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Legal framework: obstacles, facilitators and new strategies

Part 1: Existing facilitators and obstacles in national law. Analytical framework for national reports

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1 Introduction of WP 2

WP 2 will present a *legal analysis* that aims to evaluate the impact of EU and national legal frameworks as barriers or facilitators for inclusion of non-standard workers in social dialogue, with a focus on reform recommendations. The work package will thus contribute to the realization of the aim of the INDI-project of creating a more cohesive, effective, and *legally* robust environment for social dialogue, by addressing and proposing enhancements to the existing legal framework.

Part 1 is the first step in this analysis and focuses on the *existing* legal framework at a *national* level. More precisely, Part 1 will seek to *identify and compare* existing legal obstacles and facilitators for access to social dialogue for non-standard workers in selected national systems.

WP 2 Part 1 includes three deliverables: This working paper (deliverable 2.1) presents the analytical framework which will guide the five national analyses from NO, DK, NL, IT and the UK (deliverable 2.2). The national reports will serve as a basis for a comparative analysis (deliverable 2.3). In the concluding project report of Part 1, we will identify commonalities and variations, not only regarding *access to social dialogue* for non-standard workers but also focusing on *how this relates to differences in the national systems* of social dialogue.

These findings will feed into an analysis of the interplay between EU measures (Part 2, deliverable 2.4) and national law (Part 3, deliverable 2.5 and 2.6), as well as the overall conclusions and reform recommendations of WP 2 (Part 4, deliverable 2.7).

This working paper thus structures the overall work of WP 2 and forms the basis for answering the question of the effect of the legal frameworks at EU and national level on including NSW in social dialogue.

2 Analytical approach

The analytical approach presented here aspires to facilitate the analysis of legal obstacles and facilitators for access to social dialogue for non-standard workers in selected national systems.

The first dimension and subject of the analysis is a specific group of persons: *non-standard workers (NSW)*. A NSW is defined in contrast to a standard worker. While a standard worker is generally defined as a worker in an open-ended, full-time contract of employment, concluded directly with the employer, a NSW is any worker where one or more of these characteristics is missing.[1] The characteristics refer both to the legal status of the worker (e.g. contract of employment) and to terms and aspects of an employment contract (temporary work, weekly working hours, direct/indirect employment, place of work, on-call work, migration status, etc.).

The worker's employment status can in itself be a key legal condition for access to social dialogue, as legal framework inspired by a binary divide between employment and self-employment typically include workers in subordinate employment relationships and exclude workers who are genuinely self-employed. How the worker's legal employment status is determined is therefore a central issue. However, there are significant variations in national law, both regarding the determination of legal status and its significance for access to social dialogue.

To facilitate a nuanced analysis, we therefore divide the analysis in three overall categories of NSW: Workers in subordinate employment relationships, workers who are genuinely self-employed and workers in an intermediary category, who do not fit neatly within one of the two other categories. The different categories of NSWs are presented in more detail in Section 3. There, we also specify issues and questions to guide the national analysis of the different categories.

The second dimension and object of the analysis is *the legal frameworks of social dialogue*. Social dialogue is broadly defined as encompassing all types of negotiation, consultation, participation and information exchange between representatives of governments, employers and workers, on issues of common interest relating to economic, employment and social policy.[2] With a view to separate the main legal issues from the broader context of social policy and triparty cooperation, we focus on two main elements of representative participation in social dialogue between management and labour. First, *effective collective bargaining resulting in collective agreements at national, sectoral or company level* and, second, *information and consultation at company level*. We consider both elements critical for NSW's opportunities to influence directly on conditions of work. Furthermore, a legal perspective calls for a separate analysis of the two elements, as they may be based on different legal frameworks, but can still be

[1] Analytical framework paper WP1, p. 2.

[2] Analytical framework paper WP1, p. 8.

interrelated. The more precise legal conditions for inclusion in these two elements of social dialogue are elaborated in Section 4 and 5, respectively.

The overarching research question concerns *access* to social dialogue for NSW. The combination of the two above-mentioned dimensions aims to structure a systematic, yet nuanced, analysis of whether NSW are included in the legal frameworks for efficient collective bargaining and company level information and consultation. The idea is to map the inclusion of NSW by comparing access for different categories of NSW to the situation for standard workers, with an aim to identify both obstacles and facilitators of a legal nature in the national systems.

Systems for social dialogue are based on collective representation of workers. The question of access therefore encompasses *access to representation* for NSW as well as being *included in* the relevant form of social dialogue, for example being covered by a collective agreement or taking part in consultations on company level. Furthermore, from our perspective, full participation in social dialogue requires *internal voice*: that the specific interests of NSW are represented and conveyed by the collective and thus may influence on the outcomes of the social dialogue.

Enforcement mechanisms are also relevant and must also be examined. The questions the national experts are asked to answer, seek to address all these aspects of *access*, and summarize the findings by identifying obstacles and facilitators. As a basis for this analysis, (short) overall descriptions of the relevant legal norms at the national level is also needed. And, to conclude the national reports, each rapporteur is invited to reflect more broadly on the issues, i.e. on the role of the national system in ensuring inclusion of NSW in social dialogue, see more in Section IV.

A matrix is drafted for each step of the analysis, to illustrate the issues and the main dimensions. The matrixes may in addition be used as analytical tools to compare the results of the national analysis at a later stage.

As the aim of the national reports is to allow us to compare legal obstacles and facilitators and their relation to different national systems of social dialogue, the following outline of issues and questions is somewhat detailed. However, as the matrix illustrates, it is possible to address the issues from different angles and in different orders, and many issues and questions may be closely interrelated in national law. Each national rapporteur is clearly best placed to identify and highlight the most interesting and relevant issues within their jurisdiction. We therefore emphasize each rapporteur's freedom to address the issues in the order that is most suited to the national context and also to adjust/adapt/extent/exclude issues and questions when writing the report.

3 Non-standard workers in national law

3.1 Three categories of non-standard workers

As indicated above, the analysis concerns NSW, and the non-standard element may both refer to employment status and to contractual terms. In order to facilitate a nuanced discussion on inclusion in social dialogue for NSW, we here present a typology of NSW. In the national reports, we ask the rapporteur to provide a brief, general description of the legal norms determining the worker's employment status, and then analyse the characteristics that would determine whether a worker fits in category 1, 2 or 3. We also ask the national experts to include a description of any specific legal mechanisms available to workers to resolve an unclear employment status.

The standard worker is thus an important point of reference for this analysis. When describing the standard worker in the national context, the experts may include work relations that – despite certain formal differences – are considered to be standard workers in the national context. For example, in Italy, the work of workers in cooperative companies are based on a combination of membership and employment contract, they are still considered to be standard workers.

The first category of NSWs is non-standard with respect of contractual terms, not with respect to legal status. In this category of NSWs are workers, who have clear legal status as employees and are clearly in a subordinate employment relationship. However, they have *contractual terms which deviate* from those of a standard worker one way or another. The non-standard terms may be non-standard across a number of axis. This includes the classic fixed-term duration of the relationship or lower than standard weekly hours of work. It also includes deviations from direct employment, as in agency work and other types of triparty or multiparty employment relationships. In newer work relationships, non-standard terms can differ along a more complex geometry of parameters, such as the place of work (with work taking place remotely as in the case of teleworking or working from home arrangements), the number of guaranteed weekly working hours (with on-call, on demand, and zero-hour arrangements significantly diluting any mutual commitment in that domain), the migration status of the worker (with certain working visas arrangements dictating the seasonality of certain contracts, or effectively constraining a worker's ability to rescind a contract in order to seek employment elsewhere), etc. The national experts are invited to indicate at an early stage, if their national legal frameworks tend to foster an inclusive approach towards these NSW, for example by applying to them all or most of the employment rights and entitlements provided by their national employment protection systems, or if these new forms of NSW tend to attract a limited and patchy range of labour rights, or none at all. The national experts are invited to explain also, if different rules apply in the public and the private sector for the types of NSW described in this section.

The second category of NSW is an intermediary category which comprises all forms of predominantly personal work that do not fit neatly within the other categories of subordinate employment (category 1) or genuine self-employment (category 3, see below).

As a result of not fitting well into the traditional binary divide, these workers will typically be characterized by an unclear or ambiguous legal status. This lack of clarity on legal status will be related to the criteria determining employment status in national law. Uncertainty on legal status will arise when workers formally operate as independent contractors, while sharing some, but perhaps not all, of the characteristics of subordinate workers. The characteristics that create ambiguity may differ, such as control or sanctions by the principal, limited bargaining freedom with customers, economic dependency of the principal, or working as an integrated part of another company. This group includes working people that in their national systems may be referred to as "dependent contractors", quasi-subordinate workers, workers affected by misclassification practices and who can arguably be considered as 'false' or 'bogus' self-employed, platform workers working 'on the gig' and other workers who formally operate under 'umbrella companies', 'personal service companies' and similar corporate structures, while in reality working under some degree of managerial control and direction exercised by their principal/employing entity.

It is acknowledged here that some of the non-standard contractual terms of employment (place of work, lack of guaranteed hours, the presence of a physical or digital intermediary) discussed in the previous paragraphs may have some bearing on the ambiguous nature of the employment status of these workers. In countries where causal and precarious work obscures employment status, casual workers and zero-hour workers may fall within this category. In national systems who define an intermediate legal category between employees and self-employed – such as "dependent contractors", 'limb-b worker', or 'quasi-subordinates' – national experts should elaborate on whether these workers may be more easily classified under such intermediate categories, due to the inherent ambiguity of the work arrangement. Or whether their national systems have developed mechanisms to allocate them across the more traditional binary divide, as employees (or workers with an employee-like status) or as genuinely self-employed.

The authors are invited also to describe the national mechanisms for clarifying ambiguous status, whether it be courts, industrial arbitration courts, administrative entities, competent committees assessing and issuing certificates, labour inspectors, etc. The authors are invited also to describe if the legislators have provided solutions, such as presumption rules of burden-of-proof rules.

The third category are the genuinely self-employed persons, who are truly non-standard with respect of legal status. These NSW are those that most legal systems will recognise as operating a business on their own account, and as such as not falling under any 'worker' definition. National experts are encouraged to consider what criteria are likely to be relied upon in order to classify these NSW as truly independent business undertakings. And whether certain criteria or indicators may test their classification and question their autonomy.

We acknowledge that in some legal systems there may be a distinction between self-employed workers that may be reclassified into one of the previous categories discussed above and self-employed persons that are unlikely to meet any 'worker' definition, for example by virtue of employing collaborators or substitutes. These more

nuanced analyses are left to the national experts. Compared to category 1, these NSW are not recognized as employees and do not work in subordinate relationships or under contracts of employment. Compared to category 2, this group lacks the characteristics that resemble those of subordinate workers, and there is thus less reason to question that their formal status as self-employed corresponds to the factual realities. Depending on the national context, this group will include those work in their own business, own assets, have direct access to the markets they work in, negotiate freely with their customers, perform services for multiple clients without any functional integration and operational dependence on any other business entity or fulfil other criteria that define a genuinely independent contractor under national law.

3.2 National analysis Matrix I

This matrix illustrates the analysis of the categories of non-standard workers in national law; the first dimension of the analysis following later in Section 4 and 5.

National analysis Matrix I:

	General description of legal norms determining employment status	
	Characteristics for each category	Mechanisms to resolve employment status
Standard workers		
NSW - working terms		
NSW - unclear status		
NSW - different status / self-employed		

General description of legal norms on employment status for Standard Workers

The national experts may find it appropriate to start with a short, overall description of the legal norms that determine employment status in the context of social dialogue in national law, referring to the relevant legal sources.

- How is the concept of employee / a contract of employment defined, and what are the relevant criteria for determining employment status?
- How is a *standard* employment relationship defined or perceived in national law?
- Is the concept of independent contractor / self-employed explicitly defined, and – if so – how is this status defined?
- Is there an intermediate category between employee and self-employed, and – if so – how is this status defined?

Analysis of NSW in category 1, 2 and 3

The main part of this analysis is examining more closely what characteristics that would place NSW in category 1, 2 or 3 according to national law. The aim is to seek to define – or describe more precisely – the three categories of NSW in the national context. As a point of reference, the experts may elucidate how the standard worker is understood in national law.

- What characteristics will determine that a worker is clearly in a subordinate employment relationship, in spite of the presence of one or more non-standard contractual terms (category 1)?
- What characteristics will indicate that a worker belongs in the intermediary category (category 2)?
- What characteristics will determine that a worker is genuinely self-employed (category 3)?
- Please illustrate by examples of types of workers under each category

Legal mechanisms to resolve employment status

An unclear or unresolved employment status may in itself be an obstacle for access to social dialogue. Therefore, we ask the national report to include a presentation of any specific legal mechanisms to resolve classification questions pertaining to one's employment status. Such mechanisms could help minimize the number of NSWs in category 2, by resolving that the worker in question belongs to category 1 or 3 or as Standard workers. The idea is not to elaborate on the ordinary courts and the general system of judicial review. The focus is on more *specific* mechanisms available to NSWs that directly or indirectly aim to facilitate resolving employment status, such as presumption rules, administrative tribunals, etc.

- Are there any specific mechanisms available to workers to resolve an unclear or disputable employment status, and – if so – how do they facilitate resolving employment status?
- Are the mechanisms accessible for NSW, and are they often used?

4 National legal framework for access to effective collective bargaining

4.1 Key legal conditions for access to effective collective bargaining

As explained in the introduction, we consider effective collective bargaining to be one crucial element of social dialogue. Collective bargaining includes negotiations between representatives for management and labour on conditions of work and is closely linked to the opportunity to regulate conditions of work in binding collective agreements. For collective bargaining to be effective, the possibility to engage in collective action is also central.

Agreements concluded in the context of collective negotiations between management and labour, that seek to improve conditions of work and employment, fall outside the scope of TFEU art. 101(1), which sets a ban on restrictions of the free competition in the EU.[3] This exemption has traditionally been linked to the concept of 'worker' in EU law.[4] Collective bargaining and agreements on behalf of the self-employed are however understood by the CJEU as concerning 'undertakings' and as potentially in conflict with competition law. In some countries, national law explicitly recognizes a specific type of collective agreement on pay and other working conditions – a collective agreement *sui generis* (*tariffavtale*, *overenskomst* etc.) – as exempt from competition law restrictions. This type of agreement often has a specific binding and normative effect, and the bargaining is supported by a right to collective action. For NSW in category 1 and perhaps also 2, this type of collective bargaining will typically be available, and also most effective.

Nevertheless, EU competition law may allow other types of bargaining and agreements of a collective nature, potentially including NSW from category 2 and perhaps even some from category 3.[5] Whether national law allows other types of collective agreements, what the legal effects of such agreements are, and whether there is a possibility for collective action is therefore highly relevant for NSW. The national analysis of key legal conditions explored below, should therefore seek to address *different types of collective bargaining and agreements*, if relevant in the national context.

As indicated earlier, the question of *access* to effective collective bargaining can be broken down to more precise aspects. We have tried to define aspects in light of comparative literature on the legal frameworks for social dialogue and we present them here in chronological order. The national rapporteur may feel free to rearrange the order and

[3] See e.g. Case C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, ECLI:EU:C:1999:430.

[4] The CJEU however apply a functional approach to the concept of worker and include 'false self-employed' – service providers in a situation comparable to that of employed workers – in the Albany-exemption, see Case C-413/13 FNV Kunsten Informatie en Media v Staat der Nederlanden ECLI:EU:C:2014:2411.

[5] Communication from the Commission: Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons, (2022/C 374/02). These guidelines will be analysed in Part 2 of the work in WP2.

specify or adapt the aspects in light of the national context. However, note that the national experts are also asked to provide introductory general descriptions of the concept of a collective agreement (A), the legal framework for the bargaining process and industrial action (B), as well as the legal effects of collective agreements (C) and relevant enforcement mechanisms (D).

A first precondition is access to *representation* (A1). To take part in collective bargaining, it must be possible for NSW to be members of collective entities (e.g. trade unions) that can engage in collective bargaining. Second, access to dialogue requires *internal voice* (A2), meaning that the specific interests of NSW are represented within the collective entity (e.g. trade union) and thus may influence the outcomes of the social dialogue. Furthermore, NSW must be included in the legal framework governing the *bargaining process* (B1) and – importantly – have a right to support their claims with *collective action* (B2). When a collective agreement is concluded, the issue is whether NSW are covered by – have access to enjoy – *the rights and protections provided in the agreement* (C1). A related issue is whether NSW – as individuals or a collective – have access to *enforcement mechanisms* (D1) in the case of breach of the collective agreement provisions towards NSW.

Questions guiding the mapping of these aspects of access for the three categories of NSW are specified below. After the detailed mapping, the national experts are asked to summarize the findings in an overall analysis, focusing on elements in national law that acts as facilitators of and/or obstacles for effective collective bargaining for NSW, and how they are related to the legal characteristics of the national system for social dialogue.

4.2 National analysis Matrix II

This matrix illustrates the analysis of access for NSW to one main element of social dialogue: effective collective bargaining. While the rows represent the categories of NSW in national law (I), the columns represent key legal conditions for access to effective collective bargaining presented in a (Nordic) chronological order, with the top cell in each column (A-D) as general descriptions of elements of collective bargaining, and with the columns representing the analytical matrix of the central elements towards each category of workers/NSW. This is further explained below under A-D.

As mentioned above, the national rapporteur may choose a different order, for example combining the analysis of the concept of a collective agreement with analysis of the legal effects of the agreement.

National analysis matrix II:

	A: General description of the concept of a collective agreement		**B: General description of the legal framework for the bargaining process**		**C: General description of the legal effects of a collective agreement**	**D: General description of the legal framework for enforcement of collective agreements**
	A1: Access to representation in collective bargaining	A2: Access to internal voice	B1: Access to participation in the bargaining process	B2: Access to collective action	C1: Access to rights and protections in the collectively bargained agreement	D1: Access to enforcement of collectively bargained conditions of work
NSW - working terms						
NSW - unclear status						
NSW - different status / self-employed						
Mechanisms for clarification of status						

A: The concept of a collective agreement

General description of the concept of a collective agreement

A general description of the concept of a collective agreement in national law is needed, presenting the requirements that must be fulfilled for the agreement to have the specific legal effects of a collective agreement. This concept of a collective agreement *sui generis* should also be contrasted with other types of collective agreements concerning conditions of work, if relevant in the national context.

- How is the concept of a collective agreement defined, and what requirements concerning parties, topics, form etc. must be fulfilled for the agreement to be considered a collective agreement *sui generis*, with specific legal effects?
- Who can a collective agreement be concluded on behalf of, and what role does the concept of employee or worker play in defining a collective agreement?
- Are other types of collective agreements on conditions of work allowed in national law, and – if so – what characterizes these agreements?

A1: Access to representation in collective bargaining

These questions relate to whether different categories of NSWs have *access to representation* in collective entities that may negotiate and be parties to binding collective agreements *sui generis*:

- Which categories of NSW can be members in the associations that may negotiate binding collective agreements?
- How is access to membership in the relevant associations determined, by national rules (legislation or general principles) or by the associations themselves (in bylaws etc.)?
- Are there trade unions or associations established to promote the specific interest of NSW?

A2: Access to internal voice

These questions address whether different types of NSW have *access to internal voice* to promote the specific interests of NSW, even when conflicting with the interests of standard workers, when negotiating binding collective agreements. For example, specific rights related to fixed-term or agency work can be an important topic for collective bargaining for NSW in category 1, potentially conflicting with the interests of standard workers, but less so if there is already strong protection in national law in fixed-term or agency work.

- Can the associations that may negotiate binding collective agreements promote the interests of NSW? Are there any legal barriers in national rules or bylaws etc. that hinder the interests of NSW to be promoted in the bargaining process?
- How are the topics for negotiations determined within the association, and how are the priorities of the association set? Do NSW of different categories have the same membership rights to influence these processes as standard workers? Are there legal norms regulating the internal processes, balancing majority and minority interests among members?
- In light of national labour law, on what topics/conditions of work subject to collective bargaining are there potentially conflicting interests between standard workers and NSW (and/or between categories of NSW)? Can worker protection in statutory law be subject to negotiations and deviations through collective agreement?

B: The process of bargaining to conclude a collective agreement

General description of the legal framework for the bargaining process

There is a need for a brief presentation of the national legal framework for the process to bargain and conclude a collective agreement *sui generis*, including a description of the right to collective action. The description of the legal framework should refer to the de lege legal framework, whether it is protected at constitutional level, or whether it includes also, if the framework for industrial relations or collective bargaining is not

prescribed by law, but follows from other legal sources, such as caselaw, agreements, practices between legal actors in this field.

If collective action is available to support the bargaining of *other* types of collective agreements, this type of collective action should also be introduced. This general description can be kept very short and limited to present the necessary background for answering the more specific questions in B1 and B2.

- How is the bargaining process regulated, by legislation, general principles and/or agreements, and what role does the concept of employee/worker play in defining the scope of the legal framework?
- Is there a duty for employers to participate in bargaining efforts or a duty to negotiate with associations representing specific groups?
- Is the bargaining process supported by public entities, for example offering mediating measures, and what role does the concept of employee/worker play in defining the competences of such entities?
- How is the right to collective action to support efforts to bargain a collective agreement regulated, by legislation, general principles and/or agreements, and what role does the concept of employee/worker play in defining the scope of the legal framework?
- Is collective action possible in support of efforts to bargain other types of collective agreements?

B1: Access to participation in the bargaining process

The questions here concern whether different types of NSW can participate in the bargaining process and benefit from support mechanisms in an equal way as standard workers:

- Are there any specific limitations or special roles for NSW as regards participation in the bargaining process?
- Are there any variations in the employers' obligation to participate in bargaining efforts vis-à-vis NSW compared to standard workers, or vis-à-vis different categories of NSW?
- Is there a duty for employers to participate in bargaining efforts or a duty to negotiate with associations representing specific groups?
- Do the competences of public entities with a role in supporting the bargaining process include bargaining on behalf of all categories of NSW or only certain categories?

B2: Access to collective action

These questions address both access to collective action *on behalf of* different types of NSW as part of the bargaining process, and access for the individual NSW *to participate* in the collective actions:

- Can efforts to bargain a collective agreement on behalf of all categories of NSW be supported by collective action, and are there variations in the possibility of collective action for different categories of NSW?
- Are there any specific limitations or special roles for different categories of NSW as regards participation in collective action?

C: The legal effects of a collective agreement

General description of the legal effects of a collective agreement

A general presentation of the legal effects of a collective agreement in national law is useful as a background for the analysis of access to collectively bargained conditions of work for NSW in C1. The focus should be on the specific legal effects of collective agreements *sui generis*, such as binding effects on members of the associations who have concluded the agreement, and normative effect in individual work relations. It is also important to address the *scope* of the legal effects – the general norms determining whether a worker is covered by the agreement. If relevant in national law, the specific legal effects of a collective agreement *sui generis* may well be contrasted with the legal effects of other types of collective agreements.

- What are the specific legal effects of a collective agreement *sui generis*, are these legal effects determined by legislation or general principles, and what role does the agreement itself play in this regard?
- What is the scope for these legal effects (i.a. binding and normative effect), how is the scope determined, by legislation, general principles and/or agreements, and what role does the concept of employee/worker play in this regard?
- Where the collective agreement has a normative effect in individual work relations, is this effect automatic or does it depend on activation etc. by the parties or members?
- Can collective agreements be made universally applicable or are there other mechanisms or legal norms that can result in legal effects of the agreement beyond the work relations that are covered by the agreement?
- If other types of collective agreements on conditions of work are recognized in national law, what are the legal effects of these agreements and how are these effects different from that of a collective agreement *sui generis*?

C1: Access to collectively bargained conditions of work

The following questions address more specifically whether different categories of NSW have access to – may be covered by – conditions of work set in a collective agreement.

- For which categories of NSW do collectively set conditions of work have specific legal effects, such as binding and normative effects? Are there any national rules that extend or delimit the application of collectively set conditions of work for NSW specifically?
- If the collective agreement is made universally applicable or otherwise has effects beyond the work relations covered by the agreement, which categories of NSW are covered by these effects?
- For which categories of NSW are other types of collective agreements, without binding and normative effects, the only possible way to set conditions of work collectively?

D: Enforcement of collective agreements

General description of the legal framework of enforcement

It is advisable to provide a general description of the mechanisms and remedies in national law that are available to enforce rights and obligations set in collective agreements. This context will help us understand whether NSW have access to effective enforcement mechanisms. The description should, where relevant, distinguish between collective and individual enforcement mechanisms. The description should also try to address any variations related to different types of collective agreements and/or different legal effects of the agreement.

- How can the conditions of work set in a collective agreement be enforced: Which institutions are responsible for enforcement, and what types of legal sanctions can be applied?
- What enforcement mechanisms are available to the collective, and which are available to individual workers? How are these mechanisms regulated, through legislation, general principles, or agreements?
- Are the enforcement mechanisms for collective agreements *sui generis* distinct from those for other types of collective agreements?
- Are the enforcement mechanisms different for workers covered by conditions of work that carry binding and normative effects compared to those for workers under universally applicable agreements or other legal effects of the agreement?

D1: Access to enforcement of collectively bargained conditions of work

The aim of these questions is to explore whether different categories of NSW have access to the mechanisms described above when they do not receive the conditions of work established or guaranteed by collective agreements, either as part of a collective of workers or as an individual:

- Are individual and/or collective mechanisms to enforce collectively bargained conditions of work available to all categories of NSW covered by the agreement, and are there specific limitations or special roles for different categories of NSW?

- Are individual and/or collective mechanisms to enforce other legal effects of a collective agreement (made universally applicable etc) available for all categories of NSW, and are there specific limitations or special roles for different categories of NSW?

4.3 Obstacles and facilitators for access for NSW to effective collective bargaining

Based on the national analysis guided by matrix II (access of the three categories of NSW in relation to the key legal conditions in A-D), the national experts are asked to identify what obstacles and facilitators this presents for NSW's access to effective collective bargaining. These findings from national law will be used for comparison later and should thus be somewhat detailed and nuanced.

The author should seek to identify *both obstacles and facilitators* (enabling mechanisms) for access for NSW compared to standard workers. The analysis should aim to be precise on both dimensions – what *categories of NSW* are affected by the obstacles/facilitators, and *what key legal conditions* they are related to.

Furthermore, the author is invited to reflect on how the obstacles and facilitators are related to the *characteristics* of the national system of social dialogue, for example being a result of national legislation as opposed to following from international law.

5 Information and consultation at company level

5.1 Key legal conditions for access to company level information and consultation

Participation of workers in decision-making at company level is considered another core right of employees. As participation in democracy at company level is a fundamental collective right for workers, the report will include a section on access of NSWs to participation in information and consultation at company level. The section aims to bring to the surface mechanisms ensuring promotion and representation of interests of NSW as a minority group.

The right to information and consultation at the work place has in many member states been recognized as a basic part of democracy, that also takes part in the work place. This could be promoted by either national legislation or in binding collective agreements.

At EU-level the right to information and consultation in business matters was first recognized in the 1970s in restructuring situations and has since 1989 been recognized as a general fundamental right of workers in the Community Charter of Fundamental Rights of Workers. Now the fundamental right to information and consultation is expressed in article 27 in the EU Charter of Fundamental Rights. Information and consultation rights are now stipulated in several directives, including Directive 98/59/EC on collective redundancies, Directive 2001/23/EC on transfers of undertakings (article 7), and in Directive 2002/14/EC establishing a general framework relating to information and consultation of workers in the EU. Additionally, concerning the participation in ensuring health and safety at work, Directive 89/391/EEC stipulates the involvement of representatives in measures to encourage improvements in the safety and health of workers at work.

As described in theory,[6] company level 'participation' of workers is a comprehensive concept. It covers the right to information and consultation of employees in decisions taken by management; it covers participation and involvement in ensuring a safe and healthy work place; it covers participation per se in decision making, such as by employee representatives as members of board of companies or a supervisory board; it can mean financial participation of workers; and it can mean participation in the form of works councils with binding decisions making powers.

The analysis for this project will focus on a 'general' right to information and consultation as part of the processes in management decisions, as expressed at EU-level in Directive 2002/14. The reference to Directive 2002/14 is to give a framework of understanding this form of information and consultation processes across the country reports. This form of a 'general' right to information and consultation may be based in different legal sources in the member states, including in collective agreements. The

[6] Jaspers, Pennings and Peters, European Labour Law, 2nd ed, p. 532 ff.

experts are invited to explain the framework found in collective agreements as well as in legislation, if both are applicable.

If, at national level, the 'general' information and consultation processes include matters concerning health and safety at work, certain social topics, or – indeed – the powers of the internal consultation procedures are – or can be – expanded beyond the information and consultation processes outlined in Directive 2002/14, the national experts are invited to describe this. If information and consultation on health and safety at work is included in the 'general' consultation framework, the national experts are invited to make a not on how solo-self-employed are included, as outlined in Directive 1989/391.

Company level participation of workers in information and consultation processes differs from collective bargaining (at company level) in that, information and consultation is a process not involving collective action and is not aimed at (necessarily) concluding binding agreements between the employer and the employees. Instead, the focus is on ensuring that the voice of the workers are heard and included in the foundation for managerial decision making. In some countries, information and consultation focuses on the process to give the workers voice in the managerial decision making – to the benefit of management, but in the end, decisions are made by – and owned by – management. In other countries, information and consultation involves negotiations and decisions on company matters, where e.g. works council have direct influence on the final decision. The national format for information and consultation of worker representatives in ongoing business matters is the topic for analysis, and as such, all national variations under this topic are included.

Also, the interplay between the legal sources and the role of the social partners are of interest, i.e., to what extent collective agreements can divert from protections or rights for minority groups provided in legislation/national collective agreements.

And again, the authors, who are closest to understanding the best format for analysis of access of NSW to participation on company level information and consultation, are given the necessary flexibility in how to best address - and delimitate – this type of collective right in the context of the project.

5.2 National analysis Matrix III

This matrix is parallel to matrix II. Matrix III illustrates the analysis of access for NSW to the second main element of social dialogue: company level information and consultation. While the rows represent the categories of workers/NSW from the analysis of NSW in national law (I), the columns in this matrix represent the criteria for access to participation in company level information and consultation processes. At the top of the column, cell E, represents the description of the general legal framework and outline of the system of information and consultation at national level. The columns below E, sections E1-E4, then represent the analytical matrix of these central elements in relation to each category of workers/NSW. If regulation is found in both legislation and collective agreement, the national experts are invited to explain this in each subsection of the matrix.

National analysis Matrix III:

	E: Overall description of the systems of information and consultation at company level in national law			
	E1: Access to representation	E2: Access to information	E3: Access to consultation, full participation	E4: Enforcement of access
NSW - working terms				
NSW - unclear status				
NSW - different status / self-employed				

E: Information and consultation at company level

A general description of the national legal framework for worker participation at company level in the form of information and consultation is needed first.

Authors are invited to focus on the form of information and consultation that is the general ongoing participatory mechanism at company level (as found in Directive 2002/14 on Information and Consultation), where representatives of workers are informed and consulted on managerial decisions in going business matters, but authors may include other more specified systems when relevant (ex separate rules/structures for information and consultation concerning work environment).

For the purpose of the analysis in this report, access to *information* is generally understood as the procedure, where workers are *informed of* considerations or developments, that may affect the working conditions or the employment situation of the workers.

For the purpose of the analysis in this report, access to *consultation* is generally understood as the procedure, where workers are *consulted on* considerations or developments, that may affect the working conditions or the employment situation of the workers, i.e., the employer receives the viewpoints and considerations of the employees to include in the decision making process. A consultation thus *as a minimum* includes information to the workers on certain topics, with an invitation for the workers to give their opinions/recommendations to the employer about the topics for consultation.

The general description should thus present the legal basis for information and consultation, the (standard/default) system for and form of company level information and consultation, as well as legal requirements for participation in the specific elements of information and consultation of workers at company level. If collective agreements are part of the legal basis, the authors are encouraged to make a note of this, as well as to

what extent the collective agreements may deviate from the system provided in legislation.

The aim is not to describe or analyse general legal problems in national law relating to information and consultation, such as issues related to the content, form, timing of or organization of information and consultation per se, or general issues relating to lack of compliance with the existing framework. The aim is to understand and bring to the surface, in the situations where the processes are followed by management and representatives of workers, whether these procedures include and represent the interests of the NSW. In particular, it is of interest to the project whether any minority protections in legislation can be deviated from by collective agreement, and what the effects of this would be (if any).

With that in mind, the general description is again used to provide a template, for the later analyses of the role and inclusion of NSW in access to information and consultation at company level. The general description could include an outline of some or all of the following points, which may be of significance when discussing access and inclusion of NSW:

- What is the legal basis/which are the legal bases for the right to information and consultation at company level in the member state.
- How do different legal bases interrelate? E.g. whether collective agreements supplement or replace requirements in legislation?
- Is there a minority protection in legislation and if so, is there a mechanism that protects against deviation from such minority protection by collective (or other) agreement ?
- Please indicate the relation to EU law (Directive 2002/14) of the national systems, such as which rules /systems have a national origin/basis and which rules / systems are a result of transposition of EU minimum standards in Directive 2002/41.

- If different systems or duties are activated depending on the number of employees, please indicate the thresholds.
- If information and consultation take place via representatives, please indicate the criteria for being eligible for election/appointment as a representative.
- If information and consultation representatives are elected, please indicate the method for elections including – if indicated – which employees may vote.
- If information and consultation representatives are appointed, please indicate the method for appointment and by whom.

- Please describe the topics subject to mandatory information and/or consultation.

- Please describe the function of the (elected/appointed) representatives concerning information and consultation. This could be outlining if they meet with management in a dedicated forum; how and when the representatives receive information; if, and if so, how the representatives are expected to/obliged to inform the employees; what the representatives are expected to do with any opinions/positions from the employees on the topics for consultation – and perhaps already at this point mention, if are there any safeguards concerning the interests/views of minority groups such as NSW at the company.

- Please describe any complaints mechanisms for the workers concerning the election/appointment process
- Please describe any complaints mechanisms for workers concerning the operations of the representatives, e.g. if minority groups believe that their interests are not promoted.

E1: Access to representation

These questions is the basis for the author's analysis of whether different categories of NSWs have *access to representation* in the context of company level information and consultation.

- As a general reflection, do national mechanisms aim to ensure/facilitate representation of minority groups perhaps outside or in addition to other forms of representation. Are the processes entirely majority rule based?
- Are the categories of NSW counted towards the thresholds for activation of information and consultation at company level?
- Are the categories of NSW able to be eligible for a position as representative with regards to company level information and consultation?
- Are the categories of NSW able to participate in the election of worker representatives with regards to company level information and consultation?
- Are the interests of/voices of NSW included in national systems, where worker representatives are appointed?
- Please describe deviating mechanisms for minority protection in collective agreements, and the legal effects of these.

E2: Access to information

These questions is the basis for the author's analysis of whether different categories of NSWs have *access to information* in the context of company level information and consultation.

- As a general reflection, does the NSW have a right to information, e.g. does the NSW fall into the category of 'workers' who have the right to information – if not, please explain the legal criteria not fulfilled by the NSW.
- As a general reflection, do the topics elected for *information* reflect the (general and/or specific) interests of the category of NSW? This could be to highlight whether topics subject to *mandatory* information and consultation procedures include issues related to minority groups, NSW, or otherwise are inclusively described, and please state if there are no such considerations.
- Is the role and function of the representatives determined in a manner, that include safeguards for minority groups – or for the interests of the NSW. E.g. are the representatives expected to/obliged do forward information to (all) NSW as a part of the information procedure. At this point, a consideration could be whether the representative can organize the dissemination of information at his/her own will, determining who receives the information and how.

E3: Access to consultation, full participation

These questions are the basis for the author's analysis of whether different categories of NSWs have *access to consultation* in the context of company level information and consultation.

- As a general reflection, are the NSW involved in consultation processes, e.g. does the NSW fall into the category of 'workers' who have a right to consultation – if not, please explain the legal criteria not fulfilled by the NSW.
- As a general reflection, do the topics elected for *consultation* reflect the (general and/or specific) interests of the category of NSW?
- Are there national mechanisms in law or in collective agreements, which facilitate that the positions/interests of NSW are heard and included in the consultation processes. If possible, the authors could reflect on whether the role and function of the representatives are described concerning the consultation process. This could be e.g. an analysis of whether the interests of the NSW are perceived to be represented by default by the representatives, or whether there are specific minority protection mechanisms ensuring that the view points of minority groups are heard by the worker representatives, and whether such viewpoints are considered and perhaps even included in the preparation of the opinions to return to the employer. E.g. are NSW included in fora for discussion, are there any safeguards concerning presenting the interests/views of minority groups in the opinion sent back to the employer.

E4: Enforcement of access:

These questions are the basis for the author's analysis of whether any enforcement mechanisms are in place to ensure the minority safeguards – if any – are followed.

- The author is asked to elaborate on whether national enforcement mechanisms can ensure that NSW have access to the company level procedures for information and consultation, and/or whether national enforcement mechanisms can ensure, that the interests of NSW are reflected in the consultations.

5.3 Obstacles and facilitators for access for NSW to company level information and consultation

Based on the national analysis guided by matrix III (access of the three categories of NSW in relation to the key legal framework for company level information and representation described under E), the national experts are asked to summarize by identifying obstacles and facilitators for NSW's access to company level information and consultation.

As the findings from national law will be used for comparison later, the rapporteur is encouraged to formulate the conclusion as precisely and nuanced as possible.

Again, the author should seek to identify *both obstacles and facilitators* for access for NSW compared to standard workers and aim to be precise both concerning what *categories of NSW* are affected by the obstacles/facilitators, and *what key legal conditions* (representation, information, consultation, enforcement) they are related to.

As mentioned at this point we also encourage national experts to highlight whether minority protections in national legislation can be deviated from in collective agreements, and what the legal effects of this would be.

Furthermore, the author is invited to reflect on how the obstacles and facilitators are related to the *characteristics* of the national system of social dialogue, for example being a result of national legislation as opposed to following from EU law or international law, or for example including the information and consultation procedures in the existing role and functions of trade union representatives elected at company level.

6 Access for NSW to social dialogue related to the national social dialogue systems

Based on the national analysis in matrix II and III, the authors are invited to conclude the reports with cross-cutting reflections.

The authors are invited to contribute with any cross-cutting reflections on national obstacles for NSW's access to/inclusion in collective bargaining and for access to/inclusion in information and consultation

The authors are further invited to contribute with cross-cutting reflections on national facilitators/enabling mechanisms for NSW's access to/inclusion in collective bargaining and for access to/inclusion in information and consultation procedures.

The cross-cutting reflections could include whether categories or types of NSW have easier access/are better included in the national system, as well as, if applicable, whether certain types of NSW have more difficulties.

The authors are encouraged to reflect on whether the identified obstacles and/or facilitators are caused by or connected to the national legal system for collective bargaining. These cross-cutting findings relating to the national collective bargaining systems will likewise be used for comparisons later and any reflections are very welcome from the national experts.

As a last reflection at this point, the national author is encouraged to reflect on the role played by external sources. This include the role of EU law in facilitating access to social dialogue for NSW, and again, if certain types of NSW are better aided by EU law than others. Findings relating to the role of EU law will likewise be used for comparisons later and any reflections are very welcome from the national experts. The same goes for the influences and role of ILO-conventions, UN-conventions, and the European Social Charter, which the national social dialogue system may be informed and formed by.