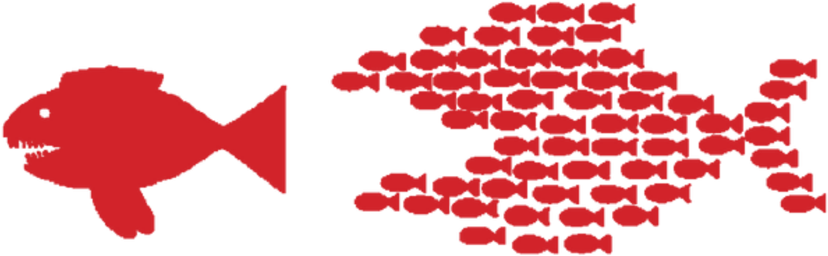
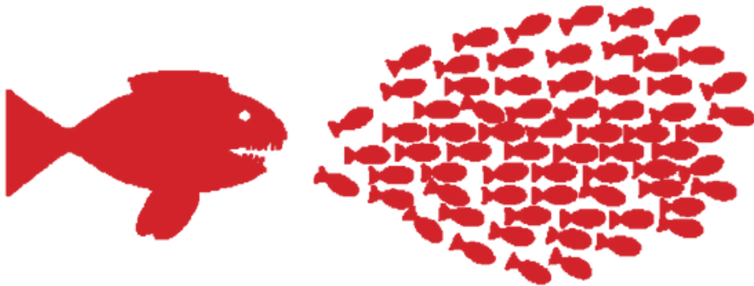
The EU Directive Collective Bargaining



OPPORTUNITY . . .



. . . OR THREAT?

Towards statutory Trade Union recognition

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Páirtí na nOibrithe
THE WORKERS' PARTY

Foreword

The impetus for this document arose from an interview given by Mr. Owen Reidy General Secretary of the Irish Congress of Trade Unions to the Industrial Relations News in November 2022. The interview covered a number of topics. These were, union recognition and collective bargaining, the EU Directive requiring all member states to ensure at least 80% of employed workers are coverage by collective bargaining, and the strategy Congress might adopt in negotiations with the Government and employers regarding the Directive's implementation.

We were disturbed by the general thrust of the interview and concerned that the strategy, apparently contemplated by Congress, would fall short of maximising the Directive's potential. Furthermore, we feared that acting on this putative or supposed strategy would in the long run damage the union movement and blight any prospect of trade union revival in the private sector.

Our fears and concerns contained in this document were communicated to the General Secretary by registered post in March of this year. To date we have received no acknowledgement or reply. This may be partly explained by the document's sharpness of tone. Needless to say it was sent with the best of intentions.

Part 1

EU Directive on adequate minimum wages in the European Union. Brussels COM (2020) 682 final.

What is an EU Directive? – It is a legislative Act which sets out a goal which all EU Member States must achieve. However, it is up to individual States to devise their own laws to reach this goal. Member States have two years in which to transpose a Directive into national law.

Origin of Directive on Minimum Wages and Collective Bargaining– It originated from the comprehensively failed promise of neo-liberalism that deregulated labour markets would deliver increased business efficiency, effectiveness and prosperity for all. As the Directive recognises "structural trends reshaping labour markets such as globalisation, digitalisation and the rise in non-standard forms of work, especially in the service sector, have led to increased job polarisation resulting in an increasing share of low paid and low skilled occupations, and have contributed to an erosion of traditional collective bargaining structures. This has led to more in-work poverty".

Who will be covered by Directive? – It will apply to all workers who have an employment contract or employment relationship as defined by law, collective agreements or practice in force in each Member State with the criteria established by the Court of Justice of the European Union for determining the status of a worker. Genuinely self-employed persons do not fall within the scope of Directive.

Goals or aims of Directive – Directive aims to ensure that all workers in the European Union are protected by adequate minimum wages allowing for a decent living where ever they work. To reach these objectives the Directive aims at promoting collective bargaining on wages in all Member States. This approach is taken because the countries with high collective bargaining coverage tend to have fewer low wage workers and high minimum wages. Consequently, the Directive requires all Member States, where collective bargaining coverage is below 80% of employed workers, to provide a framework for collective bargaining and establish an action plan to promote union recognition and collective bargaining.

What is Collective Bargaining? - A definition of collective bargaining is provided by the International Labour Organisation Convention No. 154 (Article 2) to which the Irish state is a signatory. 'All negotiations which take place between an employer, a group of employers or one or more employers' organisations, on one hand and one or more workers' organisations on the other. Furthermore, the ILO holds 'that collective bargaining cannot begin until a union is recognised for that purpose'. To meet the Directive's requirement of 80% collective bargaining coverage it seems the Irish state must actively facilitate workers seeking union recognition.

Workers in the Republic presently covered by collective bargaining – Union recognition in the Irish public sector is generally non-problematic. Not surprisingly collective bargaining coverage of 80% or more has already been achieved there. In the private sector union density, or the percentage of employed workers organised in independent unions, is at a historic low. Only about 15% of workers in that sector are organised in unions. If unorganised workers covered by Sectoral Employment Orders (SEO) are included then collective bargaining coverage may be a little over 20%. Obviously, any strategy to realise the Directive's requirements must focus on the private sector.

What is to be done? – How can trade unions maximise the positive potential of the Directive and avoid its pitfalls? Extending the operation of the Joint Labour Committees (JLCs) and associated SEOs is one method of increasing collective bargaining coverage. Unorganised and vulnerable workers in the private sector would benefit from predictable and standard wage setting. Wages negotiated by unions on a JLC would likely increase bringing them closer to the Directives target of establishing and maintaining a living wage. This would be a worthwile outcome. Yet as unorganised workers they would remain disenfranchised, mere passive beneficiaries or free riders. Within their individual enterprises they would exercise little if any influence on decisions affecting their daily working lives. Nonetheless some workers might willingly rest content satisfied with improved wages and conditions. Others however, who wish to organise and seek recognition might be dissuaded from such action by the existing and well documented formidable opposition from employers.

In the absence of an unequivocal right to recognition collective bargaining coverage might very well increase. Yet union density or the percentage of employed workers organised in unions might stagnate or decline. This has proved to be the case in France, Portugal and Spain. Union density in France is just under 11% while collective bargaining coverage is at 94%. In Portugal 74% of workers are covered by collective bargaining agreements but union density is just above 18%. Again, in Spain collective bargaining coverage amounts to 78% while union density is just under 19%.

A Dual Strategy? – These potentially negative outcomes can be avoided or at least minimised. This would involve the union movement adopting a dual strategy regarding the transposition of the EU Directive. The object would be to ensure the extension of collective bargaining coverage in the private sector through the JLCs does not grossly outstrip union density or the percentage of workers organised in trade unions. Ideally from a union perspective, union density and collective bargaining coverage should grow roughly in tandem. In the absence of an automatic right to recognition an approximation to this outcome is unlikely.

Finally, the oft cited supposed constitutional obstacles to union recognition are without foundation. Existing legislation already imposes a series of miscellaneous duties of consultation and recognition on employers. The Universities Act 1997, the Education Act 1998 and the Institutes of Technology Act 2006 are examples. The most unequivocal examples are the Railways Act of 1924 and 1933. These Acts require 'that all terms and conditions be negotiated between the employer and the trade union representing employees'; It is in short statutory recognition. Though these Act predate the 1937 Constitution they have gone unchallenged and so remain good law. While amended by section 46 of the Transport Act 1950 the provision remains that rates of pay etc. of CIE employees are regulated in accordance with agreements entered into by the company and the appropriate trade unions. Forms of statutory recognition in the public sector are, it seems, constitutionally sound. It would be difficult to convincingly argue that similar measures applied in the private sector would be constitutionally unsound.

Part 2

Industrial Relations News - Article

IRN INTERVIEW - IRN 42 - 17/11/2022

https://www.irn.ie/article/28944

Reidy seeks to grasp full potential of bargaining Directive, backs new compact

- Andy Prendergast

> Speaking to IRN this week, the new general secretary of ICTU, Owen Reidy, outlined his vision for leading the trade union movement in Ireland, discussing collective bargaining, social dialogue, union rationalisation and appealing to a new generation of workers. He also talked of his ambitions for the new Directive on Adequate Minimum Wages, which he described as the "most significant piece of labour legislation to come out of Europe" this century.

Owen Reidy, appointed general secretary of the ICTU last month, takes the reins of Congress at a pivotal time for trade unions, with a new consensus on collective bargaining in Ireland as well as new challenges, not least the current impact of inflation on workers and the housing crisis predominantly affecting younger workers.

Several developments, both national and international, may coalesce to present new opportunities for trade unions, which Mr Reidy is keen to grasp. These include how to utilise new laws to get a foothold in non-union companies and how to increase trade union presence in society.

There's "no appetite for centralised pay bargaining in the private sector at all."

"Public policy has clearly shifted, which is reflected in the LEEF High Level Group Report", said the ICTU general secretary, and quoted the Tánaiste, Leo Varadkar, who recently said that employers refusing to meet with trade unions "is not going to be sustainable into the future" (see IRN 40/2022).

Mr Reidy also picks up on the change in approach from Ibec, which now talks about "stakeholder value rather than shareholder value, a more social democratic approach. I wouldn't call it partnership – because that has other connotations – but working collaboratively and collectively in the interests of the common good."

He also points out the difference between trade union recognition and access to collective bargaining. "There's an appreciation to be had there over the distinction between the two and I actually think the latter [collective bargaining] is much more worthwhile than the former."

Mr Reidy succeeded Patricia King as the lead trade union figure in October. Prior to his appointment, Reidy served as ICTU assistant general secretary for six years.

The new ICTU leader cut his IR teeth with SIPTU in the 1990s, as an organiser in the west of Ireland, going on to represent members and organising workers in the aviation, insurance and finance, non-commercial semi states and cleaning and security sectors.

In 2013, he was appointed head of SIPTU's transport, energy, aviation and construction division (TEAC), where he was instrumental in resolving major disputes at Greyhound and Luas, as well as pay disputes at the CIE transport companies.

'PHENOMENAL' DIRECTIVE

Mr Reidy says the LEEF High Level Group report, published in October, was "excellent" and acknowledged the hard work that went into it by union officials, particularly by his predecessor, Ms King. He said the report "is an important legacy to Patricia" and he paid tribute to her for her work.

The High Level Group outlines four key areas for collective bargaining reform in Ireland: fixing the Joint Labour Committee (JLC) system to get them to operate as originally intended; using technical assessors in 'right to bargain' cases, taken under the IR Acts 2001-2015; developing a code of practice and enhancing training for enterprise level bargaining; and, arguably, the highlight: to introduce a statutory obligation on non-union employers to engage in 'good faith' with trade unions.

The Group's recommendations, which An Tánaiste Leo Varadkar said could be legislated for by next year, will likely be used by the government to transpose the aforementioned Directive. However, Mr Reidy says they are "two separate elements. The LEEF proposals have to be legislated for but the Directive is something more."

He points to the "expansive language" of Article 4 of the Directive in this regard, which has "a lot more than what's [covered] in the LEEF report."

"There may be some in the system who think: 'we've done the high level group report, that's our answer to transposing the directive'. I would say it certainly isn't. It's part of the story but it's certainly not the whole story. There will have to be two separate pieces of work."

Mr Reidy is a close observer of the Directive on Adequate Minimum Wages, which carries an obligation on Ireland to boost its collective bargaining coverage. He had been involved in the formation of the Directive, via his work with the European Trade Union Confederation (ETUC).

The Directive "is like a babushka doll when you open it up", he says. It has "more strings to its bow" than the High Level Group report. "I think it is the most significant piece of labour legislation, in a positive way, to come out of Europe in the last two decades. It's really phenomenal."

BRINGING PROPOSALS FORWARD

When both the High Level Group report is legislated for and the Directive is transposed, he said he hopes it would make it more difficult for "crazy litigation" from companies, who are "in many instances not real players in their industry [such as] in the security industry."

"Reactionary employers will have a go, but whether they get traction or make progress is the space we want to try and avoid with good transposition of the directive. You can't remove the threats of legal action – people have the right to go to court, companies and workers. It's whether they'll be more successful in the future."

The next step, he said, is how to bring the High Level Group proposals forward into law. While no one can be forced to make an agreement, in circumstances of non-engagement with unions there does need to be a level of compulsion in bringing parties together, he says.

He draws attention to the Circuit Court element for enforcing Labour Court determinations on 'good faith' engagement. If legislated as envisaged by the LEEF report, an employer who is found to have not engaged in good faith with a trade union and then fails to comply with a Labour Court determination, the Circuit Court can then force the employer to comply – and a failure to comply with a Circuit Court order would be an offence, attracting a pecuniary penalty.

This is similar to the provisions under the 'right to bargain' legislation (IR Acts 2001-2015), which is also due for revision, as per the LEEF report.

On a potential overlap between the new 'good faith engagement' avenue and the existing 'right to bargain' route, Reidy draws a distinction between the two, in that any 'good faith' dispute that would go to the Labour Court would be on procedural aspects only – not on the substantive elements, which is what the 'right to bargain' law deals with.

If a union is strong enough they "can have a go" but ultimately which route to take "will be a strategic choice for the given union", he said.

A NEW COMPACT?

Yet, he warns that the 'good faith' proposal "will not be the panacea" for the trade union movement. Trade unions will still have to "do the things they do and be creative [...] if we are to get this right, there will have to be a level of collaboration that is unprecedented", he says.

He said some see trade union recognition as a "comfort blanket" but for him, collective bargaining is the priority, not recognition. "What is mandatory union recognition? Would it mean a corollary of mandatory industrial peace, for example?"

He cited the example of the trade union recognition system in the UK, which he said is "useless [and] very few unions use it." Nevertheless, he wants trade union density to increase and he wants unions to have a stronger influence on society.

What he wants to see are significant collectively-bargained pay increases as well as "serious work" done on the social wage. The social wage is a "lever to combat inflation", he added.

"Post-pandemic people are realising that we need a bigger state [...] this now seen as a progressive, enlightened thing, not a throwback to the 1970s or the 80s. The State has to be adequately resourced."

On the tax base, he noted from ICTU's 2020 'No going back' publication, that Irish workers' income tax is around 97% of the EU average, but employers' PRSI is 48% of the EU average.

A new social compact "would be a good thing" but there is "no appetite for centralised pay bargaining in the private sector at all."

However, "as a key social partner we want to play a more central role in the socio-economic future of the State and the way to do that is to have deeper and more meaningful engagement with the government, and engaging with employers at the same time. Most European states do it; we don't. We had the Social Partnership process [...] but we need to avoid the situation where people think social partners make laws."

"It's up to the Government to decide if it's serious about this [a compact]."The Labour Employer Economic Forum "has its role and its benefits but trade unions would like to see more engagement in the output when it comes to public policy. There's 'consultation' and then there's 'serious meaningful engagement'."

"We're up for exploring something more meaningful, something deeper, as long as it doesn't try and rope in centralised pay bargaining in the private sector."

APPEALING TO YOUNGER WORKERS

One area of concern for Reidy is the potential for a 'brain drain' in Ireland, which may arise as a result of the ongoing housing crisis. The housing issue is a key focus for ICTU, which has formed a campaign called 'Raise the Roof' in cooperation with civil society bodies and political parties.

"We need to do something to restore the equilibrium" between generations of workers, he says. "The way to do that is through social dialogue, where each group can bring their analysis but to seek consensus on what are existential issues."

It has particular relevance for trade unions, given a younger generation of workers are expressing the strongest desire to be part of a trade union.

Mr Reidy points to the recent UCD report 'Employee voice in Ireland' by John Geary and Maria Belizón (see IRN 06/2022) which shows that non-unionised younger workers (aged 16-24) want to be represented by trade unions (66%), but this same age group report the lowest level of trade union membership (14%).

The ICTU general secretary said this is significant for the trade union movement, and will require a fresh approach to recruiting younger workers, to understand what this cohort are looking for.

UNION RATIONALISATION

On the subject of trade union rationalisation, Reidy said the 2011 ICTU Commission report (see Congress 2011, in IRN 26/2011) was "a compelling piece of work" which could serve as a template for building a trade union movement.

But in trying to get to a destination, it "took the motorway, and didn't bring people's hearts and minds [...] and I think we have to take the national road, or maybe even the regional road."

"Certain things happened, like the Nevin Economic Research Institute (NERI), a brilliant initiative to come out of that, but other initiatives just didn't happen for various reasons." He said trade unions now have to look at these things "in bite sizes."

He said there is willingness for unions to collaborate more on shared interests "and it is up to [ICTU] as we're trying to support trade union renewal, to make sure that a given affiliate looks and says, 'that's in the interests of our members'."

He cited the example of Fórsa, which merged IMPACT, PSEU, CPSU together, and noted that "none of them did it with their backs against the wall. We need to look at how they did that and learn from the process."

The ICTU private sector committee "is now a serious, bona fide committee" which can be used to move trade union renewal along, using a project-based approach, he said.

On pay guidance from the private sector committee, Reidy said that for next year there are many layers to consider. "If the committee comes up with a guidance – it's still an 'if' – it's going to have to be something that will be reviewed regularly throughout 2023, for obvious reasons."

Part 3

Law Library
Distillery Building
Dublin 7
Daryljames.DArt@lawlibrary.ie
6th. March 2023

Mr Owen Reidy, General Secretary
Irish Congress of Trade Unions
31/32 Parnell Square.
Dublin 1

Re: Industrial Relations News No 42. 17th. November 2022. 'Reidy seeks to grasp full potential of bargaining Directive, backs new compact'.

Dear General Secretary

My name is Daryl D'Art and I am a retired dues paying member of the Unite trade union. I am writing regarding your interview published in the Irish Industrial Relations News in November of last year. It sketched out the ICTU strategy on the EU Directive requiring 80% collective bargaining coverage and the prospect of a new social pact.

The interview was disturbing on a number of counts. In my opinion it set the union movement on course to repeat past errors, to act on baseless assumptions regarding employers and fall far short of maximising the positive potential of the EU Directive.

My concerns are laid out in attached document under a number of headings.

(1) Union Recognition and Collective Bargaining; two sides of the same coin.
(2) The Uselessness of Statutory Recognition?
(3) EU Directive and Collective Bargaining coverage of 80%
(4) An Attitudinal Revolution in IBEC?
(5) A Concession too far?

I am sure you are a very busy man. Hopefully you will have the time and inclination to read and consider the attached document.

In Solidarity

Dr Daryl D'Art Barrister at Law.

Re: Industrial Relations News No 42. 17th. November 2022. Reidy seeks to grasp full potential of bargaining Directive, backs new compact'.

(1) Union Recognition and Collective Bargaining two sides of the same coin.

In the above report the General Secretary pointed to a supposed difference between trade union recognition and access to collective bargaining. Having made this distinction he went on to claim 'that of the two collective bargaining is the priority not union recognition'. And he concluded, collective bargaining is the more worthwhile'. Union recognition on the other hand was characterised as a mere 'comfort blanket' . [1.]

To divide collective bargaining from union recognition and privilege one over the other is an egregiously erroneous distinction. It can only be productive of confusion. Not only in the movement as a whole but particularly for unions organising in the private sector. Making a distinction or separation between union recognition and collective bargaining runs directly counter to a common if not universal understanding that union recognition and collective bargaining are inextricably interlinked. In short one cannot exist without the other. This is evident when definitions of recognition and collective bargaining or pronouncements of the International Labour Organisation (ILO) are considered.

Union recognition and collective bargaining incorporate three essential complementary and sequential requirements. First, the existence of freedom of association or the right of workers to join an independent union of their choice. A second essential requirement is the willingness

1. Industrial Relations News (IRN) No. 42 17th.November 2022 'Reidy seeks to grasp full potential of bargaining Directive.

or an obligation on the employer to recognise the union. Union recognition is the formal acceptance by management of a trade union(s) as the representative of all or a group of employees for the purpose of jointly determining their terms and conditions of employment. Thirdly, only with the achievement of recognition can collective bargaining begin. Indeed, the ILO holds that collective bargaining cannot begin until a union is recognised for that purpose[2]. Finally, two unanimous judgements in the ECtHR have affirmed the inseparability of union recognition and collective bargaining. Freedom of association it held, encompasses not only the right to form and join unions but a concomitant and indivisible right to union recognition and collective bargaining .[3]

A definition of collective bargaining is provided by ILO Convention[3] No. 154 (Article 2) to which the Irish state is a signatory.

'All negotiations which take place between an employer, a group of employers or one or more employers' organisations, on one hand and one or more workers' organisations on the other for:

(a) Determining working conditions and terms of employment and/or
(b) Regulating relations between employers and workers and/or
(c) Regulating relations between employers or their organisation and a workers' organisation.

The above is an internationally accepted definition of collective bargaining. Evidently it requires an agreement between employer(s) and its employees' union representatives to engage in ongoing discussion/negotiations as the occasion demands. Consequently, collective bargaining must, by its nature, involve de facto or de jure union recognition. . There can be no separation between the two as they are interdependent and inextricably interlinked. For an employer to engage in

2. Collective Bargaining; A Workers' Education Manual International Labour Organisation Eleventh Impression Geneva 1978
3. Demir and Baykara v Turkey No.34503 ECtHR (2009)

collective bargaining involving, as it must, continuing face to face negotiation, consultation and joint decision making with a trade union but simultaneously deny it constitutes recognition could only qualify as delusionary. Ridiculous though it may be there is a real danger here. Separating recognition from collective bargaining could very well promote non-union collective bargaining.

I am sure the General Secretary will recall the Ryan Air case of 2007. The company was militantly anti-union. Its CEO boasted 'that hell would freeze over before Ryan Air recognised a union'. Not surprisingly he refused to recognise or negotiate with the pilots union. Nonetheless he claimed to carry on collective bargaining. To the dismay of the Irish trade union movement this claim was upheld by the Supreme Court[4]. It might appear to the superficial observer that the General Secretary has aligned himself with a failed anti-union blusterer.

(2) The Uselessness of Statutory Union Recognition?

In the above interview the General Secretary described the union recognition system in the UK as 'useless' and claimed 'very few unions use it'[5]. Certainly, some versions of statutory recognition are seriously defective. Indeed, the US system, on which the UK system is partially modelled, remains an exemplar of how not to proceed. The weakness of statutory recognition in the US and UK is that they are enabling provisions. Unlike the automatic provisions in Scandinavia, they do not guarantee recognition. Rather they provide for a series of procedural steps through which unions seeking recognition must progress. Successful progression will depend on meeting certain criteria. A requirement that opens the way for employer interference, wrangling as to the proportion of workers involved and the use of legal counsel and the courts. Our brothers and sisters in the US and UK seeking recognition remain mired in a swamp of procedural complexity and impeded by obstacles raised by the ingenuity of the employers' legal counsel.[6]

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4. Daryl D'Art and Tom Turner 'Ireland in breach of ILO Conventions on Freedom of Association claim academics' Industrial Relations News (IRN) No. 11, 21st.March 2007.

5. IRN No. 42 'Reidy seeks to grasp full potential of Directive 2022.

6. Daryl D'Art A World Still to Win: Union Recognition – a Constitutional and Human Right Workers Party Dublin 2021 see section 8.

In this jurisdiction section 14 of the Industrial Relations Act 1990 shows how procedural requirements by providing opportunities for employer intervention can work to disadvantage unions. Ostensibly the balloting provisions of section 14 of the Act laying out a set of procedural requirements were supposed to enhance the working of trade union democracy. In many cases legal challenges by employers, interrogating minutely the conduct and administration of the ballot, successfully halted the industrial action the ballot originally endorsed. The effect of section 14 is to subvert rather than enhance union democracy. Section 14 is but one among the many defects of the Act. Yet the 1990 Act was not a unilateral imposition by the state. Rather it was a result of negotiation and consultation between employers, trade unions and the state.[7]

Glass houses and foxes - Consequently, it ill becomes the General Secretary or the Irish trade unionists generally to be dismissive of the less than successful efforts of their US and UK counterparts to achieve a union friendly recognition process. This hubristic stone throwing from a large glass house stands condemned on two counts. First by the manifest failure of the Irish trade union movement, despite twenty years of effort, to secure legal support for recognition. In the late 1990s the first high level group was established to consider the question. Its origin lay in the intensifying opposition by employers to granting recognition and their general disregard of favourable but unenforceable Labour Court recommendations. For various spurious reasons the Group decided against a recommendation on recognition. Its deliberations took concrete form in the Industrial Relations (Amendment) Act 2001/4.[8] It was an innocuous piece of legislation whose insubstantiality was subsequently confirmed by the Supreme Court judgement in Ryanair. While Part 3 of the Industrial Relations (Amendment) Act 2015 corrected many of its deficiencies it left unresolved the question of statutory recognition. Apparently, the General Secretary's position on the recognition question is similar to that of the fabled fox who had his tail cut off. Bringing the consolations of philosophy to his aid that animal concluded that the tail

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7. D. D'Art Untying Workers' Hands: Trade Unions and the 1990 Industrial Relations Act Report commissioned by the Workers Party Dublin 2018
8. D'Art and Turner Union Recognition in Ireland: one step forward or two steps back Industrial Relations Journal 34:3 (2003)

was useless and he never needed it anyway - a mere adornment or comfort blanket.

Missed opportunity - Secondly abandoning the pursuit of legal support for recognition could be charitably defended as pragmatic defeatism. Yet it throws away the new opportunities presented by the proposed European Directive on minimum wages. A central focus of that Directive is the achievement of 80% collective bargaining coverage and the question of union recognition. The establishment of the second High Level Group was a direct response to that Directive. Among its terms of reference, the first item required the Group to examine the issue of union recognition. Despite its prominence the recognition issue was given short shrift.[9] The usual tired old threadbare and insubstantial impediments, supposed constitutional difficulties and the voluntarist tradition etc., were again deployed. No more was heard on the recognition question.

This outcome amounts to an inexplicable failure by the Group's union representatives to exploit substantial bargaining advantages and negotiate from a position of strength. These advantages were provided not only by the Directive itself but by the prominence accorded to the union recognition question in the Group's terms of reference. An additional advantage was provided by the ECtHR judgement in Demir which reinterpreted or expanded the meaning of freedom of association.[10]

Formerly, like the Irish courts, the ECtHR had held that the right of workers to bargain collectively and enter into agreements with employers did not constitute an inherent element of freedom of association. These judgements the court decided should now be reconsidered. A human right, the court held, must be interpreted in a manner 'that renders the right practical and effective not theoretical and illusory'. Consequently, the court concluded that the right to bargain collectively with the employer had become an essential element of freedom of association. A

9. Final Report of the LEEF High Level Working Group on Collective Bargaining.
10. Demir and Baykara v Turkey. See also D. D'Art 'Freedom of Association and Statutory Union Recognition; A Constitutional Impossibility? Irish Jurist 63 (2020)

year later Demir was cited in another unanimous decision of the ECtHR upholding the right to union recognition and collective bargaining as integral to freedom of association[11].

Ireland and Demir – The literal interpretation of Freedom of Association, namely that the right to form trade unions does not encompass a right to union recognition and collective bargaining has been comprehensively and unanimously rejected by the ECtHR. Though long applied by the Irish courts, this interpretation is now characterised by the ECtHR as 'theoretical and illusory' lacking in legal validity.[12]

According to the ECtHR a contracting state is obliged to take account of elements regarded as essential by that courts case law. Indeed, this is a requirement of section 4 of our European Convention on Human Rights Act 2003. However, when applying these principles, the Irish Constitution will have primacy. Thus, the Irish judiciary might be precluded by constitutional considerations from applying a purposive interpretation of Freedom of Association in which the right to recognition is the natural concomitant of the right to organise in unions.

Are there constitutional obstacles? – The short answer is no. The oft cited constitutional and other supposed obstacles - the employers property rights and right of dissociation, the so-called horizontal effect, the incompatibility with voluntarism, the possible disincentive to the States inward investment policy- have been considered at length elsewhere[13]. All were found to be without substance, mere paper tigers.

Even if the critique of the supposed constitutional and other obstacles is found to be defective it is of no consequence. Existing legislation already imposes a series of miscellaneous duties of consultation and recognition on employers. The Universities Act 1997, the Education Act 1998 and the Institutes of Technology Act 2006 are examples. The most unequivocal

11. Enerji Yapi-sol Sen v Turkey No. 68959//01 April 2009 ECtHR
12. Demir and Baykara
13. D'Art Irish Jurist (2020)

examples are the Railways Act of 1924 and 1933. These Acts require that all terms and conditions be negotiated between the employer and the trade union representing employees. It is in short, a form of statutory recognition. Though these Act predate the 1937 Constitution they have gone unchallenged and so remain good law. Though amended by section 46 of the Transport Act 1950 the provision remains that rates of pay etc. of CIE employees are regulated in accordance with agreements entered into by the company and the appropriate trade unions. Public sector workers benefiting from these provisions would likely be in sharp disagreement with the General Secretary were [14] he to characterise these forms of statutory recognition as 'useless' or 'comfort blankets'. Forms of statutory recognition in the public sector are, it seems, constitutionally sound. It would be difficult to convincingly argue that similar measures applied in the private sector would be constitutionally unsound.

Union Recognition a Constitutional and Human Right - Unlike their US and UK counterparts, Irish workers are fortunate in possessing a constitutional guarantee of Freedom of Association. This is particularly so in the light of the ECtHR rulings that freedom of association encompasses not only the right of workers to form and join union but a concomitant and indivisible right to recognition and collective bargaining. Yet these judgements were anticipated by the Irish Constitution Review Group Report of 1996. It briefly considered Art. 40.6.1 iii (freedom of association) and acknowledged that in the absence of a duty on the employer to recognise a union chosen by employees the constitutional right to Freedom of Association may remain illusory .[15] Union recognition it seems is an implicit or unenumerated constitutional right.

Given the absence of constitutional impediments the Irish state is under an obligation to uphold the European Convention on Human Rights provision and implement the judgements of its court. Consequently, the way is open for a legislative enactment on union recognition. Legislation

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14. D'Art Irish Jurist (2020)
15. Report of the Constitution Review Group (Dublin Stationery Office May 1996) p.316

enshrining a constitutional right to recognition would transcend the procedural complexity that render the recognition systems in the US and UK less than union friendly. It would confer on all organised workers, an automatic legal right to recognition. As a constitutional collective right, arbitrary requirements as to numbers or percentage of workers that must be met before workers in an individual firm can exercise the right would be impermissible. There is already in existence a Trade Union (Miscellaneous Provision) Bill 2017 that fulfils these requirements. Though now lapsed it remains a model of simplicity and elegance. It provided that an authorised trade union representing employees for collective bargaining shall be recognised by the employer. It would have established an automatic legal right to recognition when sought by the workers union(s). In that event the constitutional guarantee of freedom of association would become practical and effective and aligned with judgements in the ECtHR. It can still be done. Such a measure would minimise any potentially negative consequence of the EU Directive.

(3) EU Directive on Collective Bargaining Coverage of 80%

The General Secretary praises the proposed EU Directive on Minimum Wages and Collective Bargaining coverage as 'phenomenal' and describes it as 'the most positive labour proposal to come out of Europe in the last two decades'[16]. Few would disagree with this assessment. Yet it must be acknowledged that the Directive also contains potentially negative outcomes for unions in their role as a social movement. However, it remains to be transposed or given concrete effect in Irish legislation. The challenge is how or in what way can the positive potential of the Directive be maximised to benefit trade unions, their members the unorganised and society at large while simultaneously minimising its potentially negative effects.

Before considering possible approaches or strategies the union movement might adopt, some preliminary observations are necessary. First collective bargaining coverage of 80% or more has already been achieved in the public sector. Union density in the private sector is at a

16.IRN No. 42 Reidy seeks to Grasp --- 2022

historic low with about 15% of workers organised in unions. If unorganised workers covered by Sectoral Employment Orders are included then collective bargaining coverage may be a little over 20%. Obviously, any strategy to realise the Directive's promise must focus on the private sector. Secondly while the primary responsibility of a union(s) is to its members it must also strive to increase membership numbers. This will ensure survival along with increased influence and persuasive power when dealing with government and employers.

Possible Strategy 1 – Traditionally in these islands the extent to which workers were covered by collective bargaining depended on two principal factors. The number of workers organised in trade unions and their ability to secure recognition for collective bargaining. Extending collective bargaining coverage by this method had a number of beneficial effects. It facilitated unions at sectoral level or within the individual firm to negotiate for improved wages and conditions. Furthermore, it enabled union members within firms to collectively exercise ongoing, if modest influence, on managerial decision making affecting their working lives. Conceivably this enhances the democratic nature of a state. From a union perspective it seemed the ideal way to extend collective bargaining coverage.

Contemporary reality discounts such a strategy. The ingredients for its success – a strong confident union movement, willing and able to take solidaristic action in support of those striking for recognition – are in short supply. In any event strikes or industrial action in individual firms or solidaristic action supporting workers in other firms seeking recognition are hampered and hobbled by the 1990 Industrial Relation Act. It undermines the cardinal union principle of solidarity, an injury to one is an injury to all. In these circumstances and in the absence of legal support, an attritional campaign for recognition, even with the odd hard-won victory, is unlikely to meet with overall success[17].

17. D'Art 'A World Still to Win WP 2021 pp 98-9

Possible Strategy 2. - For once the Irish trade union movement is presented with a series of favourable conjunctures. Empowered by the judgements of the ECtHR, favoured by the Art. 40.6.1 iii of the 1937 Constitution and assisted by the EU Directive requiring 80% collective bargaining coverage the union movement is well positioned to seek an automatic legal right to recognition as both a constitutional and human right.

A strategy that simultaneously secures a right to recognition and extends collective bargaining coverage through the operation of the JLCs would have a number of beneficial effects. First, it would enable organised workers to secure recognition of their union for collective bargaining. A democratic decision that could not be set aside or overridden by superior employer power. Secondly, removal of the employers' veto might encourage more workers to join unions and seek recognition. This would automatically increase collective bargain coverage and contribute to meeting the Directives requirement of 80%. Of course, a minority of workers, motivated by anti-collectivist sentiment, extreme individualist orientation or crippled by apathy, may be content to remain non-union. Nonetheless they will benefit materially from the extension of collective bargaining coverage through the operation of the JLCs. Incidentally this might allay the cynically disingenuous concerns frequently voiced by neo-liberal economists regarding the wage differential between insiders (organised workers) and outsiders (unorganised workers). Overall successful implementation of this strategy would have a number of positive outcomes. In the private sector in particular union membership would very likely increase. Unorganised workers would benefit from the extension of collective bargaining coverage. In society at large the socially corrosive effect of atomistic individualism might be checked. Finally, it would enhance the democratic nature of the state.

Formidable obstacles stand in the way of these happy outcomes. The government, as presently constituted, may be reluctant or unwilling to legislate for a legal right to recognition. Opposition from organised

employers is very likely and they have an influential voice in the corridors of power. Such has always been the way. Yet there is no inevitability that the mistakes and failures of the past, the 1990 Act the partnership debacle, the inability to secure recognition, must be repeated. Indeed, in this particular instance the union movement leadership is in possession of substantial bargaining advantages which were noted above. These must be pressed home to ensure that the transposition of the Directive into Irish law provides for an automatic right to recognition. This can still be done.

Possible or Actual Strategy? 3. – It is not clear from the General Secretary interview what the actual strategy of Congress may be in shaping the Directive's transposition. One thing seems certain, it will not involve the pursuit of a legal right to recognition or 'mandatory' recognition as the General Secretary terms it[18]. Use of the word mandatory is most unfortunate. Employers and their spokespeople frequently attach the prefix mandatory rather than statutory when discussing recognition. It is designed to raise fears or discredit recognition as an imposition of collectivist tyranny[19]. The General Secretary then beats a hasty retreat from this position and concedes 'that there does need to be a level of compulsion in bringing the parties together'[20] Anyway, he continues, a union in the private sector seeking recognition can, if strong enough, 'still have a go'[21]. Of our weaker union brothers and sisters, unable to challenge employer intransigence on recognition, there is no mention and it seems no help.

The head spins at this contradictory and confusing position. Not surprisingly it infects what appears to be the actual Congress proposals on the extension of collective bargaining coverage. Apparently, it involves tinkering with previously ineffective legislation and more patchwork amendments. These involve strengthening the 'right to bargain' contained in the defective 2001/4 Act and sanctioning an employer who fails in

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18. IRN No. 42 Reidy seeks (2022)
19. D'Art 'The Spectre of Statutory Recognition – A Note on the Talismanic Words: 'Voluntarism' 'Voluntary' and 'Mandatory' used in its Exorcism' Irish Law Times No 10 2022.
20. IRN No. 42 Reidy (2022).
21. IRN No. 42 Reidy (2022).

‘good faith engagement’. The practical utility of a ‘right to bargain’ that excludes recognition is doubtful. As to ‘good faith engagement’ the difficulties with this concept are persistent and notorious. Beyond the tautological there is no authoritative or agreed definition of what constitutes good faith engagement. Consequently, a decision as to the presence or absence of good faith engagement becomes extremely problematic. For instance, an employer may willingly or otherwise meet with the union and patiently explain why, for various reasons, he/she cannot enter into discussion on pay, decision making or procedures. Could this be considered as good faith engagement?[22] The courts might become the ultimate arbiters of this conundrum.

The main thrust of Congress strategy to increase collective bargaining coverage is centred on enhancing the operation of JLCs and associated SEOs. Before examining possible outcomes of this approach, the contextual background should be noted. Since 2007 the volume of legal challenges by various employer groups against any collective regulation of the labour market either by the state or trade union has been remarkable . Nonetheless the General Secretary is confident that once the Directive becomes law ‘crazy litigation’ from such as the security industry employers will become more difficult.[23]Anyway, these employers he dismisses as ‘not real players.’[24] This may be mistaken. As ‘crazy litigants’, the security industry employers are not as isolated or unrepresentative as the General Secretary believes .[25]

The potential benefits of establishing 80% collective bargaining coverage are evident. Particularly so for unorganised and vulnerable private sector workers. They would benefit from predictable and standard wage setting. Also, wages negotiated by unions on a JLC would likely increase bringing them closer to the optimum of establishing and maintaining a living wage. These would be worthwile outcomes. Yet as unorganised workers they

22. Department of Trade Enterprise and Employment Public Consultation on Collective Bargaining Workers Party Submission 16th. June 2022. See our response to Principle Three ‘Good Faith Engagement at Enterprise Level’ pp 10-14 accessed at D’Art Research Gate
23. Dept. of Trade WP Submission. See our response to Principle One ‘Joint Labour Committees’ pp 3-7
24. IRN No. 42 Reidy etc.
25. See WP submission to Dept of Trade June 2022 - Principal One Joint Labour Committees pp 3-7.
Since the production of this document so called crazy litigants'. remain active. In October of this year, the High Court, on hearing an application from mechanical and building services employers, quashed the SEO covering over 10,000 plumbers and pipefitters. See IRN 36 12/10/2023.

would remain disenfranchised, mere passive beneficiaries or free riders. Within their individual enterprises they would exercise little if any influence on decision making affecting their daily working lives. Nevertheless, some workers might willingly rest content, satisfied with improved wages and conditions. Others however who wish to organise and seek recognition might be dissuaded from such action on three counts. First by strenuous objections and obstacles raised by the employer. Secondly by the challenges of successfully navigating the rigmarole and ambiguities surrounding the 'right to bargain'. Lastly by the difficulty of deciphering the theological mystery of 'good faith engagement'. In the absence of an automatic constitutional and human right to recognition this may be the result in many cases.

Pitfalls of Extending Collective Bargaining Coverage? - There is the possible, but maybe unintended consequence that the extension of collective bargaining coverage could function as a disincentive to unionisation. In France for instance collective bargaining coverage stands at 94%. Yet union density or the percentage of employed worker organised in unions is just under 11%. In Portugal 74% of worker are covered by collective bargaining agreements but union density is just above 18%. Again, in Spain collective bargaining coverage amounts to 78% while union density is just under 19%.[26] While these figures may suggest a negative connection between high levels of collective bargaining coverage and low levels of union density no definitive conclusion is warranted. Indeed, there may be other factors influencing this outcome. In the Scandinavian countries for instance the gap between collective bargaining coverage and union density is much less pronounced.[27] This may be ascribed to the institutional arrangements in these states dealing with worker employer relations in which union recognition is non problematic.[28]

26. Miguel Angel Garcia Calavia and Michael Rigby 'The Extension of collective agreements in France, Portugal and Spain' ETUI Transfer Vol. 26 (4) (2020).
27. See Appendix 1, Table 1 bottom of this document.
28. Claus Schnabel 'Union Membership and Collective Bargaining: Trends and Determinants' Institute of Labour Economics IZA DP No 13465 July 2020.

There is possibly an additional danger posed by a great disparity between high levels of collective bargaining coverage and low levels of union density. Undoubtedly a central concern of trade unions is the maintenance and improvement of wages and conditions. Yet in Western Europe at any rate trade unionism has broader objectives as a social movement. Generally, in capitalist democracies unions act to promote the values of social solidarity. They oppose a conception of society dominated by the calculus of profit and loss. In Britain and Europe trade unions in alliance with labour or socialist parties have been instrumental in the creation of welfare states. The ILO and the European Court of Human Rights have highlighted the vital contribution made by unions to social justice. By enhancing the democratic nature of the state, restricting abuse by the economically powerful, contributing to social justice and the common good unions produce socially beneficial outcomes[29]. Yet the probability of these outcomes being realised largely depends on the weight of union influence that can be brought to bear on employers and government. That in turn will be determined not by a high levels of collective barging coverage but by the percentage of workers organised in independent trade unions[30] Employers and government when considering union demands might sensibly ask how many battalions have the trade unions. If the answer is very few then it might become easy to ignore the demands of an unrepresentative interest group.

These potentially negative outcomes can be avoided or at least minimised. This would involve the union movement adopting a dual strategy regarding the transposition of the EU Directive. The object would be to ensure the extension of collective bargaining coverage in the private sector through the JLCs does not grossly outstrip union density or the percentage of workers organised in trade unions. Ideally from the union perspective union density and collective bargaining coverage should grow roughly in tandem. In the absence of an automatic right to recognition an approximation to this outcome is unlikely. Consequently, the union

29 D'Art 'A World Still to Win' WP publication July 2021 p.11.

30 France is an exception to this general rule. Despite extremely low levels of union density the union movement seems to be able to mobilize large numbers of workers. This may be due to the anarcho-syndicalist and revolutionary tradition. A tradition absent, in these islands.

movement could simultaneously pursue the extension of collective bargaining and union recognition. As shown above this is far from an impossible demand but supported by authoritative judgements from the ECtHR and implicitly by the Constitution. Government unwillingness and employer opposition may be taken as given but surely there is a duty on the union movement to at least table the demand for a right to recognition.

There is another way? - If there is a union reluctance to discommode the government and employer members on the 2nd. High Level Group by raising the issue of recognition there may be another way. It would involve taking a leaf from the employers' book and engaging in some 'crazy litigation' on or own account. Find an enterprise in which unionised employees have sought recognition from the employer and been refused. Such an enterprise would have to be chosen with great care as to the willingness, solidarity and number of union members. Then take a test case to the courts arguing that these union members have been denied their constitutional right to freedom of association as interpreted by the ECtHR. Powerful legal argument could be presented in support based on the ECtHR judgements and the Constitution itself. Admittedly union experiences with the courts have not been generally happy ones. Furthermore, the outcome of litigation is always difficult to predict. Nonetheless on this occasion much would be in the unions favour. Yet even defeat would simply preserve the status quo. Compared with the proposed referendum on recognition endorsed by the recent ICTU conference the litigation strategy suggested here would be risk free.

(4) An Attitudinal Revolution in IBEC?

Apparently, the General Secretary believes that IBEC is now adopting a more progressive approach to labour relations. In support he cites its emphasis on stakeholder value rather than shareholder value as indicative of a more social democratic approach. This is truly depressing stuff, bereft of any historical perspective. Since the 1980s talk of stakeholders rather than workers has figured prominently in the pages of every human resource text book. In many enterprises cynical blather around the stakeholder concept partly obscured vicious opposition campaigns against unions, some ending in de-unionisation. Similarly, the years of partnership were characterised by endless talk of stakeholders, new departures, harmony, cooperation and the transcendence of conflictual relations between labour and capital. Except for some senior union leaders few took it very seriously, least of all the employers[31]. Yet they were the chief beneficiaries of the process. Nonetheless, though ostensibly partners, employers mounted vigorous and sustained opposition to union recognition. By the end of partnership union density in the private sector had sunk to a historic low[32]. As the General Secretary notes there is now no appetite for centralised bargaining in the private sector. This is hardly surprising. Yet he wishes to believe that employers have changed their ways and are on the verge of becoming social democrats. The available evidence suggests the contrary. Employers remain unregenerate, faithfully attached to their old verities.

A recent lecture by Danny McCoy CEO of IBEC provides insight into employer responses to the Directive. He called for a new social pact and a move to stakeholder capitalism. The Directive, he suggested, presents society and employees with a choice; individualism or collectivism. If employees opt for recognition and collective bargaining it might engender a collectivist focus benefiting the group at the expense of 'superstar' deliverers. Alternatively, the individualist model of statutory rights and a determination to negotiate the best personal terms might prevail.[33]

31. D'Art and Turner 'Union Recognition and Partnership at Work: A New Legitimacy for Irish trade unions? Industrial Relations Journal 36.2 (2005). See also D'Art 'A World Still to Win' WP publication (2021) Section 3.
32. D'Art and Turner 'Irish trade unions under social partnership: A Faustian bargain? Industrial Relations Journal 42:2 (2011). See also D'Art 'A World Still to Win' (2021) Section 3.
33. Danny Mc Coy IBEC 'Collectivism in our Intangible Asset World' The 46th.Countess Markievicz Memorial Lecture Irish Association for Industrial Relations 19th. October 2022. pp 18-19

There is no sign here of burgeoning social democratic sentiment. Since the 19th. century employers have forcibly advised workers to shun the tyranny of collectivism and negotiate their own individual terms and conditions of employment. As to superstar deliverers, would they be the bankers and speculative property developers who delivered us all to the IMF? Stakeholder capitalism like the stakeholder concept is a creature of neo-liberalism. It was supposed to enhance worker and citizen control of privatised industries. In reality it involved massive transfers of wealth, formerly owned by the state and its citizens, to a few very wealthy individuals. Finally, the CEO of IBEC wrongly assumes that workers are free to choose collectivism or individualism. That would require an automatic right to recognition. Only then can workers freely choose to opt for individualism or collectivism.

IRN-CIPD Survey - Further insight into employer attitudes to recognition and collective bargaining is provided by the IRN-CIPD Pay and Employment Practices Survey of October 2022. In all 277 companies were surveyed of which 71% were non-union while 27% were unionised. In response to the question 'would you consider engagement with a trade union for collective bargaining' 74% of non-union companies said no. Only 2% of these companies answered in the affirmative. The remaining 24% were uncertain, answering don't know or maybe. Opposition to bargaining with trade unions is strongest among large-sized non-union companies (82%). Over 90% of non-union employers in the manufacturing sector and 70% of employer in the service sector do not want to bargain with unions. On the question of whether companies would consider non-union collective bargaining 60% of all respondents (union and non-union) said no while just 6% said yes. Less than 4% of non-union companies are interested in non-union collective bargaining.[34] In summary a majority of employers want nothing to do with unions irrespective of a 'right to bargain' or good faith arrangements. Taken

34. Industrial Relations News IRN No. 36 'Three-quarters of non-union companies do not want to bargain with unions' 6th. October 2022. See also Mary Connaughton 'Pay and Employment Practices in the private sector' CIPD Ireland 6th. October 2022.

together the above lecture and survey strongly suggests continuity not change in employer attitudes[35]. Evidently the General Secretary expectations of a new dawn in labour relations is without foundation. Any strategy based on such a fundamental misreading of the situation can only fail.

(5) A Concession too far?

The accommodating and concessionary strategy adopted by union leaders under partnership failed to evoke even the mildest of positive employer responses.[36] An unintended consequence was a sharp decline in private sector unionism. Nonetheless the General Secretary seems set to embark on a radically enhanced strategy of concession and accommodation. This is epitomised by his attempt to distinguish or separate union recognition from collective bargaining.[37] Apparently, the assumption is that collective bargaining, shorn of any obligation to engage directly with independent trade unions, will become more attractive to employers. Such an inducement, the above survey suggests, is destined to fail. An outcome for which all trade unionist should be grateful. Were the General Secretary project of separating union recognition from collective bargaining to succeed it could fatally undermine the concept of independent trade unionism. Potentially it could facilitate the return of house unions, creatures of the employer. This may be less than far-fetched. In the IRN-CIPD survey 12% of the companies who were already unionised said they would consider non-union collective bargaining.[38]

(5) Unasked Advice to the General Secretary.

Bear in mind your predecessor Mr. David Begg and his evaluation of partnership 'that it gave access but not a lot of influence'.[39] Refrain from

35. See for instance submission by Brendan McGinty, formerly of IBEC, to Dept of Trade etc. He claims 'that trade union organising campaigns are often built around a small number of disaffected people'. B. McGinty 'Risks for all parties in timely Review of Collective Bargaining' Stratis Consulting, Dublin
36. Dart and Turner 'Union Recognition and Partnership (2005) D'Art and Turner 'Irish trade unions under Partnership; A Faustian Bargain (2011) D'Art 'A World still to win' (2021) section 3.
37. See section one of this document 'Union Recognition and Collective Bargaining two sides of the same coin'.
38. IRN No. 36 'Three-quarters of non-union companies' 6th. Oct. 2022
39. 'Searching for answers in the wake of collapsed partnership' Irish Times. January 25th.2010 Carl O'Brien interviewing David Begg.

seeking the fool's gold of a social compact and pay no heed to the mendacious recycled rhetoric round stakeholders and stakeholder capitalism. Instead set out to maximise the potential of the EU Directive by pursuing simultaneously the extension of collective bargaining coverage and union recognition. Success in this endeavour will allow a stronger union movement to emerge. It can then re-engage in partnership or social compacts, partly proofed against its previous debilitating outcomes.

Dr Daryl D'Art BL

APPENDIX 1

Table 1 - Union Density and Collective Bargaining Coverage in Scandinavian Countries

Country	Union Density	Collective Bargaining Coverage
Iceland	82%	86%
Finland	68%	95%
Sweden	65%	88%
Denmark	64%	85%
Norway	55%	66%

Source. Jelle Visser, Susan Hayter and Rosina Gammarano '*Trends in Collective Bargaining Coverage: Stability, Erosion or Decline*' Issue No. 1 International Labour Office, Geneva.