage rate of collective labour agreements is around 10 to 20% (though reaching 34% in 2006, but this information is questioned).<sup>178</sup> It is left to the social parties to decide which provisions have priority over others when there are collective labour agreements at various levels. Therefore, the principle of favourability is not a legal one, but based on the wills of the social parties.<sup>179</sup> While the extension is allowed in the law, this method is applied at a negligible level. It is reported that extension takes place only in the railway sector.<sup>180</sup> However, since the *erga omnes* rule applies, the coverage rate of collective labour agreements is higher than the unionisation rate.<sup>181</sup>

While the *erga omnes* rule applies in the country, the coverage rate of collective labour agreements is not high due to the facts that the number of sector-level collective labour agreements is low and extension is not an often-practiced method. Therefore, the conditions for sector-level collective labour agreements were eased as governed by Article 18 of the Labour Code<sup>182</sup> in July 2017, and also extension conditions were made lighter. Before the said amendment, the sector-level or regional collective labour agreements could only be signed by employers' associations and their confederations, but the amendment made it possible to sign such agreements by sole employer or groups of employers as well. The amendment of 2017 also changed the worker side of the sector-level collective labour agreements. Earlier, those could be signed by any workers' union or confederation, the amendment of 2017 authorised the workers' confederation with largest membership in the country or an affiliate union thereof to sign the sector-level or regional collective labour agreements.<sup>183</sup> This aimed that the strongest organisation representing workers could conclude sector-level or regional collective labour agreements, but brought no restriction to the employer side of such agreements, thus facilitating the conclusion.

Before the amendment of 2017, extension used to take place by a request of any of the parties or by the initiative of the Ministry of Labour for sector-level or regional collective labour agreements with representative power. The Labour Code required that, for the presence of representative power, the agreement covered at least 50% of the workers in that sector or the employers party to the agreement had 60% of the business volume in that sector.<sup>184</sup> The amendment of 2017 introduced an automatic system. Accordingly, for the extension of sector-level or regional collective labour agreements, they should cover more than 50% of the workers or 50% of the business volume in that sector. In addition, the effective date of sector-level or regional collective labour agreements was changed such that, while earlier these agreements took effect on the date of publication in the Official Gazette, after the amendment they would enter in force 3 months after the publication unless the agreement specified otherwise.<sup>185</sup>

177 <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Latvia/Collective-Bargaining>

178 OECD-Annual Report 2017, 164 (coverage rate of collective labour agreements shown as 10 to 20% as of 2015). <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Latvia/Collective-Bargaining> (coverage rate of collective labour agreements expressed as 34% as of 2006).

179 **OECD-Annual Report 2017**, 149.

180 <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Latvia/Collective-Bargaining>. **Hayter-Visser**, 13. **OECD-Annual Report 2007**, 142.

181 **OECD-Annual Report 2017**, 141.

182 <https://likumi.lv/ta/en/id/26019-labour-law>

183 <https://www.eurofound.europa.eu/publications/report/2018/annual-review-of-working-life-2017>

184 **Eurofound 2011**, 7-8. **CESifo**, 2. **Hayter-Visser**, 13. <https://www.eurofound.europa.eu/publications/report/2018/annual-review-of-working-life-2017>. <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Latvia/Collective-Bargaining>

185 <https://www.eurofound.europa.eu/publications/report/2018/annual-review-of-working-life-2017>

### p. Lithuania

Upon the entry into force of the new Labour Code in Lithuania in July 2017, the amendments usually focused on setting up worker councils at workplaces with more than 20 workers. Worker councils were not empowered to sign collective labour agreements. It is known that almost no sector-level collective labour agreement has been signed in the private sector in Lithuania where the *erga omnes* rule applies.<sup>186</sup> Despite EU's encouragement to that end, no increase has occurred in the number of sector-level collective labour agreements which remain at workplace level.<sup>187</sup> Therefore, the association rate of workers and the coverage rate of collective labour agreements accordingly vary between 5 to 10%, and the association rate of employers stands around 10 to 20%.<sup>188</sup>

The only extendable agreements in the country are those at sector level.<sup>189</sup> Still, extension is never applied in the country.<sup>190</sup> For the extension to take place, necessary are the request of one of the parties to the agreement and the existence of provisions in the agreement significant for the sector or for professions in that sector. The condition of significance accords broad discretionary powers to the Ministry to such extent that OECD reports state that extension in Lithuania is not based on any criterion.<sup>191</sup> The Ministry of Labour may decide on extension upon a request from any of the parties.<sup>192</sup>

### q. Luxembourg

Some amendments were made to the legislation in Luxembourg in 2017, but included no change in extension.<sup>193</sup> Collective labour agreements are concluded in the country both at workplace and sector level. While almost all sector-level collective labour agreements are extended, the number of workplace level collective labour agreements is much higher than that of sector-level collective labour agreements. For example, in 2011 a total of 69 workplace level collective labour agreements were in effect while only 6 sector-level collective labour agreements were extended. Considering the coverage and content of these agreements, the relative importance of workplace level or sector-level collective labour agreements varies by sector. While the law provides that the national minimum wage can be set by social parties, it is not set at national level, but usually at sector level through sector-level collective labour agreements.<sup>194</sup>

In Luxembourg, the coverage rate of collective labour agreements varies between 50 to 60%; the association rate of employers between 80 to 90% and the association rate of workers between 10 to 20%.<sup>195</sup> This results from, among other things, the fact that the system motivates social parties to peacefully conclude collective labour agreements, and the extension is applicable upon request, with no conditions attached.<sup>196</sup> Consequently, extension is widely practiced in the country.<sup>197</sup>

<sup>186</sup> OECD-Annual Report 2017, 141.

<sup>187</sup> <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Lithuania/Collective-Bargaining>

<sup>188</sup> OECD-Annual Report 2017, 164.

<sup>189</sup> CESifo, 2.

<sup>190</sup> Eurofound 2011, 8. Hayter-Visser, 15.

<sup>191</sup> OECD-Annual Report 2017, 142.

<sup>192</sup> Hayter-Visser, 15. CESifo, 2. Eurofound 2011, 8.

<sup>193</sup> <https://www.eurofound.europa.eu/publications/report/2018/annual-review-of-working-life-2017>

<sup>194</sup> <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Luxembourg/Collective-Bargaining>

<sup>195</sup> OECD-Annual Report 2017, 164.

<sup>196</sup> OECD-Annual Report, 142.

<sup>197</sup> <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Luxembourg/Collective-Bargaining>. Eurofound 2011, 8. CESifo, 2.



## r. Hungary

While the association rate of employers stands around 40 to 50% in Hungary, the association rate of workers is below 5% and the coverage rate of collective labour agreements is around 20 to 30%.<sup>198</sup> While it is possible to conclude collective labour agreements at sector or workplace level, they are mostly concluded at workplace level, and sector-level collective labour agreements take place in electricity, construction, catering and tourism sectors. The low number of sector-level collective labour agreements directly reduces the number of extendable collective labour agreements because extendable ones are those at sector level.<sup>199</sup>

The legal amendments in 2016 provide that, for the Ministry of Labour to take a decision of extension, it is necessary that both parties to the collective labour agreement make a request of extension, the said agreement cover at least 50% of the workers in that sector, and the workers' union represent 10% of the workers in that sector.<sup>200</sup> Both the presence of heavy conditions, the requirement that both parties request the extension, and the low number of sector-level collective labour agreements result in a low number of extensions and low coverage rates of collective labour agreements.<sup>201</sup>

## s. Norway (not an EU member)

Though not an EU member, Norway is specifically mentioned here because it has a high coverage rate of collective labour agreements without the extension practice. The collective bargaining system in Norway is based on an exact hierarchy. On the top are national collective labour agreements concluded between confederations. They cover matters which are governed by laws in other European countries. In addition, there are sector-level or workplace level collective labour agreements. Workplace level collective labour agreements may not violate sector-level collective labour agreements to the detriment of workers, unless sector-level collective labour agreements provide otherwise. Therefore, the principle of favourability applies in Norway.<sup>202</sup>

Norway has no automatic or generally applicable extension system either.<sup>203</sup> As of 2013, the percentage of workers who were included in the collective labour agreements through extension was 4% of the total labour force.<sup>204</sup> Despite that, the association rate of employers and the coverage rate of collective labour agreements stand around 60 to 70%.<sup>205</sup> The reason is the existence of sector-level collective labour agreements and a strong collective bargaining system. The sector-level collective labour agreements signed by the employers' associations apply directly to all workers in the workplaces of member employers (*erga omnes*). Extension is used, not to equalise or balance the wages and working conditions, but to prevent social dumping in favour of employers who employ the migrant workforce who consent to lower wages and poorer conditions.<sup>206</sup> For an extension decision; at least one of the parties to the extendable collective labour agreement or the Tariff Board authorised to make such a request must make a request for extension; and further,

198 **OECD-Annual Report 2017**, 164.

199 <https://www.worker-participation.eu/index.php/National-Industrial-Relations/Countries/Hungary/Collective-Bargaining>

200 <https://www.eurofound.europa.eu/publications/report/2018/annual-review-of-working-life-2017>

201 <https://www.worker-participation.eu/index.php/National-Industrial-Relations/Countries/Hungary/Collective-Bargaining>. **Hayter-Visser**, 13. **Eurofound 2011**, 5. **CESifo**, 2.

202 **OECD-Annual Report 2017**, 141 et seq.

203 <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Norway/Collective-Bargaining>

204 **OECD-Annual Report 2017**, 142.

205 **OECD-Annual Report 2017**, 164.

206 **Visser**, 47.

it should be proved that in absence of extension, the migrant workforce will be working under poorer conditions. Therefore, Norway has no extension for sectors in which only Norwegian citizens are employed.<sup>207</sup>

### t. Poland

Collective labour agreements are concluded at workplace level in Poland. Therefore, the association rate of workers varies between 5 to 10% and accordingly the coverage rate of collective labour agreements varies between 10 to 20%.<sup>208</sup> Extension is possible only for sector-level collective labour agreements in Poland; however, since most agreements are at workplace level, extension is not used. Thus, there has been no instance of extension since 2009. For extension, either the parties to the sector-level collective labour agreements should make a request, or the Ministry of Labour should take an initiative to that effect. Another requirement is that the extension must be of a nature to respond to vital social interests.<sup>209</sup>

### u. Romania

The coverage rate of collective labour agreements, which reached 100% in 2011, receded to around 35% in 2015 through legal amendments to extension following the signing of the Troika Memorandum.<sup>210</sup> Until the amendments in 2011, extension had been broadly and automatically applied in Romania because the legislation by 2011 provided that a sector-level collective labour agreement be automatically applied to workers in that sector.<sup>211</sup> However, legal amendments that entered into force in 2012 introduced new conditions for extension, which made extension impracticable at all, thus making the extension procedure an exception.<sup>212</sup>

Following the amendments of 2012, conditions for extension included that first, the employers which were members of the employers' organisation which signed the sector-level collective labour agreement should employ more than 50% of workers in that sector; second, one of the parties should make a request for extension, and finally, the National Tripartite Council should provide an affirmative opinion for the extension. Only upon meeting these conditions, the Ministry of Labour could take a decision of extension.<sup>213</sup> Thereby, the extension procedure became exception upon introduction of such conditions.<sup>214</sup>

Following the legal amendments, the number of sector-level collective labour agreements went down drastically, and in the period of 2012-2017, only five sector-level collective labour agreements could be signed. The political will that the system therefore should be amended formulated in 2017 such drafts for amending thresholds which would facilitate the conclusion of sector-level collective labour agreements in particular. In 2018, negotiations between the government and social parties continued. To date, no consensus has been reached on a possible legal amendment.<sup>215</sup>

207 Hayter-Visser, 14. Eurofound 2011, 9. OECD-France, 15. CESifo, 3.

208 OECD-Annual Report 2017, 164.

209 Hayter-Visser, 15.

210 EU-Social Dialogue, 12.

211 Eurofound 2011, 10. Schulten, 2. At that time, for an employers' union to sign a sector-level collective labour agreement, its members should employ at least 33% of the workers in that sector. Therefore, this conditions should be met in priority for the existence of an extendable collective labour agreement. Only then, extension would apply automatically.

212 Hayter-Visser, 14. CESifo, 3.

213 Hayter-Visser, 14. <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Romania/Collective-Bargaining>

214 Hayter-Visser, 14.

215 <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Romania/Collective-Bargaining>

## v. Slovakia

Legal regulations on extension have continuously been amended in Slovakia. In this country, for extension of a sector-level collective labour agreement, any of the parties to the agreement should make a request to that effect. However, depending on the right-wing or left-wing parties being in power, the power to unilaterally veto the extension was accorded to and removed from employers many times. In the last amendment of 2014, the power of employers to unilaterally veto the extension was removed; and the request by any social party was adopted as sufficient for extension. Such a request however does not directly lead to extension; the matter is discussed in the National Tripartite Consultative Council established within the Ministry, and upon affirmative opinion from the Council, the decision of the Ministry of Labour gives effect to extension. Such a council particularly assesses whether the extension in question functions to remove inequalities among workers.<sup>216</sup>

By way of the legal amendments that went into effect in 2014, some employers were excluded from extension until the Court of Constitution annulled the said amendments in March 2016. Extension, according to the amendments of 2014, would not apply to workplaces with less than 20 workers in that sector or employing more than 10% workers with disabilities, or operating for less than 24 months.<sup>217</sup> This exception clause was annulled as contrary to the Constitution, and the extension procedure was suspended in that period.<sup>218</sup> The provisions on extension procedures in the Law No. 2/1991 were reformulated on 10.04.2017. Accordingly, the condition of non-veto by employers was removed. In other words, employers were not accorded the power to unilaterally veto extension. However, for an extension of the sector-level collective labour agreement, it must be the agreement which covered the highest number of workers among the agreements in a sector established by NACE codes. Further, the workers' confederation which signed the extendable collective labour agreement must have members in at least 30% of the workplaces operating in that sector. Therefore, the law introduced the term "*representative multi-employer collective labour agreement*". Such a sector-level collective labour agreement that meet these conditions may be extended by the Ministry's decision upon a request from any party to the agreement.<sup>219</sup>

## w. Slovenia

By 2006 in Slovenia, as in the case of Austria, since employers had to be registered with the chambers of commerce and those chambers were authorised to sign the sector-level collective labour agreements, such agreements would automatically cover all employers in the sector in question. However, upon the removal of obligation to register with the chamber in 2006 and the transfer of power to sign sector-level collective labour agreements to unions, the coverage rate of collective labour agreements which was 100% receded to 90%. Through the amendments of 2006, the extension of coverage rate of collective labour agreements was conditioned on various requirements. Accordingly, for the extension of an agreement, the employers which signed the sector-level collective labour agreement should employ at least 50% of workers in that sector. Such sector-level collective labour agreement with representative power may be extended by the decision of the Ministry of Labour upon a request from any party to the agreement.<sup>220</sup>

216 Hayter-Visser, 14. Schulten, 4. <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Slovak-Republic/Collective-Bargaining>

217 Schulten, 4. Hayter-Visser, 14. CESifo, 3.

218 Schulten, 4. <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Slovak-Republic/Collective-Bargaining>

219 <https://www.eurofound.europa.eu/publications/report/2018/annual-review-of-working-life-2017>

220 Hayter-Visser, 12. Schulten, 4. <https://www.worker-participation.eu/index.php/National-Industrial-Relations/Countries/Slovenia/Collective-Bargaining>

#### x. Greece

The suspension of extension and principle of favourability in Greece upon the signing of Troika Memorandum drastically reduced the coverage rate of collective labour agreements in the country.<sup>221</sup> Having no extension procedure today, Greece could extend sector-level collective labour agreements through a semi-automatic system prior to 2010. Practiced widely until 2010, a request by any of the parties to the agreement or the initiative of the Ministry of Labour would be sufficient to start the extension process; and where the employer side which signed the sector-level collective labour agreement employed more than 50% of workers in that sector, the Minister of Labour could take a decision of extension.<sup>222</sup>

### V. CONCLUSIONS AND RECOMMENDATIONS: CURRENT EXTENSION SYSTEM IN TURKEY AND RECOMMENDATIONS FOR CHANGE

Extension in our country is governed by Article 40 of the Law No. 6356 on Trade Unions and Collective Labour Agreement as follows:

*(1) The President of the Republic may, upon the request of any of the workers' or employers' unions or any of the employers within a sector, or at the request of the Minister of Family, Labour and Social Services, after receiving the opinion of the Higher Board of Arbitration, extend a collective labour agreement concluded by the trade union with the largest number of members in the sector in which the workplace for which an extension is to be made is established, either in whole or in part or after making the necessary changes to all or some of the workplaces not covered by any collective labour agreement within the same sector. The Higher Arbitration Board shall inform its opinion on the related subject within fifteen days.*

*(2) The extension decree shall indicate the reason. The extension decree, along with its date of entry into force, shall be published in the Official Gazette; however, the date of entry into force may not be set at a date prior to the publication date in the Official Gazette.*

*(3) The extension decree shall also expire upon the expiry of the collective labour agreement so extended.*

*(4) The President of the Republic may rescind an extension decree giving the reasons.*

*(5) It shall not be permissible to extend the clauses of a collective labour agreement providing for recourse to special arbitration or stipulating the rights and obligations of the parties.*

*(6) No extension may be decided for workplaces in this scope after an application for authorisation has been lodged and until this action is concluded or as long as the authorisation continues after an authorisation document has been obtained.*

*(7) An application for authorisation may always be lodged for authorisation in workplaces or enterprises which were covered in the scope of the extension of a collective labour agreement and the extension automatically ends when a new collective labour agreement is concluded."*

The competent authority to decide on extension is the President of the Republic. The said provision however authorised until 02.07.2018 the Council of Ministers to extend; but as a natural result of the change of government system in our country, an amendment was made in 2018 that the authorised body would be the President of the Republic, no longer the Council of Ministers.

<sup>221</sup> Schulten, Greek Collective Bargaining, 2 et seq.

<sup>222</sup> Hayter-Visser, 15. Schulten, Greek Collective Bargaining, 2 et seq.

It is necessary to indicate that extension is not a method commonly used in our country, then state the system's attributes. Extension is viewed in our country as an action that violates free collective bargaining in general, and not preferred even by workers' unions.<sup>223</sup> Thus, two interviews during this study focused on this matter. However, by July 2018 statistics, the unionisation rate for workers was 12.76% whereas the ratio of workers covered by collective labour agreements to the overall workforce was 12.38%. The association rate of employers varies around 20 to 30%. It is therefore obviously necessary to take measures to enlarge the coverage of collective labour agreements. While it is obvious that such measures do not solely consists of extension, it is necessary to make the extension more applicable.

Extension has never been applied in our country in the period of 1963-1980; and in the period of 1983-2012 when the Law No. 2822 was in effect, only 18 extension decisions were issued. In the period of 1980-1983 when labour strikes and lockouts were banned, the conditions for extension were eased by the Law No. 2364, and extension was issued 63 times in a three-year period.<sup>224</sup> The reason for inability/failure to implement extension in the era of the Law No. 275 was that the mandatory condition that, for extension as defined in Article 8, the extendable collective labour agreement must cover the majority of workers in that sector. Due to the difficulty in practice to meet the said condition, no extension decisions could be made in that period.<sup>225</sup> In the era of the Law No. 275, both sector-level and workplace level collective labour agreements were made possible, and the presence of a collective labour agreement at the workplace was not viewed, rightfully, as an obstacle to extension. Therefore, our opinion is that the criticism was not correct that extension during the era of the Law No. 275 worked to the detriment of autonomy of collective bargaining and the right to free collective bargaining.<sup>226</sup> This view holds that the collective labour agreement concluded at workplace level is amended to the favour of workers through extension. In that period however, the Council of Ministers could exclude certain provisions of the extended agreement from extension, and was not authorised to make necessary amendments in the agreement. Further in that period, the extension decree could be issued ex officio by the Council of Ministers, requiring no request from any of the social parties.

Article 4 of the Law No. 2364, which entered into force on 27.12.1980 and remained in effect for three years to broadly apply the extension procedure in a period where labour strikes and lockouts were banned, removed the majority condition, and provided that the Council of Ministers might extend the collective labour agreement concluded at workplace or sector level, consulting the opinion of the Supreme Arbitration Board. Likewise, the Council of Ministers was also authorised to make the necessary amendments to the extendable agreement, thereby attempting to remove the obstacles to extension.<sup>227</sup>

The few extension decisions issued in the era of the Law No. 2822 raised many debates and objections along. The decisions in that period were to be reasoned as required by Article 11 of the Law No. 2822, but extension decrees provided such general expressions as balancing the working conditions, encouragement of economic growth etc. as reasons, rather than providing specific reasons<sup>228</sup> based on the substantive nature of the extendable collective labour agreement or the workplaces to which it would be extended; further, while the Law authorised the Council of Ministers to exclude various provisions of the agreement from extension, such authority was never exercised.<sup>229</sup> Since most employers in our country are small and medium sized, it is necessary to justify the extension decrees on the specificities of workplaces, and even make necessary amendments. Thereby, extension will both acquire legitimacy,

223 **Sur**, 127 et seq.

224 **Subaşı**, 234. **Sur**, 127 et seq.

225 **Sur**, 129.

226 **Sur**, 131.

227 **Sur**, 135.

228 **Kutal**, 6. **Subaşı**, 236-237.

229 **Tuncay**, 25-32.

and prevents particularly small and medium sized or newly-established workplaces which have to set aside more funds for investment from experiencing economic distress, thus preventing an increase in unemployment.<sup>230</sup> The extension decrees<sup>231</sup> issued, without providing reasons, in the era of the Law No. 2822 unfortunately led to problems of social dialogue, economy and employment policies, and created chaos instead of benefits expected.<sup>232</sup> The extension decrees in that period did not refer to the alignment between the extendable agreement and the workplaces to be covered or the public interest achievable through extension; the confidence of social parties in the practice of extension and thus in the principle of autonomy of social parties was weakened; and the pressure then felt resulted in the disruption of the balance between social parties and of labour peace.

Article 11 of the Law No. 2822, rightfully, provided that no extension might be decided after an application for authorisation was lodged, in an effort to preserve the principles of free collective bargaining and autonomy of collective bargaining. It should be stated however that a supplementary provision was made in paragraph 7 of Article 40 of the Law No. 6356 in 2012 to achieve this goal. Paragraphs 6 and 7 of Article 40 of the Law No. 6356 which entered into force in 2012 provided that no extension might be decided after an application for authorisation was lodged and specifically stated that an application for authorisation might always be lodged for authorisation in workplaces or enterprises which were covered in the scope of the extension, in an effort to preserve the free and voluntary collective bargaining enshrined in Article 4 of ILO Convention No. 98.<sup>233</sup> This amendment in a sense serves to counter the criticism by labour unions, in the era of the Law No. 2822, that extension would lead to de-unionisation and erode the power of unions.<sup>234</sup> Now, labour unions are able to organise and apply for authorisation at the workplaces covered under extension.

The extension procedure, intensively applied only for a three-year period in the history of our country, will contribute to steady growth of economy, and thereby reducing unemployment, while causing unemployment in some sectors, enhancing fair working conditions, equitable wages, employment and quality of life if applied considering the substantive conditions of workplaces, socio-economic conditions of the country and sectors. To achieve these results however, extension needs to be governed by laws in line with the conditions of the country and implemented in the best manner to serve the goals.<sup>235</sup>

It is obvious that measures must be taken in our country to enable more workers to benefit from collective labour agreements. It is the only way to distribute national income fairly among the workforce, and equalise working conditions and positively contribute to quality of life. Major means of expanding the scope of collective labour agreements include allowing collective labour agreements with multiple employers and broaden the application of extension.<sup>236</sup> To have a high coverage rate of collective labour agreements in a country, either the rate of association, particularly that of employers, should be high and central collective bargaining systems at sector level (centralised) or those at workplace level (organised decentralisation) should be used or the *erga omnes* rule should be adopted, or extension mechanisms should be used.<sup>237</sup> Considering that the association rate of workers is low and the association rate of employers stands around 20 to 30%,<sup>238</sup> we are of the opinion that the coverage rate of collective labour agreements can only be increased

230 **Kutal**, 6-7. **Subaşı**, 234 et seq.

231 Extension decisions by year in the era of the Law No. 2822: April and July 2009 (2), June 2004, November 2000, Mart and August 1999, February, August and December 1995, December 1993 (4), October 1991 (4), January 1991 (2), February and December 1987 (4), July 1985 (2).

232 **Subaşı**, 226 et seq., 236-237.

233 See **Kutal**, Toplu İş, 360.

234 See **Sur**, 137 et seq.

235 **Kutal**, 6 et seq. **Subaşı**, 237 et seq.

236 **Schulten**, 2 et seq.

237 **Schulten**, 2-3. Thus, this result is clearly visible in **OECD-Annual Report 2017**, Table 4.10, 164.

238 **OECD-Annual Report 2017**, 164.

in our country by replacing the collective bargaining level by multi-level collective bargaining, and implementing the extension procedure in line with the country specific conditions. In a written response at an interview held during this study, while not posed a question on that matter, it was stated that union affiliation for workers should be taken into account only for benefitting from collective labour agreements, which meant indeed that the *erga omnes* rule was not preferred as a method.

Our recommendations that call for legislative amendments to increase the number of workers covered by collective labour agreements in our country are provided in the second sub-heading below. Before that however, several recommendations are offered for the implementation of extension in light of the present provisions of the Law No. 6356. Thereby, effort is made to generate expeditiously applicable solutions before legal amendments and associated system changes.

#### **a. Recommendations to Implement the Provisions of Law No. 6356 More Effectively**

More frequent application of extension in our country will increase the number of workers covered by collective labour agreements. Extension is indeed a method used for this purpose. Therefore, we are of the opinion that extension as provided for in Article 40 of the Law No. 6356 should be used more frequently. For this however, the request for extension should come from the workers' or employers' union in that sector or from the Ministry as clearly indicated in the legislation.

It is therefore obviously necessary first to eliminate the anti-extension attitudes of workers' unions in our country. To that end, informing the public on the advantages of extension in the world of work will help workers' unions make requests for extension; then, anti-extension attitude will first disappear from workers, and consequently from workers' unions. Thereby, unions will be able to request extension. When doing this, it should particularly be emphasised that extension does not prevent unionisation, obtaining authorisation or concluding collective labour agreements; and that Article 40 of the Law No. 6356 which provides for extension allows unions to obtain authorisation and conclude collective labour agreements. Thereby, it will be possible to dissipate the fear of extension harboured by unions.

Similarly, another reason for not preferring extension in our country is that extension decrees are issued without reasons. What is meant by reason is the narrative on the causes that explains the consistency between the extended agreement and extendable workplace. As long as extension decrees explain why the extended agreement is being extended, with what amendments it is adapted to the extendable workplace, and benefits and advantages expected of extension, the reactions of workers and unions against extension will disappear. Therefore, we are of the opinion that extension decrees should be reasoned on the basis of detailed reports prepared by the Higher Board of Arbitration, then issued.

Likewise, while it is not required by Article 40 of the Law No. 6356, consulting, prior to extension, the opinions of workers and employers of the extendable workplaces will have an impact that reduces anti-extension attitude, thus promotes extension. This will both ensure compliance with ILO Recommendation No. 91 and increase the legitimacy and acceptability of extension.

Pursuant to Article 40 of the Law No. 6356, the President of the Republic may also take a decision of extension upon an ex officio request by the Minister of Family, Labour and Social Services. The extension upon an ex officio request will have been legitimised as long as necessary amendments are made to the extendable agreement and the reasons for extension are clearly stated. Therefore, we are of the opinion that ex officio initiation of the extension process should

be promoted in our country provided that, in line with the opinion of the Supreme Arbitration Board, coherence be ensured between the extendable agreement and extendable workplaces.

We should note however that extension is not, and should not be, the first method to use in order to increase the number of workers covered by collective labour agreements. The primary goal in democratic societies is to promote free and voluntary collective bargaining and thereby increase the coverage of collective labour agreements. Therefore, we provide in the following our recommendations on building a brand new collective labour agreement and extension regime. Our recommendations are not limited to promoting extension, but more importantly aim to expand the inclusiveness of collective labour agreements. It is obvious however that our legislation on extension needs certain changes as well. It is because extension is an alternative method of “*next step*” in nature which ensures coverage of workers who fail to benefit from collective labour agreements despite the presence and practice of free and collective bargaining system.

### **b. Recommended Legislative Amendments to Increase the Coverage of Collective Labour Agreements in our Country**

The first recommendation to increase the coverage rate of collective labour agreements in our country is to establish multi-level collective bargaining. It is obvious that the limiting the collective bargaining level by law is contrary to the principle of free and voluntary collective bargaining in ILO Convention No. 98 and the rule that association must not be restricted by form or level in ILO Convention No. 87. The priority action that must be taken in our country is to allow the signing of collective labour agreements at sector level as different than the current practice of workplace, group or enterprise collective labour agreements that are signed at workplace level.<sup>239</sup> Then, conflicts arising between agreements in the era of the Law No. 275 should be resolved in the light of principle of favourability for workers as adopted today in many EU countries. Thus, collective labour agreements at lower levels may violate the collective labour agreements of higher levels only to the favour of workers, otherwise the higher ones will apply.<sup>240</sup>

Thus, the ILO Committee on Freedom of Association states that free and voluntary collective bargaining in Article 4 of ILO Convention No. 98 provides that parties determine the level of collective agreement level suiting their interests, therefore, the collective bargaining level should not be imposed by law. The Committee however allows freedom to countries to resolve the conflict between collective labour agreements of various levels.<sup>241</sup> Considering that the rates of association of workers and employers are relatively low in our country,<sup>242</sup> and since we are of the opinion that mandatory affiliation with organisations for employers, as in the case of Austria, is contrary to negative freedom of association as guaranteed in ILO Conventions No. 87 and 98, we believe that the coverage rate of collective labour agreements can only be increased by allowing agreements at sector level. Thus in France, as in our country, while the association rate of workers is low, but the coverage rate of collective labour agreements is rather high. Similarly, establishing sector-level collective labour agreements in our country will make it possible that all workers and employers who are members of the unions that operate in the sector and signatories to agreements be covered by collective labour agreements.<sup>243</sup>

The level of collective labour agreement is important in terms of extension. Extension, as governed in Article 40 of the Law No. 6356, regulates the extension of workplace level collective labour agreements to other workplaces in

239 Group and enterprise collective labour agreements are based on the workplace, therefore they should be considered at workplace level. Güzel, 906 et seq.

240 Güzel, 906 et seq., 934 et seq.

241 Güzel, 935 et seq.

242 For a tabular comparison of rates of association in OECD countries, see **OECD-Annual Report 2017**, 164.

243 It is obvious however that in order to increase the coverage rate of collective bargaining as in France, it is necessary not only to introduce sector-level collective bargaining, but also an easier system for granting authorisation. See Güzel, 941 et seq.



that sector. Indeed, the legitimacy of extension needs to be proved in the prospective area of implementation so that extension not violate free and voluntary collective bargaining and autonomy of collective bargaining. The extendable collective labour agreements in all EU countries mentioned above for this purpose are the sector-level collective labour agreements applicable at national or regional level. The establishment of extension for workplace level collective labour agreements in our country will, in our opinion, raise a problem of legitimacy and harmony with workplace structure at the very beginning of the process. While Article 40 of the Law provides that the extendable collective labour agreement shall apply to another workplace in the same sector, it will be a problem which workplace level collective labour agreement will be extended, and further problems and doubt will arise as to the fact that the extendable collective labour agreement will have governed the conflicts of interests specific to the workplace and how far it will resolve the matters in other workplaces in the sector and create labour peace and order. Therefore, it must be stated in our country, as in other EU countries, that the extendable collective labour agreement shall be the sector-level collective labour agreement, and amendments be made to remove this basic problem in our legal system.

As included in ILO Recommendation No. 91, consulting, prior to extension, the opinion of not only the parties to the agreement or social parties in general, but also of social parties to be covered by extension will prevent violations of the right to free and voluntary collective bargaining. Therefore, as provided for in Article L.2261-19 of the French Labour Code, provision should be made for lodging written and reasoned objection by employers' association(s) or workers' associations representing at least 50% of workers in that sector or within a certain time (e.g. one month). Thereby, before the final decision, the views of social parties will have been consulted. However, the threshold should be stipulated at 50% of worker representation to enable the objection to stall extension. Then, where workers' and employers' associations represent 50% of workers in that sector, they should have the power to stall extension, otherwise, their objection reasons should only be of guidance nature for the President of the Republic who should have the discretion.

To ensure legitimacy of extension and compliance of extended workplaces, the extendable collective labour agreement or the parties which signed it should have certain representation as indicated in ILO Recommendation No. 91. The criterion should be set in light of the specific socio-economic conditions of each country. As in Portugal, introducing heavy conditions not appropriate to the country may suddenly reduce extension to zero levels, or no conditions as in Finland may draw criticism from small and newly-established workplaces. Therefore, extension conditions should be appropriate to the conditions of the country, "*as severe as necessary*".

Similarly, extension conditions should include various alternatives, thereby granting the discretion to the authority which will decide on extension. However, we are of the opinion that such discretion not be granted by introducing the "*public interest*" in the law because that concept tends to serve political purposes due to being too broad. It is therefore not used in many EU countries. Instead, we believe that the criterion of "*sufficient representative power*" as in Finland may be introduced for the extendable agreement or the parties thereto. In this way, for extension decisions which should be reasoned and be based on identical and substantive reasons in respect of extendable workplaces, even when the extendable agreement does not represent 50% of workers in that sector, the agreement may be extended on grounds of the representative power of the parties to the agreement or the importance of the agreement, or potential socio-economic consequences. In such case, what is important is that both the commission comprised of social parties and the experts assess concrete cases in respect of the extendable agreement and workplaces to conclude that extension may result in higher benefits than costs, and accurately and truthfully justify extension. Then, extension conditions that are severe and not appropriate to the conditions of the country will be avoided as was the case in our country in the era of the Law No. 275 or in Portugal on account of the amendments of 2012 which made extension impracticable, and allow individual and specific assessments for each sector and workplace. When making such assessments, it will be possible to examine whether the collective labour agreement in question is applicable nationally and has provisions covering the extendable workplaces or sector.

Therefore, while the introduction of the criterion of collective labour agreement concluded by *“the trade union with the largest number of members in the sector”* in Article 40/1 of the Law No. 6356 aimed to facilitate extension, we do not believe it was a correct choice. In the interviews during this study, it was asked whether this criterion was appropriate. Verbal and written responses were in concert. Both stated that unfortunately in our country, there were still employer-supported unions in operation and able to register many members. Therefore, trade unions which lack the power to bargain with the employers may have the largest number of members in a sector. In such case, which is often the case in our country, a collective labour agreement signed by an employer-guided union will be extended to other workplaces. Therefore, it was stated that the said expression was not correct; secret ballot could be used to determine the union with the highest representativeness, and it was necessary to regulate that unions with at least 30% of votes across the country had representative power, and it was more accurate that the extendable collective labour agreement should be the one signed at sector level. In verbal responses to the interview, it was stated that the union with largest membership in a sector signed collective labour agreements at many workplaces, in which case it would be a problem to identify which collective labour agreement would be extended, therefore the said expression should be amended.

Likewise, Article 40/1 of the Law provides that the collective labour agreement may be extended in whole or in part, and the necessary changes may be made in the extendable agreement. It was asked in the interview whether the Council of Ministers prior to 2018, and today the President of the Republic having the power to make necessary changes would contravene free collective bargaining and autonomy of collective bargaining. In the verbal response, it was stated that this would contravene autonomy and freedoms. In the written response, it was stated that not only this matter, but also the fact that the Ministry would identify the authorised union or the collective agreement level was limited by law to workplace contravened the right to free and voluntary collective bargaining.

It should be noted that the French Labour Code confers such authority to the Minister only in case of an agreement signed for workers in a specific region being applied to another geographic region but in the same sector; not for any other extension. In our opinion, in light of the fact that extension will be successful if potential benefits outweigh potential harms and lead to desired results, it is not possible to accept that every agreement will be appropriate for every workplace in the same sector. Indeed, exactly for this same reason, separate sector-level collective labour agreements were signed for workplaces with less than and more than 35 workers in the metallurgy sector in the Netherlands and extended. Likewise in France, the legal amendments in 2017 required that derogation provisions must be included in sector-level collective labour agreements for workplaces with less than 50 workers, and those agreements lacking such provisions would not be extended. Similarly, it is regulated as a mandatory clause in the Netherlands that conditions of exemption from extension and procedure should be included in the extendable collective labour agreement. In addition, employers in the Netherlands are entitled to lodge a request of exemption from extension provided that they conclude a workplace level collective labour agreement and demonstrate that the extendable collective labour agreement will create problems of compliance. As seen here, in EU Member States, laws provide exemption from extension or partial application of extension. While the partial extension, i.e. excluding certain provisions of the extendable collective labour agreement from extension in a way not to prejudice the general content and substance is left to the discretion of the authority or commission authorised to extend, the full exemption from extension is conditioned on the will of social parties or clear demonstration the potential consequence. In our opinion however, making necessary changes to the extendable collective labour agreement by the authority that decides on extension will contravene free collective bargaining and autonomy of collective bargaining. It is because what is extended now is not the provisions laid down by social parties, but the administrative act of the authority that decides on extension. Therefore, instead of conferring the power to make necessary changes to the extendable collective labour agreement to the executive function or a commission that decides on extension, it will be more appropriate that the law define the possibilities of exemption from extension for small-sized or newly-established workplaces or employers in regions of high unemployment or the conditions be laid out in the extendable collective labour agreement, thus leaving it to the will of social parties.

In addition to these however, legislation may be enacted as an exceptional and extraordinary method such that, as in the French law, for sectors or workplaces where no collective labour agreement has been signed or existing one renewed for at least for five years or unionisation has not occurred or authorisation could not be obtained, through a regulation similar to that of the French “élargissement” (expansion) in the Labour Code, the President of the Republic may be authorised to extend a collective labour agreement, having consulted the opinion of the Supreme Arbitration Board, and by making the necessary changes. In such case however, since a part of the arrangements being extended is no longer an outcome of the will of social parties but of the administrative authority, this method may be perceived by the extendable sector or workplaces as a threat to induce them into concluding collective labour agreements, thus resulting in the signing of collective labour agreements. Indeed, expansion in the French law is used for this purpose. In a written response to the interview, this matter was expressed in respect of extension as well and rightfully, noted that extension should rather be used as a method to encourage the social parties to sign collective labour agreements than as a means to replace collective labour agreements.

It was expressed above that extension should be legitimate, not to result in economic recession, bankruptcies, unemployment etc. and not to strip small and medium-sized employers of competitiveness vis-à-vis larger employers. Many EU countries have exception procedures along with extension. The large number of small and medium-sized employers in our country makes it more likely that collective labour agreements signed by large employers may lead to economic distress and unemployment if extended to the former ones. Therefore, while our legislation allows partial extension, we are of the opinion that it should be made mandatory for social parties to lay down exception clauses and procedures in collective labour agreements; and sector-level collective labour agreements must absolutely include exception clauses and procedures as a precondition to extendability. Thereby, the exception procedure will have been left to the will of social parties. Further, collective labour agreements and/or extension decisions should provide that they can be suspended in times of economic crises with reasons given, or re-negotiated by social parties. In this way, a system will be established which allows employers and workers to adapt to the emerging economic crisis and maintain the labour peace rather than utter non-performance of collective labour agreements resulting in many lawsuits in times of economic crises.

Article 40/2 of the Law No. 6356, rightfully, provides that extension shall not be retrospective. In Portugal, the retroactive extension resulted in economic distress for many small and medium-sized employers who suddenly incurred burdensome obligations. Therefore, retroactive extension has been abandoned in EU Member States. Further, a legal amendment in Latvia in 2017 prescribed that the extension decision could enter into force at least three months after the date of publication in the Official Gazette. In our opinion, the insertion of a three-month period is not appropriate to the conditions of our country where the coverage rate of collective labour agreements is low. However, the President of the Republic has the authority to postpone the effective date of extension decision to a certain future date having consulted the views of social parties or experts and giving the reasons. Where the specificities of extendable workplaces require that employers need to prepare for the extension, it may be possible to set the effective date of extension further in the future.

Article 40/3 of the Law No. 6356 provides that the extension decree shall also expire upon the expiry of the collective labour agreement so extended; Article 36/2 provides that an expired collective labour agreement shall have after effects as a clause of labour contract. The Turkish labour law doctrine holds that an extended collective labour agreement which has expired will have after effects.<sup>244</sup> However, a verbal response to the interview during this study stated that extension was not a method appropriate for creating such results, nor had such a purpose; an extended collective labour agreement could not have after effects just like a collective labour agreement concluded by social parties. The written response to the question held that a collective labour agreement must be in presence to speak of any after

244 Oğuzman, 108. Şahlanan, 119 et seq. Subaşı, 233-234.

effects; the extension decree per se was not in the nature of a collective labour agreement; likewise, the said agreement in the extended workplaces could not be treated as a collective labour agreement signed by the social parties on their free will; therefore, it would not be possible to speak of after effects of an extended collective labour agreement. However, the interviewee noted that the extended agreement should be implemented in the extended workplaces until a collective labour agreement would be made; this should be explicitly governed by law relying on the purpose of extension without qualifying as "*after effects of a collective labour agreement*"; and if this was not to be done, after effects must then be assumed to exist in respect of the extended agreement.

As seen here, both responses make a distinction between an extension and a collective labour agreement concluded by social parties, and state that it is necessary to distinguish between the after effects of a collective labour agreement and of an extension. However, as many EU countries e.g. France and Netherlands, after effects are not recognised in the case of extension, some countries e.g. Portugal accords after effects to extension. In our opinion, if the purpose of extension is to increase the coverage rate of collective labour agreements and enable workers who are unable to benefit from collective labour agreements to so benefit; it should be arranged in the law that the extended collective labour agreements shall apply as a labour contract for some time, through imposing a time limit of for example one year. In light of Article 40/3 of the Law No. 6356, we believe that it is difficult to argue that extended collective labour agreements today have after effects.

Article 40/5 of the Law No. 6356, rightfully, provides that it shall not be permissible to extend the clauses of a collective labour agreement providing for recourse to special arbitration or stipulating the rights and obligations of the parties. The extension of special arbitration clauses particularly will mean to violate the principle of natural judge and right to legal remedy. It is obvious that obligating provisions have no sense because the parties to the extended contract and the social parties at the extended workplace have no legal relation. However, it should be established that when collective labour agreements are being extended which have provisions on vocational training, social responsibility, occupational safety and health as will be governed by the framework contracts introduced in our legislation for the first time through the Law No. 6356, such provisions should be considered extendable, thereby positioning the extension not only as something that equalises rights and obligations but also a mechanism that ensures labour peace and order, and distributes social justice and income.

The final point is the provision that no extension may be decided after an application for authorisation has been lodged or an application for authorisation may always be lodged for authorisation in extended workplaces. It is obvious that such provision, correctly, aims to protect the right to free and voluntary collective bargaining. What needs to be expressed here is the legal obligation that collective labour agreements be concluded at workplace level, preferred in our country but not appropriate in our opinion. In many EU countries, extended agreements are those at sector level; therefore, concluding workplace level collective labour agreements or even signing protocols with worker councils in countries such as Germany lead to no problem vis-à-vis extension; it is entrusted to the will of social parties or decided according to the principle of favourability how to resolve any disputes. Even in countries such as the Netherlands, the exemption from extension requires, among other things, that the exempted workplace must have a workplace level collective labour agreement. In our country, the fact that only workplace level collective labour agreements can be concluded creates the problem whether a separate collective labour agreement should be concluded at the extended workplace. What is required in our opinion is that a multi-level collective bargaining system be adopted, social parties conclude collective labour agreements at a level best suiting their interests, and extension apply only to collective labour agreements at sector level or inter-occupational level, and further, workplace level collective labour agreements be allowed, and conflicts be resolved through the principle of favourability.

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