



NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING
NETHERLANDS COMPARATIVE LAW ASSOCIATION

Representation of Employees in Collective Bargaining within the Firm*

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1. Trade Union Representation of Employees in Collective Bargaining within the Firm

Introductory remarks

Art. 2 of the ILO Collective Bargaining Convention No 154 defines the term ‘collective bargaining’ by extending it “to all negotiations which take place between an employer, a group of employers or one or more employers’ organizations, on the one hand, and one or more workers’ organizations, on the other, for: (a) determining working conditions and terms of employment: and/or (b) regulating relations between employers and workers” However, the term ‘negotiation’ may be interpreted more widely, as was agreed in the preparatory work for ILO Convention No. 151, as including “any form of discussion, formal or informal, that was designed to reach agreement.”¹ Furthermore, in the light of art. 3 of Convention No. 151, as well as of art. 5 of ILO Convention No. 135 on Workers’ Representatives, it is clear that in the absence of a workers’ organization other workers’ representatives could be a party to collective bargaining.

Thus, according to the above quoted ILO Conventions it is possible to adopt, for the purpose of this report, a broad meaning of the term “collective bargaining within the

* Session IIIC. National reports received from: Belgium, P. Humblet; Canada, J. P. Mc Evoy; Finland, A. von Koskul; France, B. Teyssié; Greece, A. Kardaras; Hungary, T. Prugberger; Italy, G. Boni & S. Sciarra; Japan, Sh. Ouchi; Poland, Z. Hajn; Romania, R. Dimitriu; Serbia, S. Jasarevic; South Africa, M. Olivier & N. Smit; UK, A. L. Bogg; US, M. W. Finkin. The general reporter expresses his gratitude to all national reporters for their cooperation.

¹ See in more detail: B. Gernigon, A. Odero & H. Guido, *Collective bargaining, in International Labour Standards: a Global Approach*, International Labour Office (2002), at 44 *et seq.*

firm”, covering not only collective bargaining with trade unions but also with non-union employees’ representatives. Moreover, within the term collective bargaining the employer’s consultation with non-union employees’ representatives within the firm is also included, as in practice this leads, in some countries, to the conclusion of collective agreements. But even if consultation does not end with the conclusion of a formal collective agreement, which seems to be characteristic of most countries covered by the report, it may influence the employer’s unilateral decision determining the conditions and terms of employment.

This broad understanding of collective bargaining within the firm was also adopted by the majority of the national reporters. This approach seems to be a proper interpretation of the subject of this report, as it allows one to delve deeper in searching for an answer to the general question: who is the employer’s partner in a broadly understood dialogue concerning conditions and terms of employment within the firm?

1.1. The Trade Union as a Traditional Form of Employee Representation in Collective Bargaining within the Firm

In the countries covered by the report trade unions are still the typical partner of the employer in collective bargaining within the firm. National reporters state this directly or indirectly. The right of trade unions to represent employees in collective bargaining within the work establishment is usually guaranteed by a statute.

In some countries the representation of employees for the purpose of collective bargaining remains the exclusive prerogative of union representatives. This is illustrated in the American, Canadian, Polish and Japanese reports. The American NLRA clearly provides that:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

The Japanese case is particularly interesting as trade unions in this country have a monopoly not only to lead collective bargaining, but also to lead joint consultation. The Japanese reporter states:

In Japan, there are two types of procedure concerning employee representation between the trade union and employer: collective bargaining and labour-management joint consultation. The great majority of the unionized companies have a labour-management joint consultation system. However, it is difficult to distinguish between both procedures. Legally speaking, the right to collective bargaining is guaranteed by the constitution, while labour-management joint consultation is not prescribed by law, but has been voluntarily developed by a trade union and an employer at each company. The most important difference between the two machineries lies in the level of formality. Joint consultation is a more informal and cooperative procedure than collective bargaining. Under this procedure, an employer and a trade union discuss any matter in a friendly atmosphere. Even if there is discrepancy, a union never goes on strike. The joint consultation procedure is often moved to a more formal procedure, namely collective bargaining, if an employer and a union do not succeed in coming to terms. Obviously, once moved to the phase of collective bargaining, a trade union may go on strike.

1.2. Trade Union Employee Representation and the Pluralism of Unions within the Firm: Common Union Representation or a Selected Union as a Party to Collective Bargaining?

1.2.1. Common Union Representation as a Party to Collective Bargaining

A universally recognized trade union freedom leads to trade union pluralism which also occurs at the level of the work establishment. In such a case the following question arises: which of the existing trade unions is authorised to represent employees in collective bargaining. In the countries covered by the national reports this problem has been solved in different ways.

Some countries prefer the option of common union representation, also called ‘single table’ or ‘single union deal’. This solution is illustrated by the British, Belgian and Polish reports. In Great Britain:

Collective bargaining in a situation of multi-unionism tends to occur through consolidated, ‘single table’ bargaining arrangements, with only a fifth of unionized workplaces sustaining discrete negotiations with each union representative. There is also some evidence of the increasing popularity of ‘single union deals’ where the employer confers voluntary recognition on its preferred choice of union bargaining partner. To the extent that multi-unionism leads to friction and inter-union disputes this is a damaging tendency, although there is little evidence of this in recent industrial relations experience. The practical problems are also likely to diminish in significance with the recent trends towards union merger.

In Belgium:

There is close cooperation between the Belgian General Federation of Labour, the Federation of Liberal Trade Unions and the Confederation of Christian Trade Unions, at national, sector and company level. Sometimes cracks appear in the trade union edifice. The law also creates dissension. At national and sector level a collective labour agreement can only be concluded when all parties in the National Labour Council or the joint committee agree with the text.

In Poland:

common union representation is the first rule. Only if the unions within a firm are not able to form a common representation, is the principle of a representative trade union applied.

However, the pluralism of trade unions within a firm does not lead to the problem of representation in collective bargaining when every trade union represents different professional groups. The case of Finland illustrates this situation. The national reporter says:

If there are several unions active at one workplace, they generally organize different categories of employees. It is not rare that an employer organization has concluded collective agreements with several nationwide unions. A firm may have to apply several collective agreements depending of which kind of work (or employee group) is in question. In such cases there also often exist several local collective agreements within one firm.

1.2.2. Representative Union

In the majority of countries covered by the report statutory law grants a representative union the right to engage in collective bargaining. Usually a representative trade union is the one which has the largest number or the highest percentage of members employed in a given work establishment. (E.g. Greece, Poland, Hungary, Romania and Serbia). According to the

American model, which is also applied in Canada, a trade union becomes representative when it has the support of the majority of employees, which may be confirmed by a respective public authority. According to the American reporter:

Where an employer does not disagree that the union enjoys majority support from a group of employees, it is free voluntarily to recognize the union as an exclusive bargaining representative of the group so long as the union does in fact enjoy the support of a majority. The statutory obligation to bargain in good faith attaches once voluntary recognition has been accorded. However, where there is disagreement between the employer and the union (or between unions) about what group of employees the union will represent, the dispute would be for the NLRB to resolve.

The criterion of a majority trade union is also used in the UK when an employer refuses to recognize a given trade union as the one which is authorised to conduct collective bargaining. According to the British reporter:

The statutory method is conceived as a last resort to compel recalcitrant employers to come to the bargaining table. Bargaining rights are allocated on the basis of specified thresholds related to worker support in the bargaining unit. Where the union has majority membership, or it is supported by a majority of those voting and at least forty percent of those entitled to vote in a secret ballot of constituent workers in the bargaining unit, the union is entitled to a declaration of recognition.

The rule where a majority trade union is considered to be representative is also sometimes applied *de facto*, even when the statutory law requires the employer to start collective bargaining with each trade union, regardless of its size. This is the case in Japan:

The employer is prohibited from refusing to bargain with trade unions, only because they cannot organize the majority of workers at the workplace. According to the case law an employer should keep a neutral attitude as regards every trade union in the process of collective bargaining. The duty to bargain with a trade union in good faith is imposed on the employer, irrespective of the scale of a trade union. But usually the majority union has more bargaining power and consequently succeeds in obtaining more favourable working conditions. Therefore in a company where there are two or more trade unions, an employer tends to bargain only with the majority union, which usually cooperates with management, and extends to the members of the other minority union(s) the working rules which incorporate the collective labour agreement already concluded by the majority union. If the working rules incorporate the collective labour agreement concluded with the majority union, the courts tend to affirm their rational application.

1.2.3. A Recognized Union as a Party to Collective Bargaining

In some countries the right to participate in collective bargaining is granted to the trade union which is recognized by an employer or by both interested parties. The first case is illustrated by Great Britain in which:

An employer may voluntarily recognize an independent trade union even where that union is not representative of the constituent bargaining unit. In accordance with the British tradition of voluntarism the principal method of recognition is voluntary in nature. The concept of voluntary recognition is based upon employer consent. The statutory definition identifies recognition as 'the recognition of the union by an employer ... to any extent, for the purposes of collective bargaining'. This remains so even where there is a competing union with substantial support within the bargaining unit. The representative union is precluded from bringing a statutory claim in virtue of the voluntary arrangement.

The second solution is adopted in South Africa in which, according to the national reporter:

In principle the LRA 66 of 1995 unashamedly favours voluntary collective bargaining. This means that the recognition of bargaining agents and the determination of bargaining levels and subjects are left to resolution by the parties involved. It must, however, be highlighted that all registered unions that are sufficiently

representative enjoy certain minimum organisational rights in terms of the LRA. If an employer refuses to recognise a union and refuses to bargain at plant level (workplace level) a union cannot, however, compel the employer to do so. The union does, however, have a right to call protected industrial action.

1.3. A Trade Union's Rights and Duties in Collective Bargaining within the Firm

1.3.1. The Union's Right and Duty to Bargain

The legislation of the countries covered by this report mostly stipulates that a trade union has the right to engage in collective bargaining. Moreover, that right in a number of the European countries is also granted by Constitutions. Sometimes the statutory law clearly states that both parties to collective bargaining have an obligation to bargain when this is demanded by one of the parties. This means that in this case a trade union at the same time has the right and the duty to bargain (e.g. USA, Poland, Hungary, Japan). However, most often the law in those countries stresses the right of trade unions to engage in collective bargaining and the employer's duty to bargain. Furthermore, the law prohibits, as an unfair labour practice, the refusal to bargain with the representative or recognized union without proper reasons.

One has to note, however, the particular case of Great Britain in which an employer's duty, and as a consequence: the union's right to bargain, is considerably limited. This is explained by the British reporter as follows:

The legal duty to bargain indicates considerable reluctance on the part of the law to intrude too deeply into the bargaining relationship. Instead the law's role is procedural in orientation rather than ensuring substantive outcomes. The statutory duty is limited in both scope and depth. As regards scope the bargaining agenda extends only to pay, hours and holidays. While the CAC had interpreted 'pay' expansively to encapsulate pensions, this was subsequently reversed by amending legislation. As regards depth the statutory method of bargaining does not impose good faith duties; rather, it envisages a duty merely to meet and confer without a 'view to reaching agreement' in an annualized pay round. It seems that tactics such as 'surface bargaining', entering into negotiations without an open mind to the possibility of agreement, would not be contrary to the legal duty to bargain.

In South Africa there is no explicit duty to bargain in statutory law. However, the national reporter says the following:

Section 23(5) of the Constitution grants the right to engage in collective bargaining to every employer, employers' organisation, and trade union. This would imply that there is, constitutionally speaking, a corresponding duty on the other party in the collective bargaining process to engage in collective bargaining.

The trade union's position in the collective bargaining is sometimes enforced as the legislator imposes on an employer an obligation to bargain *in good faith* and *respecting the justified interests of the other party*, as is added by the Polish legislator. Furthermore, many legislators require an employer to provide the trade union with information which is relevant to the subject of collective bargaining. It seems that the Greek legislator has adopted the most developed regulation in this respect, as is pointed out by the Greek national reporter:

The Law determines that negotiations take place with good-will and with the intention to reach a solution to the collective dispute. Both sides are obliged to justify their proposals and counter-proposals. Furthermore, the law determines that the employee side has the right to demand from the employer's side full and accurate

information, as well as the right to demand all the data which are necessary for the negotiations regarding the subjects laid down on the table and point out the financial situation, and the programme relating to the financing and the staff of the enterprise.

At the same time legislators mostly require from a trade union that it does not reveal the obtained information if it is confidential for the undertaking. Furthermore, in the case of the US it has to be noted that

insofar as the information sought relates to a permissive subject, those matters, the US Supreme Court has said, that “lie at the core of entrepreneurial control,” the company would have no duty to disclose.

The trade union’s right and the employer’s duty to bargain are both closely related to the scope of collective bargaining. The governing legislation in the majority of the countries presented in this report does not limit this to specific topics, allowing the parties to determine the subjects for negotiation. The USA and Japan represent, however, a clear exception in this respect which is based on the distinction between mandatory and non-mandatory subjects of collective bargaining. The US reporter explains:

The critical distinction for practical purposes is between mandatory and permissive subjects, not because it has a significant impact on what the parties actually talk about, but because, unlike a mandatory subject, an employer can act on a permissive subject without first exhausting a bargaining obligation. However, the line between the two is often difficult to discern.

As far as Japan is concerned, the national reporter says:

all matters can be discussed in collective bargaining if a trade union and an employer agree to do so. But the matters about which an employer is obliged to discuss at the request of a trade union are limited. These subjects are generally viewed as areas that are within the employer’s control and that concern working conditions or other treatment of union members and the management of collective labour relations (‘mandatory subjects’).

Also in Poland there are a few statutory limits to the scope of collective bargaining, but all of them seem to be reasonable. Thus, art. 240 paras 2 and 3 of the Polish Labour Code state that a collective agreement may not regulate matters which are defined as strictly mandatory by the provisions of labour law and may not infringe the rights of third parties.

2. Non-Union Representation of Employees in Collective Bargaining within the Firm

2.1. The Reasons for the Development of Non-Union Representation of Employees within the Firm

Union representation of employees in collective bargaining within the firm was for a long time dominant. However, this model became insufficient with the decrease in unionization, as the growing number of non-unionized employees are deprived of the possibility to engage in collective bargaining and other collective actions. This situation was rightly defined as a deficit of democracy in labour relations. The British reporter states:

the logic of democratic rights implied their universality, and it was in this regard that the single channel was deficient. Democratic rights within the workplace should be guaranteed to all employees affected by workplace decision-making. With the steep decline of collective bargaining over recent decades the problem of democratic deficit has increased in prominence.

And the Finnish reporter adds:

In the Constitution of Finland (1999:731; section 6) the principle of equality before the law is declared. These factors have amounted to the notion that the possibilities of participation for employees not being unionized should be strengthened.

The lack of union representation within a work establishment formed the origin of the appearance of non-union representation in many European countries. In the EU Member States this non-union representation appeared not only as a consequence of changes in the national legislation (e.g. France, Poland), but also subject to the influence of European legislation. It grants participatory opportunities to all employees through legally mandated consultative structures with employee representatives. In that context the British case is particularly striking, as is explained by the British reporter:

The historical pattern of worker representation in the UK was based upon the single channel approach. Worker representation was channelled through independent unions and this was achieved principally through enterprise-level collective bargaining. There was no concept of statutory works councils functioning as a complementary second channel within the enterprise. The single channel approach has now been superseded in both industrial relations practice and legal policy. The demise of the single channel was precipitated by European law influences. Consequently there are now two distinct approaches to the designation of employee representatives in statutory consultation procedures. First, specific consultation measures, such as those related to collective redundancies, accord representational priority to recognized unions. In the absence of a recognized union, however, the consultation procedure is channelled either through existing non-union employee representative structures such as a joint consultative committee, or alternatively employee representatives are selected through a statutory ballot procedure.

Another example is represented by Poland, as was said by the Polish reporter:

Real impetus for the creation of considered forms of employee representation was given by Poland's accession to the European Union on the 1st May 2004 and the need to implement directives on employee information and consultation.

But it has to be explained that although works councils already existed in Poland before accession to the EU, their presence was however limited to the sector of State-owned enterprises.

The German case of the establishment of non-union representation within the firm is very particular. In this country works councils became necessary not as a consequence of the decrease in unionisation, but as a consequence of adopting the concept that trade unions do not represent employees' interests in collective bargaining at the company level, but at the sector and regional level.²

The idea of workers' participation in the process of decision-making at the work establishment level was also an important cause of the development of non-union employee representation. It led to the appearance of this form of representation next to union representation (the double channel of representation) not only in Europe but also in some other countries, as is illustrated by the South African reporter:

As part of introducing a series of progressive labour law reforms which would both speak to the particular South African context and be internationally compatible, the Labour Relations Act (LRA) of 1995 innovatively provided for the workplace forum system. Its evident aim was to grant all employees in a

² See in more detail, U. Zachert, *Collective Bargaining in Germany*, in A. Ojeda Aviles (Ed.), *Collective Bargaining in Europe* 30-31 (2004).

workplace a voice in so-called production issues, and to provide an alternative alongside the existing adversarial and conflict-ridden model of labour relations in South Africa. The preamble of the LRA therefore states that the legislation is aimed at changing the law governing labour relations, and for that purpose, to promote (amongst others) employee participation in decision-making through the establishment of workplace forums. Section 79 of the Act consequently stipulates that a workplace forum established in terms of chapter V must seek to promote the interests of all employees in the workplace, whether or not they are trade union members.

2.2. Forms of Non-Union Representation within the Firm

2.2.1. Formal Non-Union Representation

In the majority of countries covered by the report there is a formal non-union employee representation in the firm. The works council is its typical form, but there are also a variety of other forms, determined under specific conditions under which the national labour law developed in various countries. Poland is a good example illustrating this tendency, as the Polish law provides for:

workers' councils in State undertakings, employees' representatives in the company's Supervisory Board or Administrative Board, employees' representatives in health and safety at work committees, employees' representatives elected ad hoc in undertakings where there are no trade unions, as well as employees' representatives in European Works Councils and representatives of employees in undertakings forming part of a European Company. Specific types of non-union employee representation can be found in certain other types of undertakings, e. g. employees' representatives in collective bodies at Universities or crew delegates on commercial ships.

In Germany non-union representation in the form of democratically elected *Betriebsräte* has become established. In France the non-union employee representation has taken the form of the *comité d'entreprise and délégués du personnel*. Non-union representation in both these countries already has a long tradition and plays an important role in their national systems of labour relations.

A particular form of representation, called the *joint consultative committee*, has appeared in the UK. As is stated by the British reporter:

With respect to industrial relations practice many employers now co-ordinate joint consultative committees either in the workplace or at some higher level within the employing entity. WERS 2004 estimates that 42 percent of employees are covered by some form of voluntary consultative arrangement. As one would expect from their voluntary nature these arrangements display a rich variety. They address a broad range of issues including future plans, production, work organization and financial issues, although pay determination is least likely to be the subject of consultation. Often such consultative committees are nested within collective bargaining structures in which case union representatives were integrated into the consultative procedures. However, there remains a high incidence of consultative arrangements where non-union representatives are either designated by management or appointed through workplace ballots. Without any legal underpinning it is doubtful that such non-union consultative committees constitute an effective and independent means of democratic influence within the firm.

In some countries non-union representation within a work establishment takes the form of democratically elected employees' representatives. Another particular form is represented by hygiene and safety at work commissions.

Sometimes employee representation within a firm takes on a mixed form. Italy, which has no works councils, has a particular example of this form, composed of union and non-union elements. According to the Italian reporters:

Within the firm, trade unions have been traditionally looking for some sort of mixed system of representation, according to which the plant representatives are partly elected by the workers and partly designated by the trade union organizations operating within the firm. The consequence of the adoption of such an unusual model of representation of the workers is a unicum in Europe, a sort of hybrid third way, typical of Italy only, which has been designated as a “mixed channel” of representation, i.e. neither single, nor double.

A similar solution was also adopted in the South Africa in the form of the *workplace forum*.

According to the national reporter:

The LRA envisages the establishment of workplace forums on the initiative of a union(s) with majority support in workplaces where at least 100 employees, excluding managerial staff, are employed. The majority union must apply to the Commission for Conciliation, Mediation and Arbitration (CCMA) for the establishment of a forum. Unlike some of its counterparts, the statutory system does not provide for the employer to be part of or represented on the forum: the forum is rather seen as a body representing employees’ interests with which the employer has to engage before certain measures can be implemented.

In Japan a mixed form of employee representation within the firm is called a *labour-management committee* consisting of both labour and management representatives. According to the Japanese reporter:

Half of the committee members must be labour representatives, designated for a specific period by a majority representative. This committee must determine the duties and workers covered by this scheme, the number of hours that will be conclusively presumed, employers’ measures to promote the health and welfare of workers covered by the scheme, and employers’ measures to process the grievances of such workers.

2.2.2. Informal Non-Union Representation

Some national reporters point to the existence in their countries of informal non-union employee representation within the firm. The Belgian reporter states:

Parties may negotiate in ways other than those already described above:

- * in parallel (extra legal) consultation bodies;
- * in companies which are too small to hold social elections and do not meet the requirements for setting up a trade union delegation;
- * with workers from companies without a works council, health and safety committee or trade union delegation;
- * with categories of workers that do not fulfil the requirements for representation in official bodies.

The American reporter informs us that non-union employers

are free to establish quality circles and other participative bodies so long as these do not take up wages, hours, working conditions, or employee grievances; indeed, such bodies are a common feature of the “high performance” workplace. But it has been argued that the actions of these bodies must necessarily trench on wages, working conditions, and the like. Until a charge is filed with the Labour Board, of a violation of § 8(a) (2), the employer is free to act. The filing of a charge is extremely unlikely, however, absent a union on the scene; and, as the only remedy for company domination or impermissible support is an order to disestablish or cease supporting the organization, it is costless for an employer to continue to deal with such bodies until it faces the prospect of a charge being filed.

In Japan,

According to the empirical research, in some non-unionized companies, employee friendship associations, which are composed of all the employees of the company including executives and managers, are organized. These associations cannot qualify as a trade union, because of the lack of independence from the company and because of the lack of objectives which are proper to the trade union. But the role of the associations

should not be neglected. It has been generally pointed out that Japanese companies, including medium and small-sized companies, tend to try to protect employment in order not to lose scarce and valuable human resources. Japanese managers consider it important to respond as much as possible to the needs of their employees and consequently regard communication, information or consultation as being highly necessary. In this context, employee friendship associations are utilized as a means of communication between labour and management.

2.2.3. The Lack of Non-Union Representation

Non-union representation is a solution which is typical for European countries. It was not adopted in the American model of labour relations as is explained by the American reporter:

Unlike Germany, France, and other European countries, no provision is made in U.S. law for a Works Council (Betriebsrat) or comité d'entreprise with co-determinational power, as in the former case, or information-sharing and consultative rights, as in the latter. Moreover [...] an employer in a unionized enterprise is not permitted to establish such a body, insofar as it would deal with management on matters of wages, hours, or working conditions, without agreement with the union; and employers of non-unionized enterprises, those that employ the vast majority of employees in the United States, are not permitted to establish or support such bodies at all. There is no provision in US law analogous to the Directive 2002/14/EC on information sharing and consultation. Absent a union, however, there is no obligation to inform and consult in any fashion at all. On July 19, 2005, for example, the Hewlett-Packard company announced plans to reduce its workforce by 10%, to freeze key employee benefits, and to reduce future benefits. The company acknowledged that that announcement was subject to "legal requirements and consultation with work councils and employee representatives" as applicable abroad, but not for its US employees. The legal obstacle to the creation of non-union forms of employee representation lies in the prohibition of section 8(a)(2) of the Act which makes it unlawful, an "unfair labor practice," "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. [...]" A "labor organization" is defined in sweeping terms as: any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The same situation is in place in Canada where, according to the reporter:

European-style worker representation models of collective bargaining have, to date, attracted little interest in Canada. Such non-union models of employee representation in collective bargaining generally receive mere en passant mention in Canadian academic literature on labour relations and have not been a subject of specific study or recommendation for adoption in any Canadian jurisdiction. *However, in Canada*, non-union representation of employees within the firm generally exists in three discrete situations. First, private sector firms may encourage non-union representation as a means to avoid or delay unionization. Second, in both public and private sector firms, specific groups of employees are excluded from unionization (such as management level or legal and other professional employees) and are given voice through formal and informal representative structures. Third, specific public interest statutes require that each workplace establish joint management-labour committees to promote workplace health and safety.

2.2.4. The Lack of Both Union and Non-Union Representation

In those countries where there is no legal ground for non-union representation employees could be deprived of any form of collective representation of their interests, if at the same time there is no trade union within a firm. The US case is a typical example of this situation.

The national reporter writes:

Absent a union, however, the law imposes a barrier to the creation of alternative forms of representation. There is no doubt that § 8(a)(2) prohibits employees from instituting the kind of representation system some employers would like their employees to have; but, it should be equally clear that § 8(a)(2) is not a barrier to the realization of the kind of representation system many employees would like to have. In the event, all efforts to amend the Labor Act, either better to facilitate union organizing or to abrogate section 8(a)(2), have

been met with the political gridlock that has for decades characterized and thwarted any legislative effort to revise the law. Meanwhile, the lack of employee representation in the firm will remain with no prospect of surcease.

A lack of any form of collective representation of employees is also seen in those countries where workers *de facto* do not establish it, although both union and non-union representation are statutorily allowed. This phenomenon takes place, for example, in the Polish private sector, where the employees of dominating micro-firms are not sufficiently numerous to establish either union or non-union representation. Furthermore, the establishment of union or non-union representation within the firm is prevented by the opposition of the employer towards trade unions or a lack of employees' trust in non-union representation. The last situation remains typical not only for Poland, but also for some other post-communist European countries, where, under communism, works councils in reality did not represent employees' interests but played the role of ideological pretence. The Serbian report shows a good example of such a situation:

Although legislation [...] allows for this option, non-union representation of employees within a company is practically non-existent. The reason for this underdevelopment of works councils or other types of employee representation in Serbian and Montenegrin companies is probably that active participation (information, consultation or codetermination) is very unpopular. This stems from the fact that the old "self-management system", which was dominant in the former Yugoslavia and in which the employees, through their representatives, managed companies independently, was one of the main reasons for operative inefficiency and the subsequent collapse of the economy.

2.3. Competencies of Non-Union Representation within the Firm

2.3.1. Information and Consultation

In the countries covered by the report, the right to conduct collective bargaining in order to conclude a collective agreement is usually reserved for trade unions. One may even say that trade unions have a monopoly in this respect. Whereas non-union representation bodies within the firm have the right to represent employees in the process of information and consultation with the employer. This type of legal solution is illustrated by the following national reports.

UK:

Legal provision for non-union representation is largely confined to statutory consultation mechanisms. While recognized unions also have preferential rights with respect to specific consultation procedures the principal function of the recognized union is to conduct collective bargaining on behalf of the bargaining unit.

In Canada,

non-union representation of employees is not unknown in both the public and private sectors but, where it exists, it is not generally for the purposes of collective bargaining. In both the public and private sectors, employees excluded from unionization because of holding management or confidential positions of employment are not infrequently represented by non-union representatives to discuss (but not negotiate) specific issues affecting terms and conditions of employment.

In Finland:

According to the labour law legislation the tasks of the elected representative are numerous. The elected representative can act as a representative of the employee in all questions where a shop steward traditionally has been a representative: working time, annual holidays, equality between the sexes and this sphere will be increasing. The elected representative is also recognized as a person who may represent the employees within the process of information and consultation according to the Act on Co-operation within Undertakings (Section 3 paragraph 2). An elected representative is placed on the same footing as the shop steward in this respect. However, the position of being an elected representative does not give the representative any competence to conclude a local collective agreement on behalf of those whom he represents.

Three forms of participation by workplace forums and exercisable against the employer are foreseen by the Act, namely the right to consultation in respect of certain (limited) issues, the right to participate in joint decision-making in respect of other (even more limited) issues, and the right to information-sharing. It is clear that these powers accorded to workplace forums in some respects constitute an infringement of the managerial prerogative hitherto unknown in South African labour law.

2.3.2. Co-determination

In some countries the non-union employee representation within the firm has the right of co-determination as a unique competence or among other competencies. In that respect the German *Betriebsräte* represent a well known example. This solution is also typical of the former European communist countries, where respective legal provisions from the previous system still remain in force. This is illustrated by the Hungarian and Polish reports.

The workers' council shall have the right of codetermination with regard to the appropriation of welfare funds specified in the collective bargaining agreement and with regard to the utilization of institutions and real property of such nature. This is the most important right of the council (Hungary).

The Works Council has the power to take decisions (co-determination), give opinions and to control. The co-determining power includes: the adoption of the annual economic plan, the change of the enterprise's line of activity, the distribution and the use of funds of the enterprise, giving consent to the transfer of the fixed assets of the enterprise, the adoption of resolutions on the transformation of the enterprise and its becoming a part of a company (Poland).

2.3.3. Collective Bargaining

In some European countries the statutory law allows non-union representation to engage in real collective bargaining, although only in certain situations and to a limited extent. As far as the countries covered by the general report are concerned, French law can be taken as an example. According to the French reporter:

Les représentants élus du personnel – membres du comité d'entreprise ou délégués du personnel – sont, de plein droit, habilités à négocier un accord collectif dès lors que le recours à ce mode de négociation a été autorisé par la convention de branche ou l'accord professionnel applicable. Nul mandatement syndical n'est requis. La légitimité que leur confère l'élection suffit. Dès lors que l'entreprise comporte un comité du même nom celui-ci peut être autorisé à négocier des accords collectifs. La structure du texte de l'article L. 132-26, II, du Code du travail et la logique qui le gouverne excluent que la convention de branche ou l'accord professionnel mette cette instance de représentation des salariés à l'écart pour ne confier qu'aux délégués du personnel le soin de négocier des accords collectifs en l'absence de délégués syndicaux. Lorsque l'entreprise est divisée en établissements distincts, dotés de comités d'établissement coiffés par un comité central d'entreprise, compétence appartient à ce dernier pour négocier des accords valant pour l'ensemble de

l'entreprise et aux premiers pour négocier ceux intéressant un établissement déterminé. However, the French reporter points out the difference between accord collectif and a collective agreement which is reserved for trade unions: Les représentants élus du personnel ne sauraient négocier une convention collective, donc un acte ayant vocation à traiter de l'ensemble des conditions d'emploi, de formation professionnelle et de travail ainsi que des garanties sociales des salariés. Seule la négociation d'accords collectifs concernant un ou des sujets déterminés leur est accessible. Des thèmes sur lesquels la négociation peut porter, la liste est établie de manière limitative par la convention de branche ou l'accord professionnel qui autorise ce mode de négociation dérogatoire ; mais aucune limite n'étant légalement fixée, aucun n'est a priori exclu ; la liste arrêtée peut avoir une ampleur telle qu'à peu près aucun aspect des relations de travail n'en est évincé.

Another example of a non-union representation right to collective bargaining is given by the Polish reporter:

As it has already been indicated, employees' representatives elected ad hoc in enterprises are, in cases specified in the regulations, the only non-union form of employee representation in collective bargaining in enterprises where there are no trade unions. The following situations are covered:

- * an agreement concluded on the suspension of the provisions of labour law, fully or in part, with respect to the rights and obligations of the parties to the employment contract.
- * an agreement on the application of less favourable conditions of employment than those resulting from their employment contracts within the scope and time-limit specified in the agreement. Furthermore, if there is no trade union organisation in the enterprise the employer agrees on the rules for the use of services and benefits financed by the enterprise's welfare fund together with the employee elected by the staff to represent their interests.

The British case is also very interesting. First of all, the British reporter underlines that the statutory definition of *consultation* specifies that it is '*with a view to reaching agreement with the appropriate representatives.*' Then the reporter continues:

In practice, given the fluidity of dialogue procedures in the UK, such categorical distinctions are rarely watertight and it seems possible that consultative arrangements formed under ICER 2004 may evolve into bargaining relationships; there seems to be no legal bar preventing employee representatives from engaging in bargaining as opposed to consultative functions. This is a concern if the representational structure falls within the statutory definition of a 'trade union' since voluntary recognition for negotiating purposes of a non-independent trade union currently blocks the operation of the statutory recognition procedure. With respect to union representation, we have already seen how voluntary collective bargaining often resembles consultation in practice, particularly where union density is low and the ability to mobilize social pressure is correspondingly diminished.

The legal competence to negotiate collective agreements by non-union representation is also reported by other national reports. Thus, in Romania:

Although in reality most of the collective labour contracts concluded at company level are negotiated by trade unions, one must take into account the fact that Romanian law does not confine the possibility of representing the employees to trade unions only, every time providing alternatively the possibility of negotiating the collective contract even in the absence of a trade union within the company. In other words, trade unions do not have the exclusive authority to negotiate the collective labour contracts.

In Serbia:

Art. 205, para. 2 of the Act on Labour stipulates that the works council's role is to provide opinions and to participate in decision-making relating to the economic and social rights of the employees, in the manner and under the conditions determined by the law and by internal company regulations (collective agreements and labour rules belong to this category). There are no other regulations pertaining to the role of this body. Since the competence of the works council has not yet been precisely defined by law, its role in a company is often agreed upon between the employees and employer. From this it follows that the council primarily has an informative and consultative function. Still, the Act on Labour also contains a possibility to negotiate; Art. 250 of the ALS stipulates that if no union has been formed within the employer's company, wages and other types of income of the employees can be laid down in an agreement signed by the employer and the representative of the council or by the employee who has been authorized by at least 50% of the employees working for that employer. This agreement ceases to be valid on the day when the collective agreement comes into force. Regarding the content of the agreement, it can only regulate wages and other types of income, but not other issues relating to labour relations.

In Japan:

The current law confers on a majority representative, a majority union or a person representing a majority of the workers, some important authorities. For example, a majority representative has the authority to conclude a labor-management agreement. The labor-management agreement is distinguished from a collective agreement, even if a collective agreement concluded by a majority union can also become a labor-management agreement. The labor-management agreement does not have a binding effect for the employees covered by it, while collective bargaining has a “normative effect”. Besides, a role which the committee is expected to play is not limited to the discretionary work scheme. According to the words of Article 38-4, Paragraph 1 of the LSL, the committee is established to investigate and deliberate matters related to working conditions such as wages, working hours, etc. Besides, the committee’s resolution, adopted by four-fifths or more of the membership, can replace a labor-management agreement as to working hours or annual paid leave.

3. Prospects for Employee Representation in Collective Bargaining within the Firm

3.1. Trade Union Monopoly over Collective Bargaining within the Firm is Open to Doubt

The right of employees to engage in collective bargaining in democratic countries with a market economy is a key instrument for shaping employment terms and conditions. For a long time this right was monopolized by the trade unions. However, nowadays the unions’ monopoly over collective bargaining raises serious doubts especially when confronted with the decline in unionisation in many countries. Although it is true that this phenomenon does not occur everywhere with the same force, it can be said that countries with a stable high percentage of unionized employees are rare.³ A high rate of unionisation remains in the Scandinavian countries and this is stressed by the Finish reporter.⁴ However, contemporary publications and the majority of reporters say that there is a clear downward tendency as illustrated by, e.g., the USA and France. The American reporter states:

Union density, the percentage of the civilian, non-agricultural workforce eligible for union representation under the Labor Act that actually is represented has declined from a twentieth-century high of 35%–37% in the late 1950s to just below 8% today. The reasons for this decline are much debated. Survey data suggest a felt need by American workers for some form of representation (or workplace “voice”) – for about 30%, that would be traditional union representation. In July, 2005, three large unions left the national federation, the AFL-CIO, to create a new Coalition for Change, devoted more energetically to organize the unorganized. It remains to be seen whether the Coalition for Change will be effective in arresting the decline in union representation, whether the AFL-CIO will be goaded into doing more, or whether union representation will in future be even more a thing of the past.

The trade union crisis in France is described by the French reporter only in general terms:

la faiblesse du taux de syndicalisation en France, avec la conséquence que nombre d’entreprises sont dépourvues de délégué syndical, However, according to the French literature, the percentage of employees who are members of trade unions in this country has recently dropped to below 10 per cent.⁵

³ See in more detail: M. Sewerynski, *Collective Agreements and Individual Contracts of Employment 27 et seq.* (2003).

⁴ See in more detail: R. Fahlbeck, *Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features*, in Stockholm Institute for Scandinavian Law, *Stability and Change in Nordic Labour Law*. Legal Abbreviations 109 (2002).

⁵ See J. Pélissier, A. Suptiot & A. Jeammaud, *Droit du travail 28 et seq.* (21^e éd.).

According to other national reporters: in Japan “Since 1975, union density has been continuously decreasing and in 2005 fell to 18.7 percent”; in the UK

Preliminary findings from the 2004 Workplace Employee Relations Survey suggest there has been further erosion of the collective bargaining base. This estimates that unions are recognized for the purposes of collective bargaining in only 30 percent of workplaces. This decline has been largely attributable to new entrants to the labour market not joining unions rather than those already in union membership walking away from the union.

Also in Poland – the country in which quite recently Solidarity played a crucial role in political and economic transformation – one can observe a decrease in trade union presence within work establishments. “They mainly exist in the public sector and the rate of unionization, in September 2002, amounted to 14% of the workforce.”

Furthermore, it has to be pointed out that in some countries the role of trade unions in collective bargaining is declining. This can be seen through a disappearing difference between collective bargaining and consultation, and as a consequence through a declining regulatory role of collective agreements within the firm. The British reporter has noted this as follows:

Sociological analysis indicates a procedural transformation in the nature of collective bargaining over the last four decades. This has corresponded to a spectacular dilution of the union’s regulatory function within the enterprise. In procedural terms, joint regulation has been progressively eroded and this has been substituted by greater unilateral control of the employment relationship by employers. This has been manifested in two tendencies. First, the scope of dialogue has contracted significantly. Whereas in the mid 1960s joint regulation extended to issues such as work distribution, recruitment and the implementation of new technologies, more recent research points to ‘a very substantial decline in union representative involvement in the regulation of employee obligations and work organization aspects of the employment contract.’ In tandem with this, dialogue with unions is increasingly assuming a consultative character. This shift to consultative interaction leaves the managerial prerogative intact. The most recent empirical work suggests that voluntary recognition arrangements prompted by the statutory procedures have involved genuine negotiation on core bargaining topics such as pay; however, other non-core topics such as training, pensions and equality of opportunity are most likely to be subject to consultation, if they are discussed at all. This still indicates a very substantial gap between legal definition and social reality in the sphere of voluntary collective bargaining

A similar observation was made by Belgian reporter:

In Belgium, many workers are affiliated to a trade union. This is not only for ideological reasons. Their popularity is also due to the services they provide. The question remains whether the members’ willingness for action is sufficiently great. We fear the contrary. Trade unions are felt to be paper tigers and employers are aware of this. An additional problem is that the influence of the organisations is fading. Although there are still affinities between the trade unions and the political parties, the importance of cooperation is fading. The political power of the trade unions is weakening and the parties are losing interest in the trade unions.

And the Serbian reporter says:

Like in most European countries, due to the declining influence of unions, in Serbia there is a noticeable decline in the importance of central and branch collective bargaining. This is obvious if one looks at the content of collective agreements. If one compares old and current versions of general collective agreements, it is evident that the new texts contain a smaller number of provisions. They also contain fewer and fewer norms regarding working conditions, turning national agreements more into a general framework for other levels of negotiation.

An argument which speaks in favour of granting employees proper representation in collective bargaining within the firm, also when there is no trade union representation, is the progressive decentralisation of collective bargaining. This tendency was reported not only by national reporters, but also by a number of publications.⁶ In France:

⁶ See Sewerynski, *supra* note 3, at 40 *et seq.*

La négociation collective d'entreprise a d'incontestables mérites: permettre le traitement des problèmes de formation, rémunération, congés, conditions de travail ... en tenant compte au mieux de la situation (économique, financière, sociale), mais aussi des projets et perspectives de développement de l'entreprise dans laquelle elle se déploie; éviter l'arbitraire de l'unilatéral en donnant aux salariés, via leurs représentants, la possibilité d'intervenir dans la vie de l'entreprise ; contribuer à la prévention des conflits du travail. Son importance s'accroît lorsque, par ce canal, des aménagements peuvent être apportés à la norme légale ou des dérogations infligées aux conventions et accords de 'niveau supérieur', y compris dans un sens défavorable aux salariés. Mais pareille évolution, particulièrement perceptible en France depuis quelques années, ne saurait aller sans qu'une attention particulière soit portée à l'autorité des négociateurs: 'légale', la norme élaborée doit aussi apparaître 'légitime' à ceux qui en sont les destinataires; son application (réelle, et non point seulement formelle), pour une large part, en dépend.

In Italy:

Nowadays, there is a trend towards an enlarged importance of decentralised bargaining and there is a debate under way on the revision of the existing bargaining structure. So far, this tendency has been essentially limited to a growing use of framework rules at national level which must then be implemented at decentralised level, taking the local situations into account. This has somehow increased the scope of decentralised bargaining, while retaining, at the same time, the formal primacy of sectoral bargaining.

In Poland:

The decentralisation of collective bargaining in Poland is obvious. Suffice it to say that in 2005 there were only 14 national level collective labour agreements with 10 industry-wide ones. Besides, there were 123 multi-employer collective agreements concluded by municipalities and communes and covering the non-teaching staff employed in educational establishments (121 agreements) and those employed in public utilities, housing and social welfare sectors (2 agreements). Under such circumstances the importance of the appropriate shaping of employee representation in collective bargaining in undertakings is unquestionable.

In Finland:

the growing importance of the local level is considered to occur as a controlled decentralization. The collective bargaining on the firm level seems to be growing.

3.2. The Need for an Alternative Form of Employee Representation in Collective Bargaining within the Firm and Related Problems

In the light of the above arguments it seems that an alternative, non-union form of employee representation in collective bargaining within the firm is necessary. Moreover, it shall be stressed that in the light of the ILO regulations the right to bargain, to information and to consultation are not trade union rights, but employees' rights and that is why they have to have the freedom to choose the way in which to use those rights. So, it is worth reading the information in the Romanian report:

Within the entire legislation which is applicable in the field of social dialogue the Romanian legislator equally refers to the union or to the employees' representatives. In other words, those entitled to the right to social dialogue are not the trade unions, but the employees themselves, whether unionized or not. Non-unionization is not an obstacle to the exercise of any of the employees' rights to negotiation, information or consultation.

Thus, one has to quote once again the pertinent remarks of the British reporter who points to the role of democracy within the workplace, nowadays developing under the particular impact of European law. The reporter says:

The right to consultation in European law envisaged universal provision of employee representation to ensure compatibility with its requirements; the single channel technique of confining representational rights to recognized unions alone was inconsistent with this aspiration since in the absence of a recognized union there would be no provision for consultation with employee representatives. This aspiration to universality is quite

natural given the democratic rationale of consultation procedure. Democratic rights within the workplace should be guaranteed to all employees affected by workplace decision-making rather than confined to areas covered by union recognition.

That is also why the Serbian reporter argues:

Due to the continuing trend of dwindling union membership and the weakening role of trade unions, it would be useful if employees in Serbia were allowed complete freedom in choosing their bargaining representatives. Although this is now formally allowed in Serbia, certain restrictions apply, such as that no trade union can exist within the company and that at least 50% of the employees working in the company are in favour. Also, in the case of non-union bargaining, the content of negotiations is limited.

However, the idea of non-union employee representation in collective bargaining within the work establishment encounters serious reservations concerning at least two major problems. The first was mentioned by the Greek reporter and it consists of the possible conflict between trade union and non-union representation when both of them are authorised to engage in collective bargaining. According to the Greek reporter:

The peculiarity of the Greek system is that within the enterprise trade unions are allowed to be formed having the same competence as the Works Council. This leads to opposition between the trade unions and the Works Council, and the reaction of the trade unions is directed against the Works Council, because they are of the opinion that its activity lessens their power.

Similar concerns are expressed in the UK. This is reported by the British reporter as follows:

works councils have attracted criticism from a radical perspective. As Kelly accounts for it, ‘the “social partnership” ideology inscribed in works councils could undermine the serious and credible alternative of militant trade unionism’; as such, union involvement in works councils is ‘ideologically disarming’. On this view, instrumental effectiveness is better served by unions vindicating workers’ interests through strike action and industrial pressure.

The second problem is well defined by the British reporter:

how to ensure the independence, expertise and integrity of non-union representative structures while at the same time honouring the democratic principle of universality. As it stands, there is a very real possibility that many non-union consultative structures will be compromised by employer domination and control. Worse still, non-union channels may operate in practice as a technique of union substitution by employers who wish to retain effective control of consultation procedures.

The same problem was raised in the Polish report, whose author criticizes the legislator for giving non-union representation a right to collective bargaining which is too broad. The Polish reporter argues:

The above-mentioned cases of legal authorisation of non-union representatives of employees to conduct collective bargaining highlight the provisional nature of the representation which obviously is there to play the role of an artificial limb until the employee representation question is properly solved for the purpose of collective bargaining where trade unions are absent from an undertaking. Nevertheless, such an arrangement for employee representation as a party to collective negotiations and a party to collective agreements should be criticised. Doubts relate in particular to the fact that in most cases the procedure for appointing the representatives is referred to as the ‘appointing following the procedure adopted by the employer’ with no reservation that employees should elect their representation. Provisions do not offer any legal protection to employees who represent the staff. Thus I share the view presented in the doctrine that it is difficult to consider such employee representation as a genuine representation of collective rights and interests. We may risk the thesis that due to the negotiating weakness of these representatives, the legislator has allowed fictional bargaining. Particularly strange is the ability given to these representatives to conclude agreements which seriously interfere with employees’ interests, such as agreements to suspend the company’s internal regulations (mainly wage regulations) or the provisions of employment contracts.

The British literature also indicates an even greater risk for trade unions stemming from non-union representation within the firm, known as the problem of union substitution.

The organizational risk at the heart of the 'union substitution' dilemma is well articulated by Ewing: 'The danger with mandatory consultation through works councils or enterprise committees is that employers would be happy to create such institutions which would simply be another way to undermine trade union organisation ... For rather than encourage the growth of trade unionism, such devices may serve only to chill support.' It is certainly true that employers have used works councils 'paternalistically' as union substitution devices, and continue to do so with a degree of success. However, a comparative perspective enables a more precise appreciation of factors tending to heighten 'union substitution' effects.

One must also quote the reservations of the Japanese reporter towards non-union representation:

Generally speaking, it is taken for granted that trade unions, not employee representatives, are a true worker representation. There are several reasons for this. First, the activities of trade unions are usually guaranteed by the constitution, but those of employee representatives are not. Secondly, employee representatives are not usually allowed to go on strike and consequently cannot have the same bargaining power as that of trade unions. This means that employee representatives are less able than labor unions to protect workers' interests. This also applies to the Japanese case; trade unions have the constitutional right to strike, while a labor-management committee does not. Thirdly, trade unions, as associations, are formed voluntarily by workers who are union members; this means that the representative power of trade unions derives directly from the contract concluded between unions and union members. On the other hand, a formation of employee representatives is compelled by the law. From this it follows that the legitimacy for the representation of the trade unions is of a higher grade than that of employee representatives. In short, it is a delicate problem whether or not a legal intervention, by which the government intends to provide employee representatives, alternative forms of worker representation other than trade unions, is consistent with the constitutional norm. In order to avoid the unconstitutionality of a new law, a legislator must take care that the authorities of a labor-management committee may not impinge upon those of trade unions, in particular those of an existent minority union or those of a "potential" trade union in the same company.

3.3. Possible Solutions

The employee representation in collective bargaining can be based on two different concepts. According to the first concept, collective regulation of the terms and conditions of employment should remain trade union prerogatives and, as a consequence, the law has to grant unions a monopoly in collective bargaining and collective conflicts.⁷ The adoption of such a theoretical concept allows the simultaneous existence within the same firm of non-union representation, but only having cooperative prerogatives, i.e. the right to information and consultation with the employer. This solution does not lead to a conflict between two parallel forms of representation, as their powers can be clearly separated.

However, the adoption of the above-described first concept does not prevent a deficit in democracy within the work establishment, being one of the paradigms of contemporary labour relations. Thus, when there is no trade union representation within the work establishment, its employees may only have the right to information and consultation, being deprived of the right to negotiate the conditions and terms of their work, as well as the right to engage in other collective actions. This situation can be avoided by rejecting the concept of the trade unions'

⁷ The British reporter says on

a functional division between union representation and works council representation. Distributive conflicts are channelled through the trade union mechanism of collective bargaining; this operates in tandem with works council institutions designed to facilitate the cooperative resolution of production-related matters at enterprise level. In predicting substitution effects, the critical issue lies in the degree of co-ordination and integration between the two channels.

absolute monopoly in the collective regulation of terms and conditions of employment, also giving a right to collective bargaining and collective disputes to non-union employee representation in the workplace as an alternative right. It means that non-union representation may only be allowed to bargain and lead the disputes in the absence of union representation within a work establishment. This solution does not undermine the position of the trade union within the firm, as it grants priority to the trade union for collective bargaining and collective disputes if union representation exists. Moreover, it allows for, at the same time, union and non-union representation within the work establishment, as the latter could only have the right to information and consultation in that situation.

The national reports develop convincing arguments in favour of an alternative right to collective bargaining to be granted to the non-union representation of employees within the workplace. It is sufficient to quote the summary statement by the British reporter, who says that

The democratic base of employees' representation within the firm suggests that in principle the double channel approach is a need rather than a superfluity. As a democratic right, collective voice should be universally guaranteed for all workers.

However, the issue is not only about granting an alternative right to collective bargaining to non-union representation, but also about the scope of collective negotiation which has to be sufficiently broad. It is rightly stressed by the British reporter in the light of his national experience:

Plant level bargaining is sometimes limited in democratic potential because its structure is out of alignment with structures of managerial decision-making. The limited bargaining agenda entails a democratic deficit. Collective bargaining is now largely confined to issues such as pay and working time. It rarely penetrates core aspects of managerial prerogative such as 'the situation, structure and probable development of employment within the undertaking'. This can be contrasted with the richer consultation agenda in the standard provisions in ICER 2004. This has the potential to expand the frontiers of worker influence, moving away from the mitigation of effects of managerial decisions towards the shaping of the decisions themselves.

It is also worth adding the arguments developed by other national reporters.

The Romanian experience seems to indicate that the existence of a real alternative to union representation would be extremely useful for the employees, the objectives of collective negotiation and ultimately for the unions themselves, which would be thus obliged to modernize and improve their methods. As already shown, the Romanian law contains the possibility of non-union negotiation of the collective contract, through the employees' representatives, but only in those companies where there is no union.

According to the Polish reporter:

The assumption which is clearly visible in Polish law is that the conducting of collective bargaining belongs to the trade unions' prerogatives while works councils (or other forms of non-union representation) are authorised to act with respect to information and consultation, and this is basically a correct assumption. The latter type of representation consists of the recognition of interests which combine the workforce and the capital in an undertaking (enterprise) and not the confrontation of interests typical of trade unions. In spite of that, if there is no trade union representation in an undertaking, it seems justified to make it possible for non-union representation to conduct the bargaining. Non-union bargaining, however, should be restricted to necessary cases, i.e. to those relating to collective agreements which are required for an undertaking to operate (such as work rules or pay regulations).

4. Conclusion

The idea of non-union employee representation within the firm, having the right to engage in collective bargaining, as an alternative to the lack of union representation, does not yet seem to be universally accepted, particularly outside Europe. The arguments quoted in the American and the Japanese reports are particularly meaningful from this point of view.

It also has to be pointed out that non-union representation in the workplace, with an alternative right to collective regulation, is contested by both trade unions and employers, although for different reasons. This concurrence of interests has serious political consequences and this is why in many countries they hamper any attempts by the government to change the legislation currently in force.

Cite as: Michał Seweryński, *Representation of Employees in Collective Bargaining within the Firm*, vol. 11.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (December 2007), <<http://www.ejcl.org/113/article113-21.pdf>>.