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To cite this version:

Pierre-Emmanuel Berthier, Olivier Leclerc. How can decentralisation of collective bargaining be achieved ? A typology of legal incentives. Bulletin of comparative labour relations, 2017, 99, pp.47-61. halshs-01636818

HAL Id: halshs-01636818

https://shs.hal.science/halshs-01636818v1

Submitted on 31 Jan 2020

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How Can Decentralisation of Collective Bargaining Be Achieved? A Typology of Legal Incentives

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Paper published in *Bulletin of Comparative Labour Relations*, vol. 99, 2017, pp. 47-61.

1. Introduction

In numerous European countries, collective bargaining law is notable for its ever-greater tendency towards decentralised collective bargaining. Obviously, situations vary from one European country to another.[1] In some countries, branch level collective bargaining and national, inter-professional bargaining are still fairly common. However, on a European scale, these countries are the exception rather than the rule. The general trend is towards collective bargaining centred on the company and the establishment.[2] Decentralised collective bargaining is deemed to better respect the financial situation of the companies concerned and be more closely attuned to the wishes of employees and their representatives. The backdrop of the economic crisis experienced by Europe since the late 2000s has accentuated this trend, making collective bargaining a preferred tool for national legislations seeking to adapt to ongoing economic changes.[3]

The growing popularity of company-level collective bargaining has already been widely studied. Some praise the increased flexibility of labour law, while others underline the limited ability of employees to influence the outcome of collective bargaining. This article does not aim

1. For an overview, *see* the contribution of Sylvaine Laulom in this issue.
2. For more information on the roots of this movement, see Harry C. Katz, *The Decentralization of Collective Bargaining: A Literature Review and Comparative Analysis*, vol. 47, no. 1, ILR Review, 3-22 (1993); A. Lyon-Caen, A. Perulli (eds), *Trasformazioni dell'impresa e rapporti di lavoro*, (Padova: Cedam), 2004.
3. B. Hepple, B. Veneziani (eds), *The Transformation of Labour Law in Europe. A Comparative Study of 15 Countries 1945-2004*, (Oxford: Hart Publ., 2009); G. Loy (ed.), *Diritto del lavoro e crisi economica. Misure contro l'emergenza ed evoluzione legislativa in Italia, Spagna e Francia*, (Roma: Ediesse, 2011); M.-C. Escande-Varniol, S. Laulom, E. Mazuyer, P. Vielle, *Quel droit social dans une Europe en crise?*, (Bruxelles: Larcier, 2012); E. Peskine, *La célébration de l'accord collectif d'entreprise. Quelques enseignements de la loi relative à la sécurisation de l'emploi*, 5 *Droit social*, 438-445 (2014).

to revisit the diagnosis of this decentralisation. Our interest lies in tackling a question that has been largely neglected to date: how can public authorities obtain the signing of collective agreements by social partners at a decentralised level? Since the conclusion of company-level collective agreements is the goal of public authorities, how is it possible to ensure that social partners actually sign such agreements? In fact, there is nothing to guarantee that the labour law reform sought by the public authorities will lead to a change in behaviour on the part of the social actors targeted by these reforms. Clearly, the mere promulgation of regulations does not automatically lead to compliant behaviour on the part of the actors at whom they are aimed. In short, there is nothing *a priori* to guarantee that employers, employees or union organisations will agree to engage in decentralised collective bargaining. Consequently, how can political impetus towards more decentralised collective bargaining be effectively translated into a change in bargaining practices in companies and professional sectors? Until now, this question has received three different responses. The first response is favoured by labour lawyers and consists in making collective bargaining obligatory at a company-level. Of course, the obligation to negotiate is not an obligation to reach agreement. However, it is implicitly supposed that at least part of these negotiations will lead to collective agreements. This procedure can be found in place in several European countries. Under the French Labour Code, employers must engage in regular negotiation on an ever-increasing number of subjects within the company.[4] During the negotiation period, the employer loses the power to take unilateral action on the matters that are the subject of the negotiation.[5] Likewise, in Italy, employers are obliged to enter into negotiation in the event of collective redundancies or a transfer of undertaking. Similarly, under Romanian law, there is a general obligation to negotiate collective agreements, applicable to all professional sectors. This obligation also extends to companies which normally employ a staff of twenty or more. The common thread between these examples is that they suppose a very simple – indeed simplistic – relationship between the rule and the actions: the rule sets out obligatory action (negotiation) and it will be obeyed because anyone contravening it would be liable to a sanction (if they refuse to negotiate or negotiate in bad faith). Thus, it is hoped that, by making negotiation obligatory, collective agreements will finally be concluded. However, the decision of whether or not to sign agreements remains outside the scope of the law.

4. Negotiation must be undertaken every year with regard to pay, working hours, the sharing of added value created by the company, professional equality between men and women and quality of work. In companies with more than 300 employees, the employer must, every three years, open negotiations on the management of employment and career paths (Article L. 2242-1 of the French Labour Code).
5. Article L. 2242-3 of the French Labour Code.

The second response given by labour lawyers, built on this finding, focuses on the consideration that the very decision to enter into collective agreements falls outside the scope of the law and is based rather on sociological considerations that it is not their role to examine. It is more the job of labour sociologists and economists to endeavour to establish the reasons that lead trade unions and employers to sign collective agreements. Notions such as 'trade union cultures' (more or less reformist), the 'balance of power' (more or less favourable) and the 'economic interests' of the parties to the agreement, etc. are particularly highlighted. In short, labour law regulations allow collective bargaining and put the relevant organisational framework in place, but the decision whether they wish to sign any agreements is left to the social partners. From this perspective, legal analysis can only relate to the context of the actions but not to the actions themselves. This has been the classic distinction since Weber between the point of view of lawyers who are interested in the rules of law ('what normative meaning ought to be attributed in correct logic to a verbal pattern having the form of a legal proposition')[6] and the point of view of sociologists who consider what the social actors actually do with this ('What actually happens in a group due to the probability that persons engaged in social action, especially those exerting a socially relevant amount of power, subjectively consider certain norms as valid and practically act according to them, in other words, orient their own conduct towards these norms').[7]

Between these two paths – one concerned with the obligation to negotiate collective agreements, the other advocating that the signing of collective agreements is outside the field of legal analysis – some authors have highlighted the possibility of implementing reflexive regulations. Respect for the rules of law arises not only from fear of sanctions but also from the integration of these rules into the instruments created by social actors themselves, rooted in self-regulation. This is how Simon Deakin, Colm McLaughlin and Dominic Chai describe how the pay gap between men and women could be reduced in companies through the use of voluntary instruments, such as salary audits, good practice dissemination mechanisms and *benchmarking* of competitors' practices.[8] As these authors say:

> reflexive regulation offers a critique of voluntarist approaches on the one hand and 'command and control' forms of law on the other. Voluntarist approaches which assume that the interests of business will automatically align themselves with the wider public good are seen as ignoring a range of barriers to this

6. M. Weber, *Economy and Society*, ed. G. Roth and C. Wittich, 311 (Berkeley: University of California Press, [1922] 1978).
7. *Id.*, p. 311.
8. S. Deakin, C. McLaughlin, D. Chai, *Gender Inequality and Reflexive Law: The Potential of Different Regulatory Mechanisms*, *in* L. Dinkens (ed.), *Making Employment Rights Effective. Issues of Enforcement and Compliance*, 115-137 (Oxford: Hart Publ., 2012).

> occurring, including externalities and related forms of market failures. The 'command and control' approach, in contrast, is criticised as involving excessive reliance on prescriptive controls. (…) Regulation should aim instead to be reflexive in the sense of both responding in its form and content, to social contexts, and in triggering a range of responses from social actors which can form the basis for effective self-regulation.[9]

These reflexive regulations likewise have a place in the field of collective bargaining. There are many examples of companies adopting good conduct guides to negotiation or undertaking to hold periodic discussions on one subject or another.

These three ways of considering the relationship between collective bargaining law and the signing of collective agreements by social partners are present, to varying degrees, in the current legislation of European countries. However, in our opinion, the three mechanisms identified do not seem to take all the relationships between the rules and the actions sufficiently into account. We propose to identify a fourth, incentive-based method of bringing rules into operation. The notion of incentive is a familiar one in economic theory. The theory of incentive agreements has undergone significant development by focusing on establishing financial mechanisms that incite rational economic agents to adopt certain behaviour that is deemed desirable.[10] The theory behind incentive agreements thus constitutes a serious attempt to take account of the limited rationality of economic agents and asymmetries of information. Within the employment relationship, it seeks, above all, to establish a salary level capable of inciting workers not to lower their productivity to the detriment of the employer.[11] Outside of the flourishing field of law and economics, this research has had a limited impact on labour law for a long time. In this respect, we have also characterised[12] rules of law that we would classify as incentive-based. We have proposed identifying incentive rules as legal provisions that leave to actors the choice of adopting one or another course of action, but whose aim is to render the hoped-for course of action more attractive. Incentives do not impose; they allow for a particular form of behaviour and encourage its adoption on the basis of the supposed interests of the beneficiary of the rule. Beneficiaries will abide by the rule not because they are obliged to do so and would be sanctioned if they did not,

9. *Id*., p. 119.
10. There is an extraordinarily number of published texts. For a classic introduction, see J.-J. Laffont and J. Tirole, *A Theory of Incentives in Procurement and Regulation* (MIT Press, 1993).
11. See Janet L. Yellen's seminal paper, *Efficiency Wage Models of Unemployment*, 74/2 American Economic Review, 200-205 (1984).
12. P.-E. Berthier, *Les incitations légales*, 1680 Semaine sociale Lamy, 36 (2015); O. Leclerc, T. Sachs, *Gouverner par les incitations. La diffusion d'une logique incitative dans le droit du travail*, 2 Revue française de socio-économie, 171 (2015). *See* also on this subject, in French law: S. Leroy, *Droit social et incitations: contribution à l'étude des transformations de la normativité juridique*, (thèse Université Paris Nanterre, 2014); in Italian law: V. Pietrogiovanni, *Le sanzioni positive nel diritto del lavoro*, (Universita degli studi di Bari Aldo Moro, 2013).

but because it is in their interest to do so. As a consequence, legal analysis does not simply cover what the law imposes or prohibits, but also the legal techniques put into place to encourage certain actions.

In this study, we examine the rules of law that provide an incentive to social partners to enter into collective agreements. It is our contention that labour law is not limited to *imposing the bargaining* of collective company agreements: it also puts mechanisms into place that *provide incentives to enter into* collective agreements. These rules are too often ignored by labour lawyers even though they play a key role in the effectiveness of the decentralisation of collective bargaining.

In order to identify mechanisms that provide an incentive to enter into collective company agreements, we conducted a comparative survey of eleven European countries. This survey was performed over 2016 with insights from the research group INLACRIS (*Independent Network for Labour Law and Crisis Studies*) in the context of a research project entitled *Collective bargaining developments in time of crisis* (project VP/2014/004, project coordinated by S. Laulom). We sent members of the INLACRIS network participating in the project a questionnaire aimed at identifying, in their country, the use of mechanisms aimed at providing an incentive to enter into collective agreements. This research enabled us to gather information on the following eleven countries: Austria, France, Italy, the Netherlands, Portugal, Slovenia, Romania, Spain, the United Kingdom, Hungary and Sweden.[13] This article is based on information drawn from this comparative survey. Responses to the questionnaire highlighted a variety of national situations. In some cases, several incentive mechanisms have been identified. By contrast, in other cases it seems that nothing of this kind exists in certain national laws. Consequently, our research enabled us to identify the diversity of incentive mechanisms present in national employment laws. Therefore, this article aims to set out a typology of incentives identified in collective bargaining law.

The comparative survey allowed us to characterise three principal incentive mechanisms in collective bargaining law. The first seeks to *facilitate* collective bargaining conditions for employers or unions. It entails removing material obstacles that could dissuade actors from entering into discussions and reaching agreement. Legislation can, for example, provide a subsidy

13. We extend our sincere gratitude for the responses that were given to our questionnaire to: Pr Teresa Coelho Moreira (Universidade do Minho), Dr Nicola Gundt (Maastricht University), Prof Tamás Gyulavári (University of Budapest), Prof Barbara Kresal (University of Ljubljana), Prof Piera Loi (University of Cagliari), Prof Franz Marhold (Wirtschafts Universität Wien), Dr José María Miranda (University of Santiago de Compostela), Dr Yolanda Maneiro (University of Santiago de Compostela), Dr Felicia Rosioru (University of Babeş-Bolyai, Cluj-Napoca), Dr Jenny Julén Votinius (Lund University).

aimed at covering negotiation costs. In this case, the incentive takes the form of facilitation. The second process consists in *compensating* actors who have actually signed a collective agreement. For example, a French employer can receive a 'bonus' for signing an agreement permitting the employment of young workers. The incentive is expressed here in a second form: reward. A third method of encouraging negotiation of a collective agreement consists in *taxing* companies who do not engage in the process. In this case, the incentive consists in making the undesirable situation more expensive (but without making it illegal). Taxation is, therefore, a third form that the incentive can assume.

In the light of French experience, and in view of the elements that we have been able to gather on other legal systems, it is our opinion that the following three procedures aimed at incentivising the signing of collective agreements can be identified: facilitation §3.02, reward §3.03 and taxation §3.04.

2. Facilitation

Facilitation is a rule of law aimed at making the conduct set out by law more simple: in this case, negotiation and signing of a collective agreement. Facilitation is aimed at simplifying the reputation of collective bargaining with a view to making it more attractive – a clear contrast to the unwieldiness and complexities sometimes attributed to it. Collective bargaining may well appear costly, difficult and risky, and this image may deter actors from embarking upon it. It is therefore important to help them to enter into negotiation and reach an agreement. To do so, the law must shed its reputation as a 'prescriber of action' and instead tackle the constraints of collective bargaining: its cost, lack of information, unavailability of negotiators or their mutual misapprehensions. Facilitation is aimed at removing these various obstacles. Although they are still very rare, such mechanisms aim to reduce the cost of negotiation for companies. In France, for example, the State may bear 70% of the costs incurred when implementing a 'generation contract'. This is a mechanism that favours the employment of young people and which is implemented, first and foremost, by the signing of a collective agreement.[14] Another form of facilitation consists of establishing, as they have in Sweden, a mediation body to which the parties to the negotiation can appeal when they are finding it difficult to reach agreement.[15]

14. Article D. 5121-6 of the French Labour Code.
15. Negotiators can call on the 'National Mediation Office' when they are finding it hard to make any headway in negotiations, even when there is no collective labour dispute. This body was established under The Co-Determination Act (1976:580), sections 46-53.

However the forms of facilitation that are best represented at a European level are mainly aimed at removing two obstacles: the lack of information available to parties and a lack of availability on the part of trade union negotiators.

Lack of information can be a disincentive to negotiation and is the target of various types of facilitation. It might be, for example, that the union or employer is not aware of the different forms of collective bargaining or does not know the legal consequences of signing an agreement. Facilitation might, therefore, consist of establishing a commission responsible for informing employers and unions about collective bargaining 'good practice' and the rules applicable to it. This is the case in the United Kingdom, where ACAS ('Advisory, Conciliation and Arbitration Service') drafts 'Codes of Practice' covering various aspects of employment relationships. These guides are aimed at aiding comprehension and implementation of texts introduced by the legislator. Among these guides, the 'Code of Practice on settlement agreements'[16] deals specifically with collective bargaining. This text is not legally binding on the parties to the negotiation, although judges can refer to it when ruling on disputes in this field.[17] The code of practice has more of an educational purpose of explaining the law. It is aimed at enhancing 'understanding' on the part of negotiators, of the provisions of the *Employment Rights Act* of 1996[18] on collective bargaining. The aim is to make negotiation accessible to all actors, employers and unions. Likewise, in France, certain facilitation methods have been proposed, aimed at making collective bargaining more accessible to a greater number of companies – particularly the smallest ones – as well as to trade unions. Thus the 'Combrexelle report' advocates the drafting of 'standard collective agreements' by professional sectors aimed at small companies.[19] The French law of 8 August 2016 likewise has an educational aspect, stating that 'employees, employers and their representatives may benefit from joint training aimed at improving social dialogue practices within companies'.[20]

However lack of information is not the only material obstacle to collective bargaining. The unavailability of actors, in particular the unions, is likewise an issue for facilitation. The time

16. Code of practice 4, 'Settlement Agreements' (under section 111 A of the Employment Rights Act, 1996).
17. The following is specified in the preamble to the Code: 'The Code is issued under section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992 and comes into effect by order of the Secretary of State on 29 July 2013. Failure to follow the Code does not, in itself, make a person or organisation liable to proceedings, nor will it lead to an adjustment in any compensation award made by an employment tribunal. However, employment tribunals will take the Code into account when considering relevant cases'.
18. This aim is set out in the introduction to this Code: 'This Code is designed to help employers, employees and their representatives understand the law relating to the negotiation of settlement agreements as set out in section 111A of the Employment Rights Act (ERA) 1996'.
19. J.-D. Combrexelle (dir.), *La négociation collective, le travail et l'emploi*, 89 (France stratégie, September 2015).
20. Article L. 2212-1 of the French Labour Code.

spent on collective bargaining within the company, if unsalaried, can be an obstacle to union negotiators, who have to interrupt their work in order to join in the negotiations. Several European countries grant union representatives the right to absent themselves from their work, without loss of pay, so they can fulfil their union role. This is specifically the case in Sweden,[21] Austria[22] and France.[23] Sometimes, for example in Hungary, such a right is specially organised in order to allow unions to hold discussion with their employer.[24] Even more specifically, under French law, union representatives are allocated additional 'credit hours', especially for the purposes of collective bargaining.[25] These supplementary hours allow a union representative, and employees called upon to take part in negotiations, to prepare the negotiation of an agreement without loss of salary, and without using up the monthly delegated hours to which the former is normally entitled. The employer is then bound to pay both for the time spent preparing the negotiation and their actual working hours.

There is, therefore, facilitation every time labour law establishes a mechanism that aids negotiation that underpins it. The aim is to put the actors in a position where they can fulfil the role that is expected of them: entering into negotiations and reaching agreement. Such facilitation must be distinguished from another form of incentive, which has often been found within the legislations analysed: reward.

3. Reward

Reward is a means of incentive that, according to Norberto Bobbio, should be carefully differentiated from facilitation. This distinction can be more easily understood by means of a simple example, inspired by the one given by the Italian author himself.[26] In order to encourage my daughter to do well in her English exam, I can do all that I can, in advance, to ensure that learning this language is a pleasure for her rather than an obligation. The incentive might consist in making learning English more fun so that my daughter is in a position to do well in her exam.

21. The Trade Union Representatives Act (1974:358) contains specific rules on employment protection for union representatives, and rules on paid leave for performing trade union activities.
22. When members of works councils are involved in their role as union representatives, they receive payment although they are generally not obliged to work as they would normally at their post (in enterprises with at least 150 employees §117 Arbeitsverfassungsgesetz) or because of the performance of their office as members of a works council (§116 Arbeitsverfassungsgesetz).
23. Articles L. 2143-13 et seq. of the French Labour Code.
24. Article 274(1) of the Labour Code: 'With a view to discharging their trade union functions of representation, employees shall be entitled to a reduction of working hours, and the employees designated according to Subsections (2)–(3) of Section 273 shall be exempted from work for the duration of consultation with the employer'.
25. Article L. 1243-16 of the French Labour Code.
26. N. Bobbio, *De la structure à la fonction. Nouveaux essais de théorie du droit*, trad. et présentation D. Soldini, 56 (Paris: Dalloz, 2012).

This incentive is aimed at eliminating the obstacles that could cause her to do less well and constitutes facilitation.

Another way of encouraging my daughter – which is not exclusive of the first – consists in promising her a reward if she does well in her exam. I could offer her a gift or take her to the cinema, depending on her wishes. Unlike facilitation, a reward is not based on adverse factors that arise before or at the same time as the exam (the fact that the child does not like English for example). The reward is given after the performance that I expect of my daughter, and is a consequence of her success.

In terms of collective bargaining, the 'reward' is given once a collective agreement has been signed. It rewards the actors who have actually signed an agreement. To this end, the reward sometimes consists of providing a financial advantage (A) and, more often than not, reducing the legal constraints that may be a burden to the employer (B).

A. Financial advantage

Some reforms adopted since the start of the economic crisis have introduced financial advantages linked to the signing of a collective agreement. These incentives are aimed at achieving the objectives that public policies seek to achieve in terms of employment through collective bargaining. The agreements sought are designed to keep in employment or training the workers most affected by unemployment. In France, it is now possible, under a collective agreement, to reduce severance pay payable to an employee taken on under a fixed-term contract in exchange for 'preferential access' to vocational training.[27] Likewise, a 'bonus' may be paid to any employer who, via a collective agreement, undertakes to employ a young worker while keeping on an older worker in their job.[28] Such financial incentives are not only being developed in France. As Barbara Kresal points out, they were implemented on a temporary basis in Slovenia at the start of the economic crisis. In early 2009, two measures aimed at preserving existing jobs were introduced by two legislative acts: on the one hand, a partial subsidy for shorter working hours and, on the other hand, partial reimbursement of wage compensation allocated to workers during temporary lay-offs. These two legislative acts linked entitlement to public subsidies either to the conclusion of a company agreement or consultation with trade-unions or other workers' representatives at a company level. These temporary measures have now expired.

Financial aid granted to companies in order to maintain employment can also take the form of more perennial mechanisms, such as in Austria, where a company with serious financial

27. Article L. 1243-9 of the French Labour Code.
28. Articles L. 5121-6 et seq. of the French Labour Code.

difficulties may request a grant from the Austrian Public Employment Service (AMS) to temporarily reduce working hours and pay for its workers by between 10% and 90% for a maximum period of six months. This requires the social partners to conclude a specific agreement. The employer receives a grant from the AMS based on the national unemployment benefit and compensates employees who suffer proportional pay cuts.

Reward, therefore, in the form of a financial advantage, is a means of encouraging employers to sign agreements on safeguarding employment or salary levels. Other rewards consist of relieving legal constraints to which employers are subject.

B. Relief from legal constraints

In this scenario, the incentive consists in granting employers a more flexible legal system than if they had not signed an agreement. This may take two forms, with unequal representation across the countries analysed.

The first, which is found in Spanish and Portuguese law, consists in temporarily suspending application of a collective agreement. Thus in Portugal, social partners can agree to suspend application of other collective agreements on working hours or salaries at a branch or company level.[29] The Spanish provision also offers an incentive to negotiate, although it still leaves more room for a unilateral decision on the part of the employer.[30] It effectively allows the employer not to apply the provisions of a collective agreement at a branch or company level, in particular in relation to salaries and working hours, in the event of economic, technical, organisational or production difficulties. In this context, the employer does not need to obtain the consensus of the parties to the agreement or even that of the company's workers' representatives. He must, however, hold negotiations on the causes justifying recourse to the suspension of the collective agreement. This negotiation, which must not last more than fifteen days, ends with obligatory arbitration by the authorities in the event of disagreement. The prospect of an intervention by the authorities is meant to encourage the parties to reach agreement. While the Spanish and Portuguese mechanisms are different, they share the same aim: to relax application of an agreement to allow a company to tackle the difficulties it is facing, and, therefore, on the employer's side, to eliminate the constraints arising from this agreement.

The second technique used as an incentive to collective bargaining is in evidence in several European countries and involves derogation from the law or from a collective agreement with

29. Law no. 55/2014 of the 25 August 2014.
30. Article 82 of the Estatuto de los Trabajadores; Real Decreto-ley 3/2012, of 10 February, de medidas urgentes para la reforma del mercado laboral, *BOE*, no. 36, 11 February 2012, pp. 12483-12546.

greater scope. We shall limit ourselves here to agreements that derogate from the law. When a derogatory agreement is signed, the employer benefits from a system that makes fewer demands on him – while not being necessarily more favourable to employees – than is established by law. There are numerous examples of derogation. They exist in the majority of countries analysed, with the notable exception of Austria. They can be observed to have developed even in countries where the 'favourable treatment principle' is still in place, such as Slovenia. In the latter, for example, the minimum salary reform which took place in 2010 left open the possibility of negotiating company agreements which would allow the new law to be temporarily derogated, by allowing minimum salaries of less than the legal amount to remain in place.[31] Derogatory agreements can cover various aspects of employment relationships, whether in relation to salaries, regulation of working hours or part-time work.[32] More specifically, agreements that permit derogation from the system governing redundancy on economic grounds have appeared in some countries, such as the Netherlands and France. In the Netherlands, a collective agreement can allow social partners to derogate from certain aspects of the legal system and establish a special commission responsible for ruling on the legitimacy of redundancies.[33] In France, the legislator has established collective agreements that allow for major derogations from the system governing redundancy on economic grounds. For example, these include 'internal mobility agreements'[34] and 'employment maintenance agreements'.[35] Internal mobility agreements govern the geographical mobility of employees within the company. 'Employment maintenance agreements' allow for a temporary reduction in the number of employees or an increase in working hours without any increase in pay. In exchange, the employer undertakes not to make any economic redundancies throughout the duration of this agreement. These mechanisms have a point in common: even if employees overwhelmingly refuse the application of these agreements, they will be made redundant without benefiting from the regulations on collective redundancy.[36]

31. Minimum Wages Act, 'Zakon o minimalni plači', Official Journal of the Republic of Slovenia, No. 13/2010.
32. In Italy, for example, numerous possibilities of derogation from the law can be cited. For instance, there is the example of legislative decree no. 66 of 2001 regulating working time. The maximum weekly working hours fixed by law are forty-eight (including overtime). Collective agreements even at company level can calculate the maximum weekly working hours as an average over a period that could be extended up to six or twelve months if there are economic or organisational reasons to do so. In more recent legislation (Jobs Act Legislative decree no. 81/2015) in the case of short-term contracts, the law sets the percentage of the workforce on this kind of contract at 20%, but collective agreements (even at company level) can derogate and increase the percentage.
33. Article 7:671a (2) and (3) Italian Civil Code. In cases of dismissal for economic reasons, the employer, together with the trade unions, may establish by collective agreement a commission that decides on the lawfulness of the planned dismissal.
34. Articles L. 2242-17 et seq. of the French Labour Code.
35. Articles L. 5125-1 et seq. of the French Labour Code.
36. More recently still, French law has provided a new category of agreement: 'agreement for the preservation and development of employment' (Articles L. 2254-2 et seq. of the French Labour Code). The regime under this agreement is similar to the 'employment maintenance agreement' where employees who oppose its application can

The redundancies that are made will then be subject to a procedure that is much less onerous for the employer.

In the countries analysed, the techniques aimed at relieving the burden of legal constraints on the employer are diverse but the incentive seems to be based on the same principles. The unions can be encouraged to sign an agreement on the basis of a promise made by the employer, for example, to maintain employment despite the company's difficulties or to encourage employee mobility in order to avoid announcing redundancies in the future. In turn, the employer may be encouraged to enter into an agreement because, if it is successful, the employer's power may be exercised in a less onerous legal framework and may, therefore, be subject to fewer demands. However, the possibility remains that these promises may not be kept and that negotiators may not achieve the result they were hoping for from the agreement signed. In other words, the incentive to enter into a collective agreement may be a source of disappointment for both employer and unions alike. The French experience offers an example of this: an 'employment maintenance agreement' could lead to results that are in direct opposition to those to which its negotiators aspired.

From the employer's side of things, the legal leeway it is granted can sometimes seriously harm the basic rights of its employees. For example, a law of 17 August 2015, removed the employer's obligation to reclassify employees subject to redundancy when they refuse the application of an employment maintenance agreement. Under this law, employers are no longer obliged to check whether another job is available and offer it to the employee before making them redundant, which in principle is set out by law for any redundancies based on financial grounds. Under Constitutional Council case law, the right to reclassification arises from the 'right to employment' guaranteed by the Constitution.[37] This exclusion from reclassification could, therefore, be the subject of an appeal on the grounds of unconstitutionality and, as a result, is very fragile. There is a case to be answered, therefore, that this reward which the employer is promised, namely the benefit of a less onerous legal regime if an agreement is reached, may in fact turn out to be disadvantageous for him. It is in cases like these that the reward can actually turn against the interests of the party that it is aimed to satisfy.

The unions, in turn, may be incited to sign such an agreement in order to maintain employment over some years, even if the company is suffering financial difficulties. An example of an

be made redundant under the same conditions. However, the agreement for the 'preservation of employment' can be signed even where there is no economic difficulty and does not contain any commitment on the part of the employer not to announce redundancies while it is in force.

37. Constitutional Council 13 January 2005, *Loi de programmation pour la cohésion sociale* [Planning Act for Social Cohesion], no. 2004-509 DC.

agreement signed in a company located in France ('Mahle-Behr') is a good demonstration of how this mechanism can have the opposite effect to the one intended.[38] An employment maintenance agreement was signed in this company in July 2013, by the majority unions, in order to avoid the loss of *one hundred and two* jobs. However, *one hundred and sixty two* employees refused the application of this agreement. These one hundred and sixty two employees were then made redundant and were unable to benefit from the guarantees implemented in cases of collective redundancy. This is a good example of how a so-called employment maintenance agreement can result in more widespread redundancy than was initially envisaged.

The incentive can, therefore, lead to disappointment when the signing of an agreement does not give its signatories the expected advantages or, worse, produces a result diametrically opposed to the one sought. Since the reward consists of rewarding the actors – basically the employer – for reaching an agreement, a third and final means of providing an incentive for collective bargaining consists of *taxing* employers who do not negotiate.

4. Taxation

'Taxation' is very common in economists' discussions on incentives.[39] A tax is aimed at making undesirable conduct more onerous. It consists of taxing the party who does not accomplish an act expected of it. From this point of view, taxes have very close links with criminal sanctions which are also a reaction on the part of the law to undesirable conduct (theft, impediment, discrimination, etc.).

There are, however, two aspects that distinguish taxation from a criminal sanction. Unlike a criminal sanction, taxation is much more predictable in terms of *amount*. While a criminal sanction can vary depending on the judge's assessment of the severity of the offence – as compensation might vary according to the prejudice caused to a victim – taxation varies on the basis of predefined, quantifiable criteria, such as a company's work force or the percentage of its total payroll. 'Taxation' does not have the connotations that a sanction does either. Under a taxation system, undesirable conduct is not necessarily 'illegal' or 'prohibited', it is simply more costly. In terms of collective bargaining, taxation consists of making an employer pay a certain amount when he does not engage in negotiation with the unions, or when he fails to respect the

38. *See* on this point: P. Adam, *Le 'prodigieux' accord de maintien de l'emploi. Escapade en pays de Rouffach*, 1611 *Semaine Sociale Lamy* (2013).
39. See for example France, where well-known economists have proposed replacing the damages that an employer can be ordered to pay when he makes a redundancy without genuine, serious grounds for doing so, with a specific, predetermined 'tax': O. Blanchard, J. Tirole, *Protection de l'emploi et procédures de licenciement*, Report by the Economic Analysis Council, (Paris: La documentation française, 2003).

agreement resulting from such negotiation. The few examples that we have managed to discover – in France and in Italy – show that taxation can either be in addition to a criminal sanction, or replace it.

Taxation sometimes seeks to augment criminal sanctions, the dissuasive nature of which is often debated. Thus French companies with at least fifty employees who have not engaged in annual collective bargaining on workforce salaries are subject to taxation,[40] in addition to any criminal sanction to which they might be subject for having failed to respect this obligation to negotiate.[41] In other cases, taxation completely replaces sanctions. This is the case, again in France, where companies with at least three hundred employees are subject to a financial 'penalty' when they fail to commence negotiations on the implementation of the 'generation contract'[42] aimed at boosting the employment of young people. Similarly, under Italian law, the fact of making collective redundancies when an agreement has set out alternative measures is not subject to a criminal sanction but to taxation. In this case, employers have to pay a higher social contribution in order to finance the special unemployment benefits due to workers collectively dismissed.[43]

In the European countries that we have considered, taxation is not a general trend. However, it is a good illustration of the content of an incentive-based approach. It does not find an actor who fails to negotiate or respect a collective agreement guilty of either a civil or criminal offence. It leaves it to the actors to decide what is most advantageous for them, by comparing the tax cost with the cost of negotiation or the ensuing costs of an agreement resulting from such negotiation.

5. Conclusion

This article clarifies the diversity of the mechanisms for legally regulating employment. The negotiation of collective agreements is far from the sole option; labour laws in Europe also use incentive-based mechanisms to encourage the signing of collective agreements. This latter type of regulation constitutes a 'soft' option for achieving the signing of a collective agreement. Rather than obliging social partners to enter into collective agreements, the law is conceived such that it is rational for them to want to do so. From the point of view of the public authorities, incentive-based mechanisms offer a major advantage: they enable a result to be obtained (the signing of

40. Article L. 2242-5-1 of the French Labour Code.
41. Articles L. 2243-1 and L. 2243-2 of the French Labour Code. Failure to respect this obligation to negotiate is punishable by a fine of EUR 3,750 and a one-year prison sentence. We should, however, specify that only the fine, and smaller than the maximum possible, is pronounced by the judges.
42. Article L. 5121-9 of the French Labour Code.
43. Law No. 223 /1991.

decentralised collective agreements) without interference in the employer's management decisions. While obliging social partners to sign agreements would be flying in the face of contractual freedom, incentives mean that such courses of action can be encouraged without the application of any constraints. Basically, this could be described as making the perspective of negotiating and reaching agreement appear more in line with the actors' interests. Signing a collective agreement does not become obligatory; it simply becomes more rational.

In the European countries that we have studied, incentives to sign collective agreements basically relate to the management of employment within a company, with a view to, or in the context of, economic difficulties, and working conditions. The most 'offensive' agreements relating to working conditions, in particular to salary and working hours, are still those rooted in financial justification. In other cases, incentives can be related to employment of certain categories (young or old) of workers. The incentive to sign collective agreements can thus be seen as a means of boosting an employment policy without forcing employers to recruit particular categories of workers. As a result, employment policies are implemented by the 'softer', but by no means less genuine, process of incentive. For this reason, the core of the incentive-based mechanisms highlighted in our study aim to encourage collective bargaining; incentives are used to support an employment policy that is implemented directly at company-level. It is, however, still necessary to bear in mind the fact that the incentive-based mechanisms that we have identified are not particularly linked to the decentralisation of collective bargaining. These incentives (facilitation, reward, taxation) could also be used in support of policy aimed at the development of collective agreements at a branch level or indeed national, inter-professional agreements.

In the European countries that we have studied, the majority of incentives favouring the signing of collective agreements are aimed at employers and employees. In this light, the signing of a collective agreement can be perceived as a condition for allowing them to benefit from certain advantages or avoid certain inconveniences. And it is to allow employees or the employer to benefit from these advantages or avoid these inconveniences, that collective agreements are indeed signed. This being the case, the policies we have studied demonstrate a considerable range of mechanisms, to the point that the recipients of the incentive are not always easy to identify. In certain cases, the incentive is aimed at employees as much as the employer. For example, French Labour Code states that 'in order to improve the professional development of employees on a fixed-term contract, a collective agreement at branch or company level can both cap the amount of compensation when the contract comes to an end at 6% [rather than 10%], while offering

consideration to these employees, particularly in the form of preferential access to professional training' (Article L. 1243-9 of the Labour Code). In this case, the incentive benefits both the employer (reduction in social charges) and employees (improved professional training). However in other situations, identifying the beneficiary of the incentive is much less clear-cut. Let us take the example of the provisions of the French Labour Code on internal mobility. In order to encourage the implementation of such collective agreements, the law stipulates that employees who refuse the application of the provisions of the agreement to their employment contract may be made redundant. In this case, the law specifies that their redundancy takes the form of individual redundancy on economic grounds. The redundancy follows the individual redundancy procedure (less onerous for the employer), whatever the number of employees involved and even if, in total, they exceed the thresholds for definition as collective redundancy. Is the incentive aimed at the employee or the employer? Predetermination of the redundancy system applicable in the event of an employee's refusal to apply the agreement allows the employer to benefit from a less onerous redundancy regime. At the same time, the incentive is extended towards the employee who is incited to accept the implementation of the agreement (and thus the mobility clause), under the threat of redundancy.

Strangely, while in the European countries that we have studied, collective agreements are entered into between employers or their representatives on the one hand and union organisations on the other, very few rewards are given directly to the unions. The incentive to enter into collective agreements always seems to be aimed at employers and employees, based presumably on the supposition that this should leave them to encourage the union organisations to enter into agreements. Among the rare examples that we found was that of the Netherlands, where in practice if not in law, the employer pays the so-called *vakbondstientje* (the union bargaining subsidy) for all his employees covered by the collective agreement in question, to the trade unions that are party to it. How can this situation be explained? An initial explanation might be that providing unions with a direct incentive to sign collective agreements could give rise to an unlawful inequality of treatment between different union organisations. For example, in France, rewarding a union simply because it is more inclined than another to sign an agreement would not constitute legitimate grounds for such a disparity.[44] This argument is, however, far from sufficient in terms of explaining why unions are not rewarded in European law, on the basis of

44. The French Court of Cassation holds that the 'principle of equality is a constitutional rule, and does not allow an employer to subsidise one representative union and not another, on the basis of whether or not they have signed a collective agreement or convention' (Cass., Soc. 29 May 2001, *Bull. civ.* V, no. 185).

their consent to collective agreements. There are two, not mutually exclusive, hypotheses as to why this may be the case.

In the first hypothesis, the employer, in so far as he has the power to influence employment, must be the main target of these incentives. In the examples given, the reward is not given to encourage *both parties* to reach agreement, but to encourage the employer to accept the obligation to maintain employment and retain employees as an essential part of its decision-making process. In this context, the incentive appears as a means of introducing a decision that is solely the employer's into a collective agreement. Consequently, the rewards are aimed exclusively at the employer. In turn, the unions will already be encouraged to take the decision to sign the agreement by the promise made to them in relation to maintaining employment and/or salary level, without the need to promise them further reward.

According to a second hypothesis, it is necessary to admit that the role of unions would be called into question if they were acknowledged as having a vested interest in the signing of an agreement. It is in fact very difficult to reconcile the idea that unions represent the collective interests of employees with the idea that these same unions could be guided towards 'rational' behaviour by incentives, particularly those of a financial nature. Providing direct incentives to unions to enter into collective agreements would be tantamount to giving them a vested interest. This interest could potentially diverge from the professional interests of the workers that they represent, as such interests are not always convergent.