

The concept of representativeness at national, international and European level



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European Industrial Relations Dictionary

In this report, a number of key terms relating to European-level industrial relations are discussed. For a comprehensive overview of each of them, visit Eurofound's European Industrial Relations Dictionary, at <http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary>

The following dictionary terms feature in the report:

Collective bargaining

Employee representation

European Social Charter

European social dialogue

European social partners

Participation

Representativeness

Right to strike

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Country codes

EU Member States

AT	Austria	FI	Finland	NL	Netherlands
BE	Belgium	FR	France	PL	Poland
BG	Bulgaria	HR	Croatia	PT	Portugal
CY	Cyprus	HU	Hungary	RO	Romania
CZ	Czech Republic	IE	Ireland	SE	Sweden
DE	Germany	IT	Italy	SI	Slovenia
DK	Denmark	LT	Lithuania	SK	Slovakia
EE	Estonia	LU	Luxembourg	UK	United Kingdom
EL	Greece	LV	Latvia		
ES	Spain	MT	Malta		

Other countries cited in the report

NO	Norway				
AD	Andorra	AM	Armenia	GE	Georgia
RU	Russia	UA	Ukraine		

Abbreviations used in the report

AEA	Association of European Airlines
ASP	Agreement on social policy
BIA	Bulgarian Industrial Association
BICA	Bulgarian Industrial Capital Association
CAS	Committee on Application of Standards
CBI	Confederation of British Industry
CEA	Croatian Employer Association
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CER	Community of European Railways
CFI	Court of First Instance
CITUB	Confederation of Independent Trade Unions in Bulgaria
CJEU	Court of Justice of the European Union
EBU	European Barge Union
EC	European Commission
ECA	European Club Association
ECSA	European Community Ship-owners' Association
ECSR	European Committee of Social Rights
EESC	European Economic and Social Committee
ERA	European Regions Airline Association
ERB	Employment Relations Board
ESO	European Skippers Organisation
ESP	European social partners
ETF	European Transport Workers' Federation
ETUC	European Trade Union Confederation
IFTU	International Federation of Trade Unions
ILO	International Labour Organization
MCESD	Malta Council for Economic and Social Development
PCIJ	Permanent Court of International Justice
SME	Small and medium-sized enterprise
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TUC	Trades Union Congress

Executive summary

Introduction

The representativeness of social partners provides legitimacy for their various roles in industrial relations, whether through the vehicle of social dialogue, collective bargaining or involvement in government policymaking or implementation. Their representativeness entitles the social partners to act on behalf of their members or, in some cases, all companies and the entire workforce. This report explores the different ways in which the representativeness of social partners is defined at national, European and international level.

Policy context

Almost all EU Member States have some kind of legal framework that defines how representativeness operates for social partner organisations. The role that legislation plays in national concepts of representativeness, however, differs vastly. This role can include setting the conditions to allow them to engage in collective bargaining or conditions to extend the resulting agreements, making them generally binding. Another way in which legislation can shape representativeness is by imposing thresholds, in terms of membership, organisational density, or as a minimum outcome of elections. There is also great variation in the extent to which legislation can play a role. In some countries, conformity with legal requirements is crucial, while in others mutual recognition is more important, or the only basis for representativeness. Today, while employers and unions in certain Member States still rely on self-regulation through mutual recognition to establish representativeness, most have a legal framework that regulates the representativeness of social partners. In some countries, ongoing clarifications are still taking place.

At EU level, the concept of representativeness was first delineated by the European Commission in 1993 and defined more clearly in 1998.¹ Representativeness forms the basis for allowing European social partner organisations to be included in the list of organisations to be consulted by the European Commission as set out in Article 154 of the Treaty on the Functioning of the European Union (TFEU), and for providing legally

binding implementation of their agreements as laid down in Article 155 of TFEU. An analysis of the European concept of representativeness can contribute to the discussion on whether elements of Eurofound's methodology in its representativeness studies need to be adjusted.

Key findings

Representativeness has various meanings across the 28 Member States and Norway. In practice, few national systems correspond to an unalloyed form of either mutual recognition or legal conformity. Member States employ a combination of these principles, applying a mix of both formal and informal criteria.

In addition to the fundamental dichotomy of the representativeness concept – based on compliance with legal requirements or based on mutual recognition – the report looks at three elements or drivers with the potential to contribute in different ways to representativeness of social partners: electoral success, organisational strength in terms of the scope of membership, and the capacity to negotiate.

Thresholds, where they exist, are less common for employers than for trade unions. Employer thresholds are either a requirement for the extension of collective agreements or a criterion permitting access to tripartite bodies.

Four models of representativeness

This report argues that four models of representativeness coexist in Europe:

1. **Social partner self-regulation:** a social partner self-regulated system of mutual recognition, associated with negotiating capacity and social strength drivers and with very little state regulation on representativeness.
2. **Mixed social partner and state regulation:** a mixed model, combining elements of social partner mutual recognition and of state regulation and legal conformity.
3. **State regulation membership strength:** a state-regulated system of legal conformity, where 'social strength' is used as a legal measure of representativeness.

¹ European Commission (1993), 'Communication concerning the application of the agreement on social policy', (COM(93)600 final) and (1998) 'Communication from the Commission adapting and promoting the social dialogue at Community level (COM(98)322 final).

4. **State regulation electoral strength:** a state-structured system of legal conformity in which electoral success primarily determines representativeness.

The discussion regarding the concept of representativeness at international level dates back to an advisory opinion in 1922 of the Permanent Court of International Justice. In 1956, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) evoked the concept of representativeness for the first time, stating that ‘the representativeness of the parties must be substantial’. According to the CEACR’s current list of conditions for representativeness, the criteria for representativeness need to be: a) objective; b) precise; and c) predetermined. The European Committee of Social Rights of the Council of Europe stipulated in 2006 that criteria of representativeness need to be: a) reasonable; b) clear; c) predetermined; d) objective; e) laid down in law; and f) subject to judicial scrutiny.

Pre-conditions for representativeness

In 1993, the European cross-sector social partners tabled a detailed list of the conditions to be met by organisations to be consulted by the European Commission. According to this list, they must be:

- organised horizontally or sectorally at European level;
- composed of organisations that are themselves regarded at their respective national levels as representative of the interests they defend, particularly in the fields of social, employment and industrial relations policy;
- represented in all Member States of the European Community and, possibly, of the European Economic Area, or have participated in the ‘Val Duchesse’ social dialogue;
- composed of organisations representing employers or workers, membership of which is voluntary at both national and European level;
- composed of members with the right to be involved, directly or through their members, in collective negotiations at their respective levels;
- instructed by their members to represent them in the framework of European Community social dialogue.

Frames of reference

The study identified four different frames of reference for the assessment of the representativeness of the EU social partners:

1. Setting up of the European sectoral social dialogue committees (legal conformity).
2. Consultation based on legal conformity.
3. Negotiation based on mutual recognition/bargaining autonomy.
4. Implementation of European framework agreements by Council decision.

Conclusions

- There is little debate, by and large, about the concept of representativeness at national level.
- In line with the 1993 Communication on the application of the Agreement on Social Policy, there is still a diversity of practice in the different Member States and no single model has emerged in the past 20 years – hence making a European concept based on common and harmonised criteria difficult to achieve.
- In its assessment of the representativeness of the EU-level social partners based on their membership strength, Eurofound might want to take into greater account the different concepts used at national level.
- In light of the different legal frameworks for representativeness at the different junctures of European social dialogue, the question arises as to whether the transparency of EU social dialogue polity could be improved by harmonising these frameworks.
- In line with the statement from the Presidency of the Council of the European Union, the European Commission and the European social partners at an event in Brussels on 27 June 2016 ‘Declaration on a new start for a strong social dialogue’, the European social partners should work towards improving ‘membership and representativeness of trade unions and employers’ organisations, and ensure that there is a capacity to enter into agreements with an appropriate mandate’.

Introduction

Social partner organisations were established in most western European countries during the 19th century, and gained a solid legitimisation of their role in society throughout the 20th century. For Member States that joined the EU in 2004, the role and legitimacy of their social partners has changed with the transformation of the political systems in those countries. Differences in social and historical developments in each of the 28 Member States explain varying understandings regarding the perception of the representativeness of social partners, and how this has been recently changing in some countries. The first part of this report aims to give an overview of this national diversity, and to show how different forms of representativeness can be grouped into categories.

The representativeness of social partners provides legitimacy for their various roles in industrial relations, whether through the vehicle of social dialogue, collective bargaining or involvement in government policymaking or implementation. Their representativeness entitles the social partners to act on behalf of their members or, in some cases, all companies and the entire workforce. This report explores the different ways in which the representativeness of social partners is defined in different countries and at different levels.

Objectives

This report forms an integral part of a wider research project, which aims to analyse the concept and criteria of representativeness at both EU and national level. The purpose of this report is to discuss representativeness at an individual country level in the EU Member States and Norway. Specifically, the objectives are to:

- map, analyse and assess differences in the concept and criteria of representativeness at national level in the 28 EU Member States and in Norway;
- identify common features and differences in the above; and
- propose elements that could be used in a common definition of representativeness.

The challenge of this research was to find ways of mapping the full meaning and outcomes of representativeness in the 28 EU Member States (plus Norway), as well as the changes taking place in those countries, and to identify the common trends.

Methodology

A questionnaire was completed (between February and May 2015) by Eurofound's Network of European correspondents (composed of 29 national correspondents covering all EU Member States plus Norway – see annex A1). A combination of open and closed questions covered the definition of organisational representativeness. In addition to the questionnaire, open-ended questions were sent to the same 29 correspondents on the following themes:

- the concept of representativeness (four questions);
- its definition (four questions);
- its impact (four questions);
- any additional comments on the actors and processes that shape representativeness (four questions); and
- the current views of the employers and unions (four questions).

The text responses were analysed using the NVivo qualitative data analysis program.

Most of the 61 closed questions in the questionnaire asked respondents to rank, on a scale of one to five (from not relevant to most important), employer associations at two levels (peak and sector) and trade unions at three (peak, sector and workplace or company). The impacts of representation were covered in a further 60 questions. The actors and processes that determine representativeness were examined through a further 36 closed questions and a final 32 questions focused on the numbers of representative organisations, their bargaining capacities and the relevance of different levels of bargaining. These data were then entered into Excel for analysis and graphing.

A comparative analysis of countries was carried out, using both an EU 'average' constructed from the 29 sets of questionnaire responses and a review of the relevant literature. The data sources, however, are not straightforward – the findings provide only a heuristic indication of interest representation trends in Europe today.

First, there are some problems of interpretation. Efforts were made to ensure that the definition of interest representation used, and its alternatives, was broad enough to enable all the national correspondents to feel they could answer all the questions. A few, however, assumed that they were being asked only about the legal framework of 'representativeness' and its implications. In some cases, where there was no such framework, or where there was one that did not fully correspond to the industrial relations reality, the

answers were narrower than had been intended. In these cases, supplementary questions were asked in an attempt to obtain further information.

Second, there are problems in the over-reliance on answers to single closed questions, particularly those involving a subjective ranking by the national correspondent. In order to address this, findings are presented by combining or juxtaposing the averages of two or more linked ranking variables, when it is possible to do so. This approach can provide greater consistency and reliability in making comparisons between countries. This initial approach towards calculating representativeness had to be re-directed towards an approach of trying to understand the different meanings and appreciate how representativeness can bring about the legitimacy of social partners in the different Member States at different levels. As this is the first time this research has been conducted, these findings are of an explorative nature.

Finally, it is problematic to use data covering entire countries that are based on the views of one correspondent. For this reason, the national correspondents were asked to provide bibliographic references and to consult the comparative literature.

It should be stated at the outset that the report does not set out to map all aspects of representativeness in each of the EU Member States and Norway. Its added value is that it clarifies the different ways of interpreting representativeness in a range of industrial relations contexts.

Different approaches to representativeness

At European level, the issue of representativeness has been a conundrum of EU social policy since its inception in 1993. According to the Court of Justice of the European Union, it is the duty of the European Commission and the Council to verify the representativeness of the signatories to an agreement. Primary EU law never refers to the notion of representativeness, and the Commission first used this criterion in its 1993 Communication concerning the application of the Agreement on Social Policy (European Commission, 1993) in annex 3 entitled 'Main findings of the social partners' study (Representativeness)', where it defines the criteria for representativeness in the consultation phase of social dialogue. Thus, 'management and labour' in the sense of Article 154 TFEU are to be understood as the European social partners, organised at cross-sector or sectoral level. The Commission has drawn up a list of the organisations it consults under Article 154 TFEU. This list, which is regularly revised, currently consists of 87 organisations. In 1993 this number stood at 28, rising to 44 in 1998, 55 in 2002, 60 in 2004 and 79 in 2010

(European Commission, 1993–2010). Over the last 22 years, the total number of EU social partner organisations to be consulted by the European Commission under Article 154 TFEU has more than tripled.

Decision 98/500/EC defines the criteria for representativeness of the European social partners, according to which it should:

- relate to specific sectors or categories and be organised at European level;
- consist of organisations, which are themselves an integral and recognised part of Member States' social partner structures and have the capacity to negotiate agreements, and which are representative of several Member States;
- have adequate structures to ensure their effective participation in the consultation process (European Commission, 1998b).

At national level, an interesting development in some countries has been the emergence in the wake of the 2008 financial recession of new social movements and industrial relations actors in Greece, Portugal, Romania, Spain and Slovenia. These movements aim to support workers who have been hit by the economic crisis, but who are not represented, or who are underrepresented, by trade unions – principally migrant workers, young workers and precarious workers. The new social movements have questioned the political institutions, established parties and social partners. In 2002, the Commission concluded in its White Paper on European Governance that 'civil society plays an important role in giving voice to the concerns of citizens and delivering services that meet people's needs' (European Commission, 2001b, p. 14). Against this background, some academics have proposed that trade unions should engage in a more pronounced societal dialogue with civil society, 'as means of promoting improved social and ecological standards in the world of work' (Schmidt, 2005, p. 449). However, even if social dialogue and societal dialogue were to cooperate more closely in the future, the problems arising from the demands of representativeness and accountability would still have to be tackled accordingly by the actors in this field. Civil society organisations, which often represent the very particular interests of society as a whole, are certainly not to the same degree as representative of their affiliates as employer and worker organisations are (EESC, 2006). The European social partners, the European Commission and the ILO are of the opinion that the European social dialogue and civil dialogue should be kept separate, and that social dialogue is not susceptible to being opened to other actors: 'Employers' and workers' organisations are distinct from other civil society groups in that they represent clearly identifiable actors of the real economy and draw their legitimacy from the members they represent'

(ILO, 2013a, p. 16). The European Commission concludes that, 'because of their representativeness, trade unions and employer organisations have a particular role', different from that of civil society actors, when it comes to consultation processes at EU level (European Commission, 2002c, p. 6).

Chapter 1, on national concepts of representativeness, comprises five sections. The first section presents the role of legislation in representativeness: it distinguishes between countries that grant representativeness through the mutual recognition of social partners and countries where representative status is obtained through conforming with legal requirements. It reviews three other elements that can contribute to the representativeness of social partners: electoral success, organisational strength in terms of the scope of membership, and the capacity to negotiate. Once representativeness status is acquired, it may have certain impacts or consequences for social partner organisations and these are looked at in the next

section of chapter 1. After classifying the different approaches towards representativeness into four categories or models, the last part of the chapter draws some conclusions on diversity regarding the concept of representativeness at different levels across the 28 EU Members States plus Norway.

Chapter 2 is based on a literature review that examines academic literature as well as policy documents of the ILO, Council of Europe, EU institutions and the European social partners. It analyses the concept of representativeness at international and European level, before going on to present and appraise Eurofound's current methodology of assessing representativeness, which has been used since 1996. It discusses whether some elements of this approach should be revisited, refined or modified, after almost 10 years of application by Eurofound, in light of developments in the concept of representativeness, as mapped at international (ILO) and European level (Council of Europe, European Union).

1 Representativeness at national level

Role of legislation and mutual recognition

Almost all EU Member States have some kind of legal framework that shapes how representativeness is endorsed by social partner organisations.² The role that legislation plays in national concepts of representativeness, however, varies considerably. This role can include setting the conditions to allow social partner organisations to engage in collective bargaining or to extend the resulting agreements, making them generally binding. Another way that legislation can shape representativeness is by imposing thresholds, in terms of membership, organisational density, or as minimum outcomes in elections. There is a great deal of variation regarding the extent to which legislation can play a role. In some countries, conformity with legal requirements is crucial, while in other countries mutual recognition is more important, or the only basis for representativeness.

This section of chapter 1 outlines the two main principles of legal conformity and mutual recognition, examines the legislative trends and forms of thresholds, and summarises the formal and informal criteria that have been reported as articulating with the main principles. It begins by presenting the legal frameworks regulating representativeness and how they developed over time. It goes on to consider collective bargaining regulations and to analyse legislative thresholds for representativeness. This is followed by a comparison of countries where mutual recognition is the basis for representativeness to those countries where representativeness is more dependent on conformity with legal requirements, before focusing on representativeness based on mutual recognition. Finally, it draws conclusions on the role of both legislation and mutual recognition for representativeness.

Legal framework for representativeness

In defining representativeness in 1993 the European Commission argued that:

For collective bargaining, in most countries mutual recognition is the basic mechanism, but additional formal or legal requirements may have to be fulfilled. In several countries there are mechanisms (for example quantitative criteria established by law or otherwise) to make a distinction between organisations with (the most) substantial membership and those which are less representative.

European Commission, 1993, p.39

Interest representation, the European Commission acknowledged, may be constituted and measured in terms of a proportion of a population of employees or enterprises, but it may also reflect the capacities of the social partners, and the extent to which these are acknowledged or recognised by others.

Today, while employers and unions in certain Member States still rely upon self-regulation through mutual recognition to establish representativeness, most have a legal framework regulating the representativeness of social partners. In some countries, like Spain, it is mentioned in the constitution. Some countries have stable legal settings that were established or finalised as far back as 40 years ago. This is the case in Belgium (1968–1972), Spain (1978–1985), Austria (1974), Sweden (1976–1987), Norway (1958), and largely in Germany (1949–1990).

Over the last two decades, changes have been introduced in national legal frameworks. This happened in Latvia (2014), Hungary (2102), Ireland (2013), Portugal (2012), Croatia (2012), Greece (2011) and France (2008–2010 and 2014–2017). In Germany, court decisions have created firmer criteria on which to judge the representativeness of agreements. In some countries, like Poland (2015), clarifications are still taking place.³

Representation is not, however, just a top-down process. Usually, the organisations that seek to speak for their members or affiliates must also have secured recognition or support from non-members as well.

² Denmark is an example of a country without a legal framework to regulate the representativeness of the social partners, as this is based on mutual recognition. There is, however, legislation on when and how industrial action can be organised, which has implications for the representative role of trade unions. Cyprus is another example of a country without legal criteria for representativeness. However, it cannot be said that Cyprus has no legal framework regarding representativeness: the trade union laws of 1949 include the provision that in order to be allowed to register, each union must have over 20 members, except in cases where fewer than 20 workers are employed in a specific occupation. In addition, the tripartite Labour Advisory Board, which advises the Minister of Labour on work-related issues, is regulated by a 1960 law (chapter 182 on hours of employment), although no criteria are included determining who can participate in this.

³ In Poland, the representativeness of social partner organisations is determined by legislation on three levels: the tripartite dialogue at national level; the sector or multi-company level; and the company level. Debate was followed by changes in 2015 concerning the institution for tripartite dialogue at national level; the Tripartite Commission for Socio-Economic Affairs was replaced by the Social Dialogue Council, as referred to in the Act of 24 July 2015.

Mapping interest representation systems across Europe must involve considering both the formal and informal mechanisms and processes that lead to exchanges between the social partners, and the outcomes of the processes of collective consultation and bargaining that such involvement brings.

Focusing first on formal criteria, this part of the report aims to identify trends in legal framework developments. For this, Eurofound’s national correspondents were asked to ‘provide the year and name of the three main pieces of national labour law that refer to representativeness (or to its alternative notion) in employment relations’. Following this, the body of 75 laws referred to by the correspondents was analysed, with the aim of answering the following four questions.

- Do they provide for the right to form collective organisations and/or regulations on their formation?

- Do they focus on the conditions for participating in tripartite arrangements?
- Do they primarily describe collective bargaining or consultative arrangements that include employee representatives?
- Do they lay down in law or labour codes detailed criteria that employer organisations or trade unions should fulfil in order to gain the advantages of representative status?

It must be stressed that the correspondents were only asked to identify what they saw to be the three most relevant laws. In cases where their text commentaries referred to other significant pieces of legislation, that information was also included. Some correspondents only listed one or two laws. They were not asked for a complete history of labour law, merely a heuristic overview of the key laws on interest representation.⁴ An overview of this historical and content analysis is presented in Table 1 below. This table does not claim to contain all laws related to representativeness, only

Table 1: Legislation affecting representativeness in EU Member States, 1946–2015

	Laws and roles on forming collective organisations		Legislation on tripartite representativeness		Regulation regarding collective bargaining or consultation of worker representatives		Recognition criteria or thresholds determining representativeness	
1946–1952	FI	1946	CY	1960	IE	1946	BE	1952
	LU	1948						
	DE	1949						
	CY	1949						
1968–1980	IT	1970	BE	1972	BE	1968	ES	1978, 1980
	NL	1970			NL	1971		
	SE	1976			AT	1974		
1985–1995	ES	1987	HU	1990	DE	1990	ES	1985
	EL	1990	CZ	1995	HU	1992	LT	1992
	LT	1991			EE	1993	SI	1993
	UK	1992						
1998–2007	UK	1999	LV	1998	EL	1999	LV	1999, 2001
	EE	2002	HR	1999	UK	1999	PL	2000
	FI	2007	NL	2000	FI	2001	RO	2003
			MT	2001, 2002	IT	2001	LU	2004, 2005
			PL	2001	LT	2002		
			SK	2007	CZ	2006		
					SI	2006		
					IE	2006		
2008–2015	EL	2011	HU	2011	HU	2009	FR	2008, 2010
	SL	2013	RO	2013	DE	2009	RO	2011
			NL	2015	SK	2011	BG	2012
					EL	2011	HU	2012
					PT	2012	HR	2014
					DE	2012	PT	2014
					HR	2012	LV	2014
					PT	2012		
					SK	2013		
					IE	2013		
					DE	2015		

Source: Eurofound’s Network of European correspondents, February 2015

⁴ This report does not set out to include all laws regulating aspects of representativeness; it only indicates different ways in which legal frameworks define representativeness. A more complete overview of changes in labour law can be found in Clauwert and Schömann (2012).

those indicated by Eurofound's national correspondents as being mostly relevant to the concept of representativeness at national level.

The most significant pieces of legislation, as identified by the correspondents, are mainly concentrated within four periods: the years following the Second World War (1946–1952); the period of industrial unrest in western Europe (1968–1980); political change in Central and Eastern Europe (1986–1995); and one long period marked by decentralisation, which can be separated into before (1998–2007) the Great Recession and after it (2008–2015).

Legal changes have affected some of the strong 'mutual recognition' countries and all of the strong 'legal conformity' countries. Between 1999 and 2001, the UK, Italy and Finland all introduced measures that framed collective bargaining rights slightly more specifically; while between 2003 and 2015, the Czech Republic, France, Germany, Romania and Slovakia all tightened their legal frameworks. Overall, countries with representativeness based on mutual recognition are less likely to have experienced recent changes to the legal contexts of representativeness than those for whom representativeness is strongly based on legal conformity.

The most recent period stands out (2008–2015), with a particularly high density of significant legal measures on interest representation being reported since 2011. Between 1998 and 2015, most changes to legal frameworks for representativeness were reported from Member States that joined the EU after 2004.

Representativeness in legislation on collective bargaining

In some countries, the legislator has taken on the responsibility of deciding which organisations may participate in collective bargaining and the mechanisms by which collective agreements are deemed to cover groups of workers and employers. The principle of conforming to the law confers representative status and the rules by which it is achieved on the partners or on the agreements they reach. Whether or not a social partner in a particular workplace or sector, or at national level, is considered to be a useful and effective interlocutor by another social partner is largely irrelevant from this perspective. A subjective judgment cannot influence the achievement of 'representative' status, which may allow the organisation to sign a

collective bargaining agreement, or to get such an agreement extended.

Table 7 in annex 2 summarises the national correspondents' reports of legislation that directly or indirectly provide a procedural basis for collective bargaining by the social partners. It suggests that, before 1989, making detailed demands on the social partners to 'prove their credentials' was a rare occurrence. Subsequently, the practice has become more common. This trend has reflected the redesign of industrial relations systems in the Central and Eastern European Member States, and the 'perforations' or 'pull-downs' of sectoral agreements referred to by Marginson (2015). In particular, it reflects a response to unease expressed by some employers at the traditional extension of collective bargaining agreements to cover employers (and workers) who were not directly involved in or who did not mandate the negotiators.

The reports of Eurofound's national correspondents on key legislation on representativeness for collective bargaining suggest the following trends.

There is a high rate of recent change.⁵ Eleven national correspondents reported that between 1999 and 2015, one or more of the most relevant legal measures affecting 'representativeness' were enacted. In a further nine countries, new legal measures had affected 'collective bargaining capacity'.

The extension of sector agreements based on sector-wide collective bargaining legitimacy appears to be coming under threat. In Greece, for example, there used to be a requirement that for a collective agreement to be extended, the employer signatories should cover over 51% of those employed in the sector. In 2011, it was decided that agreements would no longer be extended at all; only members of the signatory employer organisations would be covered.⁶ In 2015, the Greek coalition government promised to restore the earlier legislative framework that permitted the extension of agreements; however, at time of publication of this report (in 2016), this has yet to take place. In Portugal, the economic adjustment programme brought the requirement in 2012 that extensions can only be requested when the employers organise half of all employers in a sector, making extensions less likely. In June 2014, this criterion was altered; now, extensions can be requested if SMEs make up 30% of the members of an employer organisation signing the agreement.⁷

⁵ Eurofound's national correspondents were asked, in question two of the questionnaire, to provide three main pieces of national labour law referring to representativeness in employment relations. The possibility that more recent changes occurred here first, and were thus more likely to be reported than earlier changes, cannot be excluded.

⁶ In the context of the economic adjustment programme agreed with the European Commission, the European Central Bank and the International Monetary Fund.

⁷ This means that most sector agreements now meet the conditions for extension, as 99% of firms in Portugal are SMEs. See: European Semester Country report 2016, p.33-footnote 12, http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_portugal_en.pdf

New conditions of representativeness are appearing. The Italian legislation of 2001 represented the first time any numerical indicator of representativeness entered Italian law. Its 5% threshold was extended to the whole private sector by social partner agreements in 2011 and 2014. This followed the withdrawal of car company Fiat from the employer federation in 2010 and its move towards bargaining exclusively at company division or plant level. In Germany, the 1990 Reunification Act confirmed how judicial endorsement of ‘collective bargaining capacity’ is shaped by ‘social strength’, measured by a wide and case-by-case set of variables. But there is now a clear shift towards a more numerically-based concept of representativeness. In

2009, 2012 and 2015, with a new law of that year, a ‘streamlining’ of collective bargaining agreements has taken place: employers are now only required to implement the ‘majority’ agreement.

Decentralisation of bargaining appears to be undermining some earlier sectoral arrangements. The 2013 ‘unconstitutional’ ruling in Ireland on the requirement of the Industrial Relations Act 1946 that registered agreements should be negotiated by ‘substantially representative’ social partners opens the door to potentially ‘unrepresentative’ agreements at workplace level. The 2015 German reform may enable employers to pick and choose which agreements they wish to apply at workplace level.

Table 2: Representativeness in collective bargaining legislation, 1946–2015

Year	Country	Legislation	Criteria for collective bargaining
1946	Ireland	Industrial Relations Act, 1946	Social partners must be ‘substantially representative’ of workers and employers when registering employment agreements.
1968	Belgium	Law on collective labour agreements CAO-CCT	Capacity to make lasting commitments; mandates from members before signing; the results of the four-yearly social elections in companies with more than 50 workers, which determine the recognition of their representativeness at national level, and hence their acceptance at sectoral level. Extended to enterprise level in 1972.
1971	Netherlands	Wage Act (<i>Wet op de loonvorming</i>)	Specifying the social partners who would contribute to discussions on wage setting within the tripartite Social Economic Council. When social partners file a request for extension of a sector collective agreement, the employers that are party to the agreement have to employ 55% or more of the employees in the sector.
1974	Austria	Labour Constitution Act (<i>Arbeitsverfassungsgesetz</i>), in particular §4	Capacity preconditions: independence; extensive occupational and territorial membership coverage; major economic importance in terms of the absolute number of members and business activities in order to be in a position to wield effective bargaining power.
1978	Spain	Constitution	‘Most representative trade union organisations’ cover minimum of 10% of elected workers’ delegates and works council members at national level or 15% at regional level; other unions are ‘representative’ if within a specific sector they meet those criteria. ‘Most representative’ employers cover 10% of employers and workers nationally, or 15% regionally; ‘representative’ employers meet these criteria at sector level and can sign sector agreements.
1980		The Statute of Worker’s Rights (Articles 87 and 88 and the 6th additional disposition Royal Decree 2/2015 statute of workers’ rights) is the reference norm in Spanish collective bargaining.	
1985		Organic Law of Trade Union Freedoms	
1990	Germany	Reunification Treaty	‘Collective bargaining capacity’ (<i>Tariffähigkeit</i>) is grounded in the 1949 Constitution (freedom of coalition) and the Collective Bargaining Act from 1949. But it is detailed in case law, where judges apply the term ‘representative’ to collective agreements rather than to the actors concluding them. In September 2012 the Federal Labour Court determined that sectoral agreements covering more than half of all employees of a sector were ‘representative’. The acknowledged capacity to bargain therefore rests on various social and political indicators, including the criterion of social strength (<i>Soziale Mächtigkeit</i>). This is needed to bring the other social partners to the bargaining table and to guarantee the enforcement of agreements. It can be proven by information on membership figures and organisational and administrative capacity. Other criteria are: compliance with the law; voluntary membership; internal democracy; financial independence; and multi-organisation membership. The criterion of social strength is not applied to employer associations; neither is there a minimum number of affiliates required.
1999	UK	Employment Relations Act	Statutory trade union recognition provisions establish trade union ‘recognition’ by an employer (usually leading to collective bargaining) where 40% participate in the vote and a majority vote in favour.

Year	Country	Legislation	Criteria for collective bargaining
2001	Italy	Legislative Decree no.165/2001	Unions can participate in national collective negotiations in public administration (such as those working in universities or the healthcare sector) if they have 5% of representativeness (an average of the membership numbers and of the votes that each union had in the election of RSU). This test was extended by agreement to the private sector in FA 2011 and TU 2014 by the three major union confederations and Confindustria, such that the extension of a sector agreement now requires a minimum of 51% (in membership and in votes).
	Finland	Employment Contracts Act (55/2001)	'The employer shall observe at least the provisions of a national collective agreement considered representative in the sector in question (generally applicable collective agreement) on the terms and working conditions of the employment relationship that concern the work the employee performs or nearest comparable work.' Practice is that 'representative of a sector' means about one-half of the employees in the sector work for affiliated employers to ensure the 'normal applicability' (extension) of the agreement. The 'representativeness' needed for a collective agreement to be generally applicable is determined by a commission under the Ministry of Social Affairs and Health. Decisions can be appealed to the Labour Court.
2006	Ireland	Employees (Provision of Information and Consultation) Act	Employee threshold of 10% of workforce for representation to come into effect in respect of negotiations with an employer.
	Slovenia	The Collective Agreements Act (<i>Zakon o kolektivnih pogodbah</i> – ZKP, Ur.l.RS, no. 43/06)	Regulates social partners, content and procedure for signing collective agreements, its form, validity and termination, settlement of collective labour disputes and the registering of collective agreements; it differentiates between representative and non-representative signatories.
	Czech Republic	2006: Act no. 262/2006 Coll., Labour Code	When extending high-level collective agreements, social partners have to meet the quantitative criteria of representativeness that also apply to participation in the national tripartite organisation, where the law uses both quantitative and qualitative conditions. The conditions for unions are: collective bargaining practice; independence; no political activities; uniting at least three unions from different sectors; nationwide scope; and having at least 150,000 members. Only trade unions have the right to conclude a collective agreement. For employer associations, the conditions are similar except that they must represent affiliated firms with at least 400,000 employees.
2009	Germany	Posted Workers Act	A new concept of 'representative agreements' (<i>repräsentativer Tarifvertrag</i>) appears. The 'representativeness' of a collective agreement can now be proved by the coverage rate of workers in member companies of the employer organisation and by the trade union membership figures in the sector.
	Hungary	Act LXXIV on the sectoral dialogue committees and on certain questions of mezzo level social dialogue	Extensions of collective agreements can be applied for by representative employer associations determined by their number of affiliates, their economic importance and the number of employees covered. At workplace level, unions have to demonstrate 10% density to participate in collective bargaining.
2011	Slovakia	Act No. 341/2011, Labour Code. Applicable only between September 2011 and December 2012.	A law lasting only a year before it was repealed stated that in order to conclude a collective agreement covering all employees at an establishment or in a sector, on request of the management, the trade union(s) should provide evidence that at least 30% of the employees in the bargaining unit were organised by the trade union(s). This provision is no longer in force since the beginning of 2013.
	Greece	Law 4024/2011, Article 37 – 'Collective bargaining regulations'	The 51% employee coverage requirement for collective agreement extension was abolished in 2011. Since 2011, only employers who are members of the signatory employer association have to apply an agreement.

Year	Country	Legislation	Criteria for collective bargaining
2012	Portugal	Government Resolution 90/2012 (changed in 2014)	Employer associations requesting extension of agreements must have membership of one-half of all employers in their sector. In June 2014, this criterion was altered, so that it is now sufficient if SMEs account for 30% of employer associations signing the agreement.
	Croatia	Representativeness for Collective Bargaining (OG 88/12)	Determines which unions are entitled to bargain and conclude collective agreements. A union is only representative if its membership makes up at least 20% of the unionised employees, to whom the agreement will apply, either in a single company or organisation or in an industry. Where unions cover a specific occupation, the membership threshold is 40% of the unionised employees.
	Germany	Public Procurement Act of North-Rhine Westphalia	The representativeness of collective agreements in public local passenger transport is to be based on the membership figures of the collective bargaining partners and only the agreement concluded by the largest trade union and employer organisation are considered 'representative'. The act also stipulates that the labour minister may decide on the representativeness of given agreements by ministerial directive with advice from a consulting committee of trade union and employer representatives.
2013	Ireland	Court judgment	'Substantially representative' aspects of 1946 act (above) are ruled 'unconstitutional'.
2015	Germany	Act on Collective Bargaining Unity (<i>Tarifeinheitgesetz</i>)	In the case of competing agreements, only the agreement of the majority union shall be applied and its representativeness shall be proved by membership figures. From 2009, 2012 and with the new 2015 legislation, a streamlining of collective bargaining agreements is taking place. Employers are no longer required to implement the 'majority agreement'.

Source: Eurofound's Network of European correspondents

Legislative thresholds determining representativeness

In some countries, securing representative status led to the social partner being acknowledged as a competent collective bargaining partner at national or sector level; and in some countries it was either that acknowledgement or the gaining of that status in respect of collective bargaining that permitted the relevant organisation to participate in tripartite bodies. Having access to (bi-partite) collective bargaining is of course different to obtaining membership in tripartite bodies. Both outcomes of representativeness can be granted on different criteria, or on similar criteria in different legal sources.⁸

Thresholds are usually required regarding the following.

- Employer coverage: The percentage of employees or firms covered within a sector by the members of the employer associations signing the agreement.⁹
- Union elections: The union election results in works council or other forms of periodic workplace or national work-based or insurance-based social elections.
- Union membership or density: In several countries, legislation specifies a minimum number of trade union members or employer affiliates, so to make the data comparable it has been converted into a density percentage, by dividing the numbers by the country's total number of employees.^{10,11}

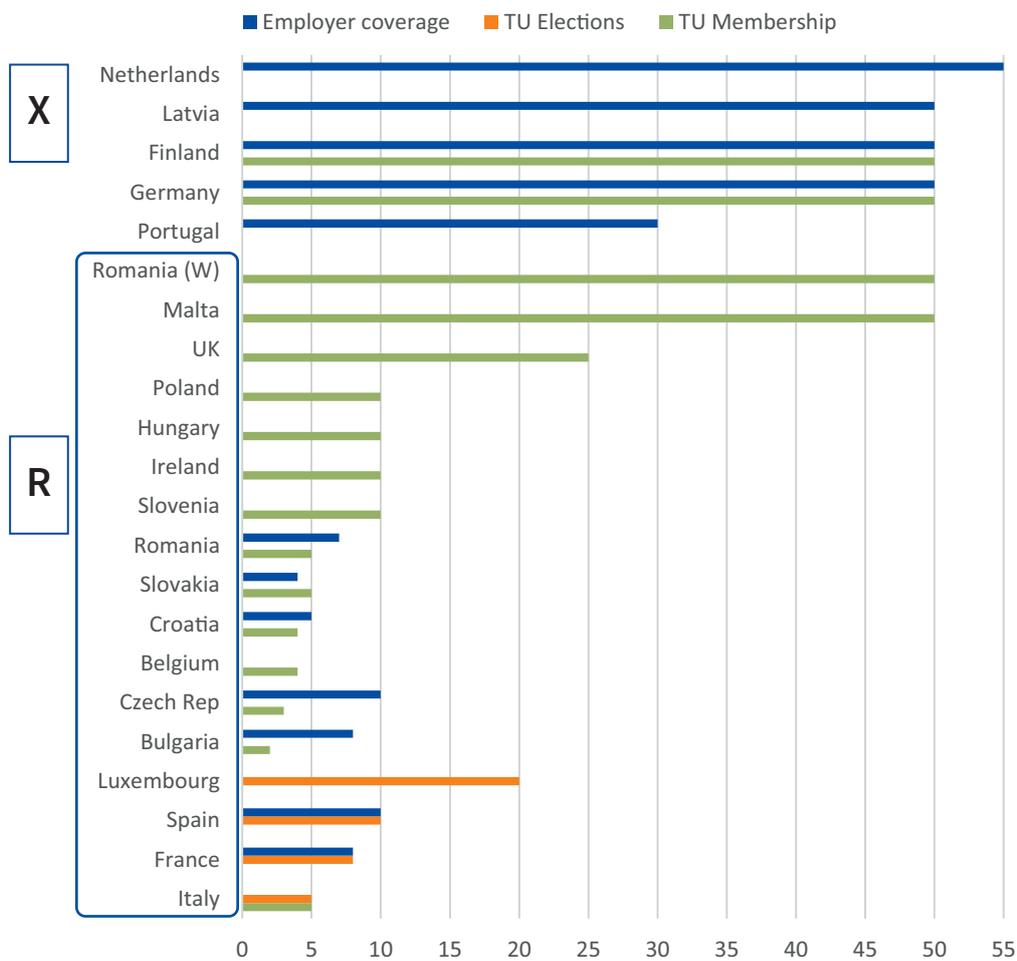
⁸ In Spain, the Law of Trade Union Freedom says in Article 3 that 'most representative trade unions are entitled to: a) have institutional representation with the public administration at both national and regional level; and b) conclude collective agreements. For employer organisations, the Statute of Workers Right (Royal Decree 2/2015) establishes that those employer organisations that cover a minimum of 10% of employers and 10% of workers at national level will be able to have institutional representation (6th Additional disposition Royal Decree 2/2015 Statute of Workers Right); and that those employer organisations that in a particular sector cover a minimum of 10% of employers and 10% of workers in the sector at national level or 15% of employers and 15% of workers of the sector at regional level will be entitled to conclude collective bargaining (Article 87 Royal Decree 2/2015 Statute of Workers Right).

⁹ The pre-2011 Greek law specifying that for extension, 51% of the employees covered should be affiliates of the signatory employer association, is not included here. This is because the 2015 government promised to restore this situation, but, at the time of publication of this report in 2016, this had not yet happened. The German 50% coverage for employers reported was a court decision concerning the construction sector.

¹⁰ The number of employees was provided by Eurofound's national correspondents.

¹¹ A 2011 law in Slovakia specifying 30% trade union density for representativeness was repealed in 2013. Thus Slovakia has been omitted from the graph. The UK 25% figures reflect the requirement where there is a legal ballot for trade union recognition in a single workplace or company, half of the workforce must vote, and those in favour must win a majority.

Figure 1: Minimum thresholds (%) for representativeness



Notes: R = threshold for representativeness or recognition; X = threshold for extension of a collective agreement.

Source: Eurofound's Network of European correspondents (February–May 2015)

Figure 1 shows these three main measures articulated in the labour laws or custom and practice of the 22 countries that have minimum thresholds for the representativeness or recognition of trade unions or for the extension of collective agreements.¹²

Specific thresholds are less common for employers than for the trade unions. Where thresholds for employers do exist, they are either a requirement legitimating the extension of collective agreements beyond the immediate signatories to all firms within the sector, or a threshold permitting access to tripartite bodies.

It is also important to recall that many of the countries where there is no legal threshold do, in practice, use

'social strength' – and in particular trade union density – as an implicit indicator of representativeness. These tend to be the higher union density, strongly mutual recognition countries such as Cyprus, Denmark, Norway and Sweden.

Different thresholds covering the status of a 'representative social partner' or the 'legitimate extension' of a collective agreement may be required for peak-level and sector-level social partners. Table 3 summarises the threshold information provided by the national correspondents, who refer to social partner representativeness at peak (P), sector (S), regional (R) and workplace (W) levels.

¹² Where two threshold levels are mentioned, the lower one is shown in the graph. Thus in Slovenia, peak-level representativeness for trade unions has a 10% threshold (graphed) while at sector level this is 15%.

Table 3: Formal representativeness thresholds of coverage, density and membership numbers at different levels

Latest law	Country	Employers		Unions	
		Coverage %	Numbers	Coverage %	Numbers
1949	Cyprus				20
1985	Spain	10 (P) 15 (S/R)		10 (P) 15 (S/R)	
1993	Slovenia			10 (P) 15 (S)	
	Estonia	(50 ¹³)			5
1999	Latvia	50 (S)			
	UK			half of 40% (W)	
2000	Poland		300,000 (P)	10 (S)	300,000 (P), 10,000 (S)
	Netherlands	55 (S)			
2001	Italy			5 (S)	
	Finland	50 (S)		50 (S)	
2003	Romania	7 (P) 10(S)		5 (P) 7(S)	
2004	Luxembourg			20 (P) elections, 10 (S)	
2006	Czech Republic				150,000 (P)
	Ireland			10 (W)	
2007	Malta			50 (W) ^{14,15}	
	Slovakia		100,000 (P)		100,000 (P)
2008 2010 2015	France	8 (S & P)		8 (P & S) 10 (W)	
2009	Belgium				125,000 (P)
2011	Greece*	(51 (S))		60 (W) ¹⁶	
	Romania			50 (W)	
2012	Portugal	50 (S/R)			
	Croatia			20 (S)	
	Bulgaria		100,000 (P)		75,000 (P)
	Hungary			10 (P)	
	Germany**	50 (S)		50 (S)	
2014	Croatia		100,000 (P)		50,000 (P)
	Portugal	30 (S/R)			

Notes: P=peak; S=sector; R=regional; W=workplace. * 2015 Greek government policy is to restore capacity to extend collective agreements where 51% of employees are covered by the employer signatories within a sector. ** The German Federal Labour Court found that in the construction sector, collective agreements were 'representative' if they were negotiated by bodies covering half or more of the employees concerned. Country shading: Strongly mutual recognition countries are shaded in yellow; strongly legal conformity countries are shaded in green.

Source: Eurofound's Network of European correspondents

13 In a not yet adopted proposal from 2015, a new collective employment relations reform is proposed, addressing the issue of representativeness of employer associations that can conclude extended collective agreements. The proposed reform states that extended collective agreements can only be concluded by employer associations that represent at least one-half of the employers active in the sector where the collective agreement is concluded or by employer association representing employers that employ at least one-half of the employees to whom the collective agreement applies. As of 2016, this proposal is still on hold, and thus has not yet been adopted.

14 In Malta, workplace level representativeness takes the form of collective bargaining by the trade union which is given recognition by the employer on the basis that its membership comprises more than 50% of the workforce. However, in some corporations some categories of workers have won the right to be represented exclusively. For example at Air Malta workers are represented by four unions, namely: General Workers' Union, Airline Pilots Association Malta, Union of Cabin Crew, Association of Airline Engineers. At the workplace level there have been cases where two trade unions claim majority of membership. The latest dispute of this kind was between the GWU and the Malta Union of Bank Employees over representation at the Bank of Valletta. As there are no clear provisions in the law about the right of representativeness, these litigations take time to be settled. The practice being used lately is a verification exercise conducted by the Director of the Industrial and Employment Relations. The case of the University of Malta in 2004 was referred to the Industrial Tribunal as the newly established University of Malta Academic Staff (UMASA) requested to have sole representation for academic staff at the University. The Malta Union of Teachers (MUT) objected to this request as it claimed that it has higher number of members at the Junior College which forms part of the University. The Industrial Tribunal in 2007 ruled that both unions should conduct collective bargaining jointly.

15 The table includes in principle only 'Formal' legal requirements. As in the UK, Malta operates a mutual recognition system that assumes the employer will recognise the union when it has membership of half or more of the workers – but it is mutual recognition, not a legal obligation.

16 In 2011 the then Greek government introduced the concept of an 'association of persons' which, where they represented 60% of the workforce, could negotiate a workplace collective agreement on terms that derogated from the sector agreement.

More detailed descriptions of the thresholds and other requirements for general ‘representativeness’, ‘collective bargaining legislation’, ‘collective rights’ and access to ‘tripartite arrangements’ are provided in annex 2.

Analysis of the changing legal context shows that the bulk of changes referred to took place recently. Only one of the detailed threshold specifications referred to was located in the decade following the Second World War. Only one correspondent (for Spain) referred back to legislative changes in the 1970s – a decade of industrial action. Only the correspondent for Slovenia considered it relevant to refer back to the period post-1989, when the command economies of Central and Eastern Europe established new political and social arrangements.

In seven countries, the national correspondents referred to laws passed since 1999, giving weight to the argument that stability in representative arrangements has given way to instability for a significant number of EU Member States. In two countries, recent changes may limit the ease with which collective agreements can be extended to all employers and employees in the sector. In Portugal the employers must, since 2014, have affiliates of 30% of the SMEs in the sector before the agreement can be extended. In Croatia, for proof of union membership, peak unions now require employers to list the numbers of employees who have instructed them to deduct union dues from their pay. Reaching agreement in decentralised bargaining has also been made more difficult in Hungary (where membership numbers have replaced electoral support as the measure of representativeness) and in Romania (where the membership density threshold has been raised from 33% to 50%).

Table 4: Legislation with thresholds for representativeness, 1952–2014

Year	Country	Legislation	Criteria for representativeness
1949	Cyprus	‘Trade Union Law (1949)’	The only statutory regulation that might be considered as establishing criteria of representativeness is the obligation for trade unions to be registered with the Trade Union Registrar. After submitting a special application for registration, each union is obliged to register with this registrar within 30 days from the date it is established. In order to register, each union must have over 20 members, except for cases where fewer than 20 workers are employed in a specific occupation. Registration became mandatory in the third of a series of Trade Union Laws, passed in 1949. This is more about legal registration – it is used by unions to protect their legal position – than criteria for representativeness.
1952	Belgium	Foundation Law of the National Labour Council (Conseil National du Travail/National Arbeidsraad, CNT/NAR)	This relates to national organisations with at least an average of 50,000 paying members (raised to 125,000 in 2009) over the previous four years; being multi-occupational, covering more than one-half of occupations in the private and public sector.
2009		Law of 30/12/2009	The most representative trade unions meet these four criteria: <ul style="list-style-type: none"> • national and multi-sectoral; • representing an absolute majority of the sectors and categories of workers in private and public sectors that cover at least one-half the workforce; • having at least 125,000 paying members among affiliated and associated organisations; • having as a statutory objective to defend the interests of workers.
1993	Slovenia	Representativeness of Trade Union Act (Zakon o reprezentativnosti sindikatov)	Trade union criteria established: democratic character; at least six months; independence from state bodies and employers; own funding; and quantitative thresholds stipulated by the Ministry of Labour – 15% workers per trade, industry or occupation or workers per firm or, for multi-occupational trade union (confederation, federation), 10% workers per trade, industry or occupation.
1999	Latvia	Employer Organisations and their Associations Law	Organisations can sign binding sectoral agreements if they employ over 50% of employees or provide over 60% of turnover.
2000	Estonia	Trade Unions Act	According to the Trade Unions Act, a trade union can be founded by five employees, a federation of trade unions by five trade unions and a confederation by five nationwide trade unions. ¹⁷ There is no criteria set for employer associations. (The requirement for the establishment of a trade union is more linked to the legal status of trade unions than to their representativeness.)

¹⁷ This requirement for the establishment of a trade union is, however, linked more to the legal status of trade unions and is not so much about their representativeness.

Year	Country	Legislation	Criteria for representativeness
2000	Poland	Labour Code Art. 241(17), Labour Code of 1974, Art. 241(17), 2000; Act on the Tripartite Commission for Socio-Economic Affairs and on voivodship social dialogue commissions, Art. 6, 2001.	Trade unions are representative if they are representative for the Tripartite Commission ('more than 300,000 member employees and which operates in economic entities whose core activity is specified in more than half of the sections of the Polish Classification of Activities (PKD)'); have 10% or more of all the employees covered and less than 10,000 members; have highest number of members covered by a given multi-employer agreement.
2001	Latvia	Labour Law	A social partner is representative for more than their own members if: it performs the same activity; is recognised as a leader and by reputation; its members make up a significant proportion of the whole group, or produce a significant share; it has the capacity to do so; it is independent.
2003	Romania	Labour Code – Law no. 53/2003	Trade unions must have at least 5% of the employed workforce for peak representativeness, 7% at sector level and at company and workplace level at least one-third of the total number of employees; organisational and financial independence; confirmed by a court decision and valid for four years. Peak employers must cover 7% of all (non-state) employees and 10% of sector employers.
2004	Luxembourg	Collective Employment Relationships Act	At national level, trade unions must have won at least an average of 20% of the votes within the Chamber of Employees at the latest social elections, and must be able to prove effective activity in the majority of the economic branches of the country. At sectoral level, trade unions are considered representative as soon as they are powerful in a significant sector; that is, a sector that employs at least 10% of the private employees of the country. They also have to provide candidates at Chamber of Employees' elections and gain at least 50% of the votes of workers who are intended to be totally covered by the CBA or 50% of the votes at the occasion of the elections of staff delegations in the relevant sector.
2007	Slovakia	Act No. 103/2007 on tripartite consultations at the national level and amendments to some acts (Tripartite Act)	Representatives of social partners on the HSR are nominated by 'representative organisations' of employers and of employees. Representative employer associations unite employers from several sectors or employers active at least in five (out of eight) regions (higher territorial units – VUC) and employ at least 100,000 employees. Representative trade unions have at least 100,000 members in several sectors. Social partners may be required to provide evidence on their representativeness by the government or by another social partner.
2008	France	LOI no. 2008-789 du 20 août 2008 portant rénovation de la démocratie sociale et réforme du temps de travail [Law on the renewal of social democracy and reform of working time]	Seven criteria established: respecting republican values; independence; two years' existence; number of members relative to other unions; trade union influence; financial transparency; scores in elections. Trade unions have to obtain 10% of the ballot votes at the company level; 8% of the ballots vote; and to have a balanced territorial presence at the sector level; 8% of the ballots votes and to have a balanced sectoral presence (in industry, services, building, trade, for example) at the multi-sector national level. Similar criteria are laid down for employer associations without the electoral criteria.
2010		LOI no. 2010-1215 du 15 octobre 2010 complétant les dispositions relatives à la démocratie sociale issues de la loi no. 2008-789 du 20 août 2008 [Law supplementing the provisions relating to social democracy from Law No. no. 2008-789 of 20 August 2008]	
2011	Romania	Law on Social Dialogue no. 62/2011	Threshold for workplace/company representative status raised to 50% of employees (from 33%). It was reported that only a few trade unions have so many members, and subsequently 'a number of 458 trade union organisations were unable to require representative status' in accordance with the new conditions in the 2011 legislative reform. At national peak level, trade unions need to have at least 5% of the workforce as members, and employer organisations need to have member companies with a total employment of 7% of the workforce. At sector level, this is 7% for trade unions and 10% for employer organisations.

Year	Country	Legislation	Criteria for representativeness
2012	Bulgaria	Labour Code (Articles 34, 35, 36)	Representative trade unions shall: have over 75,000 members; be present in 25% of sectors with minimum of five members or have 50 affiliates with minimum of five members from different sectors; represent staff in 25% or more of local authorities; have a national governing body; be registered as a non-profit association; have been in existence for three years. Members of representative employer associations shall employ 100,000 workers or more (up from 30,000) and be represented in 25% of sectors, with 5% or more in each sector or a minimum of 10 employers in each. Other criteria are similar to those for the unions. Representativeness is recognised for four years.
	Hungary	Act I of 2012 on Labour Code	Replaces earlier measure of electoral support in works council elections by a minimum 10% union membership density threshold.
2014	Croatia	Representativeness of Employer Associations and Trade Unions (OG 93/14)	Trade union confederations must have 50,000+ members in affiliated organisations, with at least five unions operating in different sectors, and be present in at least four regions. They must have offices and employ at least five workers. Lists of numbers of members signed by the trade union must be supplied. Employer associations must: have been registered for six months; bring together 3,000 employers or have affiliated employers employing at least 100,000 workers; have at least five employer affiliates in different sectors; have at least four regional offices; and employ at least five members of staff.
	Latvia	Trade Union Law	Government recognition to be given to those trade unions that have the highest numbers of members.
	Portugal	Government Resolution 90/2014	Employer associations requesting extension of agreements must have membership of one-half of all employers or over 30% of all SMEs in sector.
2015	Netherlands	Act on Administrative Extension and Non-extension of Collective Labour Agreements (Wet AVV)	The extension of collective agreements has been regulated since the 1937 Act on Administrative Extension and Non-extension of Collective Labour Agreements (Wet AVV). The revised version of this AVV law that entered into force in July 2015 aims to avoid periods with no collective agreement, when delays occur in the renewal or renegotiation of existing agreements. Membership density plays a role in the extension of collective agreements, but in a very specific (indirect) way. When social partners file a request for extension of a sector collective agreement, the employers that are party to the agreement have to employ 55% or more of the employees in the sector.

Source: Eurofound's Network of European correspondents

Legal conformity versus mutual recognition

The first open question put to Eurofound's national correspondents asked them to describe in their 'own words the meaning of the concept of representativeness or indicate the alternative concept that is relevant in their country of origin and that deals with the social recognition or social significance and weight of collective organisations (e.g. mutual recognition, election results, membership, mandate)'.

Their responses range across a spectrum running from an informal process of mutual recognition by the social partners, with little or no legal underpinning, through to systems that incorporate more legal conditions and can even appear flexible, to those where formal legal requirements specify the preconditions for participation in collective bargaining and binding collective agreements.

This information is complemented by answers to a closed question that requested estimates (as explained earlier) of the relative importance of different factors in determining the representativeness of certain industrial relations approaches. Two of the variables were: 'conformity with legal requirements', and 'mutual recognition' by the 'other side' of the industry of the benefits of information exchange, consultation or bargaining. By averaging the two estimates made for employer organisations (at peak and sector levels) and for trade unions (at peak, sector and workplace levels) and then by subtracting the score of 'legal conformity' (column C) countries from the 'mutual recognition' scores (column B), a scale was produced (column D) running from +4 ('mutual recognition' is the most important and 'mutual recognition' is not relevant) to -4 ('legal conformity' is the most important and 'mutual recognition' is not relevant), as shown in Table 5.

Table 5: Relative importance of mutual recognition and legal conformity (based on one expert opinion per country)

	Relative importance of mutual recognition and conformity to legal criteria	Trade union density (% of employees)	Threshold present	
			Representation	Extension
DK	In these 11 countries, the national correspondents scored mutual recognition as being more important for representativeness than conformity to legal criteria.	69		
UK		26	(TU workplace vote)	
ES		17	TU elections, EM coverage	
CY		51		
AT		33		
SE		70		
IT		34	TU membership, TU elections	TU membership, TU elections
PT		19		EM coverage
FI		75		TU/EM coverage
NL		29	EM coverage	
NO		51		
SI	In these 11 countries, the national correspondents' scores gave mutual recognition and conformity to legal criteria a similar level of importance for representativeness.	23	TU density	
HR		17	TU/EM coverage + membership	
EE		11		EM coverage (proposal 2014)
LT		8		
LU		33	TU elections	
MT		50	TU membership	
IE		28	TU membership	
LV		6		EM coverage
BE		66	TU/EM membership, TU elections	
EL		28		EM coverage (annulled 2011)
HU		10	TU membership	EM coverage
PL	In these seven countries, the national correspondents' scores gave conformity to legal criteria greater importance for representativeness than mutual recognition.	17	TU membership	
BG		14	TU/EM membership	
DE		18		TU/EM coverage, TU membership
FR		8	TU elections	
CZ		10		TU/EM membership
RO		17	TU membership	
SK		14	TU membership (annulled 2013)	

Notes: The numbers presented in this table are based on one single expert opinion per country. EM=peak and sector employers; TU=peak, sector and workplace trade unions. Figures on trade union density were provided by Eurofound's national correspondents. For some Member States, union density figures shown may vary from those of other sources, which may refer to all workers, rather than employees, or relate to different periods. For example, according to the ICTWSS, union density in Belgium was 55% in 2013, and according to European Social Survey, it was 48% in 2012.

Source: Eurofound's Network of European correspondents

From these ratings given by Eurofound's national correspondents, the following observations may be made.

The 11 stronger 'mutual recognition' countries at the top of the table (with average ratings for mutual recognition at least one point greater than for legal conformity) tend to display higher average levels of trade union density (41%) than the seven stronger 'legal conformity' countries at the bottom (14%). At the same

time, there is very considerable variation in trade union density across the 'mutual recognition' highly rated countries, ranging from below 20% (Portugal and Spain) to around 70% (Denmark, Finland and Sweden). As such, the average figure for this group is to be taken with caution. Across the countries with representativeness rated more exclusively on legal conformity, trade union density varies much less, between 8% for France and 18% for Germany.

The 11 countries where legal conformity and mutual recognition are scored more or less equally and whose average trade union density is 25% (varying from less than 10% for Latvia and Lithuania, to more than 50% in Belgium and Malta) divide into two groups:

- those where the national correspondents considered neither legal conformity nor mutual recognition to be significant or important (Luxembourg, Lithuania and Malta); and
- those where the national correspondents considered both mutual recognition and legal conformity to be important (Belgium, Croatia, Estonia, Greece, Hungary, Ireland, Latvia, and Slovenia).¹⁸

While all the ‘legal conformity’ countries have legal thresholds determining either whether the social partners are ‘representative’ or not, or whether or not the agreements they conclude can be extended to all firms within the sector or region, this is the case for only one-half of the ‘mutual recognition’ countries.

Although not shown in this table, it is also worth commenting that all the ‘legal conformity’ countries have experienced legal changes to representation since 1998, while this is the case for only three out of the top 11 ‘mutual recognition’ countries.

The data reported in Table 5 indicate a complex mix of emphasis between elections and density or membership on the union side, and employee coverage or employer membership density on the employer side, when the democratic credentials of the social partners are being gauged. It bears repeating that these numbers are based on one single expert opinion per country – the views of Eurofound’s national correspondents.

In certain countries, the reality is too complex to be presented by the national averages across all levels and both social partners in Table 5. Responses for the social partners at peak levels may be slightly or totally different to those for social partners at sector levels, and their significance may vary between the employers and the unions. Analysis of the reports of national experts suggests that assessments of the significance of these two principles for representativeness between employers and trade unions are very similar, across different countries. Ratings for peak employers are very similar to those for sectoral employers, with more differences being shown between peak-level and sector-level trade unions, as discussed further below.

Despite such similarities, major differences occur across three Member States, making it difficult to indicate clearly which is the ‘dominant’ country principle –

mutual recognition or legal conformity. In Germany, mutual recognition is rated ‘most important’ for the unions and employers at sector level, but it is irrelevant for both at peak level, because sector-level collective bargaining is dominant. In Luxembourg, legal conformity is ‘most important’ for the peak trade unions but ‘irrelevant’ at the other levels of employer–employee interaction.

Mutual recognition

Instead of the state determining which organisations may negotiate and sign binding agreements, mutual recognition involves self-regulation by the social partners. Mutual recognition is a relationship that matures incrementally over time. The perception of other social partner organisations as useful and effective interlocutors can be the basis of mutual recognition, although it can also be simply the consequence of the need of a counterpart to engage in social dialogue or collective bargaining. Legitimate or ‘mutually recognised’ trade unions and employer associations create their own institutional fora, within which they collectively bargain or consult on issues of mutual interest in the employment field. For Hyman (1997, p. 311) this ‘legitimacy’ is partly about the historic record of achievement, partly about the strength of the available ideological resources, and partly about the capacity of a social partner to inform, explain and win an argument.

Membership strength is very important to winning this argument. Under the mutual recognition principle, membership numbers are a major means to the end of securing both the acknowledgement of representative status and the substantive or procedural improvements that may follow from concluding collective bargaining agreements. Yet in the ‘mutual recognition’ countries, this is not generally a legal requirement. Thus, the main difference is whether the state or the other social partner(s) decides most on representativeness.

The national correspondents were asked to rank the relevance of an understanding of ‘representativeness’ as being ‘mutual recognition’ by the ‘other side’ of industry regarding the benefits of information exchange, consultation or bargaining. Analysis of the national correspondent responses suggests three main groupings (shown in Figure 17 in annex 3):

- Thirteen countries (from Hungary to Finland) in which the national experts consistently rate mutual recognition as ‘important’ or ‘most important’ for both peak and sector employer associations and trade unions.

¹⁸ This is an initial grouping of countries, based on the relevance of legal conformity or mutual recognition. Table 7 adds further factors of representativeness to the four main models of representativeness. In Table 7, Slovenia is categorised as ‘social partner self-regulation’ (rather than mixed model), and Belgium is in the state electoral strength model.

- Nine countries (from Germany to Croatia) that generally hold the middle ground on the issue of the mutual recognition principle but where clear differences, in the assessments of the views of employer associations and trade unions at peak and sector level, are likely to appear.
- Seven countries (from the Czech Republic to Lithuania) where the national experts see mutual recognition as having little or no relevance for either trade unions or employer organisations.

But what does ‘mutual recognition’ actually mean? The key elements described by the 13 national correspondents who identify mutual recognition as important or most important in their systems can be summarised in four points:

- a relatively low level of state regulation of employment relations;
- organisational capacity to act on behalf of a significant number of social partner organisations or members;
- sufficient mutual trust with the other side of industry to enable collective agreements to be negotiated and implemented;
- acknowledgement from the ‘other side’ as having an equivalent legitimacy as a social actor.

The social partners in ‘strong’ mutual recognition countries tend to be well embedded, and to possess organisational coherence and capacity linked to associational strength and democratically legitimate forms of policymaking and mandate delivery. These features are key in determining the role of the other side of industry in acknowledging representative status; denial by the other side can even be used as a sanction.¹⁹

The Danish correspondent considers a key element is the fact that ‘Within the organisations the leaders are chosen by the members’. The members or affiliates thus give their negotiators a democratic mandate to make lasting commitments on their behalf.

The Swedish correspondent considers that

representativeness mainly means the legitimacy that arises from custom and practice as well as from the rate of organisation. This is the case for both employers’ and employees’ associations and the practice is based on the mutual recognition of the two sides.

Both legitimacy and coverage of the organisation are also emphasised by the Finnish correspondent:

The legitimacy arises from a combination of a variety of factors, whereof the rate of organisation and mandate from affiliate and members are among the most important. Among the peak-level organisations, a national coverage, encompassing members/affiliates in the largest and most prominent sectors, can be seen as a prerequisite.

Mutual recognition usually reflects an understanding of each other’s capacity to make and keep agreements between themselves, more than an externally imposed regulation or formula. The correspondent from Finland expands the argument:

In the context of the social partners and their ability to conclude collective agreements, it might be more relevant to speak of legitimacy, where mandate and mutual recognition can be seen as the cornerstones. Hence, legitimacy to a great extent arises from social dialogue itself. Where the mandate relates to the formal organisation of the union and rules of internal democracy, the latter relates to the position of the organisation in the industrial relations system and the economy.

Mutual recognition is also frequently described as being a key component of a system’s DNA, what could be described as an ‘industrial relations pathway’. The Danish correspondent, for example, sees ‘mutual recognition’ as arising from the processes of negotiation: ‘Recognition is in principle established the moment two organisations conclude a collective agreement’. Arriving at such collective agreements often involves the prior establishment of trust.

In the UK, where low levels of trust are widespread within industrial relations, the national correspondent indicates that there is significantly less ‘mutuality’ within the award or acknowledgement of ‘mutual recognition’:

The recognition of unions by employers for collective bargaining has traditionally been at the discretion of employers, reflecting factors such as membership density, industrial pressure exerted by unions and employer preferences. Hence ‘mutual recognition’ is the most important factor. Though voluntary recognition can be withdrawn at any time, it usually represents a long-term arrangement between the parties, reflecting the union’s capacity to make lasting commitments on behalf of employees in the workplace and giving rise to legitimacy through custom and practice.’

¹⁹ Two unions that broke away from the main Swedish trade union (such as LO) were both refused recognition as legitimate representative organisations by the employers and by other unions. They are therefore not able to participate in collective bargaining, but are not bound by the industrial peace obligation it entails.

Legitimacy arising from custom and practice depends upon mutual recognition. Custom and practice refers to the unwritten but respected informal regulations governing relations between employers and trade unions and workers.

Conclusion

Representativeness has various meanings across the 28 Member States and Norway. These meanings depend, first of all, on which core principle carries the most weight. Two core principles structure representativeness systems:

- Legal conformity: representativeness is shaped by state regulations that refer to a set of formal criteria.
- Mutual recognition: representativeness is determined by self-regulation of the social partners on the basis largely of informal criteria.

In practice, few national systems correspond to an unalloyed form of either mutual recognition or legal conformity. Most Member States feature a combination of these principles, applying a mix of both formal and informal criteria.

The formal criteria may include one or more of the following:

- membership numbers or density for trade unions or both and numbers of affiliates or share of the sector employers or of its employees for employer associations (Belgium, Bulgaria, Croatia, the Czech Republic, France, Germany, Hungary, Ireland, Italy, Latvia, Malta, Poland, Portugal, Romania, Slovenia, Slovakia);
- company share of sector turnover, economic weight (Hungary, Latvia);
- multi-occupational coverage (Austria, Belgium, Bulgaria, Croatia, France, Luxembourg, Poland);
- multi-sector presence (Belgium, Luxembourg);
- territorial coverage (Austria, Bulgaria, Croatia, Poland, Romania, Slovakia, Spain);
- electoral success (France, Italy, Luxembourg, Spain, UK);
- political values either Democratic (Croatia, Germany, Latvia, Slovenia) or Republican (France);
- financial and organisational independence from third parties or the other side of industry (Austria, the Czech Republic, France, Germany, Romania, Slovenia,);
- material conditions – premises and staff (Croatia);
- no members from the other side (Germany);
- length of institutional existence (Belgium, Bulgaria, Croatia, France, Romania, Slovenia);
- official registration (Croatia, Cyprus, Ireland, UK).

Informal criteria used may refer to any of the above, but typically also involve one or more of the following.

- recognition of ‘leading’ role, ‘reputation’ or ‘influence’ (Cyprus, France, Hungary, Latvia);
- capacity to reach, sign and implement agreements (Austria, Finland, Germany, Italy, Spain, Sweden);
- collective bargaining as a declared objective (Germany);
- voluntary membership (Germany);
- democratic internal structure – in trade unions (Germany);
- presence in a significant economic sector (Luxembourg);
- existence of mandates from the constituents (Finland, Italy);
- ability to influence terms and conditions of employment or effective activity (Austria, Cyprus, Italy, Luxembourg, Sweden, UK);
- endorsement of legitimacy by other social partners (Cyprus, Finland, Hungary);
- custom and practice (Finland, Sweden, UK).

The full operational definition of representativeness in a given country thus depends on the articulation between the two core principles and many formal and informal criteria.

Drivers of representativeness

This section of chapter 1 presents other elements that, according to the national correspondents, drive or enhance the representativeness of social partner organisations. These include workplace elections, membership-based organisational strength and the capacity to negotiate. This is followed by an exploration of the consequences of gaining or having representative status.

The national correspondents were asked to rate the meaning of several different drivers for representativeness on a scale from one to five for employers and trade unions at national, sector and local levels. The drivers they rated were:

- capacity to mobilise nationally;
- capacity to make lasting commitments on behalf of employers at national level;
- transparent financial independence;
- electoral success;
- mandate from affiliates/members;
- legitimacy arising from custom and practice;
- capacity to act independently/autonomously.

They were asked to identify any other factors they considered significant. While this focus on the opinion of individual experts from each of the 28 EU Member States and Norway has clear limitations, some tentative conclusions can be drawn.

The difference in the meaning of representativeness for trade unions when compared to employers suggests the capacity to mobilise is more important for trade unions, while elections are irrelevant for employer organisations. Electoral success is only considered important for representativeness in a small number of countries, and where this is the case, it is mostly important at workplace level, as such elections tend to be organised at that level. When sector level is compared with peak level, getting a mandate from affiliates emerges as being more important for representativeness at sector level. The different meanings of representativeness in the 28 EU Member States and Norway can be explained by historical context, the varying levels at which collective bargaining takes place in each country and by organisational density rates.

The previous section distinguished between the Member States in which the concept of representativeness mainly relies on mutual recognition and those that emphasise legal conformity. This section identifies a number of sub-concepts: electoral strength (representativeness based on election results), organisational strength (representativeness based on membership) and the capacity to negotiate. Following an analysis of each of these three drivers of representativeness, this section concludes by considering how they might be interlinked.

Electoral strength (representativeness based on election results)

Representativeness can be based on the results of employee representation elections in the workplace. While elections for worker representatives were shown to contribute to the representativeness of trade unions in a number of countries, electoral success was not found to be relevant in most EU Member States.²⁰

Workplace elections were only identified as being 'significant', 'important' or 'most important' for the unions in Belgium, Italy, Spain, Luxembourg and France. From 2017 in these countries, with the exception of France, they are considered to have little or no relevance for employers.²¹

In France, the 2008 reform represented a major shift. The notion of representativeness moved from a centralised (top-down) government assessment to a decentralised one (bottom-up). Unions now have to exceed electoral thresholds of 10% at company level, or 8% at sector and cross-sector level. Another shift has been a reduced focus on assessing its 'genuine' actions and presence and a greater focus on the trade unions' results in the professional elections.²²

In Italy, the 2001, 2011 and 2014 laws and subsequent private sector agreements introducing a 5% minimum representativeness threshold at sector level mark a shift towards a more decentralised system. The threshold is reached by using a formula based on the union's average membership across the sector and the proportion of votes it receives in the elections for workplace union delegates (*rappresentanze sindacali unitary*, RSU).²³ It thus combines density measures (which are returned to below) and electoral audience measures.

In Spain, the representativeness of the unions relies on the election results for worker delegates and works council members at workplace levels. The 'most representative' unions are those that cover a minimum of 10% of worker delegates and works council members at national level, or 15% at regional level.

In Luxembourg, peak trade union representativeness is ensured when a union exceeds the 20% threshold in the Chamber of Employees elections; at the sector level they must still put up candidates in the Chamber of Employees elections but also garner half of the votes cast in the representative elections held within the remit of the collective bargaining agreement.

The Belgian unions are also subject to the test of representativeness through special 'labour' or 'social' elections held every four years. The most recent elections in 2016, for example, recorded 51% of the votes going to the Christian trade union confederation, the ACV-CSC, 35% going to the socialist confederation, the ABVV-FGTB and 12% to the liberal confederation, the ACLVB-CGSLB. The outcome of these workplace elections are important for the trade unions, as candidates can only stand on an already designated 'representative' trade union list.

20 Q9.6 asked about the relevance of 'electoral success' at workplace level to the 'representativeness' of the union. In nine of the 29 countries, it was 'most important' or 'important'; in 15 countries it was 'irrelevant' or 'unimportant'; in four no workplace trade unionism was reported.

21 It should be noted that the most important elections in which the employers voted by direct universal suffrage, the *Prud'hommes* elections, were suppressed on 11 December 2014 by the French constitutional court, and replaced by the nomination of employer and employee representatives on the basis of the representativeness of their organisation. From 2017, French employer associations will have to affiliate 8% of employers within the sector or national constituency they claim to represent to secure representativeness status.

22 This was challenged locally before the courts on several occasions during the following years, but the Court of Cassation (*Cour de Cassation*) and the French constitutional court (*Conseil Constitutionnel*) confirmed the legislation and thus stabilised the system.

23 Elections for RSU positions were initiated in 1993 following a memorandum of understanding signed on 3 July 1993 (*Protocollo d'Intesa*) by the unions CGIL, CISL and the UIL, by Confindustria as employer organisation and by the government.

Elections are relevant for employers in a few countries besides France (Denmark, Greece, Ireland and Slovenia) for appointment procedures to secure social partner delegates in labour courts or arbitration bodies, but without much relevance for overall representativeness. Other kinds of ballots, besides those for works council members and personnel delegates, occur at the workplace in order to elect representatives to external bodies. In Germany, where elections to the boards that run the national social security organisations enable both employers and unions to draw up lists of candidates, election procedures are laid down in the Social Code (IV Sozialgesetzbuch). The representatives of employers and insured (workers) are elected in free and secret ballots. The threshold for representation on the boards of, for example, the public health insurers or the Federal Employment Agency, is 5% of the votes cast. But the results, unlike those for the elections of employment judges in the French Prud'hommes tribunal system, are not used to help define representativeness.

The significance of electoral results for representativeness lies in the outcome of workplace elections. Electoral thresholds for peak and sector trade unions, and particularly the recent changes to them, are indicators of the way legislation may use balloting procedures to help larger existing trade unions maintain (and even extend) their representativeness, while for smaller or newer actors, such thresholds can hinder them in obtaining 'representative' status.

Organisational strength (representativeness based on membership)

The capacity of an organisation to represent the interests of a wider group can depend on its budget, its human resources in terms of staff, its internal structures, and its capacity to mobilise and assemble a mandate from the affiliates. Membership density is a crucial factor in the representativeness of most social partner organisations. An organisation's budget comes from membership fee income; therefore, the number of members an organisation has can affect its capacity to act autonomously and to mobilise. This can be a relevant factor if several social partner organisations are competing for members. Organisational weakness or significant membership decline can have an eroding impact on representativeness. Finally, the longevity of being a representative organisation can also enforce representativeness, as legitimacy arises from custom and practice.

Membership strength is obviously significant whenever thresholds have to be reached, but is possibly still more important when there are no thresholds. This is because, under the mutual recognition principle, membership numbers are a means to the end of securing both the acknowledgement of representative status and the substantive or procedural improvements that may follow from concluding collective bargaining agreements.

Organisational strength can also be reached through a capacity to mobilise members, as well as non-members.²⁴ Trade unions in France for example find their organisational strength in their capacity to mobilise (including among non-members) more than in their membership density.

Membership strength and the capacity to mobilise appear to be more important in countries where representativeness emerges with mutual recognition. Four of the 11 countries rated higher by national correspondents regarding organisational strength (mobilisation and membership) – Denmark, Finland, Portugal and Sweden – also appear among the 10 strongest countries regarding mutual recognition (Table 5), while only one of them (the Czech Republic) appears among the seven countries that are strongest on legal conformity.

Eurofound national correspondents from Austria, Belgium, Cyprus, Hungary, Ireland, Luxembourg, Portugal and Spain reported that the mobilising capacity of the unions is more important for their representativeness than it is for the employers. The Hungarian correspondent described how important this factor was, even if it was not always achievable:

Capacity to mobilise (make members actively involved in organisational decision making, in strikes or protests) is a prerequisite to being accepted as [a] reliable negotiating partner. However, achieving this status is one of the biggest challenges. Workers feel intimidated (especially in the times of crisis – fear of losing job), while there exists a very low level of solidarity (also as a general phenomenon across society).

Capacity to negotiate

The capacity to negotiate involves access to the bargaining process where an autonomous and independent organisation can be mandated to make lasting commitments on behalf of its members. It can also mean that the negotiating parties are given the right, based on their representativeness, to conclude

²⁴ It is possible that social partner organisations could also gain representativeness through their internal democratic decision-making structures. Depending on their tradition of consensus building or voting systems, where a majority puts their views forward against a minority, or on the way the leaderships of a social partner organisation is elected or appointed, is an aspect of industrial democracy that can enhance its capacity to mobilise, and maybe also its legitimacy. The internal decision-making or election of an organisation its leadership has not been explored in this study.

agreements that are made generally binding, following the *erga omnes* principle, so that they apply to those that are not member of the contracting parties signing the agreement, as well as members.

In Cyprus, the conditions that need to be fulfilled to allow trade unions access to collective bargaining are registration within 30 days of being founded and having more than 20 members. In Austria, access to collective bargaining depends on the independence and autonomy of social partners, their cross-sector and national coverage and number of members, with recognition determined through an assessment of the Federal Arbitration Board. Capacity to negotiate thus also depends on financial and organisational independence, and on each organisation's public visibility and reputation.

Although 'negotiating capacity' is sometimes described as being almost autonomous, it is better understood as a combination of factors, which lead towards social partner dialogue, which, in turn, leads to collective agreements. Comments from the national correspondents of countries with 'more mutual recognition' based representativeness support the argument that such organisational, strength-defined 'capacity' is more significant for representativeness for them. Arguably, the criteria of 'negotiating capacity' should be understood as being intertwined with both 'organisational strength' and 'social legitimacy', and is therefore more likely to be used in systems based on mutual recognition.

At EU sectoral level, social partners are required to prove their capacity to negotiate through a mandating procedure. But such proof was not specified as a requirement at national level by any of the national correspondents, although the German correspondent considered that 'collective bargaining capacity is more than an alternative concept of representativeness, it defines trade unions' under a 1964 German constitutional court decision.

However, 16 national correspondents rated a mandate from affiliates or members as being 'important' or 'most important' at peak and sector level for the trade unions or employer associations or both. In six countries, a specific mandate was identified as being irrelevant or only slightly relevant. In some other countries, it seems that by becoming a member of a trade union or employer organisation, the individual is delegating authority to the union or employer organisation to sign

collective agreements on their behalf.²⁵ Ratings for the representativeness of employer organisations indicate that having a mandate is 'most important' at peak level in 10 Member States: Croatia, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, Luxembourg and Slovenia.

Conclusions regarding the drivers of representativeness

Organisational strength, electoral success and the capacity to negotiate can each play a role in representativeness based on mutual recognition as well as in compliance to standards in regulations. It can also be that political parties in power try to influence representativeness status of certain social partner actors through non-legislative government interventions. Government ministries or labour inspectors may play significant roles both in opening up representativeness to new organisations, or in determining the timing and procedures by which the status may be removed when an organisation moves into decline or crisis.

This influence may come through government political preference, which is difficult to measure directly. Eurofound's national correspondents were asked two questions that attempted to capture this influence. One asked 'Which actors or processes determine whether [a social partner] conforms to the norms of 'representativeness' within your employment relations system?', and asked them to rate the significance of a 'government ministry/labour inspection' on a five-point scale. The other question asked them to rate the significance of 'the government' in determining 'whether [a social partner] ceases to be 'representative'.

Sixteen of the national correspondents rated the government role as 'irrelevant' or, on average, below 'slightly relevant'. At the other end of the continuum, national correspondents representing six countries indicated a potential government influence on representativeness for both employers and unions: Austria, Belgium, Bulgaria, France, the Netherlands and Slovakia. The national correspondent for Luxembourg reported a possible political influence of the government on the representativeness of trade unions. This influence would not be as significant for the representativeness status of employer organisations in those countries. For Spain, the influence of the government only affects employers, while it has no influence on the representativeness of trade unions.²⁶

25 How this delegation is done relates back to the question of internal organisational democracy: whether or not internal voice, or influence, is allowed to be channelled, or if ending the membership is the only option for a member when they disagree with positions taken or with agreements signed by social partner organisations.

26 Fernandez, R. (2008) states that the Spanish model of representativeness favours the trade unions acting at the political level but reduces its incentives to act at the workplace level; this, however, does not mean that there is political influence of the government on assessing the representativeness of trade unions.

Organisational strength, electoral success and the capacity to negotiate can also help or hinder the process of mutual recognition of social partners. Membership strength and mobilising power may not, however, be sufficient for a union to secure representative status. Some employers and some employer associations may deliberately avoid negotiating with or recognising a 'strong' union in favour of a 'weaker' one. The Portuguese correspondent describes what can happen:

In most cases the employers' associations or companies acknowledge unions based on the criterion of their 'strength' or 'weakness'. But the consequences of this are very diverse. In a number of cases the employers recognise the unions with the most members and mobilisation capacity as their partners in negotiations and collective bargaining. In many other cases, the employers prefer to negotiate with weaker unions. ... The decisive factor is whether the employer or the employers' association come to the conclusion that it is advantageous or unavoidable to accept a union as partner.

This evidence, that in certain countries and under certain circumstances employers may choose which trade union should be acknowledged as an interest representative organisation, suggests an association between 'organisational strength' and 'negotiating capacity'.

Representativeness outcomes

This section of chapter 1 considers the impacts or consequences of the acquisition of 'recognition' of representative status, as well as how it can be put to an end or questioned.

At peak level, the most important impact from obtaining representative status is the resulting membership of tripartite bodies and greater political influence on the government and on the other side, social partner organisations. At sector and workplace level, the most important consequence is that it enables the conclusion of collective bargaining agreements with enhanced influence on the other side's social partner organisations. The national correspondents report these to be the three most important consequences for both trade unions and employers.

In almost all countries, tripartite body membership is an important outcome of gaining representativeness status. Three Eurofound national correspondents (from Cyprus, Denmark and Sweden) indicated that tripartite membership has no relevance to either the employer associations or to the trade unions in the countries they reported from. In Cyprus, the Labour Advisory Board is the tripartite institution, while in Sweden and Denmark there is no tripartite structure, but only bipartite bodies and tripartite consultations. As there is no tripartite body, there are no membership criteria for such a body.

Cyprus, Denmark and Sweden are countries with strongly mutual recognition-based representativeness.

To explore cross-country differences, the impacts of representativeness for social partner organisations, as reported by the national correspondents, were grouped into three main themes.

1. Political influence, in terms of greater proximity to decision-makers, enhanced status and prestige, entitlement to membership of tripartite bodies and consultation, improvement in the quality of information flows with the other side of industry and greater influence over employment outcomes and processes.
2. Legal consequences, as when representativeness permits the legal extension of agreements, agreements to be concluded, or can make industrial action lawful.
3. Institutional strength, where the status of representativeness encourages members to join or affiliate and improves access to funding.

The following conclusions on the impacts of representativeness status are based on the national correspondent reports as they relate to these three main themes.

For more than one-half of European countries, the important outcomes of achieving representativeness status for peak social partner organisations largely relate to gains in political influence, particularly securing a seat in tripartite arrangements. The nine countries where political influence is reported to be least relevant as an impact of representativeness are: Croatia, Cyprus, Italy, Luxembourg, the Netherlands, Poland, Slovakia, Spain and Sweden. Also, in more than one-half of the countries, the political influence gained from representativeness status is reported to be (slightly) more important for employer organisations than for trade unions.

The legal consequences arising from representativeness may be significant for both mutual recognition and legal conformity countries, as well as for both employers and unions.

Half of the 29 countries see the institutional strength gained from representativeness as being significant or important. The national correspondent rated this institutional strength impact as being strongest in Estonia, France, Latvia, Romania and Greece. No institutional strength impact was reported for the Czech Republic, Croatia, Cyprus, Luxembourg, Norway or Slovakia.

The most significant finding is that there are more and stronger common features between countries in terms of the outcomes of representativeness than there are among the elements helping to drive representativeness. Once representativeness is acquired, its implications appear to be more or less the

same across countries. Of course, as industrial relations systems differ, the impact of gaining representativeness also varies; for example, between countries with and without extension mechanisms for collective bargaining agreements.

Four main models of representativeness

Analysis presented in the previous sections suggests that four models of representativeness coexist in Europe, ranging between the ideal types of mutual recognition and legal conformity.

- Social partner self-regulation: a social partner self-regulated system of mutual recognition, associated with negotiating capacity and social strength drivers and with very little state regulation on representativeness.
- Mixed social partner and state regulation: a mixed model, combining elements of social partner mutual recognition and of state regulation and legal conformity.
- State regulation membership strength: a state-regulated system of legal conformity, where ‘social strength’ is used as a legal measure of representativeness.

- State regulation electoral strength: a state-structured system of legal conformity in which electoral success primarily determines representativeness.

Countries have been assigned to each category according to the following: their position on the mutual recognition to legal conformity scale; their scores on the four-driver criteria groupings discussed above; and the qualitative commentary made by Eurofound national correspondents.²⁷ In total, 29 countries are classified according to one or other dominant combination of characteristics.

Social partner self-regulated model

This model brings together countries where mutual recognition is far more important than legal conformity, at all levels. Here, the implicit criteria of representativeness presented relate to negotiating capacity and social strength drivers. Ten countries (Cyprus, Denmark, Finland, Ireland, Lithuania, Malta, Norway, Slovenia, Sweden and UK) are essentially self-regulating at the moment. A further six (Austria, Germany, Hungary, Italy, the Netherlands and Portugal) are a mixture of self-regulation and state regulation.²⁸

Table 6: Classification of Member States and Norway by representativeness model

Representativeness model	Countries
Social partner self-regulation	Cyprus, Denmark, Finland, Ireland, Lithuania, Malta, Norway, Slovenia (for employers), Sweden, the UK.
Mixed model	Austria, Estonia, Germany, Hungary, Italy, Netherlands, Portugal, Spain (for employers) and Slovenia (for trade unions)
State membership regulated	Bulgaria, Croatia, Czech Republic, Estonia, Greece, Latvia, Poland, Romania, Slovakia.
State electoral strength model	Belgium, France, Luxembourg, Spain.

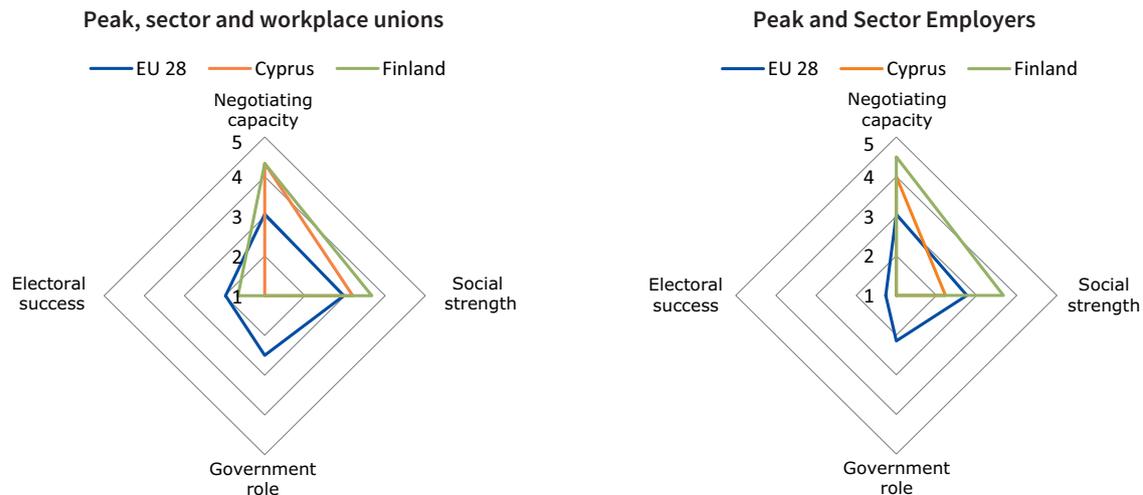
Notes: This classification extends the difference between legal conformity and mutual recognition systems by taking into account the drivers and impacts of representativeness.

Source: Eurofound’s Network of European correspondents

27 A more detailed illustration of how the allocation was developed is shown in Table 13. The heuristic scoring worked well in locating nearly all the 28 Member States plus Norway, but in the light of the national correspondent commentaries the classification was adjusted in the cases of Austria, Croatia, Germany, Ireland, Lithuania, Slovakia and Spain.

28 Lithuania has ‘important’ elections for workplace union representativeness, but in February 2015 there was no state structuring of these or of representativeness at any other level, although draft legislation was being considered. In 2007, the three national peak trade unions and the two employer organisations signed a joint declaration of mutual recognition. Although Austria’s ‘heuristic score’ was strongly towards the mutual recognition pole, it is better understood as a mixed social partner and state representativeness system. Austria’s 1974 law requires a series of ‘capacity’ indicators, and its strong mutual recognition practices operate within this framework.

Figure 2: Social partner self-regulation model in Cyprus and Finland



Note: The numbers presented in this graph are based on one single expert opinion per country.

Source: Eurofound's Network of European correspondents (February–May 2015)

Figure 2 illustrates the characteristics of the self-regulation model for Cyprus and Finland, contrasting them with average trade union and employer ratings across all EU28 Member States (shown by a blue line).

The two most obvious observations to be made of this model are the near total absence of any non-legislative role for government or for electoral success, and the near perfect symmetry between the rating by the national correspondents for the unions and for the employers in the two very different countries.

The UK provides a good example of the self-regulating countries where representation is based on the mutual recognition principle (Contrepois, 2016). Its industrial relations system is historically based on voluntarism and single channel representation. There is just one major union confederation, the Trade Union Congress (TUC) and, since 1965, just one major employer association, the Confederation of British Industry (CBI).

The voluntarism principle implies that the state intervenes very little or not at all in the regulation of relations between employers and employees. The representativeness of the two collective actors are then based on voluntary mutual recognition, where each side recognises the legitimacy of the other. In a political economy dominated by *laissez-faire*, state regulation traditionally occupied a limited place in structuring employer–employee relations.²⁹ Industrial relations are thus primarily the product of the balance of power between employers and unions. There are no legal provisions obliging social partners to negotiate collectively, while individual relationships are mainly

governed by the employment contract. Collective agreements are now non-existent at national level and, outside the public sector, rare at sector level. Without any obligation to negotiate, only one-third of employees are now covered by collective agreements.

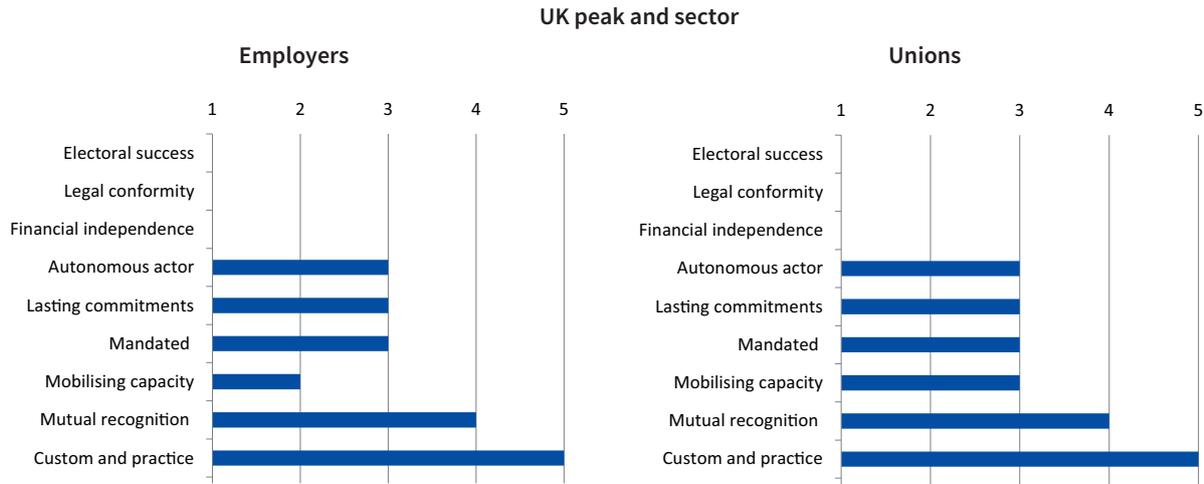
The single channel representativeness tradition was embedded when UK unions were strong and could enforce a closed shop, often obliging those entering work to join the union. Today it still means that nearly everywhere the trade union is the sole legitimate instance of employee representation. Other institutions and legal structures of employee representation that exist in other European countries are effectively absent in the UK.

Since the late 1970s, voluntarism and single channel representation have been strongly questioned without being fundamentally changed. In the 1980s and 1990s, the Conservative government took many legislative measures to limit the role of unions, removing the closed shop and restricting their ability to organise effective strikes. Thus the Trade Union and Labour Relations Act (1992) defined trade unions as ‘organisations whose principal purposes include the regulation of relations between workers and employers or employer associations’.

The Conservative government’s restrictive measures were not repealed by the Labour government (1997–2010) and still apply today. Besides extending individual employment rights to include the protections of the social chapter of the Maastricht Treaty, the Labour government did, however, introduce new regulations

²⁹ Nonetheless, the UK national correspondent pointed to the role of government action in encouraging trade unions to take on representative roles in some specific periods: ‘Historically, during the early/mid-20th century and especially during the Second World War and the immediate post-war period, UK governments actively promoted union recognition and the establishment of sectoral bargaining machinery. In the public sector, state influence on the shape and scope of bargaining/consultative arrangements (including pay review bodies) remains a more significant factor’.

Figure 3: Most important determinants of representativeness for UK employers and trade unions



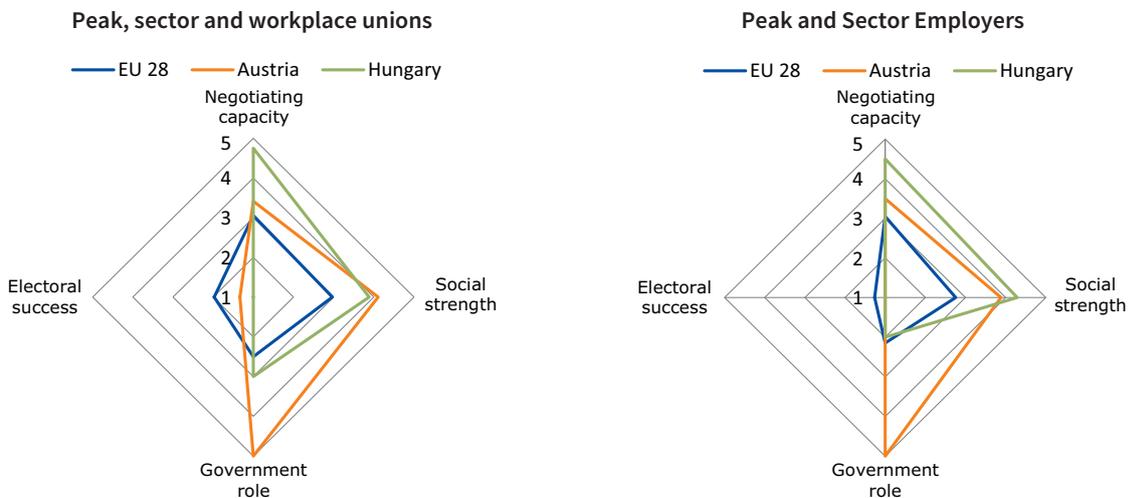
Note: 1=not relevant, 5=most important. The numbers presented in this graph are based on one single expert opinion.
 Source: Eurofound’s national correspondent for the UK.

creating minimal criteria for establishing representativeness. The 1999 Employment Act included trade union recognition provisions, as referred to above. Yet although for the first time the law established a lengthy process to allow workers to secure trade union recognition, it did not go further to require employers to undertake meaningful collective bargaining. Equally, there is no legislation or legally-binding collective agreements that confer extensive rights to local trade unions.

In answering the supplementary question concerning actors who are significant in determining representativeness, the UK national expert identified the presence of competitor associations or trade unions as very important, as well as their membership density and numbers. The law is significant for the unions but only slightly relevant for the employers, while collective bargaining is viewed as very important for the unions and irrelevant for the employers. Trade union capacity to mobilise, derived from its membership density and numbers, as well as its physical asset base and longevity of being a recognised representative institution, all play a part in establishing recognition by the employers.

Figure 3 shows the UK national correspondent’s ratings of the most important determinants for representativeness. It is nearly a mirror opposite to the French situation, which is shown in Figure 6.

Figure 4: Mixed social partner and state representativeness countries: Austria and Hungary



Note: The numbers presented in this graph are based on one single expert opinion per country.
 Source: Eurofound’s Network of European correspondents

Mixed social partner and state representativeness model

This model brings together seven countries where mutual recognition is balanced by some strong elements of legal conformity at different levels. These may include thresholds, electoral targets and a role for government. The implicit criteria of representativeness, however, still reflect mutual recognition and self-regulation, and relate to negotiating capacity and social strength.

The seven countries are: Austria, Estonia, Germany, Hungary, Italy, Netherlands and Portugal. Figure 4 illustrates the characteristics of this model with reference to Austria and Hungary.

These two countries – one an EU15 Member State and the other an EU13 Member State from the 2004 accession – illustrate the combination of relatively strong ratings on the non-legislative government role, negotiating capacity and social strength scales. (Some other countries in this group, such as Spain, also place considerable emphasis upon electoral success for the trade unions.)

In Austria, for example, employee and employer representation is based on a complex articulation between voluntary organisations and statutory bodies from which representatives are elected. At peak and sector level, social partners come from four institutions, which sit together on a joint national committee, the Austrian Trade Union Federation (ÖGB). This is the unique peak trade union organisation recognised as representative by the government. Membership is optional. ÖGB had 1,198,489 members and seven affiliates in 2013.

The regional chambers of labour (Arbeiterkammern) are employee representative bodies that have a capacity to negotiate and that are established by statute law. Membership is obligatory. In each state (Land), a general assembly is elected for five years by direct universal suffrage. All members have the right to vote.

The Austrian Federal Economic Chamber (WKO) and its numerous (sub)sectoral subunits are employer representative bodies that have a capacity to negotiate and that are established by statute law for which membership is obligatory.

In the Committee of Presidents of the Chamber of Agriculture, at company level, employees are represented through a works council for which they elect representatives by direct universal suffrage. These representatives have the capacity to negotiate at company level on the basis of the existing national collective agreements.

Mutual recognition of the social partner organisations is a key element for the functioning of the Austrian social partnership, because – in legal terms – neither party on the employer or employee side can be forced by the

other side of industry to enter into collective employment regulation. Since 1945, the social partners have internalised a strong commitment to the principle of harmonious cooperation; this commitment finds expression in a system of industrial relations free from substantive intervention by the state. The capacity to make lasting commitments on behalf of their respective members is essential for the peak organisations on the two sides of industry, because it means that agreements concluded by the peak-level organisations are binding for all their members.

There is no explicit concept of representativeness applying to voluntary organisations of labour and business in Austria. However, in relation to the capacity of voluntary organisations to conclude collective agreements, the Austrian labour law (the Labour Constitution Act) identifies some general preconditions a voluntary collective interest organisation has to meet: (financial) independency (in particular, from the other side of industry); an extensive occupational and territorial coverage in terms of membership domain, which means that the organisation must at least be operative above company level; and a major economic importance in terms of the absolute number of members and business activities in order to be in a position to wield effective bargaining power. The criterion of representativeness (whereby this term is non-existing in the Austrian labour law) is thus linked to the capacity of collective interest organisations to conclude collective agreements (the right to conclude collective agreements is conferred by the Federal Arbitration Board) and hence to their recognition as a relevant social partner organisation.

When assessing an organisation with regard to its fulfilment of the requirements for obtaining the capacity to conclude agreements, the Federal Arbitration Board does not apply across-the-board thresholds in terms of members or densities; rather it always assesses an organisation's 'representativeness' in the context the economic sector(s) in which it claims to be a relevant social partner. For instance, although an interest organisation usually needs to have a membership domain and be active in the whole territory of the country in order to be recognised by the Federal Arbitration Board as possessing the capacity to conclude collective agreements, in a few cases organisations with only regional significance have also been granted this recognition. This is because the economic and/or employment structure of a particular segment of the economy in one particular province (Land) may differ widely from the national situation; this may, from the Board's point of view, justify the establishment of a separate social partner organisation (which is deemed 'representative' for the employer or employee side of this segment) to be equipped with the right to bargain on behalf of this segment of the economy (in a particular part of the country).

In countries where mutual recognition is balanced by strong elements of legal conformity at different levels, the crossover between some forms of state structuring of representativeness and strong traditions of self-regulation points to the likelihood of greater state–social partner tension and in some countries a higher level of social partner political engagement. In all of these countries, apart from Austria, the legal context of representativeness has changed since 1998.

State membership regulation representativeness model

The state membership regulation model brings together nine countries where the law has very considerable significance for representativeness. The state has structured representativeness in such a way that legal conformity is viewed as being clearly more important than mutual recognition. The explicit or implicit criteria of representativeness within this model all relate to definitions of numbers or density of membership, or to sectoral or territorial coverage by the social partners.

These countries are: Bulgaria, Croatia, the Czech Republic, Estonia, Greece, Latvia, Poland, Romania and Slovakia.³⁰ With the exception of Greece, all these countries are EU13 Member States, which reflects the influence of the EU transition period in recasting their industrial relations systems. A strong non-legislative government role, complementing the legal framework, is common among countries that fall within this model, as suggested by the examples of Latvia and Bulgaria in Figure 5.

Neither country sees electoral success as being at all relevant. For these national correspondents, alongside

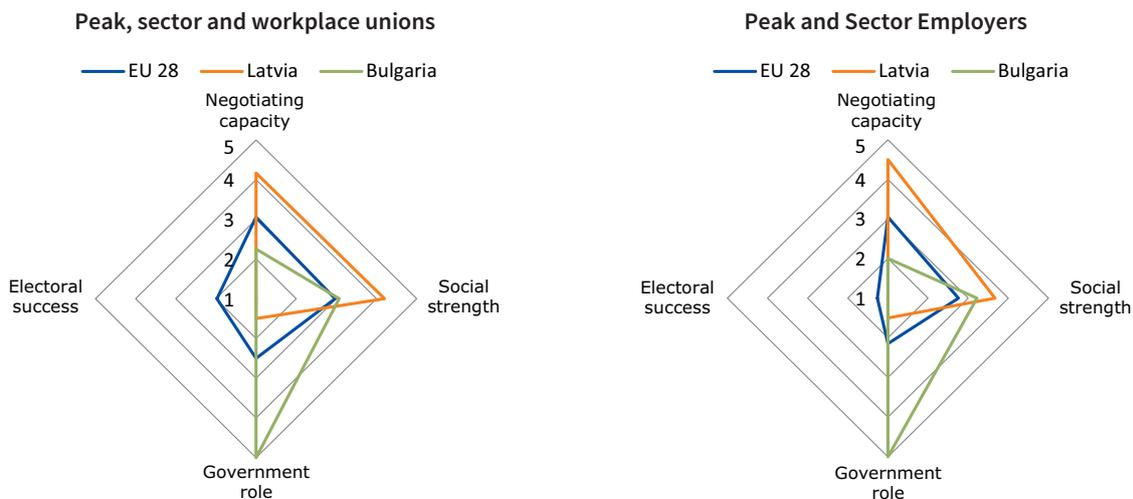
formal state membership density requirements for representativeness comes the question of how they are actually applied in practice. The importance of good relations with the government is not to be underestimated. This, in turn, often depends on the negotiating capacities and social strength of the social partners. But conformity with the law remains a critical requirement.

The Bulgarian model is based on a plurality of social partners, on both employee and employer sides. Two main trade union confederations represent employees – the Confederation of Independent Trade Unions in Bulgaria (CITUB) and the Confederation of Labour (Podkrepa). Employers are represented by the Bulgarian Chamber of Commerce and Industry and three confederations – the Bulgarian Industrial Association (BIA), the Confederation of Employers and Industrialists in Bulgaria (CEIBG) and the Bulgarian Industrial Capital Association (BICA).

In Bulgaria, the concept of representativeness is based on labour legislation. In January 2012, the legislator adopted stricter criteria for social partners being recognised as nationally representative. According to the Bulgarian labour code (Article 34), the following criteria apply to peak level trade unions:

- a minimum of 75,000 members;
- representation in the economic sectors (active in more than one-quarter of NACE code-defined economic activities, with at least five members in each, or having at least 50 member organisations with at least five members from different NACE code economic activities);

Figure 5: State membership regulation representativeness countries: Latvia and Bulgaria

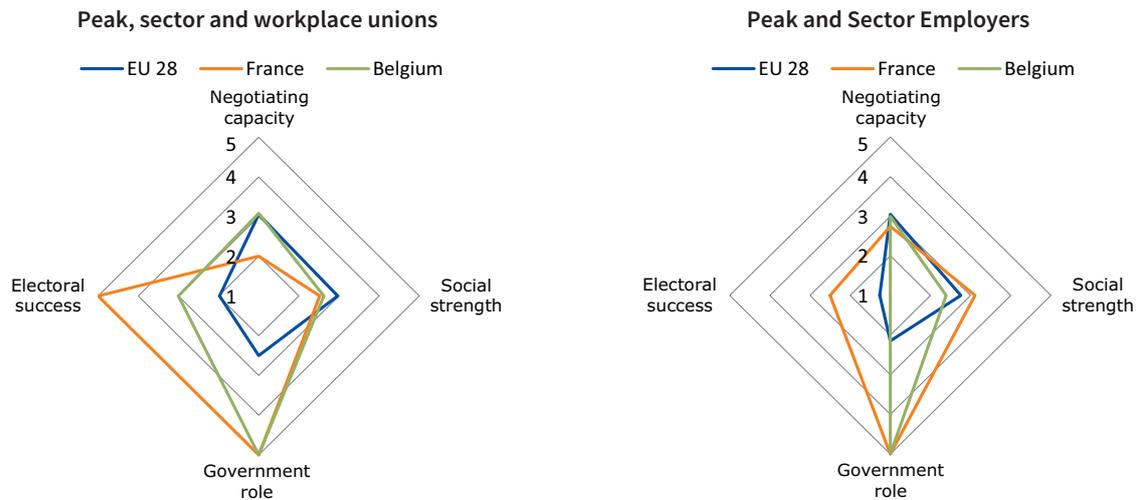


Note: The numbers presented in this graph are based on one single expert opinion per country.

Source: Eurofound’s national correspondents for Latvia and Bulgaria.

30 Up to 2011, Greece had a law requiring 51% employee coverage of a sector before an agreement could be extended. Since this date, collective agreements are only binding on their signatories. However, the existing law conferring representative status on trade unions that secure the highest vote in judicially-supervised elections in the separate private and public sectors has not been repealed.

Figure 6: State electoral strength representativeness countries: Belgium and France



Note: The numbers presented in this graph are based on one single expert opinion per country.

Source: Eurofound's Network of European correspondents (February–May 2015).

- adequate territorial representation, with staff represented in local authorities across more than one-quarter of Bulgaria's municipalities;
- having a national managing body; and
- regarding length of experience, having had the status of a legal entity, obtained by registration as a non-profit association, at least three years before the census.

Article 35 of the Labour Code addresses employer organisations. Requirements include:

- affiliate sector/branch structures and companies to have at least 100,000 employees for employer organisations;³¹
- representation in the economic sectors (represent employers in more than one-quarter of the NACE code-defined economic activities with no less than 5% of employees in each economic activity, or a minimum of 10 employers in each activity);
- adequate territorial representation, representing employers in more than one-quarter of Bulgaria's municipalities;
- have a national managing body; and
- regarding length of experience, having had the status of a legal entity, obtained by registration as a non-profit association, at least three years before the census.

Nationally representative organisations of employers and trade unions can acquire the statute of representative, on request from the Council of Ministers,

for a four-year period. Every four years, the Council of Ministers carries out procedures for the recognition of the nationally representative peak organisations. The president of the National Council for Tripartite Cooperation (a position often held by the Deputy Prime Minister with responsibility for the Ministry of Labour) announces the procedure in The State Gazette six months before the expiry of the four-year term.

At sector and company level, trade union and employer organisation representativeness is measured in the light of the legal definition and mechanism for verification at national level. But these criteria are not sufficient to establish representativeness, at either level, for trade unions and employers organisations that do not belong to a national representative organisation.

State electoral strength representativeness model

This model brings together countries where, according to the national correspondents, legal conformity is far more important than mutual recognition at all levels, but where there is also a degree of ambivalence. The approach in these countries is not fully top-down, but involves an element of democratic control: the criteria used relate to social partners (primarily trade unions) having electoral success in the workplace or in special national elections.

The four countries represented by this model are Belgium, France, Luxembourg and Spain. Figure 6 illustrates its 'shape' as exemplified by Belgium and France.

31 This requirement has been ruled as unconstitutional by the Bulgarian constitutional court.

For the trade unions in both countries, particularly in France, electoral success is a huge driver. By contrast, for employers this factor is only somewhat relevant in France and is not relevant in Belgium. Remarkably, the non-legislative role of the government regarding representativeness is considered to be ‘most important’ for both trade unions and employers at all levels, in both countries.

Here, the state clearly does not just intervene to frame the structures and rules of representation and access to them. In the state electoral strength model, it also appears to play a much greater role in supporting both types of social partner.

In France, electoral thresholds were introduced in new legislation in 2008. This country now perfectly illustrates the state electoral strength representativeness model. Representativeness for both trade unions and employer associations has a precise definition, set by acts of parliament since 1936 (Contrepois, 2011). That definition became even more precise in 1966, when the law decreed that five union confederations would have permanent nationally representative status on the basis of five criteria (number of members, independence, membership fees, level and length of experience and their patriotic attitude during the Occupation in the Second World War).³²

In 1982, this full legal recognition was given to the same five confederations at company level, even if they did not have a branch in the firm. Thus until 2008, however many members they had, and however many workers voted for them, the five main legally-recognised confederations effectively held a monopoly over the right to name trade union representatives and to put up candidates in the first round of works council and worker representatives (*délégués du personnel*) elections in all companies, without having to prove that they were representative of a firm’s workers. In addition, they were officially endowed with a whole range of responsibilities, principally the elaboration and implementation of work regulations, as well as the management of social welfare organisations. As a result of their participation in these missions, the state, the jointly-run welfare organisations and many companies ensured that these unions received the necessary legally-backed means to carry them out: facility time paid by public sector firms and large companies was made available, as well as some funding through grants.

This legal framework gave representatives of these French unions rights to negotiate agreements on the terms and conditions of work, covering most occupational categories or professions and within companies.

On 6 November 1996, the French constitutional Court decided to permit alternative methods of collective bargaining in companies without union delegates, although a union role was maintained. Its Council ruled that ‘workers who had been elected or who held mandates guaranteeing their representativeness can also participate in the collective determination of working conditions as long as their interventions has neither the object nor the effect of placing obstacles to the interventions of the representative union organisations’.

In 2008, a new law abolished the legally-binding representative status for the five main confederations and introduced seven required criteria of representativeness.³³ They are: respect for republican values; union independence; financial transparency; the length of time the union has existed; its influence; its number of members; and electoral success. This final criterion is central to the reform. It will be measured at every election, forcing all the unions to regularly prove their representativeness. The status is acquired at workplace level by the trade unions that obtain a minimum of 10% of all votes in workplace elections; at sectoral level by the trade unions that obtain 8% of the ballot votes and that have a balanced territorial presence; and at multi-sectoral national level, by the trade unions that obtain 8% of the ballot votes and that have a balanced sectoral presence (across areas such as industry, services, building and trade).

The 20 August 2008 law also includes a section about the validity of collective agreements. Since 1 January 2009, company-level agreements are only valid if the unions signing them have secured at least 30% of the votes in the first round of the relevant workplace elections. This measure became law in 2012 for sector-level and national-level agreements.

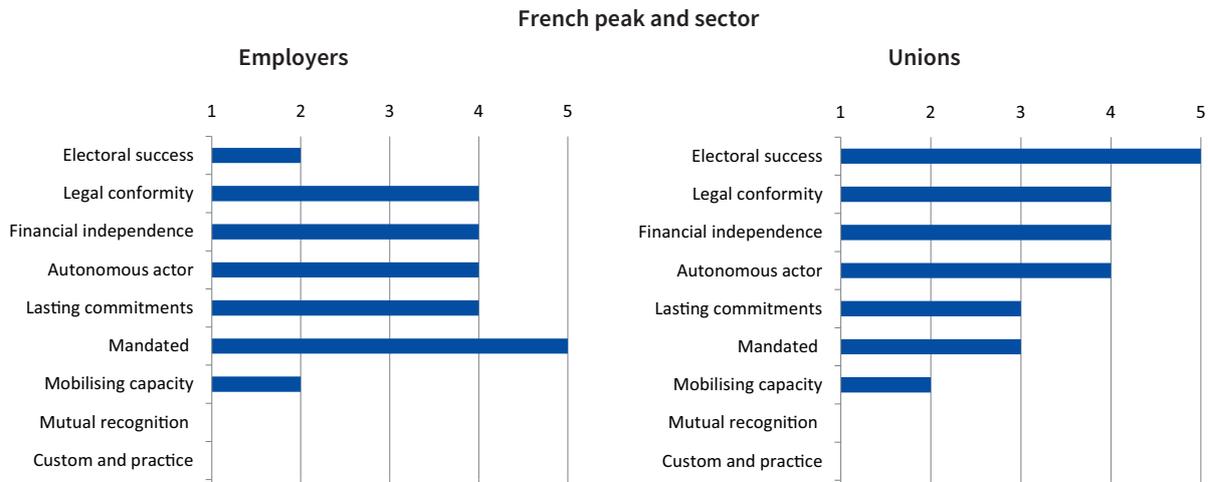
This new legislation, which connected a bottom-up process of establishing representativeness to the existing top-down process, was reinforced by two new laws in 2010 and 2014. The 2010 law aimed at organising the terms of a specific poll to measure the audience of trade unions in companies employing less than 11 employees at regional level every four years, with special rules for the agricultural sector.³⁴ The first

32 The five confederations were: the Confédération Générale du Travail (CGT); the Confédération Française et Démocratique du Travail (CFDT); the Confédération Générale du Travail-Force Ouvrière (FO); the Confédération Française des Travailleurs Chrétiens (CFTC); and (relating to white-collar and management workers only) the Confédération Générale des Cadres (CGC).

33 Act of Parliament issued on 20 August 2008, relating to social democracy renewal and working time reform.

34 Act of Parliament issued on 15 October 2010, completing the former law on social democracy issued in law no. 2008-789 issued on 20 August 2008.

Figure 7: What are the most important determinants of representativeness for French employers and trade unions?



Note: The numbers presented in this graph are based on one single expert opinion.

Source: Eurofound's national correspondent for France.

elections were organised in late 2012 and attracted only 10% of voters. The second act of parliament issued on 5 March 2014 concerned vocational training, employment and social democracy. It established six representativeness criteria for employers: respect for republican values, independence, financial transparency, the length of time the association has existed, its influence, and assistance to its members. A decree on 13 June 2015 specified that an organisation had to exist for two years, and regroup at least 8% of the firms within the sector, counting only those who paid their subscriptions in the preceding year. Employer representativeness in France will thus be measured for the first time in 2017. That year will also mark the second time trade union representativeness will be measured.

Figure 7 shows the rankings for employers and trade unions provided by the French national correspondent, identifying 'what does 'representative' mean in your employment relations system?'

When asked to identify 'the actor, actors or processes most relevant in determining whether an organisation of employers or workers conforms to the norms of "representativity"', the national correspondent for France identified the government and the courts. The role of the other social partners in terminating 'representativity' was rated as 'irrelevant'.

Conclusion: Is representativeness under question?

A summary of the key findings of this chapter is followed by an overview of how this issue is debated and/or reflected in the EU Member States, as reported by the national correspondents. A dichotomy has emerged between concepts of representativeness strongly based on compliance with legal requirements and those strongly based on mutual recognition. This conclusion also considers why little debate has occurred concerning the representativeness of social partners at national level.

Key findings on national concepts of representativeness

Drawing from questionnaires completed and returned by 29 of Eurofound's national correspondents, this chapter has reported and analysed the different elements and concepts of trade union and employer representativeness at peak, sector and (for trade unions only) workplace and company levels. One limitation of these findings is that they are solely based on 29 single expert opinions, each one representing a single Member State and Norway. Despite this, its value is that it provides a comparative overview of the different elements driving representativeness today.

As was the case when the European Commission last defined national representativeness in 1993, Europe's interest representation systems tend to rely largely on mutual recognition processes, regulations laid down by national law, or complex combinations of both. Today's representativeness frameworks can still be located on a spectrum ranging from those where mutual recognition is most important and there is no legal regulation, to

those where legal regulation is the most important factor and where self-regulation by the social partners plays no part at all.

Most EU Member States do have some kind of legal framework shaping how representativeness is granted to or achieved by social partner organisations. The role legislation plays in national concepts of representativeness does however differ vastly by Member State. Legislation can shape representativeness by imposing thresholds in terms of membership, organisational density or as a minimum outcome of elections. It can impose adherence to certain values or norms. In some countries, conformity with the legal requirements is crucial, while in others mutual recognition is either more important than legal conformity or is the only basis for representativeness. The countries where representativeness is self-regulating through mutual recognition by the social partners can thus be distinguished from countries where representative status is obtained by conforming to legal requirements. Three other elements or drivers also appear to contribute in different ways to establishing the representativeness of social partners: electoral success; organisational strength; and the capacity to negotiate.

The countries where representativeness is largely shaped by mutual recognition mechanisms tend to display higher levels of trade union density. Cyprus, Ireland, Malta, the UK, and the Scandinavian countries, are among those countries where representativeness is based on mutual recognition, with little or no emphasis on a legal framework.

All those countries where representativeness is based more on legal conformity have recently changed the requirements for representativeness within their legal frameworks. The Czech Republic, France, Germany, Romania and Slovakia are examples of countries where legal conformity based representativeness is considered to be much more important than mutual recognition.

In France, seven specific criteria are to be met for trade unions to obtain representative status. French employer organisations must meet six, fairly similar, criteria. Among these criteria are: respect for the constitution; political and financial independence; having existed for at least two years; having a certain number of members; and minimum scores in works council elections. The authority to grant, question or withdraw representative status is in the hands of labour courts and government institutions.

In the UK, there is no role for government institutions in the process of obtaining or losing representative statuses. UK labour law only plays a very minor role for trade union representativeness, and no role for employer organisations. Legitimacy arising from custom and practice is associated with mutual recognition, part of a relationship between organisations over a longer

period of time. Membership strength is a factor in gaining recognition from a union's counterpart. The organisational capacity to act on behalf of its members and to make lasting commitments, as well as negotiating capacity and the ability to mobilise, are further elements supporting the mutual recognition process, especially for the purpose of collective bargaining.

The UK is an example of a voluntarist mechanism with a low level of state regulation of representativeness. Trade unions in the UK are the single channel of employee representation, generally without works councils elected by the entire workforce. It was reported that the UK recognition mechanism is not precisely mutual, as the power to 'recognise' lies with the employers and can be withdrawn by them at any time.

Once representativeness status is acquired, it can have certain impacts or consequences for social partner organisations. These implications or effects can vary, across peak, sector and workplace levels. At peak level, the most important impact from obtaining representative status is the resulting membership of tripartite bodies and greater political influence on the government and on the other side, social partner organisations. At sector and workplace level, the most important consequence of gaining representative status is that it enables the conclusion of collective bargaining agreements with enhanced influence on the social partner organisations on the other side.

The analysis conducted in this chapter presents a classification of four models of representativeness that coexist in Europe, ranging from ideal types of mutual recognition to legal conformity:

- a social partner self-regulated system of mutual recognition (associated with negotiating capacity and social strength drivers and with very little state regulation on representativeness);
- a mixed model combining elements of social partner mutual recognition and of state regulation and legal conformity;
- a state-regulated system of legal conformity where 'social strength' is used as a legal measure of representativeness; and
- a state-structured system of legal conformity in which electoral success primarily determines representativeness.

Despite the diversity across Europe, these four models capture the duality and coexistence of representativeness, based on mutual recognition or legal regulation.

Part of the reason for this continuity is the articulation between lower and higher levels of collective bargaining, where the representativeness of the higher level is often transmitted directly to the lower levels, while different but essentially 'acceptable' forms of

democratic delegation from ‘the bottom’ still give legitimacy to the representatives at ‘the top’.

Given this core duality and the complexity of intervening arrangements, it is now even more difficult (or even impossible) a task than it was in 1993 to propose any single all-embracing European definition of social partners’ representativeness at national level.³⁵ If one is developed, it has to encompass the breadth of arrangements, from self-regulation to state regulation, to enable the expression of complex national histories, and to ensure that it celebrates and encourages the provision of opportunities for trade union and employer organisations to be involved in democratising working lives.

Debate on national concepts of representativeness

Apart from in France, Italy and Portugal, there has been relatively little public debate about the intertwined issues of interest representation and the level of collective bargaining. In most Member States, representativeness is present yet there is no debate around its terms. In some cases, the absence of debate is because most of the social partners do not consider it appropriate to question their own (or the other side’s) legitimacy. Sometimes this is about inertia. The national correspondent for Denmark described the existing system as being unchanged and never discussed: ‘It is laid down in their genes.’ In Portugal, a White Paper on Labour Relations in 2007 did have a section called ‘The question of representativeness of associations’. It proposed drawing up general legal criteria that would be self-regulated by the social partners. After that, however, nothing happened until 2012 and 2014, when the criteria for the extension of collective agreements were changed; but even then no mention was made of representativeness.

Yet even in countries where representativeness has had a relatively short life span, the tendency is to oppose legal changes that might limit their claims to special treatment. The Bulgarian Industrial Association (employers) publicly criticised the introduction in 2012 of new criteria requiring representative employer organisations to affiliate companies totalling a minimum 100,000 employees, as did a smaller organisation, the Union of Private Entrepreneurs, which lost its representativeness status entirely. Aimed at trying to strengthen the main Bulgarian employer associations, the threshold increase from 30,000 to 100,000 employees was subsequently declared unconstitutional by Bulgaria’s constitutional court. In Poland, a new draft law on the Social Dialogue Council

(replacing the Tripartite Commission for Socio-Economic Affairs), which preserves the existing principles, has been prepared jointly by the employers and trade unions.

In the Czech Republic the organisations that meet the 2008 criteria for participation in the country’s tripartite organisation, such as a union having 150,000 members, are fully supportive of it. Those that are excluded are not and consider it discriminatory. A similar division between ‘winners’ and ‘losers’ has also been voiced by some of the smaller trade unions in France, particularly those likely to score lower than the ballot threshold in elections, and by some of the smaller French employer associations whose affiliations fall below the required 8% of businesses.

The low level of debate, as reported by the national correspondents, may also reflect the limited capacity of an existing system to accommodate new trends. Yet concerns may still be expressed behind closed doors, even in some of the most stable representative systems. The correspondent from the Netherlands reported that, ‘On the employers’ side, there are some worries about the representativeness of the union side’, while the correspondent from Finland commented perceptively about the potential impact of decentralisation:

One tendency that to some extent relates to the concept of representativeness is, however, that the employer organisations pursue the objective of more local level negotiations, as the current system with a focus on central and sectoral-level agreements has not been seen to sufficiently respond to the needs of flexibility for individual enterprises. Such a development could in the long run have an impact on the notion of ‘representativeness’, as it shifts the focus to the local level and makes issues related to workplace representation more topical.

The implications of representativeness for workplace bargaining are also of concern to some Slovakian employers. The Slovakian Association of Mechanical Engineering has recently been arguing that higher thresholds of trade union membership need to be introduced in order to avoid the current anomaly whereby a small number of trade unionists in a workplace can represent all the employees and conclude collective agreements that cover everyone.

In line with this awareness of a growing interest in the structure of representativeness at workplace level, developments were reported from Germany and Italy. In Germany, the employer umbrella organisation BDA supported new legislation that came into force in 2015 on collective bargaining. This permits employers to only

35 This was due to the increased diversity that came with EU enlargement.

implement agreements signed by the trade union with the largest membership within each establishment.

The BDA position has parallels with that of Fiat in Italy, but with a very different outcome. Fiat's decision to leave the main Italian employer association, Confindustria, in 2012, to avoid the constraints of the sectoral collective agreement and to embark on plant-level collective agreements, sparked a major public debate. This eventually led to a new 2014 agreement between Confindustria and the three main peak trade unions, where the two sides recognised the need to measure representativeness through membership numbers and election results. The debate continues today as to whether this collective agreement is sufficient, or whether it will need to be transformed into law, thus breaking with the traditionally very low levels of legal involvement in industrial relations in Italy.

The Fiat case is also significant as the reasoning given by the company for taking the largest Italian company out of the major employer association was directly related to its global strategy. The impact of the presence of large transnational companies has also been felt elsewhere as undermining national systems of representativeness. The general secretary of the Romanian trade union confederation, CNSLR Fratia, was highly critical of the role of global firms: 'The multinational corporations are trying to influence the political process with supranational means in an attempt to avoid or minimize the role of social dialogue at national level'. Another Romanian trade unionist, the president of Cartel Alfa, was even more explicit:

Legislative modifications that rendered the obtaining of representativeness difficult were made under the pressure of transnational corporations, without the consent of trade union confederations and employers' confederations. The consequence was the taking away of collective labour contracts at branch level and the collective contract at the national level. There are no longer collective contracts at the sector level (in the private sector) but only at company level, or at the level of group of companies.

Most employer organisations and trade unions prefer to refrain from openly discussing the failings or strengths of the ways in which national rules and regulations establish their credentials for participating in bipartite or tripartite social dialogue. The Maltese Chamber of Commerce, Enterprise and Industry, however, represents employers in a country dominated by workplace level collective bargaining. To the protests of the trade unions, but to the silence of the other national employer associations, it recently described the country's tripartite institution for social dialogue, the Malta Council for Economic and Social Development (MCESD), as 'rudderless, irrelevant and inconsequential'. The implication is that in some countries tripartite arrangements may not deepen or strengthen citizen involvement in democratically influencing major decisions that affect peoples' working lives.

It was the emergence in 2004 of a third force in the trade union movement in Malta, the confederation known as Forum, which caused debates about representation. Only in 2012, on the strength of representing 11% of the unionised Maltese workers and the support given it by the ETUC after it became one of its affiliates, was Forum assimilated into the Maltese tripartite body at national level.

The relatively low volume of discussions about representativeness conceals, however, a significant undercurrent of change, which has been demonstrated in the findings outlined in the first part of this chapter.

2 Representativeness at international and European level

Introduction³⁶

‘The legitimacy and effectiveness of the social-partner consultation is based on their representativeness.’ (European Commission, 2002a)

The term ‘European social partners’ usually refers to all those European social partner organisations that participate in the European social dialogue on grounds of Articles 154 and 155 of the Treaty on the Functioning of the European Union (TFEU).³⁷ Since the Agreement on Social Policy of 31 October 1991 and up to the introduction of Articles 154 and 155 into the TFEU, the European social partners have become corporate actors in European politics and its polity. As actors, they have even ‘obtained a status similar to legislators’ (Keller and Sörries, 1997). Their impact is quite tangible in some of the cross-industry sectoral and multi-sectoral agreements they have concluded and which were subsequently either forged into European directives or remained autonomous agreements. The European social partners and the social dialogue have become important elements of the social *acquis* itself, as corroborated by Article 152 (1) TFEU:

The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.

Under European social dialogue, the social partners have become key players in a process that is sometimes tagged as ‘negotiated legislation’ (Falkner, 2000) or social partnership, and that has obtained the quality of an *idée directrice* or *Leitidee* [main idea] as described by Hauriou (1965). Yet, an important question remains regarding the issue of representativeness, which has been a conundrum of EU social policy since its inception in 1993. According to the Court of Justice of the European Union, it is the duty of the European Commission to scrutinise the European social partners and to identify those who are eligible to engage in European social dialogue. Primary and secondary EU law never recur to the notion of representativeness, and the Commission first used this criterion in its 1993

Communication concerning the application of the agreement on social policy (European Commission, 1993) in annex 3 entitled ‘Main findings of the social partners’ study (Representativeness)’, where it defines criteria for representativeness in the consultation phase of social dialogue. Thus, ‘management and labour’ in the sense of Article 154 TFEU are to be understood as the European social partners, organised at cross-sector or sectoral level. The Commission has drawn up a list of organisations it consults under Article 154 TFEU. This list, which is regularly revised, currently consists of 87 organisations (see European Commission, 2016b). This number stood at 28 in 1993, at 44 in 1998, at 55 in 2002, at 60 in 2004 and at 79 in 2010 (European Commission, 1993–2010). In the last 22 years, the total number of EU social partner organisations to be consulted by the European Commission under Article 154 TFEU has more than tripled.

As early as the 1993 Communication, the European Commission clearly identified those cross-sector organisations that met the above criteria and acknowledged the special status of a limited number of EU-level social partner organisations: [T]he Commission recognises that there is a substantial body of experience behind the social dialogue established between the UNICE (now BUSINESSEUROPE [since 23 January 2007]), CEEP and ETUC’ (European Commission, 1993). Despite the fact that they are not the only social partner organisations at EU cross-sector level representing management and labour, BusinessEurope, ETUC and CEEP are generally understood to be the European social partners (Hecquet, 2007). A complaint by UEAPME, representing craft and small and medium-sized enterprises (SMEs), to the European Court of First Instance (CFI) doubting the legality of Council directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, and challenging their status as European social partners in the UEAPME case, led to a strategic coalition between UNICE and UEAPME.³⁸ Over time, two social partner organisations on the employee side (CEC and Eurocadres), representing professional and managerial staff, joined the ranks. In 2014, Eurofound analysed the cross-sector social partners BusinessEurope, ETUC,

36 The author of this chapter wishes to thank Sara Lafuente Hernández, Lena Schindler and Simon Boehmer for their contributions to this chapter, Jan Vandamme for procuring some not easily accessible documents and Peter Kerckhofs for his constructive comments on earlier drafts.

37 This chapter draws in part on Welz (2008, 2014); Eurofound (2014a); the Eurofound methodology page for the representativeness studies; and Welz and Foden (2015).

38 UEAPME v. Council of the European Union, case T-135/96, ECR II, 1998, 2335). Henceforth cited as T-135/96.

CEEP, UEAPME, CEC and Eurocadres and took a closer look at their structure, competences, national-level affiliates, and internal decision-making processes (Eurofound, 2014a). Against the above developments, the European cross-sector social partners demanded in 1993 that, ‘in the light of the responsibilities conferred on them by the agreement, the concept of ‘social partners’ need(ed) to be defined more clearly’ (ETUC, UNICE, CEEP, 1993).

International level

Is it a coincidence that the first advisory opinion issued by the newly created Permanent Court of International Justice (PCIJ) was on the topic of representativeness? The issue of representativeness is a longstanding conundrum of international labour law (Teyssié, 2005), going back to this advisory opinion, rendered on 31 July 1922, which related to a question of trade union representativeness that arose in the framework of the International Labour Organisation (ILO) (Franssen and Jacobs, 1998; Bérout et al, 2012). It is in the ILO Recommendation 91, which contains an international definition of collective agreements, where we can find an intimation being made to the notion of representativeness:

... all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers organisations, on the one hand, and one or more representative workers’ organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other.

(ILO, 1951)

Permanent Court of International Justice (PCIJ)

As mentioned above, the very first advisory opinion the PCIJ issued was on the concept of representativeness to be applied at international level. In 1921, the Dutch government had nominated Jos Serrarens, General Secretary of the Christian trade union, as the representative of the workers’ delegation to the ILO conference. This nomination was fervently opposed by the International Federation of Trade Unions (IFTU), which first threatened to leave the conference and then took the case to the Permanent Court of International Justice. The Netherlands Confederation of Trade Unions was a member of IFTU and claimed that it was the most representative trade union in the Netherlands in terms of numbers, and that, henceforth, the nomination of Mr Serrarens of the Christian Trade Union was a violation of Article 389 of the Treaty of Versailles

(now Article 3(5) of the ILO Constitution) since his nomination did not take place in agreement with the Confederation as the most representative interest organisation.³⁹ In July 1922, the PCIJ stated in advisory opinion no.1 against IFTU that one of the main texts to be considered in this case was the abovementioned Article 389 (paragraphs 3 and 4) of the Treaty of Versailles. Paragraph 3 argued:

*The Members undertake to nominate non-Government Delegates and advisers chosen in agreement with the industrial organisations, if such organisations exist, which are **most representative** [authors’ highlight] of employers or work-people, as the case may be, in their respective countries’.*

(PCIJ, 1922 B01, 17)

After the recourse to the relevant norms of the Treaty of Versailles, the PCIJ then tries to fine-tune the criterion of ‘most representative’:

There is no definition of the word ‘representative’ in the Treaty. The most representative organisations for this purpose are, of course, those organisations which best represent the employers and the workers respectively. What these organisations are, is a question to be decided in the particular case, having regard to the circumstances in each particular country at the time when the choice falls to be made. Numbers are not the only test of the representative character of the organisations, but they are an important factor; other things being equal, the most numerous will be the most representative.

(PCIJ, 1922 B01,19/21)

In the course of the deliberation, the PCIJ then had to establish whether the plural used in paragraph 3 (‘chosen in agreement with the industrial organisations, if such organisations exist’) was to be used in relation to the two sides of industry taken together, and, consequently, a national government needed to nominate in agreement with the most representative organisation of workers and employers only. The alternative was if, by contrast, the plural referred to each side of industry individually – trade unions and employers – and a government had to take all relevant interest organisation into consideration per side of industry. The PCIJ went for the second option in his advisory opinion and stated:

If, therefore, in a particular country there exist several industrial organisations representing the working classes, the Government must take all of them into consideration when it is proceeding to the nomination of the workers’ delegate and his technical advisers. Only by acting in this way can the Government succeed in choosing persons who, having regard to the particular circumstances, will be able to represent at the Conference the views of the working classes concerned.

(PCIJ, 1922 B01, 23)

³⁹ See <http://www.icj-cij.org/pcij/>. The case is cited hereafter as PCIJ 1922 B01.

The PCIJ then illustrated its argument with a quantitative example.

In a given country there are six organisations of workers, one with 110,000 members, and five others each with a membership of 100,000. According to the view of the objectors to the nomination made in the present case, the candidate proposed by the five last organisations jointly would have to be discarded in favour of the candidate of the first. One hundred and ten thousand workers would dictate to five hundred thousand.

(PCIJ, 1922 B01, 23)

Following on from the above, the PCIJ drew up the following requirements for governments to comply with the stipulation to select the most representative organisation for representation at the ILO conference. Where a government is not in a position to reach an agreement with all industrial organisations that are considered to be the most representative, the terms of Article 389 (paragraphs 3 and 4) of the Treaty of Versailles would apply provided that the nomination took place ‘... in agreement with the organisations which, taken together, included a majority of the organised workers of the country’ (PCIJ, 1922 B01, 25/27).⁴⁰ For these reasons, the PCIJ concluded in his advisory opinion no. 1 from 1922 that Mr Serrarens had been nominated in conformity with the provision of paragraph 3 of Article 389 of the Treaty of Versailles. This advisory opinion did away with the *de facto* monopoly of the IFTU within the ILO as ‘the most representative organisation’ (van Goethem, 2006, 143).

In a similar case in 1970, the International Court of Justice decided that quantitative criteria, such as the number of members, are important but are not the only criterion to be taken into account in the assessment of the representativeness of an interest organisation (Casale, 1996, p. 1). In the framework of the ILO (2002) research project on ‘la représentativité des organisations de travailleurs et d’employeurs en Afrique francophone dans un contexte comparatif’ [the representativeness of workers’ and employers’ organisations in French-speaking Africa in a comparative context], a tripartite working group under

the Presidency of Mr Aliou Oumarou (employer representative) laid down the following criteria as being objective in order to assess the representativeness of trade unions:

*L’importance numérique; la représentation sectorielle et interprofessionnelle (secteurs public, parapublic et privé); la représentation géographique c’est-à-dire l’envergure nationale des organisations professionnelles; la participation effective et systématique à la négociation collective; l’indépendance des organisations professionnelles par rapport à toutes formes de pression; les résultats aux élections des délégués du personnel.*⁴¹

(ILO, 2002, 126)

Committee of Experts on the Application of Conventions and Recommendations (CEACR)

The Committee of Experts on the Application of Conventions and Recommendations (CEACR) is composed of 20 legal experts appointed by the governing body, on a three-year term basis. It supports the ILO via a preliminary technical examination of compliance with ILO standards. The annual report of the CEACR is tabled to the Committee on Application of Standards (CAS). The CAS is a tripartite body made up of government, employer, and worker representatives, which examines the CEACR report and then introduces a number of issues for general discussion. The CAS also draws up conclusions and recommendations addressed to governments and inviting them to take specific actions (Eurofound 2005b).

In 1956, the CEACR mentioned the concept of representativeness for the very first time in a case on the Union of South Africa; it stated that ‘the representativeness of the parties must be substantial. Non-parties are not consulted’ (ILC, 1956, p.35). The CEACR continued to use this notion until 1969. From 1973 (ILC, 1973, p.30) until 1994 the CEACR, similar to the ECSR of the Council of Europe (cf. below), started to use the term ‘representativity’ (ILC, 1994, p.108).⁴²

40 ‘The Members undertake to nominate non-government delegates and advisers chosen in agreement with the industrial organisations, if such organisations exist, which are **most representative** [authors’ emphasis] of employers or working people, as the case may be, in their respective countries’ (PCIJ, 1922 B01, 17).

41 [‘Size; interprofessional and sectoral representation (public, semi-public and private); geographical representation – the nationwide professional organisations; effective and systematic participation in collective bargaining; the independence of professional organisations against all forms of pressure; results of elections of representatives.’]

42 From 1995 to 2016, the CEACR has constantly used the notion of *representativeness* again (ILC, 1999, p. 275), except for one case in 2007 when *representativity* shortly returns in a case on Lesotho (ILC, 1995, p. 161; ILC, 2007, p.105; ILC, 2015, p.59; ILC 2016, p.116).

In 1982, the CEACR for the very first time claimed that criteria to identify the most representative trade union had to be objective and set by law:

... on condition that the determination of the most representative organisations is made on the basis of objective criteria laid down in advance, so as to avoid any possibility of partiality or abuse. The Committee is of the opinion that the criteria fixed by law should enable the trade unions which appear to be the most representative of the workers in a given sector, or of a given category of workers, to be associated in the collective bargaining procedures so as to represent and defend the collective interests of their members.
(ILC, 1982, p. 113)

In 1985, the Committee added that these objective criteria needed to be pre-established (ILC, 1985, p.240). A slightly different wording was used in 1987, asking for the criteria to be 'laid down in advance' (ILC, 1987, p512). A first exhaustive list of criteria and their underlying rationale was tabled by the CEACR in 1988, while commenting on the Belgium National Labour Council (Conseil National du Travail/National Arbeidsraad, CNT/NAR) that had been established in 1952.

... the Committee on Freedom of Association considers that the simple fact that the legislation of a country establishes a distinction between the most representative workers' and employers' occupational organisations and other occupational organisations is not in itself open to criticism. However, the determination of the representative occupational organisation must be based on objective and predetermined criteria, so as to avoid any possibility of partiality or abuse. In view of the absence of any criteria in the legislation, the Committee of Experts, in line with the Committee on Freedom of Association, therefore invites the Government to adopt by legislative means objective, predetermined and detailed criteria to govern the rules for the access of workers' and employers' occupational organisations to the National Labour Council and to the various public and private sector committees in which the binding collective agreements are formulated, in order to avoid any possibility of partiality or abuse in the choice of organisations authorised to sit in these bodies.
(ILC, 1988, p. 145)

In 1994, the CEACR then made the distinction between different degrees of representativeness as well as between optional and compulsory trade union

recognition and its link to the criteria of representativeness.

The recognition (by public authorities) of one or more trade unions as partners in collective bargaining immediately raises the question of their representativity. During its discussion on Convention No. 98, the International Labour Conference referred to this question and to some extent accepted the distinction sometimes made between the various trade unions according to their degree of representativity... Recognition of a trade union for the purposes of collective bargaining is sometimes optional, in which case the public authority should encourage employers to recognize trade unions which can prove their representativity. Recognition may also be voluntary when provided for in a bipartite or tripartite agreement or where it constitutes a well-established practice. In many countries, however, the legislation establishes a system of "compulsory" (p.108) recognition where the employer, under certain conditions, must recognize the existing trade union(s). The Committee considers that it is important in such cases for the determination of the trade union in question to be based on objective and pre-established criteria so as to avoid any opportunity for partiality or abuse.

(ILC, 1994, p. 108; see also ILC 1998, p. 165)

Furthermore, the Committee established that in the case of compulsory trade union recognition a number of safeguards had to be respected.

a) the certification to be made by an independent body; (b) the representative organisation to be chosen by a majority vote of the employees in the unit concerned; (c) the right of an organisation, which in a previous trade union election failed to secure a sufficiently large number of votes, to request a new election after a stipulated period; (d) the right of any new organisation other than the certified organisation to demand a new election after a reasonable period has elapsed.

(ILC, 1994, p.109)

In 1999, the CEACR claimed that representativeness criteria needed to 'be predetermined and impartial' (ILC, 1994, p. 275) and that the parameters of representativeness had to be 'verified by the public authority based on legal criteria' (ILC, 1994, p.324). In 2007 and 2012, the CEACR again called 'for a fair determination of the representativeness of the highest level based on objective and pre-established criteria and for the composition of the negotiation board when no trade union organisation represents 33 per cent of employees or no employers' organisation meets the same requirement' (ILC, 2007, p.164) in order 'to avoid any possibility of bias or abuse' (ILC, 2012, 152).

To sum up, the up-to-date list of criteria of representativeness, as upheld by the CEACR from 2013 to 2016 is that an organisation must be:

- a) objective;
- b) precise; and
- c) predetermined (ILC 2013, p. 152; 2015, p. 59); 2016, p.116).

The CEACR added that these criteria also came with the stipulation that third parties were no longer able to object to the status of most representative trade unions in relation to those interest organisations having fulfilled the aforementioned criteria (ILC, 2015, p.59.). At the same time, the Committee concluded that the criteria had to be assessed in light of the specificities of the national industrial relations systems and whether they were shared by the most representative social partners (ILC, 2014, p. 90).

International Training Centre of the International Labour Organization (ITCILO)

In 2013, the ILO Guide on National Tripartite Social Dialogue stated that ‘one of the main challenges of social dialogue relates to the determination of the workers’ and employers’ organisations that will take part in the consultation or negotiation process’ (ILO, 2013a, 103). This guide continues to explain that, according to the ILO supervisory bodies, the representativeness of the two sides of industry have to be established on ‘precise, objective and pre-established criteria to avoid any opportunity for

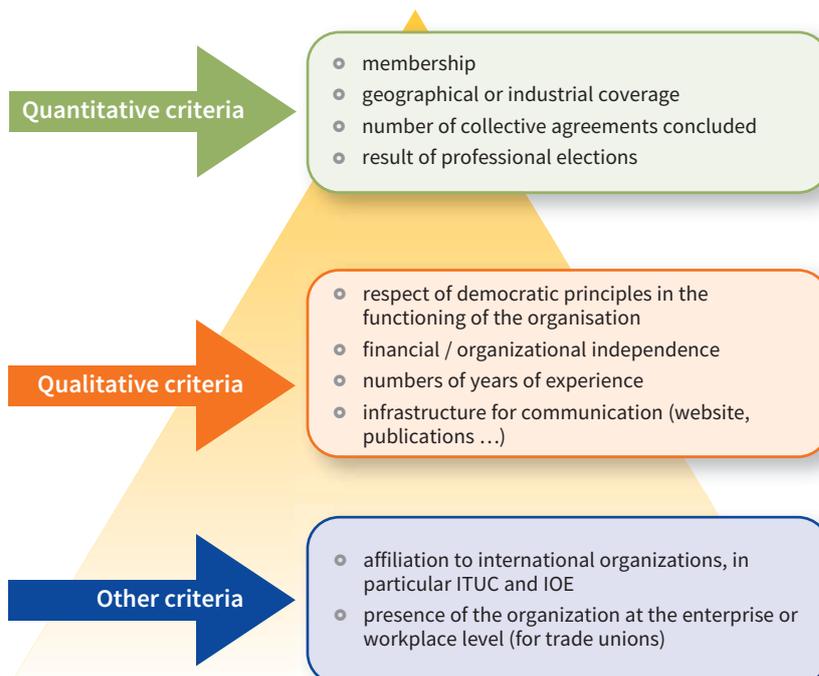
partiality or abuse. The lack of a clear procedure for the determination of representativeness criteria involves the risk of political bias (ibidem)’. Blanpain adds to this that these representativeness criteria should be statutory and their determination should not be left to the governments in power (Blanpain, 2014, p. 213; Ritschard et al, 2007). A more positive outcome is that the label of being the most representative organisation may lead to preferential rights of interest organisations provided that this assessment took place according to objective and pre-established criteria (Ritschard et al, 2007, p. 39).

Finally, the ITCILO distinguishes between quantitative, qualitative and other criteria when it comes to assessing the representativeness of management and labour.

Council of Europe

The European Social Charter of the Council of Europe is referred to in the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU) as one of the sources inspiring the social objectives of the EU. The Preamble to the TEU also speaks of the Member States’ wish to confirm ‘their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961’. The Council of Europe adopted the European Social Charter in 1961; it was revised in 1996. All EU Member States are members of the Council of Europe and have ratified the European Social Charter. The charter includes fundamental rights in the field of

Table 4: Representativeness criteria according to the ITCILO



Source: ILO (2013a).

social policy generally (health, social security, welfare) and specifically in the fields of employment and industrial relations, including the rights to work, to just conditions of work, to a fair remuneration and to organise and bargain collectively. It was the first international treaty expressly recognising the right to strike. States who ratify the charter accept at least five of its seven core articles: the rights to work, organise, bargain collectively, social security, social and medical assistance; the rights of the family to social, legal and medical protection; and the protection of migrant workers. In addition, they undertake to be bound by at least 10 of the 19 articles in Part II or by 45 of the 72 numbered paragraphs. The European Social Charter relies on supervision of practices through scrutiny of the regular reports submitted by the states to a committee of independent experts, the European Committee of Social Rights (ECSR). On the basis of the assessment by the ECSR, a government committee proposes to the Committee of Ministers to issue recommendations requesting (particular) states to bring national law and practice into conformity with the charter. Moreover, in November 1995, an additional protocol was added to the charter providing, when ratified, for a system of collective complaints by international and national organisations of employers and trade unions and international non-governmental organisations. This enforcement system does not depend on the willingness or availability of resources of an individual complainant; it is policy-oriented and might thus provide a broader perspective than a case-based procedure (Eurofound 2006).

Article 5 of the European Social Charter stipulates:

Employers and workers have the right to form national or international associations for the protection of their economic and social interests. With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.

Trade unions and employer organisations must be free to organise without prior authorisation and initial formalities should be simple. Fees, if charged for the registration or establishment of an organisation, must be reasonable and designed only to cover strictly necessary administrative costs. Thresholds related to membership figures comply with Article 5 if the number

is reasonable and presents no obstacle to the founding of social partner organisations, which must be independent (Council of Europe, 2008, p. 49). Trade unions must be free to form federations and join similar national and international organisations. National law must guarantee the right of workers to join a trade union and include effective sanctions where this right is not respected. Trade union members must be protected from any harmful consequence deriving from their trade union membership. Where such discrimination occurs, national law must cater for adequate and proportionate compensation. Any form of legally compulsory trade unionism is incompatible with Article 5. The same rules apply to employers' freedom to organise. Trade unions and employers are entitled to perform their activities effectively and devise a work programme. Consequently, any excessive state interference constitutes a violation of Article 5 (Council of Europe, 2008, pp. 49–51).

The independence of the trade unions may take various forms.

- a) Trade unions are entitled to choose their own members and representatives.
- b) Excessive limits on the reasons for which a trade union may take disciplinary action against a member constitute an unwarranted interference in the autonomy of trade unions inherent in Article 5.
- c) Trade union officials must have access to the workplace and union members must be able to hold meetings at work in so far as employers' interests and company requirements permit (Council of Europe, 2008, pp. 50–51).

With regard to the concept of representativeness, the impact of Article 5 as interpreted by ECSR are the following. Domestic law may restrict participation in various consultation and collective bargaining procedures to representative trade unions alone. For the situation to comply with Article 5, the following conditions must be met:

- a) *decisions on representativeness must not present a direct or indirect obstacle to the founding of trade unions;*
- b) *areas of activity restricted to representative unions should not include key trade union prerogatives (ECSR, Conclusions XV-1, Belgium, p. 74);*
- c) *criteria used to determine representativeness must be reasonable, clear, predetermined, objective, prescribed by law and open to judicial review (ECSR, Conclusions XV-1, France, p. 240).*

Similar to the ILO, the wording of the concept changed over time between *representativity* and *representativeness*. First mentioned in 1979, the concept was called *representativeness* (ECSR, FR, 1979), changed to *representativity* in 2000 (ECSR, FR, 2000) and has been again labelled as *representativeness*, ever since 2006

(ECSR, HR, 2006). The ECSR has recalled at many instance, from 2000 until 2014, that the concept of representativeness is an autonomous concept which is 'not necessarily identical to the national notion of representativeness' (ECSR, Complaint No. 9/2000, *Confédération Française de l'Encadrement 'CFE-CGC' v. France*, decision on admissibility of 6 November 2000, paragraph 6).

With regard to the criteria of representativeness, the opinions of the ECSR have also evolved over time. In 2000, the Committee stipulated that these criteria, in particular when it comes to collective bargaining, have to be pre-established, clear and objective (ECSR, FR, 2000). In the French case, the ECHR took particular note of the fact that these criteria were subject to specific two-fold legal control by the *Conseil d'Etat* and the Court of Cassation (ECSR, FR 2000) and consisted both of a quantitative and qualitative screening (ECSR, FR, 2000). In 2004, the ECSR considered with regard to a case emanating from Bulgaria that the criteria enshrined contained in Article 34 of the Labour Code were 'formally laid down and objective, and their application is subject to oversight by an independent body and must be regularly reviewed' (ECSR, BG, 2004). In 2006, the Committee considered that a national system of industrial relation that did not contain any criteria for representativeness was in conformity with Article 5 of the charter (ECSR, DK, 2006).

From 2006 onwards, the ECSR argued that in order to be compatible with Article 5 of the charter, criteria of representativeness needed to be:

- a) reasonable;
- b) clear;
- c) predetermined;
- d) objective;
- e) laid down in law; and
- f) subject to judicial scrutiny (Council of Europe, 2008, p. 51; ECSR, Conclusions XV-1, France, pp. 240-250; LU 2006, BE 2010, BG, 2010, ES 2010, FR 2010, MT 2014, NL 2014).

A slightly different wording for two of the criteria was used from 2010 onwards, starting with a conclusion related to Bulgaria when the ECSR stated that 'criteria used to decide on representativeness of employees' and employer organisations are pre-established, objective and subject to review by an independent body (ECSR, BG 2010.) In the same year the ECSR further specified that:

- a) decisions on representativeness must not present a direct or indirect obstacle to the founding of trade unions (ECSR, AD 2014, AM 2014, MT 2014, RU 2014);
- b) areas of activity restricted to representative unions should not include key trade union prerogatives (ECSR, Conclusions XV-1, Belgium, GE 2010, UA 2010, GE 2014, MT 2014, RU 2014);

- c) the application of criteria of representativeness should not lead to automatic exclusion of the small trade unions or those not long formed, to the advantage of larger and longer-established trade unions (ECSR, UA 2010, NO 2013, AD 2014, AM 2014, RU 2014).

In 2014, the ECSR was asked to give an opinion on the French Act No. 2009-789 of 20 August 2008 on the reform of social democracy and working time, in particular the claim of several French trade unions that the electoral thresholds prescribed by that law were not reasonable. In April 2010, the Court of Cassation had given a judgment (No. 899), arguing that they 'had considered that Article 5 of the charter did not prohibit the existence of some kind of trade union representativeness' (ECSR, FR, 2014). The French Constitutional Court had held that:

the legislator is free to set criteria for the representativeness of trade unions. The freedom to join a trade union of one's choice provided for by the sixth paragraph of the 1946 Preamble does not require that all trade unions be regarded as representative regardless of their support; by setting the threshold at 10% of the votes cast in the first round of the last election of staff representatives, regardless of the number of voters, the legislator did not disregard the principles laid down in paragraphs six and eight of the 1946 Preamble.

(ECSR, FR 2014)

The ECSR reserved its position on this issue and did not come forward with an opinion in 2014.

European Union

Both paragraphs 2 and 3 of Article 154 TFEU specify that the Commission 'shall consult management and labour' in the course of the two phases of the consultation process. But who does 'management and labour' (Eurofound, 2005a) include? The TFEU remains silent on the definition of these two actors. The only selection criterion that may be drawn from Article 154(1) TFEU is the reference to the 'Community level', which seems to exclude the national social partners. Since the EU-level social partners are numerous as well as heterogeneous, the key concept developed by the Commission in order to identify 'management and labour' is that of representativeness. Management and labour in all three phases of the European social dialogue under Articles 154 and 155 TFEU must be representative. That includes first and second consultation (Article 154 (1 and 2) TFEU); negotiations between the social partners (Articles 154(4) and 155(1) TFEU); and implementation of the European collective agreements (Article 155(2) TFEU).

Council of the European Union

In the UEAPME case of 1996, the Court of First Instance stressed the duty of both the European Commission and the Council of Ministers to assess the representativeness of the European social partners as signatory parties to any agreement, because the European Parliament was absent in the legislative process under the European social dialogue.

In two of the most recent directives implementing social partner agreements, the Council of Ministers took the following stance. With regard to the Commission proposal for a Council directive implementing the framework agreement on prevention from sharp injuries in the hospital and healthcare sector concluded by HOSPEEM and EPSU, the Council concluded that

the Commission took account of the representativeness of the signatory parties, having regard to the scope of the Agreement, for the hospital and healthcare sector, their mandate and the legality of the clauses in the Framework Agreement and its compliance with the relevant provisions concerning small and medium-sized undertakings.

(European Commission, 2009a)

As for the Commission's proposal for a Council directive implementing the European agreement concluded by the European Barge Union (EBU), the European Skippers Organisation (ESO) and the European Transport Workers' Federation (ETF) concerning certain aspects of the organisation of working time in inland waterway transport, the Council considered that

the Commission drafted its proposal for a Directive, in accordance with its Communication of 20 May 1998 on adapting and promoting the social dialogue at Community level, taking into account the representative status of the signatory parties and the legality of each paragraph of the Agreement.

(European Commission, 2014)

On 16 June 2016, the Council of the European Union adopted in Amsterdam the conclusions on 'a new start for a strong social dialogue'. The concept of representativeness at European level also plays a role in these conclusions.

- 'An effective social dialogue requires social partners that are resilient, representative, autonomous, mandated and equipped with all the capacities needed. Social partners also need institutional settings that allow their dialogue to be effective' (Council of the European Union, 2016, p. 3).

- 'The Council of the European Union stresses ... the importance of capacity building of social partners at national and sectoral level, which could contribute – amongst others things – to improved representativeness of European social partners in negotiating their agreements' (ibid., 2016, p. 4).
- 'The Council of the European Union calls on the Member States to take the necessary steps to: ... promote the building and strengthening of the capacities of the social partners through different forms of support, including legal and technical expertise. This should be ensured at all relevant levels, depending on the needs of countries and social partners, including to become solid and representative organisations' (ibid., 2016, p. 5).
- 'The Council of the European Union calls on the European Commission to take the necessary steps to: ... continue to assess the representativeness of Union social partners, based upon the analysis carried out through Eurofound representativeness studies' (ibid., 2016, p. 6).
- 'The Council of the European Union Invites the social partners at the appropriate levels, and with full respect for their autonomy, to take the necessary steps to: ... continue efforts to improve membership and representativeness, and to ensure that the capacity to enter into agreements exists' (ibid., 2016, p. 7).

European Commission

Management and labour in the sense of Article 155(1) TFEU designates those organisations that agree to negotiate with each other. This principle of 'mutual recognition' was expressed by the Commission in its 1993 Communication and confirmed by the Court of Justice of the European Union (CJEU) in the UEAPME case. Thus, in contrast to the consultation procedure under Article 154 TFEU, the Commission does not apply selection criteria to the autonomous negotiations of the European social partners under Article 155 TFEU (European Commission, 1993; Smismans, 2004; Reale, 2003; Lhernould, 2008).⁴³ If, however, the EU-level social partners act as a 'substitute to the European Parliament' (Spiess, 2005) in the European social dialogue, they have to be screened when they request the extension of their European collective agreements via Article 155 (2) TFEU. According to some academics, this is a necessary prerequisite for a 'functionally democratic' or 'state democratic' (Spiess, 2005, p. 168) representativeness, legitimising a process that is in line with criteria of accountability and democratic legitimacy.

43 European Association of Craft, Small and Medium-sized Enterprises (UEAPME) v. Council of the European Union, Case T-135/96, ECR II, 1998, 2367.

Since the adoption of the Maastricht Treaty,

a number of the organisations, which do not participate in the existing social dialogue, have submitted formal requests to the Commission to take part directly in the social dialogue. To take a position on this question in full knowledge of the facts, the Commission carried out a study of European employers' and workers' organisations so as to enable the Commission to understand more clearly the different mechanisms by which representative social dialogues are established at national level, and to assist in assessing how this process might best operate at Community level.

(European Commission, 1993)

Annex 3 of this 1993 communication summarised the main findings of the study on the representativeness of the social partners. The study identified the concept of representativeness as a key criterion and comes to the conclusion:

For collective bargaining, in most countries mutual recognition is the basic mechanism, but additional formal or legal requirements may have to be fulfilled. In several countries there are mechanisms (for example quantitative criteria established by law or otherwise) to make a distinction between organisations with (the most) substantial membership and those which are less representative.

(European Commission, 1993)

Annex 3 then defined criteria for representativeness for the consultation phase of the European social dialogue. According to the 1993 Communication, 'organisations [that] are potentially eligible to be consulted' under Articles 154 TFEU must:

- be cross-industry or relate to specific sectors or categories and be organised at European level;
- consist of organisations, which are themselves an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, **as far as possible** [emphasis added];
- have adequate structures to ensure their effective participation in the consultation process (European Commission, 1993).

In spite of some criticism from scholars and other EU institutions regarding the criteria of representativeness, the Commission, to date, has not elaborated on this definition, to go beyond its existing scope and precision (Barnard, 2012). According to Moreau, the Commission

justified this restraint in the past by the following arguments. First, the structures of the European social partners had not yet stabilised. The second argument for not elaborating further on the criteria was the respect of the autonomy of the social partners. In the eyes of the Commission, the diversity of interpretations given to the concept of representativeness at Member State level, also constituted an insurmountable obstacle for a common definition (Moreau, 1999). As we have shown in chapter 1 of this report, this diversity is still present in 2016 and probably has even increased since 1993. Despite this, the research could identify two main principles (mutual recognition and legal conformity) and four different concepts (self-regulated mutual recognition; mixed mutual recognition and state regulation; state-regulated membership strength; and state-regulated electoral strength), which are spread across the EU 28 Member States. In particular, the concept of 'state-regulated membership strength' builds on criteria and thresholds, which might help in fine-tuning the application of the criteria stemming from COM(93)600, COM(98)322, the decision annexed to the later Commission Decision 98/500/EC.

In its 1996 communication (European Commission, 1996), the European Commission argued that

participation in the Val Duchesse social dialogue is based on the mutual recognition of the parties, not on a decision of the Commission. Nevertheless, the Commission has received a series of requests to participate in the interprofessional social dialogue from organisations who were not party to the original initiative.⁴⁴

(European Commission, 1996, p. 4)

In the same communication, the Commission also stated a number of proposals and questions on which it wished to hear the views of all interested parties. One of the questions dealt with criteria of representativeness: 'Do you agree with adapting the representativeness criteria for organisations to be consulted?' (European Commission, 1996, p. 18).

In the second communication from 1998, the Commission confirmed its 1993 criteria as regards the consultation phase and reproduced these verbatim. In the 1998 decision, however, the Commission slightly varied the criteria with regard to the setting-up of sectoral social dialogue committees.

Sectoral Dialogue Committees (hereinafter referred to as 'the Committees') are hereby established in those sectors where the social partners make a joint request to take part in a dialogue at European level, and

⁴⁴ The castle of Val Duchesse is a former priory in Auderghem in the Brussels Capital Region of Belgium. Since the historic 1985 meeting, 'Val Duchesse' has become synonymous with the second phase of the European social dialogue and its actual kick-off.

where the organisations representing both sides of industry fulfil the following criteria:

(a) they shall relate to specific sectors or categories and be organised at European level;

(b) they shall consist of organisations which are themselves an integral and recognized part of Member States' social partner structures and have the capacity to negotiate agreements, and which are representative of **several Member States** [emphasis added];

(c) they shall have adequate structures to ensure their effective participation in the work of the Committees.

(European Commission, 1998b, p. 31)

In the 1998 communication, the Commission changed the wording in criterion (b), from the 1993 version 'which are representative of all Member States, **as far as possible** [emphasis added]' to 'which are representative of **several Member States** [emphasis added]'.

In its communication from 2002 on European social dialogue, a force for innovation and change, the Commission repeated its former position (European Commission, 2002a). The Commission announced, however, that it would 'launch a fresh study on representativeness to cover further sectors reflecting developments in the European economy and prepare studies on the cross-sector and sectoral social partner organisations in the candidate countries'. In its 2004 communication on social dialogue, the Commission proposed Eurofound for this task (European Commission, 2004b), and in 2006 the Dublin tripartite EU agency commenced to conduct sectoral representativeness studies.⁴⁵ By mid-June 2016, Eurofound has published 43 sectoral studies and finished the cross-sector representativeness study on which chapter 1 of this report is partly based. The Commission also promised that it would present an amended list of organisations consulted under Article 154 TFEU, and that it would adapt the list again in function of the potential establishment of new social dialogue committees and of the results of the studies on representativeness.

The Commission maintains and regularly updates a 'list of European social partners' organisations consulted under Article 154 TFEU' which comply with these criteria. The latest version of this list, accessed on 21 June 2016, includes 87 organisations which are divided into five groups:

- general cross-industry organisations (BusinessEurope, CEEP, ETUC);
- cross-industry organisations representing certain categories of workers or undertakings (Eurocadres, UEAPME, CEC);

- specific organisations (Eurochambres);
- sectoral organisations representing employers (65 organisations); and
- sectoral European trade union organisations (15 organisations) (European Commission, undated).

Aware of the problems linked to the concept of 'representativeness', the Commission drew the following two main conclusions from its 1993 study.

(a) the diversity of practice in the different Member States is such that there is no single model, which could be replicated at European level, and

(b) the different Member States' systems having all taken many years to grow and develop, it is difficult to see how a European system can be created by administrative decision in the short term.

(European Commission, 1993, p. 22)

More recently, the concept of representativeness also plays a role in the framework of the better regulation agenda. In tool number seven (IA requirements for social partner initiatives), the Commission states that whenever the impacts of the agreement are likely to be significant, before taking its decision, the Commission will carry out a proportionate impact assessment, which will focus in particular on the representativeness of the signatories (European Commission, 2015). The Commission also concludes that 'the success of self- and co-regulation depends in essence on several key factors which include: representativeness, transparency, legal compliance and effective implementation and monitoring (ibid., 2015).

European Parliament

A critical reflection came from the European Parliament, which linked the issue of participation and consultation to the necessity of democratic legitimacy of those involved in the decision-making process:

'organised civil society' as 'the sum of all organisational structures whose members have objectives and responsibilities that are of general interest and who also act as mediators between the public authorities and citizens'(22), whilst important, are inevitably sectoral and cannot be regarded as having its own democratic legitimacy (23), given that representatives are not elected by the people and therefore cannot be voted out by the people, consultation of interested parties with the aim of improving draft legislation can only ever supplement and can never replace the procedures and decisions of legislative bodies which possess democratic legitimacy; only the Council and Parliament, as co-legislators, can take responsible decisions in the context of legislative procedures ...

(European Parliament, 2001)

45 Prior to 2004, the representativeness studies were carried out by the Catholic University of Louvain – see <http://www.uclouvain.be/en-11476.html>.

In April of 1994, the Committee on Social Affairs, Employment and the Working Environment of the European Parliament adopted a report on the application of the agreement on social policy. In this report, the Committee proposed to complement the representativeness criteria of the Commission by the following two conditions:

- (a) eligible organisations should be composed of organisations representing employers or workers with membership that is voluntary at both national and European level;
- (b) eligible organisations should have a mandate from their members to represent them in the context of the Community social dialogue and are to demonstrate their representativity (European Parliament, 1994).

Both criteria – voluntary membership and mandate to represent their affiliates in European social dialogue – had also been identified by the social partners themselves as key representativeness criteria in both the consultation and negotiation phases (ETUC, UNICE and CEEP, 1993).

European Economic and Social Committee

In 1994, the European Economic and Social Committee (EESC) issued a critical opinion in relation to the 1993 communication with regard to the use of the concept of ‘representativeness’ (EESC, 1994). The EESC claimed that the criteria assessing the representativeness of a social partner organisation should reflect the specific context of the European social dialogue.

Consultation and social dialogue at European Commission level should not be assumed to be the same as collective bargaining within the Member States. The processes and outcomes may be different; those engaged in social dialogue at European Commission level may also be identified with especially different criteria. It is important to not simply extrapolate from national experience to Commission level (EESC, 1994). Furthermore, the EESC claimed that ‘the social partners at EU level are to be selected having regard to the nature of the process and of the outcome of EU social dialogue. These would indicate transnational criteria linked to national social partners, and organisational capacity’ (EESC, 1994). With regard to the Commission criteria of COM(93)600, the EESC criticised that these were ‘ambiguous as to the need for a negotiating capacity of the EC social partners’. The EESC proposed to add an additional criterion – the capacity to negotiate binding agreements: ‘Criteria should also

include capacity to negotiate for and bind national structures’ (EESC, 1994, para. 2.1.12). The EESC continued that:

Member State social partners comprising the EC level organisations should be encouraged to grant adequate bargaining mandates to the EC level social partner organisations. Member States should be encouraged to provide the procedures and guarantees securing the general effect of EC level agreements reached.

(EESC, 1994, para. 2.1.14).

In 1997, the EESC issued the opinion of the Economic and Social Committee on the Commission communication concerning the development of the social dialogue at Community level. In paragraph 1.8, the EESC came up with its own list of criteria that representative organisations should satisfy.

1. A European representative organisation must be widely spread over the EU. This means that it must have member organisations at the appropriate relevant negotiation level in at least three-quarters of the EU Member States and be seeking to be represented in the others.

2. The European organisation must have a mandate from its member organisations to negotiate at European level.

3. All the organisations affiliated to the European organisation, either in their own name or through their member organisations, must be entitled to negotiate in the Member States and must be able to implement conventions concluded at European level in accordance with national practices and usage.

4. The European organisation must be made up of organisations that are considered in their Member States as representative.

(EESC, 1997, 1.8)

Thus, the main new criterion for representativeness of the 1997 opinion is the quantitative threshold of a required membership base in at least three-quarters of the Member States. When it comes to the implementation of European framework agreements by Council decision, however, the EESC argues that ‘[t]his question should not be answered using criteria based on figures. What is essential when answering this question is that every representative organisation which fulfils the criteria set out in point 1.8.1 should be admitted to the talks if it so wishes, at the appropriate relevant negotiation level’ (EESC, 1997, 1.9).

European cross-industry social partners

The European cross-sector social partners ETUC, CEEP and UNICE reacted by issuing a position paper on the European Commission's first communication on social dialogue from 1993 (European Commission, 1993). In their proposals for implementation of the agreement annexed to the protocol on social policy of the TEU of 29 October 1993, ETUC, CEEP and UNICE tabled a more detailed and encompassing list of conditions to be met by organisations to be consulted by the European Commission.

In order to be regarded as such, the organisations involved under Articles 3 and 4 of the Agreement should meet all the following conditions:

- *be organised horizontally or sectorally at European level;*
- *be composed of organisations which are themselves regarded at their respective national levels as representative of the interests they defend, particularly in the fields of social, employment and industrial relations policy;*
- *be represented in all Member States of the European Community and, possibly, of the European Economic Area or have participated in the 'Val Duchesse' social dialogue;*
- *be composed of organisations representing employers or workers, membership of which is voluntary at both national and European level;*
- *be composed of members with the right to be involved, directly or through their members, in collective negotiations at their respective levels;*
- *be instructed by their members to represent them in the framework of the Community social dialogue.*

(ETUC, UNICE and CEEP, 1993)

In their subsequent chapter on negotiations, ETUC, CEEP and UNICE then point to the importance of the concepts of mutual recognition and the capacity to negotiate, which have also been identified here as important concepts and criteria at national level:

[I]n the light of the spirit of the Agreement, ETUC, CEEP and UNICE believe that the fact that organisations meeting the criteria set out in point 4 above, mutually recognizing each other as social partners and with an ad hoc mandate from their members decide to open negotiations in the framework of Article 3 paragraph 4 of the Agreement.

(ETUC, CEEP, UNICE, 1993)

In their analysis of European social dialogue, Franssen and Jacobs (1998) pointed out that the Commission's criteria represent 'a slim version of a suggested list of criteria proposed to the Commission by UNICE, ETUC and CEEP'. In its 1998 position paper on the Commission communication on adapting and promoting the social dialogue at Community level, UNICE regretted that a weakening of the 1993 criteria had taken place:

However, UNICE deeply regrets that this statement is contradicted by the fact that the formulation of article 1.b of the Commission decision on the establishment of sectoral social dialogue committees has weakened these criteria as compared with COM(93)600 final. Instead of requiring organisations to be representative 'in all Member States, as far as possible', the Decision only requires them to be representative 'in several Member States'.

(UNICE, 1998)

Such an interpretation, however, does not clearly distinguish between the scope of application of the communications from 1993 and 1998 and the 1998 decision. As mentioned above, the two communications set out criteria for organisations to be consulted under Article 154 TFEU, whereas decision 98/500/EC postulates criteria for the establishment of sectoral social dialogue committees. Since not all sectors are present in all EU 28 Member States, these criteria have to be less exigent.

Court of Justice of the European Union (UEAPME case)

At the peak of the parental leave dispute, UEAPME drafted a complaint to the European Court of First Instance (CFI) doubting the legality of Council directive 96/34/EC of 3 June 1996 on the framework agreement concluded by UNICE, CEEP and the ETUC, and challenged their status as European social partners (T-135/96, 2335). The criterion of 'sufficient collective representativity' became the bone of contention in the so-called UEAPME case. Due to the fact that the European social partners are not directly legitimised democratic Community institutions, the question about the source of their legitimacy in the framework of European social dialogue is a crucial one. Since under European social dialogue, management and labour have developed into 'co-legislators' (Dufresne et al, 2006, p. 45) in the social policy field, the representativeness and mandate checks exercised by the European Commission are very important. Against the background of the principle of democracy, it is an essential condition that the signatory parties, which

have concluded a European collective agreement, are representative and have been properly mandated by their national affiliates, and even more importantly, that this mandate has been given in a democratic manner (Welz, 2008; Franssen, 2002). Consequently, in a first step, the CFI exposed the link between the principles of democracy and representativity.

However, the principle of democracy on which the Union is founded requires – in the absence of the participation of the European Parliament in the legislative process – that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council, acting on a qualified majority, on a proposal from the Commission, with a legislative foundation at Community level. In order to make sure that that requirement is complied with, the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative.

(Case T-135/96, 2335)

The legitimacy of the European Union as such is said to increase by the participation of citizens and other parties, like the two sides of industry, in the decision-making process (Føllesdahl, 2004, p. 9).

According to Bercusson, it follows from the above paragraph that in the view of the CFI, ‘the European social dialogue is equated with the EU legislative process; as such, it must attain the equivalent degree of democratic legitimacy’ (Bercusson, 1999, pp. 163–164). Following on from this, the CFI argues that if a European collective agreement is to be democratically legitimate, that it needs to be assured ‘whether, having regard to the content of the agreement in question, the signatories, **taken together** [emphasis added], are sufficiently representative’ (T-135/96, 2335, para. 90). The CFI further claims that the representativeness of the signatory parties has to be judged ‘in relation to the content of the agreement,’ or ‘with respect to the substantive scope of the framework agreement’ (T-135/96, 2335, para. 90/91). The consequence for the European social partners is that agreements may be democratically legitimate when signed by organisations that are only representative in relation to the limited content or scope of the specific agreement (Obradovic, 1998, p. 149). A sufficient cumulative representativeness may be achieved, even if the signatory parties of either side, taken separately, are not representative individually, but taken together achieve a cumulative representativeness (Hellsten, 2004; Bercusson, 1999, p. 82).

The CFI then held that legitimate employer and employee representatives may challenge collective agreements that are negotiated at the EU level between social partners lacking sufficient cumulative representativeness. The CFI stipulated that the criterion

of ‘sufficient representativeness’ had to be measured in relation to the content of the agreement. If the contracting parties, taken together, are not sufficiently representative, the European Commission and the Council must refrain from implementing the agreement. Otherwise, the EU-level social partners who were consulted, but were not signatories, and whose participation in relation to the content of the agreement was necessary for the cumulative representativeness to be achieved, have the right of action of annulment against the Union decision implementing the social partners’ agreement (Even, 2008, p. 144). However, the CFI was of the opinion that UEAPME was not in such a position, where its level of representativeness is so great that its non-participation in the conclusion of an agreement between general cross-industry organisations automatically means that the requirement of sufficient collective representativeness was not satisfied (T-135/96, 2335, para. 104).

The CFI, rather adamant about the concept of collective representativeness, was, however, less clear on the question of the relevant and corresponding criteria. The CFI only referred to the criteria as sketched by the Commission in its 1993 communication, but did not comment on these criteria. The Court only stressed the duty of both the European Commission and the Council of Ministers to assess the representativeness of the European social partners as signatory parties to any agreement. As regards the EU-level employers, UNICE, the CFI concluded that this ‘body represented undertakings of all sizes in the private sector, which qualified it to represent the SMEs, and that it counted among its members associations of SMEs, many of which were also affiliated to the applicant’ (T-135/96, 2335, para. 98). The CFI took into consideration that the numeric criterion of social partner organisations may be validated, but concluded:

The applicant’s criticisms cannot be accepted. In the first place, they are all based on a single criterion, namely the number of SMUs represented respectively by the applicant and UNICE. Even if that criterion may be taken into consideration when determining whether the collective representativity of the signatories to the framework agreement is sufficient, it cannot be regarded as decisive in relation to the content of that agreement. Since the framework agreement concerns all employment relationships..., it is not so much the status of undertaking which is important, but that of employer.

(T-135/96, 2335, para. 102)

UEAPME’s complaint was dismissed by the CFI, and UEAPME lodged an appeal to the CJEU, the next instance in European judicial review. In the meantime, however, new intra-associational developments had occurred. On 4 December 1998, UEAPME and UNICE signed a cooperation agreement. According to the text of this agreement, UEAPME recognises UNICE as the sole

European organisation representing businesses of all sizes active in all sectors of the economy, and takes for granted the fact that the vast majority of businesses represented by UNICE are SMEs. UNICE recognises that UEAPME is the main cross-industry organisation representing the specific interests of SMEs at European level, and that it therefore has a role to play in the social dialogue and can make a useful contribution to defending the interests of employers in negotiations with ETUC, in cooperation with UNICE. In terms of the agreement, the two employer organisations will strive to ‘reach consensus on the positions to be defended in the social dialogue while fully respecting the autonomy of the two organisations’. Specifically, as leader of and spokesperson for employees within the social dialogue process, UNICE will consult UEAPME before taking public positions on behalf of employers in negotiations and in the social dialogue. For their part, the representatives of UEAPME are to play a full part in preparatory meetings of the employers’ group, and in plenary meetings with the ETUC. UNICE is to take into account, as much as possible, the views expressed by UEAPME during preparatory meetings of the employer group.

The issue of representativeness also played an important role in relation to the other employer organisation, CEEP, which also claimed to be representative. The CFI acknowledged CEEP as an essential social partner in the context of the agreement on parental leave (T-135/96, 2335, para. 100) In contrast to the non-involvement of UEAPME, the CFI concluded that if CEEP had not participated in the parental leave discussions ‘this alone would have fundamentally affected the sufficiency of the collectively representational character of those signatories in view of the contents of that agreement, because then one particular category of undertakings, that of the public sector, would have been wholly without representation’ (T-135/96, 2335, para. 100). In short, the representative status of CEEP was reinforced by the UEAPME judgment.

In summary, it seems correct to conclude that ‘the judgment of the Court of First Instance does not seem to have clarified the relevant uncertainties concerning the “dogma” of representativity’ (Reale, 2003, p. 13). Many points of detail have stayed unclear to date and a number of scholars, such as Blanpain, ‘deeply regret(ed) this judgement’: ‘when the criteria for representativeness are not clearly spelled out at European level, the Court has to look for inspiration in the ILO Conventions. The ILO has repeatedly said that the criteria for representativeness need to be objective, precise and beforehand known’ (2014, p. 233). A number of academics argue that the determination of objective criteria of representativeness at EU level has not sufficiently materialised, and henceforth speak of a ‘legal limbo’ (*floeu juridique*) in this context (Rabier, 2007, p. 118). In the polity, the European Union ‘the Commission and the Council are under a duty to verify

that the signatories to the agreement are truly representative’ (T-135/96, 2335, para. 89). Furthermore, the CFI acknowledged the obligation of the Commission and Council to refuse to implement an agreement where a sufficient degree of representativeness of the social partners, taken together, as signatories to an agreement, was missing (T-135/96, 2335, para. 90).

As early as 1972, Lyon-Caen put it in these terms: ‘il est manifestement nécessaire que les interlocuteurs en présence soient dûment habilités par les entreprises et les syndicats [it is clearly necessary that the speakers present are duly authorised by the companies and unions] (Lyon-Caen, 1972, 39). Some sociologists have in the past invoked numeric criteria (*‘épreuves’*), in order to assess the representativeness of social partner organisations (Bérout et al, 2012, p. 6).

The next section presents Eurofound’s methodology of assessing representativeness since 1996, followed by a discussion over whether some elements of this approach should be revisited, refined or modified after almost 10 years of application.

Eurofound’s methodology for assessing representativeness

Following on from the European Commission criteria discussed above, Eurofound methodology for representativeness studies, at both cross-sector and sectoral level has to address two main tasks. The first one is to analyse the relevant European associations of the two sides of industry. The second is to identify the relevant national associations on both sides of industry. For this purpose, a combined approach was used for screening the relevant social partner associations.

Top-down screening: This starts with reference to the current relevant cross-industry European interest associations and then looks at their affiliate members at national level. In the top-down approach, it should be stressed that the analysis only focuses on affiliates in the 28 Member States of the European Union. All members and affiliated associations in other countries are not considered in this study. Moreover, only social partner organisations will be taken into consideration; other kinds of member associations with no role in industrial relations and individual companies are not covered by the present representativeness study, although they are important national affiliates of some of the relevant cross-industry EU-level organisations included here.

Bottom-up screening: This starts with reference to the cross-industry national associations involved in cross-industry collective bargaining and/or direct bipartite or tripartite consultations, and then proceeds with the collection of data on their affiliation to any European associations.

Via top-down and bottom-up screening, the cross-sector study aimed to identify and analyse all the relevant interest associations of cross-sector social dialogue at EU and national level. In this context, a European association is a relevant cross-industry interest organisation if:

- it is on the Commission's list of interest organisations to be consulted in matters of cross-industry social dialogue under Article 154 TFEU;
- and/or it participates in the cross-industry European social dialogue;
- and/or it has requested to be consulted under Article 154 TFEU.

A national association is a relevant cross-industry national interest organisation if it meets both the criteria (a) and (b) below:

- (a) The association is:
- either regularly directly or indirectly (via its member organisations) involved in cross-industry collective bargaining (or employment regulation) or directly involved in bipartite/tripartite consultations on cross-industry labour market and industrial relations issues (i.e. bottom-up screening);
 - and/or affiliated to a relevant European interest association (i.e. top-down screening).
- (b) The association's domain relates to:
- either more than one sector of the economy (at least two sections in terms of the NACE Rev.2 classification system – that is one-digit sectors), thus including associations with a general membership domain;
 - or a group of enterprises or organisations (such as SMEs, cooperatives or public-owned companies) across the economy, in the case of employer organisations, or a category of employees (such as white-collar workers, blue-collar workers or academics) across the economy, in the case of trade union confederations.

In the framework of its representativeness study on the sectoral social partners, Eurofound uses the following criteria in order to identify relevant European and national associations.

European associations are analysed via the 'top-down' approach if they:

- are on the Commission's list of interest organisations to be consulted on behalf of the sector under Article 154 TFEU;
- and/or participate in the sector-related European social dialogue.

The Commission may decide to include other EU sector-related organisations in the study, if relevant, such as a sector-related organisation that has recently requested to be consulted under Article 154 TFEU.

A national association is considered to be a relevant sector-related interest association if it meets both criteria A and B.

- A: The association's domain relates to the sector.
- B: The association is either: affiliated to a European-level organisation, which is analysed in the study within the top-down approach (independent of their involvement in collective bargaining); or, if not, regularly involved in sector-related collective bargaining.

Representativeness criteria revisited

Union recognition – or its extension by employers – has usually depended either on the 'economic' power of unions to induce employers to accept them as legitimate employee representatives or on the employers' voluntary acceptance of collective bargaining, and so of the unions as the legitimate bargaining partners.

(Casale, 1996, p. 3)

European social dialogue draws its legitimacy from a sufficient functional representativeness of the EU-level social partners, measured by the Commission against its own well established criteria. When assessed against the criterion of democratic legitimacy, some scholars argue that the European social partners dispose of their own reservoir of legitimacy: legitimacy on basis of functional representation.

Functional representation, when exercised through fair representation and balanced with mechanisms ensuring public control on the process, can reinforce the democratic legitimacy of a system without endangering or jeopardizing the rights of the individual.

(Reale, 2003, p. 17).

According to the European Commission, the 'social partners are representative and accountable organisations, which act on the basis of a mandate from their members. Social partners draw their legitimacy from a sufficient level of representativity' (European Commission, 2001a). On the grounds of its functional representation, European social dialogue is portrayed by some as a form of 'associative democracy' (Falkner et al, 2002).

Following on from recommendations from the European Parliament, EESC, the EU cross-industry social partners and academics, there seems room for a conceptual clarification of these criteria. In its 2002 communication, the Commission was very clear with regard to the important role social dialogue plays in democratic European governance:

As a driving force for modernisation of the European economy and the European social model, the social dialogue holds a crucial, unique position in the democratic governance of Europe. The active involvement of the social partners in the decision-making process of the Union and its institutions needs to be reinforced, as called for in the White Paper on European Governance, through closer consultation on the basis of the procedures included in the Treaty as early as 1992.

(European Commission, 2002a, p. 6)

Functional legitimacy, however, does not equal that of the European Parliament, which, as the only actor of the Community method, is directly elected by the European citizens; yet, one also has to keep in mind that the outcomes of European social dialogue to be implemented by Council directive can only be in those social policy fields that are covered by Article 153 of the TFEU. For functional legitimacy to be acceptable, the European social partners have to be representative of their constituent affiliates. The EU-level social partners, as a ‘substitute to the European Parliament’ in European social dialogue, must be screened if they are to legislate under Article 155 of the TFEU. This is a necessary prerequisite for ‘functionally democratic’, or as Spiess puts it ‘state democratic’ (2005, 168) representativeness, legitimising a process that is in line with accountability and democratic legitimacy (Welz, 2008).

These two concepts – legal conformity and mutual recognition – have also been identified as the two main principles guiding representatives at national level in the EU28. In a number of EU Member States (such as France), compliance to legal measures determines representative status. Here, the state has taken on the responsibility of deciding which organisations may participate in collective bargaining, the mechanisms by which collective agreements cover certain groups of workers and employers, and which organisations may

participate in tripartite arrangements. The principle of conforming to the law confers representative status and the rules by which it is achieved on the partners or on the agreements they reach. As an impact of the global economic and fiscal crisis, some of the EU Member States reviewed representativeness criteria and raised certain thresholds to be met by the two sides of industry; this is the case for example for Greece, Hungary, Italy, Portugal, Romania, Slovakia and Spain (ILO, 2013; Eurofound 2013a, 2013b and 2013c).

At EU level, the consultation phase of the European social dialogue under Article 154 TFEU largely corresponds to this principle. The European Commission only consults those EU-level social partners that fulfil the criteria laid down in COM(93)600 and COM(98)322 (European Commission, 1993 and 1998b). The setting-up of the sectoral social dialogue committees is also ruled by the legal conformity principle, since it is subject to hard EU law in the form of Commission Decision 98/500/EC. The negotiation phase of European social dialogue on the grounds of Article 155 TFEU is embedded to a large extent in the same principle of mutual recognition. Instead of the State determining which organisations may negotiate and sign binding agreements, mutual recognition involves self-regulation by the social partners. Legitimate or ‘recognised’ trade unions and employer associations create their own institutional fora, within which they collectively bargain or consult on issues of mutual interest in the employment field. As shown in chapter 1, this principle is applied, among other things, in Cyprus, Sweden and the UK. The autonomy of the social partners, however, comes to an abrupt end, once the consultations lead to agreements to be implemented by Council decision on the request of the social partners (Bercusson, 1999, p. 160). Now the criteria of the Court of First Instance are applicable, which state that the social partners, taken together and having regard to the content of the agreement in question, are sufficiently representative in light of the UEAPME judgment. In a number of recent proposals for Council directives, however, the Commission also used Commission decision 98/500/EC as a legal frame of reference (European Commission, 2005, p. 3; European Commission, 2009a, p. 7; European Commission, 2014, p. 7; and European Commission, 2016, p. 6).

A new start for social dialogue

The European Commission under President Jean-Claude Juncker is committed to relaunching social dialogue. A first step in this direction was taken with the organisation of a high-level conference in Brussels on 5 March 2015. The aim of the conference was to discuss concrete ways to strengthen social dialogue with EU cross-industry social partners and their national affiliates. What is the situation one year later? In order to breathe new life into EU social dialogue to deal with past and future challenges, the commitment and cooperation of all actors on the company, sectoral, national and European level would be a precondition. As a concrete outcome of the high-level conference of last year, two thematic groups were created with the participation of the social partners (at EU and national level and at cross-industry and sectoral level), the social affairs attachés from the past, present and future presidencies (Latvia, Luxembourg, Malta, the Netherlands and Slovakia), the Council Secretariat, the European Commission and Eurofound.

Thematic group 1 focused on social dialogue, economic governance and capacity building. It assessed the involvement and positions of the national and European social partner organisations in the European Semester. Thematic Group 2 focused on social dialogue, policymaking and law-making. After six months of deliberations and discussions, the EU social partners adopted a joint declaration in Brussels on 26–27 January 2016, announcing a fresh start for a strong social dialogue at European level. To promote greater effectiveness and a better functioning social dialogue the declaration stresses the importance of:

- involving social partners in EU policymaking;
- the functioning and effectiveness of social dialogue and the capacity-building of social partners at national level;
- involving social partners in the European economic governance and European Semester and in assessing, designing, agreeing and implementing relevant reforms and policies;
- clarifying the relation between social partners' agreements and the European Commission's better regulation agenda.

Building on previous studies that were presented by Eurofound at the thematic working groups, the declaration more specifically draws the following conclusions:

- the involvement of social partners at EU level has significantly improved in recent years, but there is room for further improvement at national level;
- the involvement of national social partners in the preparation of the national reform programmes and in the design and implementation of relevant policy reforms could be reinforced while respecting national practices;
- annexing the views of social partners to the national reform programmes was considered to be a good practice;
- the concept of representativeness at both national and European levels and its implications for policymaking and law-making at EU level should be examined;
- in particular, representativeness checks need to ensure that EU social dialogue relies on recognised social partners at national level in all Member States.

Source: Eurofound (2016)

This section now goes on to revisit the three criteria cited above, one by one, in order to assess if after 10 years of representativeness studies being carried out by Eurofound, there is a need to fine-tune them in the application of this important mapping exercise. This need has been very recently acknowledged by the cross-sectoral social partners themselves in their 'Declaration on a new start for a strong social dialogue':

A more accurate and clearer picture of the situation on the concept of representativeness at both national and European levels needs to be developed and its implications in terms of policy and law making at EU level should be examined and clarified. In particular,

representativeness checks need to ensure that EU social dialogue is based on recognised social partners at national level across Member States. Likewise, the mutual recognition between partners and the existence of a dedicated mandate are important elements to be taken into account.

(ETUC, UNICE, CEEP, UEAPME, 2016, point 22)

Cross-industry or sector-related

Out of the three criteria to be applied to Eurofound representativeness studies, this seems to be the least controversial one as far as the cross-sector social dialogue is concerned.

On the trade union side, ETUC, Eurocadres and CEC together represent almost 80% of all listed national trade union organisations.

Among the trade union peak-level organisations, ETUC has, by far, the highest number of organisations that are national (70 out of 108, or 65%), that have comprehensive representational domains (48 out of 61, or 79%) and that are most prominent in national cross-industry industrial relations (38 out of 59 in collective bargaining and 68 out of 97 in consultations, corresponding to 64% and 70% respectively).

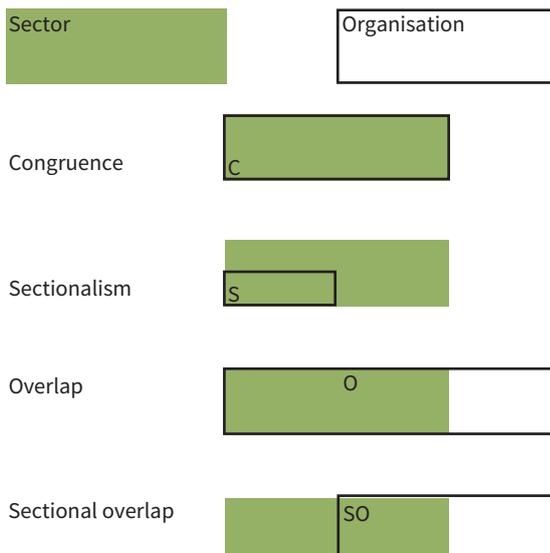
Member associations of Eurocadres comprise a subsection of ETUC’s members and therefore are often all-encompassing unions. CEC, which is independent of ETUC although it participates in cross-industry social dialogue within the ETUC’s delegation, only represents sectional representational domains. On the employers’ side, BusinessEurope E, UEAPME, and CEEP are the EU-level employer associations that affiliate most of the national organisations involved in national cross-industry industrial relations. BusinessEurope tends to have a broader representational domain, whereas the members of UEAPME and CEEP tend to have sectional representation, focused on SMEs and public services respectively (Eurofound, 2014a).

In the framework of the sectoral representativeness studies, the criterion of sector relatedness is often much more problematic. The first step in each representativeness study is a discussion with the

relevant sectoral actors at European level, to agree on the definition of the sector to be studied. The introductory chapter of each study provides details of the given sector definition, in terms of the ‘Statistical classification of economic activities in the European Community’ (*Nomenclature statistique des activités économiques dans la Communauté européenne*, NACE) to ensure that the findings can be compared cross-nationally. However, the domains in which the national trade unions and employer organisations work often do not correspond exactly to the NACE demarcation. The extent to which, and the manner in which, the bodies and agreements relate to the sector differ. Eurofound has identified four patterns by means of which an organisation may make proof of its sector relatedness.

- **Congruence:** The domain of the organisation or scope of the collective agreement is identical to that of the sectoral NACE demarcation.
- **Sectionalism:** The domain of the organisation or scope of the agreement covers only part of the sector, as defined by the sectoral NACE demarcation.
- **Overlap:** The domain of the organisation or scope of the agreement covers the entire sector as demarcated by NACE, along with parts of one or more other sectors.
- **Sectional overlap:** The domain of the organisation or scope of the agreement covers part of the given sector as demarcated by NACE, as well as parts of one or more other sectors (Eurofound, 2015c).

Figure 9: Forms of sector-relatedness and domain patterns of sectoral social partners



Source: Eurofound (2015c).

Previous studies based on the Eurofound sectoral representativeness studies have identified a considerable variety of sectoral domains within the analysed sectoral social dialogue committees (agriculture, postal services and electricity).

... European sectoral committees may not even cover similar socioeconomic situations across all Member States. The definition of a given sector in a particular country, from an industrial relations perspective, results from its domestic institutional history and the progressive constitution of the actors and the industrial relations bodies in the sector. It does not necessarily correspond to the economic demarcation of the sector. Variations across the countries can also reasonably be expected, and data on selected sectors analysed for this study indicate that the variation can be significant.

(Eurofound, 2009a, 37)

The ideal type of congruence between the domains of the organisations analysed and that of the NACE demarcation of the sectoral social dialogue committee has been a rare exception in all the sectors analysed to date. This often occurring mismatch between forms of sector-relatedness in terms of NACE demarcation and domain patterns of sectoral social partners lead some academics to question the adequacy of the level linkages between the European and the national level of sectoral social dialogue (Perin and Léonard, 2011; Lafuente Hernández, 2015). Other issues that have surfaced in the course of the representativeness studies are the following. It is not only the actors of a given sectoral social dialogue committee that sometimes do not correspond to the sector NACE demarcation but also agreements concluded, in particular agreements concluded for sub-sectors or multi-sector agreements (such as that for crystalline silica). Particular problems arise when there is a need for shifting the boundaries of a sector because of economic transformations or mergers (such as merging telecom and the ICT sector).

Integral part of Member State industrial relations and capacity to negotiate

Integral and recognised part of Member State industrial relations

This second criterion which, at first sight appears more straightforward, is also rather complex in its application. There is, first of all, some discrepancy with regard to Article 1b of Decision 98/500/EC between the English and other language versions.

They shall consist of organisations which are themselves an integral and recognized part of Member States' social partner structures and have the capacity to negotiate agreements, and which are representative of several Member States.

Être composées d'organisations elles-mêmes reconnues comme faisant partie intégrante des structures des partenaires sociaux des États membres et avoir la capacité de négocier des accords et être représentatives dans plusieurs États membres.

Sie sollten aus Verbänden bestehen, die in ihrem Land integraler und anerkannter Bestandteil des Systems der Arbeitsbeziehungen sind, sollten Vereinbarungen aushandeln können und in mehreren Mitgliedstaaten repräsentativ sein.

Siano composte da organizzazioni che, a loro volta, formino parte integrante e riconosciuta delle strutture delle parti sociali degli Stati membri, siano abilitate a negoziare accordi e siano rappresentative in più Stati membri.

In the English version, the criterion to 'have the capacity to negotiate agreements' may be read as referring to associations at national level, whereas in the French, German and Italian versions, this requirement clearly refers to the EU-level social partners only. If the latter versions were to prevail, European social partners could also consist of national affiliates – as an integral part of their Member State industrial relations – which do not have the capacity to negotiate and are, consequently, mere business/trade associations.

The EESC had claimed, in the 1993 opinion, that 'the social partners at EC level are to be selected having regard to the nature of the process and of the outcome of EC social dialogue. These would indicate transnational criteria linked to national social partners, and organisational capacity' (EESC, 1994, para. 2.1.9). The EESC proposed to add an additional criterion – the capacity to negotiate binding agreements: '... [C]riteria should also include capacity to negotiate for and bind national structures' (EESC, 1994, para. 2.1.12, 8). Thus, according to the EESC, the European social partners engaging in negotiations should dispose of the capacity to negotiate agreements that are potentially binding on the national industrial relations structures.

Eurofound has applied the criterion of 'capacity to negotiate' to both the EU-level partner associations and, in the bottom-up approach, to the national associations as well, in order to assess their relevance. This interpretation is shared by the European Parliament and the EESC, both arguing that the EU and national social partners must have statutory capacity to negotiate collective agreements. This view was also expressed by the European cross-sector social partners themselves in their 1993 proposal. ETUC, UNICE and CEEP argued that in order to be able to participate in European social dialogue, the relevant actors should '... be composed of members with the right to be involved, directly or through their members, in collective negotiations at their respective levels' (ETUC, UNICE, CEEP, 1993; Mazuyer, 2007, p. 121). The above interpretation is also explicitly shared by some of the EU

sectoral social partners themselves, stipulating in their statutes that only those national organisations are eligible to become a member who have ‘capacity to negotiate collective agreements if applicable and existing in the country concerned’ (such as the Confederation of European Security Services, Art. 8.2 of the Articles of Association).

Following the arguments above, the standard Eurofound methodology for assessing the criterion ‘integral part of Member State industrial relations and capacity to negotiate’ applies the ‘capacity to negotiate agreements’ to both the EU and the national level.

A national association is considered to be a relevant sector-related interest association if it meets both criteria A and B.

- A. The association’s domain relates to the sector (cf. above).
- B. The association is either: affiliated to a European-level organisation, which is analysed in the study within the top-down approach (independent of their involvement in collective bargaining); or, if not, regularly involved in sector-related collective bargaining.

If the national association in question is not affiliated to a European interest association, it will only be regarded as relevant in the sense of the study if it is regularly involved in collective bargaining, that is, if it is not only a trade association but a fully-fledged social partner having the capacity to negotiate agreements. An interesting example in this context can be drawn from the electricity sector. On the workers’ side, of the 77 identified sector-related national interest organisation, only three do not participate in any sector-related national collective bargaining (3.9%), while 74 do (96.1%). On the employers’ side, only 14 national affiliates are involved in collective bargaining whereas 19 are not (57.58%) (Eurofound, 2012; Lafuente Hernández, 2015).

In 1993, the cross-sector social partners ETUC, CEEP and UNICE themselves claimed in their proposals for implementation of the agreement annexed to the protocol on social policy of the TEU that in order to be recognised as a social partner, EU-level interest organisations needed to ‘be composed of members with the right to be involved, directly or through their members, in collective negotiations at their respective levels’.

Capacity to negotiate in practice

According to Elster, the concept of a mandate emerged in Europe (France and the UK) and the USA around the end of the 18th century. Political thinkers, such as Edmund Burke, argued that deliberative assemblies should not be bound by mandates of their constituents (Elster, 1998, pp. 3–4). It was Lyon-Caen who, as early as 1972, in its reports to the European Commission, brought the issue to the point:

*On a beaucoup embrouillé cette question; elle n’est dans la réalité qu’une simple application du mécanisme de la représentation dans les actes juridiques. Cela signifie en premier lieu que la personne qui parle et signe au nom d’une organisation, doit disposer d’un pouvoir qui l’autorise à parler et à signer au nom de celle-ci; et en second lieu que la signature de ce représentant est donné au nom et pour le compte de l’organisme ou des organismes représentés de telle manière que les effets de l’acte juridique se produisent directement à leur égard.*⁴⁶

(Lyon-Caen, 1972, p. 40)

According to Hecquet, the concept of representativeness is a ‘legal fiction’. The authentic reflection of reality is translated by the legal instrument of representation. The instrument used for this process is the mandate (Hecquet, 2007, p. 64).

At European level, it was in April 1994 that the Committee on Social Affairs, Employment and the Working Environment of the European Parliament adopted a report on the application of the agreement on social policy. In this report, the Committee proposed to complement the representativeness criteria of the European Commission by the criterion of having a mandate:

[E]ligible organisations should have a mandate from their members to represent them in the context of the Community social dialogue and are to demonstrate their representativity.

(EP, 1994)

As mentioned above, the criterion of ‘mandate’ was also identified by the European cross-sector social partners themselves in their 1993 proposal:

... be instructed by their members to represent them in the framework of the Community social dialogue.

(ETUC, UNICE, CEEP, 1993)

According to the first part of the report, ‘the capacity to negotiate’ of a social partner organisation is considered a very important element in the definition of their representative status at national level. According to the

⁴⁶ [‘There has been much confusion over this question; in reality it is a mere application of the mechanism of representation in legal acts. This means first of all that the person who speaks and signs on behalf of an organisation must be given the authorisation to speak and sign on behalf of the organisation; and secondly that the signature of that representative is granted in the name and on behalf of the body or bodies represented in such a way that the effects of the legal act impact directly on them.’]

28 country reports analysed, the capacity to negotiate applies to situations in which the two sides of industry can authoritatively commit their affiliates, are financially and organisationally independent of each other, and have public visibility. The research identified ten Member States in which the capacity to negotiate is explicitly recognised as an important element in the conceptual framework defining representativeness at national level: Austria, Cyprus, the Czech Republic, Estonia, Finland, France, Greece, Germany, Latvia and Spain. In particular, the German national report highlighted the importance of the ‘concept of capacity to negotiate in German industrial relations’:

In 1964 the Constitutional Court decided (BVerG, 1 BvR 79/62) that trade unions have to be capable of collective bargaining (tariffähig) to be considered a trade union from a juridical perspective. Organisations not capable of doing so are termed worker association (Arbeitnehmervereinigung) and operate under the Basic Law. They may term themselves trade union, but are not considered trade unions from a labour law perspective. Considering this, collective bargaining capacity is more than an alternative concept of representativeness, it defines trade unions. Associations of employers which are not capable of collective bargaining are business organisations or statutory employer organisations of the social security system.

(Kraemer, 2015)

A European association is only deemed to be representative on the grounds of the 1998 decision if it ‘consist(s) of organisations, which are themselves an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements’. The European Commission and Eurofound have very recently tried to render this criterion more precise by distinguishing between different kinds of mandates. In order to fulfil the criterion of ‘capacity to negotiate’, a European association must give proof of the following. The European sectoral social partners should be able to prove their capacity to negotiate on behalf of their affiliates and to enter into ‘contractual relations, including agreements’ (Article 155 TFEU) – the capacity to commit themselves and their national affiliates. This criterion does refer to the capacity to negotiate agreements as provided for in Article 155 TFEU; negotiating other types of joint texts (such as joint opinions, frameworks of action or guidelines), however valuable they may be, is not considered to be sufficient in this context. A European organisation has the capacity to negotiate such an agreement if it has received a mandate to do so from its affiliates, or if it can receive such a mandate in accordance with a given mandating procedure.

The mandate/mandating procedure can be either statutory – laid down in the statutes (constitution) of the organisation or annexed to them – or non-statutory – laid down in secondary (formal) documents, such as

rules of procedures, memoranda of understanding or decisions by the governing bodies of the organisation. The mandate will be described in terms of the conditions and procedure for the European social partner organisation to be given the authorisation to enter into a specific negotiation, as well as for the ratification of a possible agreement. If no such formal mandating procedure can be identified, it should be considered that the condition concerned is not fulfilled. European social partners will be asked to provide proof of their statutes or any other written documentation, describing their mandate and capacity to negotiate as well as the ratification procedures in place (Eurofound, 2014a).

In application of the new distinction between different forms of mandate, the situation with regard to the EU cross-sector social partners is as follows.

BusinessEurope has a statutory mandate in Article 6.3 last indent of its statutes: according to Article 7.8 of BusinessEurope’s statutes,

the decision to enter into negotiations in the framework of the dialogue between the social partners ... may be approved by the Association only if at least four-fifths of the votes are cast in favour, the members entitled to vote being only those having voting rights and whose country is affected by the decision in question.

Once the Council of Presidents has approved the mandate, the negotiations between the two sides of industry may commence (Eurofound, 2014a; Welz, 2008).

CEEP has a non-statutory mandate, as specified in Article 40 of its rules of procedure from 2011:

During the first phase of the consultations, the opinion to be produced on whether legislation should be introduced or whether a European agreement should be concluded between the social partners shall be issued by the General Assembly after consulting the Social Affairs Committee. If the opinion authorises the subsequent quest for an agreement, the Social Affairs Committee shall be given a negotiating mandate. This mandate shall specify the purpose of the negotiations.

The precise procedures for the negotiation and ratification of ‘European collective agreements’ (Article 39) are laid down in Articles 41 to 44 (Eurofound, 2014a; Welz, 2008).

ETUC has a statutory mandate in Article 13 of its Constitution. In 1995, ETUC changed its constitution in order to introduce the new mandate procedure. The prime target of this reform was to render the bargaining capacity of the confederation more effective, in order to fully take advantage of the new procedures offered by the 1991 agreement on social policy (Eurofound, 2014a; Welz, 2008).

UEAPME has a non-statutory mandate. UEPAME participates in the European social dialogue on the basis of the cooperation agreement with UNICE of 4 December 1998 (Eurofound, 2014a; Welz, 2008). UEAPME is mandated in its procedures for negotiations in the social dialogue from 6 December 1999.

Eurocadres has a statutory mandate in Article 2 of its constitution, adopted on 28–29 November 2013.

Eurocadres is a not for profit organisation and shall have the following tasks in particular to: (...) represent them vis-à-vis relevant institutions and bodies, and in particular to take part, on their behalf, at European level in social dialogue and collective bargaining.

CEC has a de facto mandate. The organisation signed a cooperation agreement, on the basis of which the liaison committee was founded. It is via the liaison committee that both Eurocadres and CEC participate in the European social dialogue (Eurofound, 2014a; Welz, 2008).

At the date of 9 December 2016, Eurofound had published 45 studies on 43 sectoral social dialogue committees. Some of the studies had already been carried out for a second time (such as those on agriculture and personal services). The situation regarding the capacity of the 43 EU sectoral social dialogue committees to negotiate – provided that relevant information was given – is much more heterogeneous than in the cross-sector social dialogue. In its work programme for 2016, Eurofound proposed a new project aimed at a mapping exercise of the mandates given to the European social partners in their statutory or non-statutory documents. In the preparation of this project proposal, the mandate of the European social partners was provisionally mapped by analysing their statutes in as far as they are publicly available or transmitted to Eurofound (the list of the European Commission includes 69 employer organisations and 18 trade union organisations). Up to mid-November 2016, the statutes and rules and regulations of the vast majority of EU-level social partner organisations listed by the European Commission as organisations to be consulted under Article 154 TFEU were checked (see European Commission, undated; European Commission, 2015, p. 4). In line with the methodology set out on the Representativeness studies section on Eurofound's website, organisations were only considered to have a 'statutory mandate' when a specific formal mandating

procedure for the purpose of negotiations in European social dialogue (Articles 154 and 155 TFEU) were contained in its statutes.⁴⁷

As a first step, it was possible to map all 87 EU-level social partners organisations in a preliminary step. As Table 7 shows, at least nine employer organisations and 10 trade union organisations have a statutory mandating procedure.

- Employer organisations with a statutory mandating procedure: BusinessEurope, EBF, via the Banking Committee for European Social Affairs, European Broadcasting Union (EBU), European Club Association (ECA), ECEG, EFEE, Eurociett, HOSPEM and UEPG).
- Trade union organisations with a statutory mandating procedure: ETUC, Eurocadres, EAEA, EFBWW, EFFAT, EPSU, ETF, FifPRO, IndustriAll and UNI-Europa.

In addition, the statutes of at least seven employer organisations and three trade union federations also remit to non-statutory rules – internal rules of procedure, guidelines, or any other kind of secondary (formal) documents – containing or completing mandating procedures.

- Employer organisations that follow non-statutory rules: CEEP, UEAPME, CEEMET, GEOPA-COPA, ECEG, EFEE, IMA and Insurance Europe.
- Trade union federations that follow non-statutory rules: Eurocadres, EFBWW, EFFAT and ETF.

In total, at least 19 European social partner organisations (9 employers and 10 trade unions) out of the 87 for which data is available dispose of a statutory mandate. At least 10 European social partner organisations (seven employers and three trade unions) dispose of a non-statutory mandate. Three trade unions and two employers dispose of a statutory and non-statutory mandate. In sum, at least 24 European social partner organisations have a statutory and/or non-statutory mandate. At least 42 employer associations and seven trade unions seem to be in a position to obtain an ad hoc mandate of their affiliates or dispose of other procedures, e.g. rules of procedures of the committee. Some of these organisations have signed European framework agreements on the grounds of Article 155 TFEU in the past. Eurofound hopes to be able to provide more complete information on the EU-level social partners' mandate by the end of 2016.

47 <http://www.eurofound.europa.eu/representativeness-studies-methodology>

Table 7: Overview of mandates of the EU social partners to negotiate

Mandate	Statutory		Non-statutory	Ad hoc/other procedures	
Employers	BusinessEurope EBF European Broadcasting Union European Club Association ECEG EFEE Eurociett/World Employment Confederation-Europe HOSPPEM UEPG		CEEP UEAPME ECEG EFEE GEOPA-COPA IMA Europe Insurance Europe	AER CANSO CEC CEEMET CEI-Bois CER CoESS Coiffure EU Confederation of European Paper Industries Cotance EACB EBF ECSA EFCI EPFL ERA ESBG ESO ETNO ESPO Euracoal	Euratex Eurelectric EuroCommerce Eurofer Eurogas Euromines European Barge Union European Coordination of Independent Producers Europêche FEPOR FIAPF FIEC FoodDrinkEurope FoodServiceEurope HORTREC Intergraf IRU PEARLE* Posteurop SEA Europe UEA
Total employers	9		7	42	
Trade unions	ETUC Eurocadres EAEA EFBWW EFFAT	EPSU ETF FifPRO industriALL UNI	EFBWW EFATT ETF	CEC Eurocadres ECA CESI	EFBWW FIA FIM
Total trade unions	10		3	7	
Total	19		10	49	

Source: Eurofound data on the basis of statutes/non-statutory rules and regulations submitted or representativeness studies (as of 13 December 2016).

Representative of ‘all Member States, as far as possible’ / ‘of several Member States’

Geographical coverage as a criterion of defining representativeness evidently plays a much less important role at national than at European level. The national correspondents identified only four Member States in which this was the case: Bulgaria, Hungary (trade unions only), Poland (employer organisations only) and Slovakia (employer organisations only). The territorial dimension, however, also plays a certain role in countries like Belgium and Spain, in which regional elections are held for trade union representation.

With regard to the geographical coverage that European associations must have in order to be regarded as representative, there is also a distinction made between the COM(93)600, COM(98)322 and the decision annexed to the latter COM: 98/500/EC. In relation to geographical coverage, the two communications require the EU-level social partners to be ‘representative in all Member States, **as far as possible**’ [emphasis added], whereas the decision only requires the sectoral social partners to be ‘representative of **several** [emphasis added] Members States’.

The differences between the 1993 and 1998 communications and the 1998 decision may be explained by the fact that the two communications and the decision spell out criteria for different phases of the European social dialogue. According to the European Commission, the criteria of COM(93)600 are set out for organisations that are ‘potentially eligible to be consulted’ (European Commission, 1993, p. 5). The same criteria, which are reproduced in COM(98)322, are aiming at the organisations’ ‘participation in the different form of social dialogue’ (European Commission, 1998a, p. 6). When it comes to the setting-up of social dialogue committees, Commission decision COM(98)500/EC applies. Once the social partners start their negotiations, experts propose that the principle of ‘mutual recognition’ is now applicable and the Commission stresses the ‘autonomy of the social partners’ in this phase (European Commission, 1993, p. 15). The autonomy of the social partners, however, comes to an abrupt end, once the consultations lead to agreements to be implemented by the Council decision on the request of the social partners (Bercusson, 1999, p. 160). At this point, the criteria of the Court of First Instance are applicable, stating that the social partners, taken together and having regard to the content of the

agreement in question, are sufficiently representative in light of the UEAPME judgment. In a number of recent proposals for Council directives, however, the Commission also cited Commission decision 98/500/EC as a frame of reference (European Commission, 2005, p. 3; 2009a, p. 7; 2014, p. 7; and 2016, p. 6).

In the explanatory memorandum of its 2000 proposal for a Council directive concerning the European agreement on the organisation of working time of mobile workers in the civil aviation sector, the European Commission assessed the representativeness of the signatory parties for the first time as regards a sectoral agreement, yet in very brief terms:

The Commission has drafted its proposal for a Directive, in accordance with its communication of 20 May 1998 on adapting and promoting the social dialogue at Community level, taking into account the representative status of the signatory parties and the legality of each clause of the Agreement.

(European Commission, 2000, p. 169)

It is interesting to note that this is the only Commission proposal for which the frame of reference was the 1998 Communication and not Decision 98/500/EC.

In its 2005 proposal for a Council directive on the agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services, the Commission assessed the representative status of the signatory parties in great detail, since three organisation of the sector were claiming that they had not been invited to participate in

the negotiations. Here again the frame of reference for assessing the representativeness of the actors in question was the Commission decision of 20 May 1998.

In its 2009 proposal for a Council directive implementing the framework agreement on prevention from sharp injuries in the hospital and healthcare sector, concluded by HOSPEEM and EPSU, the European Commission drew the following conclusion with regard to the signatory parties:

The European social partners' ability to be consulted and to negotiate agreements depends on their representativeness. One of the criteria defining that ability in Commission Decision 98/500/EC of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level states that they 'shall consist of organisations which are themselves an integral and recognised part of Member States' social partner structures and have the capacity to negotiate agreements, and which are representative of several Member States.

(European Commission, 2009a, p. 7)

In its 2016 proposal for a Council directive implementing the agreement concluded between the General Confederation of Agricultural Cooperatives in the European Union (Cogeca), the ETF and the Association of National Organisations of Fishing Enterprises (EUROPÊCHE) of 21 May 2012, the European Commission states, 'In accordance with Article 1 of Commission decision 98/500/EC of 20 May 1998, social partners at the European level should fulfil the following criteria' (European Commission, 2016a, p. 6).

Frames of reference for representativeness

1. **Setting up of the European sectoral social dialogue committees (legal conformity):** on the basis of Commission decision 98/500/EC and on the basis of the Eurofound representativeness studies.
2. **Consultation based on legal conformity:** representativeness by accreditation of the Commission on the basis of the representativeness criteria as elaborated in the COM(93)600 final and COM(98)322 final and on basis of the Eurofound representativeness studies.
3. **Negotiation based on mutual recognition/bargaining autonomy:** representativeness by mutual recognition as described by academics (Lhernould, 2008, pp. 36–37; Mazuyer, 2007, p. 128; Reale, 2003, p. 12; Hecquet, 2007, p. 63) and based on the bargaining autonomy of the social partners (European Commission, 1993, p. 15).
4. **Implementation of European framework agreements by Council decision:** representativeness assessed in light of the UEAPME judgement: 'whether, having regard to the content of the agreement in question, the signatories, taken together, are sufficiently representative (T-135/96, 2335, para. 90), in light of COM(98)322 (only for European Commission, 2000, p. 169), decision 98(500)EC (European Commission, 2005, p. 3; 2009a, p. 7; 2014, p. 7 and 2016a, p. 6)' and on basis of the Eurofound representativeness studies.

A more precise definition of the terms ‘all Member States, in as far as possible’ and ‘several Member States’ could possibly foster the democratic legitimacy of the EU sectoral social dialogue. What follows is a discussion of the arguments in favour of and against having a more precise definition of the criteria ‘all Member States, in as far as possible’ (COM(93)600 and COM(98)322 and ‘several Member States’ (in Commission Decision 98/500/EC).

On the one hand, the criterion of membership is one of the most important criteria to establish representativeness at national level, according to the principle of legal conformity. As mapped in the second chapter of this report, the legislation of 23 EU Member States contains one or more criteria of membership/density/coverage figures for employer associations and/or trade unions at different national levels (see Table 3). Casale remarked, rightly, that in practice these membership figures are often not so important, as they are ‘usually not officially verifiable’ (1996, p. 11). It is also interesting to note that statutes of at least five Member States (Finland, Germany, Latvia, the Netherlands and Portugal, see Figure 1) contain provisions subjecting the extension of social partner agreements by the national governments to majorities of between 50% and 55%. As early as 1922, the Permanent Court of International Justice concluded that the most representative organisations for this purpose were those that best represented the employers and the workers respectively and that the national governments had the duty of deciding what organisations were the most representative. Eighty years later, the High Level Group on Industrial Relations and Change in the European Union, under the lead of Maria João Rodrigues (in the role of Chair), proposed a list of indicators by means of which the quality of industrial relations could be benchmarked. Indicator 12 reads, ‘highly-representative social partners, i.e. partners able to represent **most** [emphasis added] employers and employees, either through direct membership or via other channels (e.g. support in industrial action)’ (European Commission, 2002d, p. 39). As shown above, both the CEACR and the ECHR have postulated that criteria of representativeness need to be objective, precise and predetermined. If European social dialogue was governed by more precise thresholds on the above, this would contribute to more objective, transparent and predictable processes. At the same time, more concrete thresholds might incentivise the existing as well as new actors to strive for a larger membership basis. Applying certain thresholds (such as having members in 50% of Member States in which the sector is present or each side of industry taken together representing via its affiliates at least 50% of the sectoral employment), a European representative organisation should be largely present across the EU. This means that it must have member organisations at the appropriate, relevant negotiation level in at least three-

quarters of the EU Member States and be seeking to be represented in the others’ (EESC, 1997, 1.8; Franssen, 2002, p. 91) might lead to more objectivity, precision and transparency of the assessment. In the past, the Commission has on occasion, for example, resorted to employment data in order to distinguish between the most representative social partners and less representative ones in a given sector.

In its 2005 proposal for a Council directive on the agreement between the CER and the ETF on certain aspects of the working conditions of mobile workers assigned to interoperable cross-border services, the Commission assessed the representative status of the signatory parties in great detail, since three organisations of the sector were claiming that they had not been invited to participate in the negotiations. In the assessment of the representativeness of the actors in this sector, the Commission took the employment figures of the concerned organisations into account.

According to the Court, the Commission and the Council are obliged to ascertain whether, having regard to the content of the agreement in question, the signatories, taken together, are sufficiently representative (point 90). It should be emphasised that the three organisations in question are not, so far, regarded as representative of the sector and are therefore not consulted by the Commission under Article 138 of the Treaty. ... [I]t can be estimated that the total number of mobile workers in the sector constitutes approximately 20% of the total workforce, i.e. approximately 210,000 persons, of whom about 12% are assigned to interoperable cross-border services (25,000 persons). As regards the employers, the CER employs almost 95% of the entire workforce. The ETF represents some 80% of the workers who are members of trade unions. The total number of train drivers in the EU of 25 Member States is estimated to be around 133,000.

(European Commission, 2005, pp. 3–6)

In its 2016 proposal for a Council directive implementing the agreement concluded between the General Confederation of Agricultural Cooperatives in the European Union (Cogeca), the ETF and the Association of National Organisations of Fishing Enterprises (EUROPÊCHE) concerning the implementation of the Work in Fishing Convention, the Commission, again, took employment figures into account for its assessment.

Considering the membership of both Cogeca and Europêche, it means that on the employers’ side, altogether 16 Member States are represented in the committee. On the workers’ side, ETF has membership related to sea-fisheries in 11 Member States. This leaves fishermen in 11 Member States not represented. However, according to the employment figures for the sector, for most of these countries the numbers of employees are around 1,000 workers (in

most of these Member States, employment is considerably lower). While Ireland, Greece, Romania and Sweden have more than 1,000 fishermen, a very large share of them are self-employed. In conclusion, with the exception of Portugal and Romania, there are no Member States where employer organisations active in sea-fishing are not represented at European level, taking into account that the sector is relatively small in Romania. The eight Member States which make up 84% of the sector in total employment terms and 87% in terms of full-time equivalent are represented within the EU social dialogue. This leads to the conclusion that the social partners who have signed the Agreement are representative of the sector and can therefore request the Commission to implement it in accordance with Article 155 of the TFEU.

(European Commission, 2016a, p. 6)

Finally, some authors, such as Hecquet, also argue in terms of the efficiency and effectiveness of European social dialogue. The prerogative of the social partners to step in as legislators under Article 155 TFEU should only belong to the most representative organisations, those able to prove their sufficient degree of representativeness: *'Il serait contraire à la finalité de la représentativité d'admettre un nombre très large d'organisations aptes à engager une négociation. En effet, l'objet de la fiction juridique que constitue la représentativité est la recherche de l'efficacité décisionnelle'* (Hecquet, 2007, pp. 62–63).⁴⁸

On the other hand, more concrete thresholds with regard to the membership criterion also bear certain risks. First of all, one might argue that every threshold is arbitrary to some extent. Should one distinguish a presence in large Member States from one in smaller ones? Some sectors are only present in a limited number of Member States. Should one take employment figures into account? What about sectors with a high level of self-employment? Too strict criteria might exclude a number of actors, especially new ones, from the process. This might lead to less effective European social dialogue committees in terms of scope and output.

When more restrictive criteria were introduced at Member State level in the wake of the economic crisis, this was often criticised by international organisations, such as the ILO and the Council of Europe. In 2014, for

example, the CEACR issued its opinion towards Hungary.

The Committee previously requested the Government to indicate in its next report any measures taken or contemplated so as to lower the 65 per cent requirement set out in the Labour Code, as well as to ensure that, where no union represents 65 per cent of the employees in a bargaining unit, collective bargaining rights are granted to all unions in the unit, at least on behalf of their own members. The Committee notes the Government's indication that trade unions will no longer need to represent 65 per cent of the workforce in order to be able to engage in collective bargaining.

(ILC, 2014, p. 122)

Finally, the reliability and validity of the indicators, as well as the quality of the data used, might not always be given. In the UEAPME case, for example, the CFI argued the following.

In the first place, they are all based on a single criterion, namely the number of SMUs represented respectively by the applicant and UNICE. Even if that criterion may be taken into consideration when determining whether the collective representativity of the signatories to the framework agreement is sufficient, it cannot be regarded as decisive in relation to the content of that agreement. ... [A]mong the SMUs represented by the applicant ... (5,565,300 according to the table set out in Annex I to the reply; 4,835,658 according to the table set out in Annex I to the rejoinder, supplemented by the applicant's replies to the written questions put by the Court of First Instance; and 6,600,000 according to the applicant's oral statements at the hearing), a third (2,200,000 out of 6,600,000, according to the applicant at the hearing), perhaps as many as two-thirds (3,217,000 out of 4,835,658, according to the table set out in Annex I to the rejoinder) of those SMUs are also affiliated to one of the organisations represented by UNICE.

(T-135/96, 2335, para. 102/103)

Following on from the above, a number of scholars argue that quantitative criteria were not used by the Court of First Instance in its assessment of the representativeness of the signatory parties of the parental leave agreement in the UEAPME case. The Court had given more space to the assessment of whether the interest of small-and-medium enterprises had been taken into account than to the actual number of members represented by the signatory parties (Hecquet, 2007, p. 71; Bercusson, 1999, p. 57, Moreau, 1999, p. 58).

⁴⁸ ['It would be contrary to the purpose of representativeness to allow a very wide number of organisations capable of entering into negotiations. Indeed, the aim of the legal fiction of representativeness is the search for efficiency in decision-making'].

As demonstrated in chapter 1 of this report, there is also still a large variety of legal frameworks and elements defining the concept of representativeness at national level. As far back as its first Communication in 1993, the Commission echoed this variety in the following terms:

a) The diversity of practice in the different Member States is such that there is no single model, which could be replicated at European level, and ...;

(b) The different Member States' systems having all taken many years to grow and develop, it is difficult to see how a European system can be created by administrative decision in the short term.

(European Commission, 1993, p. 22)

In the declaration on a new start for a strong social dialogue of 26–27 January 2016, the EU-level social partners claim that, 'social dialogue requires social partners that are strong, representative, autonomous, mandated and equipped with the capacities needed'. The issue of representativeness and the question of whether or not more precise criteria are needed might be a topic of discussion for the two sides of industry in the future.

Cross-sector social dialogue

With regard to cross-sector social dialogue, the European Commission criterion related to geographical coverage claims that the relevant EU-level social partners have to 'consist of organisations, which ... are representative of all Member States, as far as possible'. On the basis of the analysis of representativeness of the EU cross-sector social partner in this paper, it can certainly be claimed that this criterion is fulfilled and, for the time being, does not need any further specification.

The European social partners currently involved in cross-industry social dialogue affiliate the great majority of national organisations that have a role in cross-industry industrial relations in the EU28 Member States and cover about 90% of member employees and firms. Specifically, the national members of ETUC, Eurocadres and CEC organise 91% of all employees and the national affiliated organisations of BusinessEurope, UEAPME and CEEP organise 85% of firms, which employ 89% of workers. It should be noted that ETUC and BusinessEurope are the only organisations with affiliated members in each of the 28 Member States under scrutiny. Together, ETUC, Eurocadres, CEC and BusinessEurope, UEAPME, CEEP cover three-quarters of the national social partner organisations that participate in cross-industry industrial relations across the EU. They also affiliate, through their national members, the great majority of unionised workers and firms affiliated to employer associations. With their specificities in terms of representation, according to the result of this Eurofound study, they are to be regarded as the most important EU-wide representatives of labour and management at cross-industry level that are

also present in all Member States, as far as possible (Eurofound, 2014a).

Sectoral social dialogue

In sectoral social dialogue, the picture is much more varied and complex. As of June 2016, there are 43 sectoral social dialogue committees. On the management side, there are 65 sectoral organisations representing employers, while 15 sectoral European trade union organisations represent the interests of workers. In a few sectors, for which Eurofound conducted representativeness studies very recently, some of the actors only have a limited geographical coverage; for example, with affiliates in eight to 10 EU Member States. Thus, a question may be raised. If these organisations fulfil the European Commission criterion that the relevant EU-level sectoral social partners must 'representative of **several** [emphasis added] Members States', what does 'several Member States' mean in the context of European sectoral social dialogue? If a sectoral organisation is to be present in several Member States, from which geographical coverage onwards is this criterion fulfilled? Does one have to take the size of the sector or the number of members in these States into account? What if certain sectors are hardly present in some Member States, such as shipbuilding and sea fisheries in Austria and Luxembourg, or railways and textiles in Cyprus and Malta?

Academia has long called for a stricter application of quantitative criteria for some time: '[I]t might be better to have recourse to quantitative criteria, and verify the number of enterprises (or of workers) which are represented by the signing organisations' (Adinolfi, 2000, p. 176). Milman-Sivan forwarded the idea that 'membership of the European organisations should be spread as equally as possible with members in at least three-quarters of the EU Member States' (Milman-Sivan, 2009, p. 313, footnote 5).

Analysis of the criteria of representativeness, as laid down by both the ILO and the Council of Europe, reveals that the following set of criteria is used by both organisations. Criteria of representativeness as upheld by the CEACR from 2013 until 2015 consists of the elements; they need to be:

- a) objective;
- b) precise; and
- c) predetermined (ILC 2013, p. 152; 2015, p. 59).

From 2006 onwards, the ECSR argued that in order to be compatible with Article 5 of the charter, criteria of representativeness need to be:

- a) reasonable;
- b) clear;
- c) predetermined;
- d) objective;
- e) laid down in law; and

- f) subject to judicial scrutiny (Council of Europe, 2008, p. 51; ECSR, Conclusions XV-1, France, pp. 240–250; Luxembourg, 2006; Belgium, 2010; Bulgaria, 2010; Spain, 2010; France, 2010; Malta, 2014; the Netherlands, 2014).

These criteria are common to both the CEACR and the ECSR; that they must be:

- a) objective; and
- b) predetermined.

A third category is

- c) precise / clear.

The ECSR goes beyond the criteria of the CEACR with the following:

- a) laid down in law; and
- b) subject to judicial scrutiny.

In 2010, the ECSR further specified that:

- a) decisions on representativeness must not present a direct or indirect obstacle to the founding of trade unions (ECSR; AD, 2014; AM, 2014; MT, 2014; RU, 2014);
- b) areas of activity restricted to representative unions should not include key trade union prerogatives (ECSR, Conclusions XV-1 Belgium; GE, 2010; UA, 2010; GE, 2014; MT, 2014; RU, 2014);
- c) the application of criteria of representativeness should not lead to automatic exclusion of the small trade unions or those not long formed, to the advantage of larger and longer-established trade unions (ECSR, UA, 2010; NO, 2013; AD, 2014; AM, 2014; RU, 2014).

On the basis of the above findings, in particular those of the Eurofound representativeness studies, the UEAPME case T-135/96, the Advisory Opinion of the Permanent Court of International Justice (PCIJ 1922 B01), conclusions of the Committee on the Application of Conventions and Recommendations (ILO) and of the European Committee of Social Rights (ECSR) (Council of Europe), Eurofound may want to make a better distinction, in the conclusions of its future representativeness studies, between the most representative and representative social partner organisations. It may also want to more clearly identify the actors whose status as representative organisation might give rise to doubts in light of the European Commission criteria.

Organisational capacity

The last criterion of the 1998 decision stipulates that relevant EU-level social partners must ‘have adequate structures to ensure their effective, in the consultation process’ (European Commission, 1993; 1998). Scholars argue that representativeness not only depended on quantitative criteria (such as density rates) but also on

the internal functioning and capacity of the two sides of industry involved (Milman-Sivan, 2009, p. 330). The Commission is calling for adequate financial and human resources. This is a criterion which is currently not assessed at all in the Eurofound representativeness studies and, henceforth, could be integrated in future analyses. In 1995, some academics proposed that an independent secretariat of the EU social partners or an autonomous department within ECOSOC be created (Bercusson and van Dijk, 1995, pp. 20–23). In times of tight public finances, both at national and EU level, this does not appear to be a viable solution. In addition, for the sake of the autonomy of the EU-level social partners, it is far preferable for the respective interest associations to raise their own financial resources in order to strengthen their financial capacity. This funding can be complemented by subsidies and programmes stemming from the budget of the European Union.

Conclusion and outlook

Towards better links between levels?

A crucial element for effective European social dialogue is the articulation between the European and the national levels. One dimension of this issue concerns the relationships between the national affiliates of European trade unions and employer organisations and developments at EU level, viewed from a ‘bottom-up’ perspective. To what extent are national players aware of the European social dialogue, and what is their degree of interest in European affairs? What positions and strategies do they take on these subjects, and what resources do they have or not have for European issues? What kind of relationships do national players have with the European social partners?

If the legitimacy of European social dialogue and the role of autonomous processes in the Europeanisation of industrial relations are to be improved, top-down approaches that focus too strongly on institutional and technical dimensions at the EU level and neglect vertical and horizontal dynamics between the national and the European players should be avoided. The future of all forms of social dialogue at EU level is above all dependent on the social partners’ capacity to increase the articulation between their EU-level organisations and their rank-and-file at the national, local and company levels. Degryse and Clauwaert conclude that ‘if European social dialogue is to operate to the full, therefore, the EU and its Member States must support not only European social dialogue itself but also the national players and structures pursuing social coordination’ (2014). The most effective way by which the European Commission could fulfil its task of promoting the horizontal dialogue between management and labour at EU level is to provide balanced support for the vertical dialogue between their organisations at EU and national levels

(Eurofound, 2007). The European Commission recognised in 2010 ‘that there is a direct correlation between the effectiveness of national social dialogue and effectiveness at European level, and that each energises the other’ (European Commission, 2010).

Towards more institutional support and capacity building?

In the field of social dialogue, the number and scope of policy proposals also depends on whether the European Commission considers these initiatives to be a priority in the Union’s interests, and whether the administration is willing and able to use its political, human and financial resources to promote such an agenda. The European Commission’s progress in the field of social dialogue and industrial relations is also contingent on the degree of support from the other EU institutions and Member States, and on the position of the social partners. A survey carried out by Voss et al (2011) identified the need to strengthen the capacity and competence of European social dialogue structures, as well as the need for capacity building, mutual learning and exchange of experience of national social dialogue institutions. According to the report, numerous respondents from central and eastern European countries emphasised the positive effects and the added value of the European social partners’ initiatives to strengthen social dialogue and support the capacity-building process. Autonomous agreements constitute the biggest challenge for the social partners, as they have to ensure their timely and adequate implementation and subsequent monitoring at national level. Some actors and experts argued that the European social partners did not live up to their expectations in this respect and the question on how to impact on the affiliates in the course of the implementation process was one of the most challenging of the European social dialogue. In 2005, some scholars also expressed the view that a relaunch of social dialogue ‘involve(d) strong initiatives from the Commission. Without the driving force of the Commission’s initiatives, the European social dialogue (was) reduced to a study and discussion, in which the lack of interest (would) quickly dissuade people from taking part’ (Didry and Mias, 2005). This is why Bercusson interpreted the European social dialogue as an industrial relations process, characterised by ‘bargaining in the shadow of the law’ (1996). As shown in the box on page 53 ‘A new start for social dialogue’ the European Commission under President Jean-Claude Juncker is committed to the relaunch of social dialogue and a number of initiatives have already been started since the high-level conference in Brussels on 5 March 2015.

Towards more mutual trust?

Social dialogue is based on arguing and learning, which may lead to an aggregation and transformation of interests and preferences. The Val Duchesse origins of social dialogue created a dynamic by building up a trust relationship between the actors through better information about each other’s capacities as well as intentions and a commitment to engage in negotiations at EU level (see P. de Buck and B. Segol in European Commission, 2006). Past interviews with protagonists of EU-level social partner organisations have corroborated the thesis that ‘mutual learning’ is a key factor in the process of European social dialogue: the close involvement with policy networks results in a revised definition of interests and preferences. Thus, socialisation is an important factor in understanding EU social dialogue, as a multi-level and multi-actor polity. The European social dialogue not only fosters deliberation at EU level, but also at national level. This effect was empirically corroborated by Falkner’s analysis of the implementation of the directives on parental leave, part-time and fixed-term work in selected Member States. According to this study, the European social dialogue did impact positively on social dialogue at national level. In some cases, the European social dialogue even led to autonomous negotiations between the national social partners (Falkner et al, 2002; Welz, 2008). In the aftermath of the 2008 economic crisis, it may be time to revisit the spirit of Val Duchesse and rebuild a relationship of trust between the two sides of industry (Welz and Foden, 2015).

Towards more representativeness?

‘La représentativité est une fiction juridique’ (Hecquet, 2007, p. 64).⁴⁹

At European level, the issue of representativeness has been a conundrum of EU social policy since its inception in 1993. According to the Court of Justice of the European Union, it is the duty of the European Commission and the Council to verify the representativeness of the signatories to an agreement. Primary EU law never reverts to the notion of representativeness, and the Commission first used this criterion in its 1993 communication concerning the application of the agreement on social policy (European Commission, 1993) in annex 3 entitled ‘Main findings of the social partners’ study (Representativeness)’, where it defines criteria for representativeness in the consultation phase of social dialogue. Thus, ‘management and labour’ in the sense of Article 154 TFEU are to be understood as the European social partners, organised at cross-sector or sectoral level.

49 [‘Representativeness is a legal fiction’].

The Commission has drawn up a list of organisations it consults under Article 154 TFEU. This list, which is regularly revised, consists, at time of writing, of 87 organisations. This number amounted to 28 in 1993, at 44 in 1998, at 55 in 2002, at 60 in 2004 and at 79 in 2010 (European Commission, 1993–2010). Over the last 22 years, the total number of EU social partner organisations to be consulted by the European Commission under Article 154 TFEU has more than tripled. The European Commission only consults those EU-level social partners that fulfil the criteria laid down in COM(93)600 and COM(98)322. The setting-up of the sectoral social dialogue committees is also ruled by the legal conformity principle, since it is subject to hard EU law in the form of Commission Decision 98/500/EC. The negotiation phase of European social dialogue on the grounds of Article 155 TFEU is embedded to a large extent in the same principle of mutual recognition. Instead of the State determining which organisations may negotiate and sign binding agreements, mutual recognition involves self-regulation by the social partners. Legitimate or ‘recognised’ trade unions and employer associations create their own institutional fora within which they collectively bargain or consult on issues of mutual interest in the employment field. The autonomy of the social partners, however, comes to an abrupt end, once the consultations lead to agreements to be implemented by a Council decision on the request of the social partners (Bercusson, 1999, p. 160). At this point, the criteria of the Court of First Instance are applicable, stating that the social partners, taken together and having regard to the content of the agreement in question, are sufficiently representative in light of the UEAPME judgment. In a number of recent proposals for Council directives, however, the Commission also used Commission decision 98/500/EC as a legal frame of reference (European Commission, 2005, p. 3; 2009a, p. 7; 2014, p. 7 and 2016a, p. 6).

The study identified different frames of reference for the assessment of the representativeness of the EU social partners, as follows.

Setting-up of the European sectoral social dialogue committees (legal conformity): on the basis of the Commission decision 98/500/EC and on the basis of representativeness studies by Eurofound.

Consultation based on legal conformity: representativeness by accreditation of the Commission on the basis of the representativeness criteria as elaborated in the COM(1993) 600 final and COM(1998) 322 final and on basis of representativeness studies by Eurofound.

Negotiation based on mutual recognition/bargaining autonomy: representativeness by mutual recognition as described by academia (Lhernould, 2008, pp. 36–37; Mazuyer, 2007, p. 128; Reale, 2003, p. 12) and based on the bargaining autonomy of the social partners (European Commission, 1993, p. 15).

Implementation of European framework agreements by Council decision: representativeness assessed in light of the UEAPME judgment: ‘whether, having regard to the content of the agreement in question, the signatories, taken together, are sufficiently representative’ (T-135/96, 2335, para. 90), in light of communication (98/322) (only for European Commission, 2000, p. 169), decision 98/500/EC (European Commission, 2005, p. 3; 2009a, p. 7; 2014, p. 7 and 2016, p. 6) and on the basis of representativeness studies by Eurofound.

The Commission first used the concept of representativeness in its 1993 communication on the application of the 1992 agreement on social policy. Representativeness became the key issue of dispute in the UEAPME legal case in 1996. The European Court of First Instance (CFI) asserted that agreements reached through social dialogue – which are then transposed into directives – may be challenged on grounds of their democratic legitimacy. The CFI deemed this necessary, since the directive was not subject to scrutiny by the European Parliament (Eurofound, 2015c).

Due to the fact that the European social partners are not directly legitimised democratic European actors, the question about the source of their legitimacy in the framework of European social dialogue is a crucial one. Since under European social dialogue, management and labour have developed into co-legislators in the social policy field, the representativeness and mandate checks exercised by the European Commission are very important. Against the background of the principle of democracy, it is an essential condition that the signatory parties, which have concluded a European framework agreement, are representative and were adequately mandated by their national affiliate. Democratic legitimacy is, of course, more at stake when it comes to agreements to be transposed by Council decision than in relation to autonomous agreements. In light of the different legal frameworks for representativeness (COM(93)600, COM(98)322, COM(98)/500/EC), UEAPME Judgment (T-135/96, ECR II, 1998, p. 2,335)) for the different junctures of the European social dialogue, the question arises as to whether the transparency of EU social dialogue polity could be improved by harmonising these frameworks. Echoing the quadripartite statement ‘New start for social dialogue’ of 27 June 2016, the European social partners could discuss advantages and inconveniences of having a more precise, predictable and transparent concept of representativeness at European level.

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Annexes

Annex 1: Survey questionnaire

Annex 2: Supplementary tables

Annex 3: Supplementary figures

The annexes are published separately on the web page for this report at:
<http://www.eurofound.europa.eu/publications/report/2016/industrial-relations/the-concept-of-representativeness-at-national-international-and-european-level>

The representativeness of social partners provides legitimacy for their various roles in industrial relations, whether through the vehicle of social dialogue, collective bargaining or involvement in government policymaking or implementation. This report compares the different ways in which the representativeness of social partners is defined at national, European and international levels. It shows that representativeness has various meanings across the 28 Member States and Norway, with most countries featuring a combination of legal conformity and mutual recognition. Based on information provided by national correspondents in the 28 EU Member States and Norway, the report analyses the concept of representativeness at national level by reviewing key elements such as electoral success, organisational strength in terms of membership, and the capacity to negotiate. The final section turns to the methodology used by Eurofound to assess representativeness since 1996 and raises the question as to whether this approach should be refined or modified after 10 years of application.

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