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What is a collective agreement? Part two (DK)

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Summary

The Danish Supreme Court has upheld the decision from the Danish Eastern High Court (reported in EELC 2017/26) on the implementation of the Working Time Directive to the effect that an 'intervention act' can be deemed to be a collective agreement within the meaning of Article 18 of the Working Time Directive.

The law

Directive 2003/88/EC on Working Time (the 'Directive') sets working time standards for workers within its scope. For example, workers are entitled to a daily 11-hour rest period and a weekly 24-hour rest period.
The Directive allows for some derogation by law or collective agreement. For certain activities performed, Article 17 allows for derogation by laws, regulation, administrative provisions or collective agreement. Article 18 provides for more general derogations by collective agreement, if the workers concerned are protected appropriately.

Facts

In Denmark, almost all primary school teachers' employment relationships are covered by collective agreements. There are specific collective agreements about rest time, both in general and during school camps. In these agreements, which have been in force since the mid 1990's, the contracting parties derogated from the Directive.
In 2013, a major dispute erupted between the teachers' organisations and the employers' organisations (i.e. the Ministry of Finance on behalf of the State and Local Government Denmark on behalf of the Danish municipalities). During negotiations on a new collective agreement, the employers' organisations demanded fundamental changes to teachers' working time. The parties could not reach agreement, after which the employers' organisations staged a lockout of the teachers.
After four weeks of lockout, the Danish Parliament passed a so-called intervention act. Regulatory intervention is a long-standing Danish tradition, which allows the Danish parliament to end industrial action if essential social interests are at stake. Its consequence is that the collective agreement is renewed and replaced by an 'intervention act'. Normally, with an intervention act, the lawmaker will try to strike a fair balance to satisfy both sides of the dispute.
In this case, the intervention act effectively equalled the teachers' working time regime with that of public servants. The intervention act contained provisions about school camps similar to the provisions in the former collective agreements between parties. However, as regards general daily rest time, employers would be able to reduce this more often than under the former collective agreements. The intervention act made use of the exceptions to the Directive provided for in Articles 17 and 18.
The teachers' union claimed that the intervention act was in violation of the Directive and brought an action before the court against the Ministry of Employment, which was responsible for the intervention act. The union made two arguments. Firstly, school camps would not fall under the activities mentioned in Article 17(3) of the Directive, rendering it impossible to use the exception to the Directive. Secondly, as regards general daily rest time, an intervention act cannot be a collective agreement as referred to Article 18 of the Directive. The consequence of these two arguments would be that the intervention act would violate the Directive.
According to the Ministry of Employment, school camps were activities within the scope of Article 17(3)(b and c). It specifically relied on the ECJ judgment in *Union syndicale Solidaires Isèr*e (C-428/09), in which the ECJ had found that some workers employed under "educational commitment contracts", carrying out casual and seasonal activities in holiday and leisure centres, which constituted legitimate derogations from the Directive (using Article 17(3)(b and c)). Therefore, the intervention act in the case at hand contained a valid derogation from the Directive. As regards general daily rest time, according to the Ministry of Employment, the intervention act was to be interpreted as a collective

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agreement, as its outcome was to renew and replace a former collective agreement. Therefore, it was compliant with Article 18 of the Directive.

Decision of the High Court

In first instance, the case was heard by the Danish Eastern High Court. During the proceedings, the union had asked for certain questions to be referred to the ECJ if the High Court could not exclude the possibility that an intervention act could be considered to be of similar nature to a collective agreement.

However, the High Court found against the union. It held that school camp activities fell within the scope of Article 17(3)(b and c), which was in accordance with how this provision had been interpreted by the ECJ. Since activities within the scope of article 17(3) can be derogated from bylaws and regulation, the intervention act on this point was not inconsistent with the Directive.

As regards the general rest periods, the High Court essentially had to decide whether the intervention act could be regarded as a collective agreement within the meaning of Article 18 of the Directive. It held that the Danish labour market model entails a great deal of freedom of contract between the social partners. The state generally does not interfere in labour relations – it only does so *if* essential social interests are at stake, *if* the industrial action has been going on for a substantial period of time and *if* the prospect of the conflicting parties agree to a renewal of the collective agreement by means of negotiation seems hopeless.

After highlighting these characteristics of the Danish labour market model, the High Court explained the substance of the intervention act in dispute. The purpose of the intervention act was a renewal and replacement of the existing collective agreement to restore the no-strike commitment (*fredspligt*). The working time rules in the intervention act were left open to amendments between the local parties (the municipalities and local teachers' unions) and a majority of the local parties actually did enter into local agreements amending the intervention act.

Given this context, the High Court found that the intervention act satisfied the requirements of Article 18 of the Directive in relation to derogation by means of collective agreement. As the High Court did not find any reasonable doubt about the interpretation of the relevant EU law provisions, it rejected the request to refer questions to the ECJ.

Decision of the Supreme Court

The Danish Supreme Court upheld the decision of the High Court. Like the High Court, it held that school camp activities fell within the scope of Article 17(3)(b and c) of the Directive and the ECJ's interpretation. Consequently, the derogation could be specified by law and the intervention act was therefore not in violation of Article 17 of the Directive. As regards the general rest period and whether the intervention act could be deemed a collective agreement within the meaning of Article 18 of the Directive, the Supreme Court held that the Directive lacked a definition of a 'collective agreement'. It referred to the European Commission's Interpretative Communication on the Directive, stating that this concept is not defined. The Supreme Court also noted that a definition was also lacking in EU legislation and case law. Therefore, the question was thus to be answered from a Danish law perspective. In a Danish context, the provisions in the intervention act had become an integral part of the collective agreement in the same way as if the parties themselves had agreed upon the provisions. For example, a dispute about the intervention act would be treated in the same way as a dispute in a collective agreement is treated, with the consequence that the dispute is dealt with in the Labour Court or by means of industrial arbitration. According to the Supreme Court, this was a characteristic shared with a 'normal' collective agreement. Moreover, the provisions in the intervention act were essentially an extension of the agreement between the parties. Although the intervention did indeed imply changes, the view of the Supreme Court seems to have been that these changes were not substantive. It highlighted that no evidence had been presented to the court as to whether the new provisions in the intervention act had actually been used in a way that went beyond what had been possible under the collective agreement.

The Supreme Court upheld the High Court's judgment, ruling that the intervention act could be deemed to be a collective agreement within the meaning of Article 18 of the Directive.

Commentary

Regulatory intervention is a rare phenomenon in an international context. Presumably, only Norway has a similar practice. As explained, its aim is to end industrial action where substantial societal interests are at stake. The regulatory intervention regime in Denmark has developed over time, with acceptance from the Danish social partners. It is not rooted in legislation, but inferred from case law.

Over time, the ILO Freedom of Association Committee has criticised various regulatory interventions in ongoing industrial actions in Denmark, but to no effect. In this case, the Danish National Teachers Union filed a complaint with the Committee when the intervention act was adopted. After hearing the Danish government and criticising the process of the regulatory intervention, the Committee closed the case. The Committee generally finds state interference in labour disputes to be inappropriate. It does not accept social interests as a legitimate reason for intervention. This stands in stark contrast with the Danish approach, and the Danish Par-

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liament has not – despite the ILO criticism – refrained from interfering when lengthy industrial actions have threatened essential social interests. In Norway, one Supreme Court judgment even found that the ILO bodies' views on the limits on state intervention in labour conflicts lacked a sufficient basis in the ILO conventions themselves (RT1997/580).

Regulatory interventions are also controversial from a human rights perspective. The EctHR has held that the right to dispute (*konfliktretten*) is autonomously protected under the right of freedom of association under Article 11 of the European Human Rights Convention (*Yapi-Yol Sen*, Case no. 68959/01). However, the EctHR has so far not taken any decisions in cases concerning regulatory intervention. Danish legal scholars generally believe that the EctHR is likely to b be less strict than the ILO Freedom of Association Committee, as it has previously has accepted essential social interests as a legitimate reason for a restriction of a right protected by the Convention.

While the case at hand does not make regulatory interventions any more likely to be used to resolve disputes in the labour market, it adds a new perspective as to what a collective agreement is and whether it is an autonomous concept under EU law or one that is left up to Member States to define.

Principles laid out in EU directives are often derogated from by means of collective agreements or implemented by means of collective agreements and yet the ECJ has not yet expressed a view as to whether a collective agreement is an autonomous concept under EU law. In *Österreichischer Gewerkschaftsbund* (C-328/13), Advocate-General Cruz Villalón found a collective agreement was not an autonomous concept under EU law in relation to the Acquired Rights Directive (2001/23/EC). However, the ECJ was not as explicit as the Advocate-General.

It should be stressed that the concept of intervention acts is hard to pigeonhole. It is not traditional legislation, but nor is it a traditional collective agreement – it is somewhere in between. The judgments of the High Court and the Supreme Court suggest that intervention acts have more in common with collective agreements than traditional legislation, as a result of which they can be deemed collective agreements within the meaning of Article 18 of the Directive. But as regulatory interventions are a rare European phenomenon and as there does not seem to be a definition of collective agreement in EU law, it is quite remarkable that the case was not referred to the ECJ. However, the Supreme Court was confident that this was not necessary, since it relied on the Interpretive Communication from the EU Commission with regard to the Directive (2003/88/EC), which was issued between the judgments of the High Court and the Supreme Court.

The Supreme Court's judgment can also be seen as a pragmatic way to unite the complicated interplay between EU legislation on one hand and the Danish labour market model on the other.

Comments from other jurisdictions

Belgium (Gautier Busschaert, Van Olmen & Wynant): In theory Belgium has no fixed system of legislative or governmental intervention in social conflicts between social partners. As the social partners have a strong presence in Belgium and they are indirectly affiliated with certain political parties, it is not always politically feasible to intervene against the wish of the employment organisations or trade unions. Often the government and parliament will therefore stay absent. Nonetheless, there are many instances where the government has taken regulatory measures because the social partners could not find solutions. This has usually been the case at the national level in what is known as the 'Group of 10' (the council meeting of heads of the most important social partners) or in the National Labour Council (in which the national social partners can negotiate national collective agreements). If collective bargaining takes too much time and the social partners are not able to find a workable compromise, the government will often take over the initiative to adopt new legislation or executive measures. These interventions are sometimes controversial (e.g. salary freezes) and might not be in line with the international labour standards of the ILO, but the Belgian Constitutional Court usually gives the government and parliament a large margin of appreciation in social policy matters.

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