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The Role of Collective Agreements in Regulation of Work Conditions in View of the Effects of Estonian Labour-law Reform

1. Introduction

The new Employment Contracts Act^{*1} (ECA) has been in force in Estonia for two and a half years. One of the key motivations for its adoption was to increase labour-market flexibility. As outlined in the Explanatory Statement of the Draft of the Employment Contracts Act^{*2}, modernisation of labour laws was considered a key element for bringing greater flexibility to the labour market. From the standpoint of employee security, it was concluded that, in addition to the new aspects of regulation under the new ECA (e.g., amended regulation of proprietary liability)^{*3}, there was also a need for addressing security elements that lie outside the regulation of employment contracts, such as unemployment benefits, increases in unemployment insurance compensation, expansion of the range of people eligible for benefits, and establishment of schemes facilitating access to lifelong learning.^{*4}

Although one component of the European Commission policy on the common principles of flexicurity^{*5} is to provide for flexible and reliable contract terms through labour laws, collective agreements, and the work organisation, the role of collective agreements was not prominent in the drafting of the ECA. At the same time, in the implementation of all elements of flexibility (institutional, working time, wage, and

¹ Töölepingu seadus. – RT I 2009, 5, 35; RT I, 25.5.2012, 26 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 10.4.2012).

² Seletuskiri töölepingu seaduse juurde. Available via <http://www.riigikogu.ee/> (most recently accessed on 10.4.2012) (in Estonian).

³ Eesti Vabariigi töölepingu seadus (Republic of Estonia Employment Contracts Act). – RT 1992, 15/16, 241; 2007, 44, 316 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 10.4.2012).

⁴ Seletuskiri töölepingu seaduse juurde (see Note 2).

⁵ Communication of the Commission on the common principles of flexicurity. Brussels: European Commission 2007. Available at <http://eur-lex.europa.eu/lexUriServ/LexUriServ.do?uri=CELEX:52007DCO359:EN:NOT> (most recently accessed on 10.4.2012).

worker- and job-mobility elements)⁶, collective agreements definitely play a significant role, in addition to laws and in conjunction with individual employment agreements and regulations on employers' work procedures.

Because of the economic recession, there was no increase in unemployment insurance compensation or unemployment benefits and no expansion in the range of people eligible for benefits. In the final findings of a study completed in 2010⁷, it was concluded that the focus in Estonia has been placed rather heavily on increasing the flexibility of the labour market and that labour and social policies have, to date, not facilitated the implementation of the balanced European social model in Estonia.

On account of the above, it is necessary to analyse the role of collective agreements in regulation of labour relations and achievement of flexicurity since the new ECA's entry into force in Estonia, in comparison to other EU countries. This article is intended to answer the following questions: What is the coverage of collective agreements in Estonia, and what are the levels of these agreements; which material labour relations are regulated in Estonia by collective agreements; how do collective agreements regulate non-typical labour relations, work and rest time, and other work conditions in Estonia; how and on what conditions may collective agreements deviate from the imperative provisions of the Employment Contracts Act; and what legislative amendments would contribute to improvement in the regulation of collective agreements?

2. Collective agreements' coverage, and levels of agreements in Estonia

For one to understand the role of collective agreements in Estonia, it is important to note that about 32.7% of employees are covered by collective agreements.⁸ For the most part, collective agreements in Estonia are entered into at the enterprise level. In 2010–2012, seven expanded contracts at sector level have been signed in the fields of transport and health care.⁹

Of 465 actual enterprise-level collective agreements, 105 have been entered into by those not representing trade unions.¹⁰ The reason for such dualism in agreements from the angle of employees is that there are few trade-union members in Estonia. Trade unions have been set up in 6% of enterprises, and an employee representative has been elected in 13.3% of enterprises.¹¹ One reason the percentage of coverage by the agreements is higher than that of union membership is the provision in §4 (1) of the Collective Agreements Act¹² (CAA) by which a collective agreement can be applied to all workers at an enterprise, regardless of their membership in the trade union, if the parties to the agreement so agree. The second reason for the percentage of coverage by agreements being higher is the provision in §4 (4) of the CAA according to which the wages and the work- and rest-time conditions regulated by sector-based and nationwide agreements can be expanded to all workers in the relevant sector or to all enterprises in Estonia.

In many European countries, regardless of legislative initiative, the practice of transition from collective agreements made centrally (state and branch activity level) to enterprise-level agreements is not so common. An example is the practical outcome of the collective-agreement reform that was carried out in Holland, where industry-wide agreements cover 70% of all employees and around 10% of workers are covered additionally by enterprise-level collective agreements.¹³ In Estonia, the situation is quite the opposite—the

⁶ R. Eamets, T. Paas. *Labour Market Flexibility, Flexicurity and Employment: Lessons of the Baltic States*. Nova Science Publishers 2007, p. 198.

⁷ *Turvaline paidlikkus Eestis: Hetkeolukord ja arenguperspektiivid (Flexicurity in Estonia: Current Situation and Development Prospects)*. RAKE and Praxis 2010. Available via <http://www.eakl.ee/> (most recently accessed on 10.4.2012) (in Estonian).

⁸ Background information on industrial relations in companies in Estonia was used, with data from 2009. Available at <http://www.eurofound.europa.eu/eiro/2012/country/estonia.htm> (most recently accessed on 10.4.2012).

⁹ Statistics from the collective agreements database. Available via <http://klak.sm.ee/> (most recently accessed on 10.4.2012) (in Estonian).

¹⁰ Statistics from the collective agreements database (see Note 9).

¹¹ From background information on industrial relations in companies in Estonia (see Note 8).

¹² *Kollektiivlepingu seadus*. – RT I 1993, 20, 353; 2009, 5, 35 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 10.4.2012).

¹³ R. Blanpain, T. Blanke, E. Rose. *Collective Bargaining and Wages in Comparative Perspective: Germany, France, the Netherlands, Sweden and the United Kingdom*. Hague: Kluwer Law International 2005, p. 91.

modest number of industry-wide agreements itself ensures a flexible process, but it also enables major differences in regulation of material work conditions within the same sector of activity and for employees of the same enterprise.

3. Content of collective agreements

In most European countries, the regulation of collective agreements has undergone major changes in the past decade. In addition to traditional issues, such as wages, working time, and terms for termination of an employment relationship, collective agreements are increasingly used for agreeing on issues such as employability, balance between work and family life, efficiency and quality of work, and sustainability.^{*14} The key role of collective agreements is still to protect employees, as the weaker side in labour relations, from market forces by reducing inequality, though collective agreements are seeing increasing use for balancing employers interests for workplace flexibility with workers interest for worker-oriented forms of flexibility.^{*15}

Pursuant to §2 (1) of the CAA, the role of a collective agreement in Estonia is relatively broad and one may enter into a collective agreement in different segments of the employment relationship. The subject fields of labour relations provided in §6 (1) of the CAA (wages, working and rest time, terms of employment, termination of contract, redundancy, occupational health and safety, retraining and training at work, refusal to work, and other terms that the parties regard as necessary to agree on) is regulated, with minor changes, in the most of the collective agreements entered into in the field of transport, communication, energy, the manufacturing industry, health care, service, and the public sector.^{*16} Although the list in §6 (1) of the repealed CAA does not provide for such highly important labour issues as promotion of employment, support for balance between work and family life, equal treatment, inclusion of employees in decision-making, and employees' notification and consultation, one can say that these issues are regulated in some respects in Estonian collective agreements. However, collective agreements at their various levels seldom address gender equality issues and matters of achieving higher productivity, innovation, and quality of work with a view to stabilising the employment situation and cutting costs. In summary, the above-mentioned §6 (2) of the CAA allows collective agreements to regulate all and any work conditions as the partners deem necessary; however, it is the sample list contained in this provision that has had the greatest impact on the content of collective agreements in Estonia.

4. Regulation of the work conditions of non-typical employees by collective agreement

The European Commission's policy on common principles of flexicurity also requires that relevant regulations be established for non-typical employees and forms of work and for reducing gaps between employees.^{*17} According to §1 (2) of the CAA, a collective agreement is a voluntary agreement—between employees or a union or federation of employees and an employer or an association or federation of employers—that regulates labour relations between employers and employees (including public-sector employees and officials). Collective agreements can be entered into at enterprise, sector, or national level, according to §3 (2) of the CAA. Under the definition given, trilateral collective agreements cannot be entered into in the case of non-typical forms of work between an agency offering temporary staff, its employees, and the enterprise that uses these staff.

¹⁴ T. Fashoyin. Trends and developments in employment relations and the world of work in developing countries. – *The International Journal of Comparative Labour Law and Industrial Relations* 2010/2, p. 133.

¹⁵ S. Hayter. *The Role of Collective Bargaining in the Global Economy: Negotiating for Social Justice*. Geneva: International Labour Organization 2011, p. 8.

¹⁶ The author analysed 50% of the enterprise-level collective agreements concluded in 2010–2011 in her possession (50 agreements out of 100). Collective agreements registered in the database of collective agreements (after removal of personal data therefrom) too were made available to the author for scientific purposes.

¹⁷ Communication of the Commission on the common principles of flexicurity (see Note 5).

A similar restriction applies to persons defined as only worker-like persons. For instance, entry into a collective agreement is prohibited between economically dependent individuals who operate as self-employed persons or under contract in the law of obligations (they are legally not considered as under an employment contract) and their contractual partners. Although in Estonia there is use of such people working as self-employed persons to provide services as are generally contracted by a specific employer (making this person dependent on such an employer), our labour laws do not use the term 'economically dependent worker' as is done in the Czech Republic^{*18} or in Germany.^{*19} Pursuant to §1 (4) of the ECA, provisions of the ECA do not apply to contracts under which persons who carry out work responsibilities are significantly independent in terms of selection of the nature, time, and location of the work. This author believes that the concept of 'economically dependent worker' should be regulated by the ECA and that adapted labour law should be applied to such workers.

However, according to the general spirit of the CAA, in a collective agreement it is possible to agree that certain working conditions (minimum wage, requirements as to the quality of the work, etc.) are applied both to the terms for agency staff used in the enterprise and for self-employed persons contracted for the work by the employer. For example, the collective agreement signed between the Union of Estonian Automobile Enterprises and the Estonian Transport and Road Workers' Trade Union^{*20} requires the application of terms for working and rest time and for wages to both temp staff working in this field and those people working under a service contract.

The general spirit of the CAA also provides for entering into a collective agreement with an agency that rents labour as an employer. This is similar to the situation in Holland, which recognises collective agreements in establishing minimum working conditions for agency staff.^{*21} In 2003, Germany introduced the principle that agencies offering temporary staff must apply the minimum terms for the relevant field of activity.^{*22} But since the objective of hiring staff from an agency is to cut costs, German law allows payment of a lower minimum wage to these staff than to direct employees in that specific branch of activity, provided that this has been agreed upon with trade unions in the given sector.^{*23} At the same time, under §11¹ (2¹) of the Equal Treatment Act, which was recently amended^{*24}, agency staff in Estonia must be subject to work- and rest-time, wage, occupational safety, and health terms similar to those for employees of the relevant enterprise. While in Italy, for instance, collective agreements are used to regulate the causes of use of temporary agency work (technology, production, and organisational) and specific activities (cleaning and construction) allowing for the use of agency staff^{*25}, our collective agreements do not provide for such regulation. A collective agreement concluded in AS Fortum Termest^{*26} obliges the employer to hire persons outside AS Fortum Termest to carry out renovation, construction, or similar work if the employees of AS Fortum Termest themselves are fully occupied, no in-house employees have the required training, or there are justified economic reasons. A collective agreement concluded in AS Eesti Post^{*27} lays down the employer's obligation to inform the trade union every six months as to the number of agency staff, by unit.

Twenty per cent of our enterprises use telework (aka distance work).^{*28} Telework is indirectly defined in §6 (4) of the ECA; however, the law provides no specific terms for it. Since telework is a specific form of work and is increasingly common, it should have been legislated that the specific terms for telework may be agreed upon in collective agreements. This author's opinion is that such a reference in the law would provide an impetus to the work partners in society to regulate this area more broadly with collective agree-

¹⁸ J. Pichrt, M. Stefko. *Labour Law in Czech Republic*. Wolters Kluwer Law and Business 2010, p. 45.

¹⁹ M. Weiss, M. Schmidt. *Labour Law in Germany*. Austin: Wolters Kluwer 2008, p. 47.

²⁰ The collective agreement, concluded in 2012, is available via <http://www.etta.ee/> (most recently accessed on 10.4.2012) (in Estonian).

²¹ Communication of the Commission on the common principles of flexicurity (see Note 5).

²² Blanpain *et al.* (see Note 13), p. 24.

²³ *Ibid.*

²⁴ Võrdse kohtlemise seadus. – RT I 2008, 56, 315; RT I, 10.2.2012, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 10.4.2012).

²⁵ T. Treu. *Labour Law and Industrial Relations in Italy*. Alphen aan den Rijn: Kluwer Law International 2007, pp. 42–43.

²⁶ In the possession of the article's author. The company operates in the energy sector. The agreement was concluded in 2011.

²⁷ In the possession of the article's author. The company operates in the communications sector. The agreement concluded in 2011.

²⁸ *Paindlikud töövormid Eestis (Flexible Forms of Work in Estonia)*. Praxis 2011. Available at http://www.pare.ee/files_www/Kristi_Nurmela.pdf (most recently accessed on 10.4.2012) (in Estonian). Data from 2009 were used.

ments. One of the few collective agreements that provide for telework has been concluded in the Chancellery of the Riigikogu.²⁹ The degree of regulation of teleworking via laws or collective agreements varies by country. In France, labour law designates telework as an agreement between the employer and employee within the framework of the existing collective agreement with regard to total annual working time, provided that time spent teleworking does not exceed 218 hours a year.³⁰ The national collective agreement in Belgium³¹ regulates the terms for home-based telework, including the employer's obligation to avoid isolation of teleworking employees and see to technical support and software protection.

The role of collective agreements in regulating the versatility of contractual relations is increasingly important from the angle of the flexicurity of labour relations. It is necessary to update the CAA with regard to non-typical agreements. In view of the novelty and complexity of these issues, it is important to use a combination of laws and collective agreements to regulate non-typical forms of work. Since the work conditions with non-typical forms of work are especially dependent on the specific area of activity and the nature of the work, the ability to regulate work conditions sensibly via only laws is clearly restricted. It is important to agree with the relevant partners at the government level on the framework provided by the ECA for agreements related to the work conditions of non-typical workers and as to which conditions should belong to the realm of collective agreements.

5. The derogatory role of collective agreements

In the past decades, the role of the law, individuals, and collective agreements in regulating work conditions has significantly changed, in terms of both their essence and their interaction.

As a legal reference, in Estonia the collective agreement lies below law and higher than an individual employment contract in the hierarchy of legal sources. The provisions agreed upon in the collective agreement are mandatory for the parties who have entered into said agreement. Under §2 of the ECA, an agreement that is less favourable for the employee than what is prescribed by law (that is, a so-called derogatory agreement) is invalid, except if the possibility of agreement on derogation is provided for in the ECA. In comparison with the labour law that was in force until 2009 (where derogation that was less favourable for the employee was prohibited altogether), the role of agreements has thus been expanded. Although the lawmaker has not specified which contracts allow for making of derogations that are less favourable for the employee, the text of the ECA indicates that this category includes an individual agreement made between the employee and the employer, as well as a collective agreement. This principle is also supported by §4 (2) of the CAA, under which terms of a collective agreement that are less favourable than what is prescribed by law or some other legal act are invalid except when the possibility of entering into such an agreement is provided by law. Hence, if one explores the text of the ECA in its entirety (incl. the provisions on derogatory agreements) and proceeds from the rationale of the text, one may conclude that §2 of the ECA lays down a general principle of deviating from the law; however, the specific agreement that allows deviation from a specific provision of law to the detriment of the worker is determined by the very same provision of the ECA that allows such derogation.

When agreeing on working conditions that are less favourable than those prescribed by law, one should ask what is actually favourable for the employee. If the contract or law states that the condition is such a general principle as 'reasonable time', this can be interpreted differently, depending on the nature of the work. If the law clearly states who has priority in cases of redundancy, the derogation can be defined more clearly for employees in the relevant category. Finally it can be said that in Estonia it is not yet common to define a more favourable situation in the context of several conditions of the same collective agreement.

The ECA cites only three cases in which derogatory agreements in collective agreements are allowed: According to §97 of the ECA, collective agreements may, for economic reasons, establish a shorter term of notice in cases of termination of an employment contract than what is prescribed by law; §51 (3) of the ECA states that by collective agreement, the daily rest time can be reduced to less than 11 hours; and §46 (2) of the ECA states that a collective agreement may establish less favourable working time for up to one year for

²⁹ In the possession of the article's author. The collective agreement was concluded for the public sector in 2011.

³⁰ K. Nevens. Home work, telework and the regulation of working time: A tale of (partially) similar regulatory needs, in spite of historically rooted conceptual divergence. – *Journal of Comparative Labour Law and Industrial Relations* 2010/2, p. 214.

³¹ R. Blanpain. *Labour Law in Belgium*. Austin: Wolters Kluwer Law and Business 2010, p. 121.

employees in the health-care, welfare, agriculture, and tourism sectors. One reason the derogatory role of a collective agreement is so modestly being established is clearly the fact that it is a new principle for employees' representatives. For decades, the overall principle was application of a provision that is more favourable for employees. This is definitely also a key question for Estonian employees and employers unions in taking responsibility for entering into derogatory agreements. A study of collective labour relations in 2011 showed that where few enterprise-level trade unions were ready to accept the responsibility related to the derogatory role of collective agreements in entry into contracts, central trade unions have started to look positively at the derogatory role of collective agreements.^{*32} According to the same study, the central unions of employers see the role of a collective agreement as that of an agreement that permits the deviation from the protection arising from the ECA.

Section 2 of the ECA is formulated in a manner common to laws of many European countries where the principle of derogation is regulated by law. In the Czech Republic^{*33}, Italy^{*34}, Sweden^{*35}, Holland^{*36}, and Belgium^{*37}, enterprise-level trade unions have the right to make derogations from law in their collective agreements also if the derogation is less favourable for the employee, provided that such a possibility is provided for in the sector's collective agreement. For instance, in Sweden^{*38} the law establishes maximum ratios of working time, and these are mandatory for partners where working time is agreed upon neither via collective agreements nor otherwise.

In Finland, §§6 to 9 of Chapter 13 of the Employment Contracts Act^{*39} lay down the principle for when and by which level of collective agreement deviation from the provisions is allowed. The Lithuanian Labour Code allows for the use of collective agreements to agree on principles differing from the law in terms of entry into fixed-term employment contracts, the term of notice required of the employer for termination of an employment contract, and the level of compensation paid by employers.^{*40} In addition, the Lithuanian Labour Code delegates to collective agreements the regulation of rules on overtime (Article 152) and agreement on summary recording of working time (Article 149), laying down only a maximum. Also the basis for proprietary liability of workers (Article 255) and categories of employees who may enter into a proprietary liability agreement (Article 256) have been included in such regulation.^{*41}

In Hungary, collective agreements may derogate from labour laws with regard to work and rest time, the law provides specific instructions and maximum ratios for this kind of derogation.^{*42} In Poland, derogation from the legislation is allowed only if it provides more beneficial terms for the employee.^{*43} The Latvian Labour Code does not provide for derogatory regulation through collective agreements.^{*44} Similarly to Estonia, Latvia displays labour relations that are regulated mainly by law, while the individual employment contract is regarded as an alternative to the regulation more than the collective agreement is.

Generally, EU member states have a principle that derogations from the law that would affect employees are within the purview of collective agreements. This is because collective agreements are considered more suitable for offsetting the impact of work conditions worse than those prescribed by law than are individual contracts. The objective is for there to be adequate regulation to provide sufficient security and the greatest possible flexibility.

³² A study of collective labour relations in the private sector (Centar, 2011). Available at <http://www.sm.ee/meie/uringud-janalüüsid/toovaldkond.html> (most recently accessed on 10.4.2012) (in Estonian).

³³ Pichrt, Stefko (see Note 18), p. 241.

³⁴ Treu (see Note 25), p. 192.

³⁵ A. Adlercreutz, B. Nyström. *Labour Law in Sweden*. Austin: Wolters Law and Business 2010, p. 59.

³⁶ Blanpain *et al.* (see Note 13), p. 104.

³⁷ *Ibid.*, p. 46.

³⁸ Adlercreutz, Nyström (see Note 35), p. 58.

³⁹ Finnish Employment Contracts Act (55/2001). English text available via <http://www.finlex.fi/en/> (most recently accessed on 10.4.2012).

⁴⁰ R. Blanpain, W. Bromwich, O. Rymkevich, S. Spattini. *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective*. The Hague: Wolters Kluwer Law and Business 2009, p. 361.

⁴¹ Lithuanian Labour Code, 4.6.2002. English text available via http://www3.lrs.lt/dokpaieska/forma_lhtm (most recently accessed on 10.4.2012).

⁴² Blanpain *et al.* (see Note 40), p. 344.

⁴³ M. Sewerynski. *Collective Agreements and Individual Contracts of Employment*. London: Kluwer Law International 2003, p. 193.

⁴⁴ I. Tare. *Labour Law in Latvia*. Austin: Wolters Kluwer Law and Business 2010, p. 48.

6. Regulation of work and rest time via collective agreements

Traditionally, most of the collective agreements in Estonia regulate work- and rest-time issues, since these conditions are highly dependent on the particular nature of the work and the applicable regulation is sometimes so detailed that it is not feasible to specify it via law.

Subsection 46 (2) of the ECA refers to the possibility of extending the period for working-time calculation (to one year at maximum) via a collective agreement in the fields of health care, welfare, agriculture, and tourism. This principle according to which working time is calculated for a period of up to one year, which entered into force on 1 July 2009, has already been adopted in collective agreements made in the field of health care. For example, West Tallinn Central Hospital has entered into a collective agreement in which the total calculation period agreed on for working time is as long as six months.^{*45} For all other fields of operation, the period for calculation of working time has been limited to four months.

Subsection 46 (3) of the ECA has delegated to individual agreements the right to make exceptions to working time. This provision limits working time to 52 hours per seven days over a calculation period of four months and this overtime conditions must not be unreasonably unfair to the employee. From the angle of the safety of the employees, thought might be given to changing Section 46 of the ECA. Namely, the law should require that collective agreements be used to regulate the principles for application of overtime in companies, including potentially unreasonably unfair conditions in respect of employees and the principles of occupational safety and health care involved in the overtime and that the Labour Inspector must monitor under §46 (4) of the ECA. In a parallel with the practice of many other EU member states, national laws have delegated the right to agree on the total length of working time for collective agreements in Belgium^{*46}; working time's organisation in Sweden^{*47}; and possible cases of overtime obligations in, for instance, Spain.^{*48}

Pursuant to §51 (1) of the ECA, an agreement by which the uninterrupted rest period left for an employee over a span of 24 hours is less than 11 hours is void unless the law provides otherwise. Pursuant to §51 (3) of the ECA, derogation (daily rest time that is less than 11 hours) from the terms of §51 (1) may be agreed upon only via a collective agreement. Special provisions in §51 (4) of the ECA state the principle that §51 (1) of the ECA does not apply to health-care and welfare workers. As §51 (1) of the ECA is not applicable in the health-care and welfare sectors, the requirement to conclude a collective agreement does not apply when one derogates from this provision for the length of the rest time. Regardless of the absence of such a delegation provision in the ECA, a rest-time period that is shorter than 11 hours is at present being agreed upon via collective agreements in the health-care sector. Given the importance of the issue, this is clearly justified. The collective agreement made in AS Põlva Haigla^{*49} states that the agreed working time of employees working to a shift list not exceed 12 hours and it is possible, by special arrangement, to agree that a shift shall be up to 24 hours long.

While considering the topic of making derogatory agreements under the ECA, one should also note that, in accordance with §50 (4) of the ECA, night-time work extending beyond eight hours, and up to 24 hours, may be agreed upon either in an individual employment contract or through a collective agreement. Subsection 51 (6) of the ECA also allows for the use of individual and collective agreements for apportioning daily rest time in a manner different from that prescribed by law (minimum blocks of six hours).

From examination of the regulation of working and rest time in the ECA, it is difficult to understand why the lawmaker decided upon establishing specific provisions to give such roles to the individual agreement and the collective agreement. No national agreement with the social partners is prescribed in Estonian law.

However, the specific provisions (allowing for derogations) on working-time regulation that are stated above are being implemented in various enterprise-level collective agreements. For instance, AS G4S has regulated in its collective agreement^{*50}, by employing a derogation that is permissible by law, the principles

⁴⁵ In the possession of the article's author. Concluded in 2010.

⁴⁶ Blanpain (see Note 31), p. 133.

⁴⁷ Adlercreutz, Nyström (see Note 35), p. 88.

⁴⁸ M.A. Olea, F. Rodrigues-Sanudo. *Labour Law in Spain*. Austin: Wolters Kluwer Law and Business 2010, p. 71.

⁴⁹ In the possession of the article's author. Concluded in 2011. The company operates in the health-care sector.

⁵⁰ In the possession of the article's author. Concluded in 2011. The company operates in the security sector.

for night-time work, shift lengths, and stints of rest time, as well as the scope for implementation of these terms, justification, and special situations in terms of occupational safety and health. At the same time, it should be said that such derogatory agreements enabled by law have value only if, in addition to the flexibility provided by law, these collective agreements also stipulate measures to protect workers' health and safety. This is a new area for collective agreements in Estonia, opened up by the adoption of the new regulation of the ECA, and this field of regulation in collective agreements will surely develop.

At any rate, one must support the trend toward regulating working- and rest-time issues in collective agreements for supplementation of individual contracts of employment and in addition to them. It must also be ensured that making of derogatory provisions is the result of carefully analysed decisions by those implementing them, looking at the entire package of work conditions and development in general that a single employee often cannot analyse when negotiating a contract. In the ECA's current provisions, the chapter on working and rest time is very detailed in comparison with other chapters, and it is likely to become even more detailed if these issues are not delegated to collective agreements.

One such area, in the author's opinion, in which the system of regulation could have continued, especially in view of the practice of current employment contracts, is on-call duty time and the remuneration for non-standard working time. Until the ECA entered into force, the terms and organisation of on-call duty work had to be agreed upon in collective agreements. However, §48 (1) of the ECA provides for a minimum wage for on-call duty work by law. While thus far, for instance, remuneration for on-duty work under collective agreements was given at a rate of 25–40% of the normal hourly rates, the minimum rate stated by §48 (1) of the ECA is 1/10 of the agreed fee. Collective agreements are also, in some respects, influenced by the fact that the ECA does not require the payment of additional fees for work done in late evening (from 18.00 to 22.00). As a result, several collective agreements now provide for payment of additional fees only for night-time work and work on public holidays. Therefore, the author's opinion is that in the case of enforcement of these minimum guarantees, one should weigh whether to provide for the principle that the law is applicable unless the issue is regulated by a collective agreement. Such a change would contribute to better use of the resources available in the companies and sectors that enter into such agreements (the parties habit of addressing this issue in their collective agreements until the new labour law was adopted) as well as enhance guidance of the social partners toward regulation of minimum conditions that match the actual situation.

7. Regulation of other work conditions via a collective agreement

The ECA does not provide a significant role for collective agreements in key issues of labour relations that many countries' law mandates to be regulated by collective agreements, such as terms for entering into fixed-term contracts in Italy⁵¹; the maximum duration of fixed-term contracts and principles for extension in Germany⁵²; terms of notice for termination of employment contracts that are shorter than those prescribed by law in Germany⁵³; principles for prohibition of ordinary redundancy in Germany⁵⁴; and the redundancy procedure, benefits, and reinstatement principles in Finland according to §7 of Chapter 13 of the Finnish Employment Contracts Act. In Estonia, these areas are regulated mostly in general terms in the ECA.

Undoubtedly, this is partly because collective agreements are relatively uncommon in Estonia. However, for instance, lawmakers in Lithuania have not been influenced by the modest coverage of collective agreements (no more than 15% of the population⁵⁵) and the government still has given collective agreements a bigger role in regulating labour relations (see also item 5).

At the same time, many collective agreements have started to agree on important issues for social partners that are generally regulated in the ECA and that have been legally easier to define. The general wording

⁵¹ Treu (see Note 25), p. 40.

⁵² Weiss, Schmidt (see Note 19), p. 55.

⁵³ *Ibid.*, p. 124.

⁵⁴ *Ibid.*, p. 135.

⁵⁵ Blanpain *et al.* (see Note 40), p. 361.

of §38 of the ECA, which regulates continuation of the payment of wages for a reasonable period if there are obstacles to the work, requires that the provision for cases wherein personal factors render the worker unable to work be made more specific by the social partners. For instance, AS Stockmanni Kaubamaja has entered into a collective agreement⁵⁶ that has a specific provision for when such remuneration is maintained (consultation of a physician, illness of a family member, job interview during one's term of notice, etc.) and for how long, if the employee needs to be away from the workplace. Other provisions address the procedure for applying; formulating; and, if necessary, proving such need. The collective agreement concluded in AS SEBE⁵⁷ has specified the necessary diligence in work (customer service for passengers, ticket sales rules, work in cases of accidents, etc.) that is considered in awarding of performance-based pay. Section 16 of the ECA refers to the degree of diligence very generally.

Ensuring that extraordinary termination of the employment relationship is handled correctly is constantly an important issue for employers, and collective agreements deal with principles that enable one to implement this provision more accurately. This is the case with employment contracts concluded in AS Eesti Energia Narva Elektriijaamad⁵⁸, which describe acts in connection with which such termination of the contract may be implemented in the relevant sector.

Moreover, for cases of violation of work responsibilities, collective agreements regulate the procedure of drawing up a warning and the validity of such a warning; examples are the collective agreements concluded in AS Eesti Energia, OÜ Eesti Energia Jaotusvõrk, and AS Eesti Energia Võrguehitus⁵⁹. Subsection 88 (4) of the ECA mentions such a warning only in passing.

As a rule, Estonian collective agreements do not regulate those aspects of labour relations that are more complex legally and are only generally formulated in our ECA, such as those principles of proprietary liability that are regulated by collective agreements in Germany⁶⁰ and the right and causes of extraordinary termination of employment (handled in Italy by collective agreements⁶¹). Under §75 of the ECA, the principles for calculation of proprietary damages, procedure for claiming damages, and the maximum degree of liability are regulated only via an agreement made between the employer and employee, although this may not be the best possible option from the viewpoint of the employee. Similarly, with reference to an agreement made between an employer and employee, §77 of the ECA prescribes a contractual penalty. For more detailed agreement on when the fine may be applied and its maximum rate, the law should have referred to regulation in collective agreements. In Estonia, collective agreements regulate, in the main, the notification in situations of termination of employment contracts (mostly for economic reasons), the pre-emptive right to maintain an employment relationship, terms for offering a different job, the employer's obligation to provide the necessary training in cases of transfer of employees, the pre-emptive right to regain a job in the event of vacancies, etc. At the same time, in cases of extraordinary termination of employment, it is not yet common to describe significant causes and reasonable time from becoming aware of significant circumstances until termination of employment, etc. In view of the issue of termination from the perspective of the importance of industrial harmony, ensuring employees' security, and prevention of breaches of work duties, it is reasonable to delegate the generally worded regulation in §§ 88 and 89 of the ECA to collective agreements. This is also important for better use of existing resources (practice of handling the issue via collective agreements).

The general principle is, naturally, that such collective agreements may not, in comparison with the law, affect the employee's situation (except in cases allowed by law), according to §4 (2) of the CAA. Neither may collective agreements be in conflict with the meaning of the law and the general principles of contracts under the law of obligations.

Analysis of collective agreements shows that the development of the regulation of material work conditions in collective agreements unguided by law has been unsystematic and vastly different between individual fields of operation and from one company to the next.

It arises from the current practices, described above, that in cases of a social dialogue, as it is today in Estonia, employers accept to regulate with collective agreements mainly those terms that are also dealt by

⁵⁶ In the possession of the article's author. The company operates in commerce. The agreement was concluded in 2011.

⁵⁷ In the possession of the article's author, it was concluded in 2011. The company operates in the transport sector.

⁵⁸ In the possession of the article's author, the agreement was concluded in 2011. The company operates in the energy sector.

⁵⁹ In the possession of the article's author, it was concluded in 2011. The company operates in the energy sector.

⁶⁰ Weiss, Schmidt (see Note 19), p. 187.

⁶¹ Treu (see Note 25), p. 108.

the law. This is shown additionally by a study of collective labour relations in 2011⁶², wherein, as one reason for entering into a collective agreement, participants indicated the relevant reference in the law—e.g., delegation of working-time regulation.

8. Conclusions

In most EU member states, the role of collective agreements has changed since the 1980s. In a global economy, social partners and states have an interest not only in stability but also in being able to adapt and be sustainable. In other words, the traditional role of collective agreements—agreement on terms that are more beneficial than those demanded by the law—is no longer enough. In addition to a distributor of profit and an instrument augmenting the legislation, it is seen as an instrument that is regulative and provides flexibility. Depending on the situation, the role of collective agreements is to supersede, develop, or implement a law.

Thus the lawmakers in countries where coverage by collective agreements is high have entrusted to them the regulatory role of providing content for the provisions of the law as well as the option of deviating from the imperative legal provisions, even to the detriment of the employee. Of the countries studied for this article, there are some exceptions—for instance, I have noted that Lithuania has rather modest coverage by collective agreements but a Labour Code that assigns the essential role to collective agreements (*inter alia*, allowing deviation from the law), probably from a wish to develop the regulatory role of collective agreements with the aid of the legal framework.

Unlike many other EU members, Estonia has stayed true to the traditional role of collective agreements, which prevailed until the early 1990s. This is true for both the content of the agreements and the role of the agreement in deviation from the imperative provisions laid down in the ECA (incl. to the detriment of the employee).

Neither Estonian lawmakers nor the major social partners have accentuated the regulation of labour relations by collective agreements during the reform of labour-related legislation. The current practices related to collective agreements have mostly been disregarded. Next to laws, a central role has been given to individual employment contracts in the regulation of work conditions. The provisions for the regulation of working and rest time form an exception in this regard, in giving collective agreements somewhat more weight than individual contracts, and this has also been applied in collective agreements by social partners.

The new ECA allows collective agreements' deviations from the imperative provisions of the law, to the detriment of the employee in just three cases.

Analysis of the regulation of collective agreements established after the reform of labour laws shows that collective agreements have started to agree on important issues for social partners that are generally regulated in the ECA and that have been legally easier to define. However, the development of the regulation of material work conditions in collective agreements unguided by law has been vastly different across areas of activity and company boundaries. The practices prevalent in Estonia have proved that the conclusion of collective agreements can be directly affected—through addition to the law of references to collective agreements—with a legal framework provided for resolution of the issues or by delegation of the agreement on the content of a matter provided for to collective agreements.

Today, the key to changing the role of the collective agreements lies in development of social dialogue and in the changing of the ECA. The current CAA does not directly restrict conclusion of agreements addressing the subjects, content, or validity of collective agreements. However, the current CAA needs to be made more detailed with respect to both the content of the agreement and parties to a non-typical contract.

The author of this article is, however, of the opinion that, as things stand in the Estonian labour market, where collective agreements are rarely entered into, it is necessary to guide the values of the parties to an employment relationship by making the law semi-mandatory, depending on whether or not the collective agreement applies to the parties in an employment relationship with respect to the given issue. This is true for the areas wherein certain detailed regulation is necessary for better protection of the employee (for instance, alternative terms and conditions for working and rest time, as well as extraordinary cancellation

⁶² Study of collective labour relations in the private sector (see Note 32).

of a contract with a view to achieving maximally adequate regulation in terms of flexibility and security in the given economic and labour market conditions).

The providing of content to the generally worded norms of the ECA might also be—subject to agreement with the social partners—delegated to collective agreements, especially where it is difficult for the law to give detailed guidelines to the parties to an individual employment contract on account of differences in work life and where an individual employee might lack the contracting skills to ensure security. The relevant areas include the degree of diligence, principles governing obstruction of work, proprietary liability, terms of contractual penalty, and principles and procedure for cancelling a contract. The goal is to create a better balance among competitiveness, job creation, and maintenance of jobs, and to take into account the minimum rights of employees.

Contrary to the trend in countries with a tradition of negotiating to conclude more agreements at the level of the enterprise, in Estonia we should, in view of the eclectic nature of the regulation of work conditions, attach more importance to the role of sector-level collective agreements in order to generalise the regulation of labour relations better while enjoying the benefits of regulation at the level of the enterprise. Consequently, the author holds that use of the combination of law and collective agreements needs support from the law and that, instead of law, regulation via collective agreements should be encouraged in establishment of work conditions—to the detriment of the employee, if necessary. Such diversification of the regulation of work conditions would enable flexibility and security matching the current situation, by granting discretion in decision-making to the level of the employees of the enterprise instead of to individual employees for important aspects of the employment relationship.