

Mediation in Collective Interest Disputes

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1 Introduction¹

Mediation services were introduced early in the history of collective bargaining in all Nordic countries. The services have been shaped in close contact with the labour market parties, and many national characteristics have developed. In addition, close ties between the Nordic countries have promoted inspiration and copying of both rules and practices. In relation to the common distinction between “conciliation” and “mediation”, where the first refers to efforts in assisting in communication while the last also refers to a more intrusive role of formulating and proposing settlement terms, the activities in the Nordic countries clearly resemble mediation.² Still, the distinction is not strictly applied in the Nordic countries, and one often finds activities classifiable under both labels.

The mediation institutions or their mediators are also equipped with instruments for control over the mediation process. Duties to notify the institutions about industrial action and the right of the institutions to postpone industrial action for shorter periods are central empowerments. In addition, mediation is in practice compulsory, at least if the dispute is important enough to endanger public interests.

Mediation must be distinguished from two other types of governmental activities in collective bargaining in the Nordic countries. First of all, appointment of *ad hoc* commissions or negotiation leaders in order to bring about centralised recommendations or agreements occur from time to time. Such practice is especially frequent in Finland, where an Incomes Policy Officer may even include governmental measures in order to try to reach an encompassing deal with the main labour market parties.

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² See de Roo & Jagtenberg (1994), at 24-28.

Secondly, especially in Norway and Denmark there has developed a tradition where parliament intervenes in labour disputes threatening vital interests and/or essential services. Intervention takes place after the mediation phase, and can take the form of compulsory arbitration as in Norway or the adoption of a rejected mediator proposal by law as is common in Denmark.

Mediation services are financed by the state, and free of charge for the disputing parties. As opposed to several continental European countries, the labour market parties in the Nordic countries have until recently not aspired to create their own mediation services. The exception is recent developments in Sweden, where several parties have established “private” dispute resolution services regulated through collective agreements.

The main focus in this article will be on the role of mediation in collective bargaining. First the evolution of the Nordic mediation services will be tracked. Thereafter follows a discussion and comparison of mediation rules and practices in the four countries.

Mediation is an integral part of collective bargaining today. Bargaining over collective agreements usually takes place at the sectoral level in the Nordic countries, occasionally more centralised bargaining at confederate level dominates. As an integral part of collective bargaining at these levels, certain aspects of mediation have also become subject to considerable debate. The last part of the article is devoted to the more recent of these debates.

2 Historical Perspective

During the second half of the 19th century, when nationwide trade unions and employer associations were founded and collective agreements began to proliferate in the Nordic countries, an important issue in the debate on how to secure industrial peace was that of mediation. The discussions took place at a time when collective agreements still remained unregulated by labour law, and the party most favourable towards the instrument of mediation was undoubtedly the trade unions. From the point of view of the trade unions mediation was seen as an important tool to promote collective bargaining. Mediation was a subject of debate at the Scandinavian Labour Congresses of 1886 and 1888, at which delegates from unions and labour parties met. Both congresses recommended a form of impartial third-party mediation in order to prevent open conflict, the issue of voluntary arbitration also formed part of these discussions. The manner in which the employment of mediation developed in the Scandinavian countries varies, but mediation efforts were often an ingredient in larger disputes either on the initiative of the government, or one or both of the parties concerned. One factor that goes a long way to explain differences in developments was the establishment of framework agreements both at national level and in the metal industry in Denmark, while such developments came considerably later at these levels in the other Scandinavian countries. Thus the continuing debate on mediation entered a more national track, although parts of the discussions were comparative in scope.³

³ Ousland (1949), at 491ff, Westerståhl (1945), at 174.

2.1 Founding and Development

The first country to establish an encompassing mediation service was Sweden. In 1906, an Act on mediation was passed. The country was divided into eight districts, with a regional mediator in each. If a dispute covered more than one district, the government could appoint an ad-hoc mediator to handle the dispute.⁴ Mediation was essentially voluntary, but amendments to the Act in 1920 and during the 1930s introduced both the obligation to notify the mediator about work stoppages, and the right of the mediator to call the parties to mediation. The Swedish mediation service was subject to considerable debate, especially during the 1980s and 90s, but underwent very few changes until the establishment of the Mediation Institute in 2000. Mediation in Sweden is today regulated by the Co-Determination Act (1976, with amendments).

The next country to set up a mediation service was Denmark. A national mediation institution was established by Act in 1910, following a process of deliberation involving both sides of the labour market. The mediation institution was one of three institutions growing out of the provisions of the 1899 September Agreement, the other two institutions being a forerunner of the Labour Court dealing with breaches to the peace duty and an agreement called the “Norm” concerning the handling of disputes over rights. The mediation institution underwent substantial changes in the following decades. The powers of the mediators were strengthened, most clearly by imposing a temporary ban on industrial action during mediation and by regulating the procedures for membership ballots over mediation proposals. Mediation in Denmark is today regulated by the Conciliation in Industrial Disputes Act (1934, with amendments).

The Norwegian mediation institution was set up in 1916, as a part of the broader Labour Disputes Act passed in 1915. In contrast to both Sweden and Denmark, the Norwegian institution consisted of both a regional and a national permanent preparedness from the start. Mediation was to a large extent compulsory, and amendments during the 1930s (which were largely inspired by changes to the Danish Act) expanded the powers of the mediator to also cover the process of membership ballots over mediation proposals. A Labour Court ruling in 1982 played an important role in restricting these powers, and since then the matter has been subject to considerable debate in Norwegian working life. Mediation in Norway is today regulated by the Labour Disputes Act (1927) and the Public Sector Labour Disputes Act (1958, both with amendments).

Finland enjoyed legislation that assigned labour inspectors to mediate in disputes between workers and management already in the late 19th century.⁵ On the basis of a mediation Act of 1925, a permanent number of part-time mediators were appointed in order to help the labour market parties reach agreements. The development of collective bargaining in Finland was halted by the Civil War in 1918, and it was not until 1944 that the main labour market organisations signed a Basic Agreement. A new mediation Act was passed in 1946, in which the

⁴ Nyström (1990), at 62ff. This role of the government originated spontaneously, but was regulated through the 1920 amendment.

⁵ Tiitinen & Ruponen (1999), at 8-17.

parties were obliged to notify the mediation institution about work stoppages, and the Ministry of Social Affairs could postpone a work stoppage for up till two weeks if the stoppage affected specific industrial branches of national importance. In 1962 a new Act carried on most of the previous regulations, but it also included the possibility of appointing two fulltime national mediators. Mediation in Finland is today regulated by the Act relating to Mediation in Labour Disputes (1962, with amendments).

2.2 Explaining Divergences

The developments of mediation services in the Nordic countries are closely linked to the organisational centralisation and bargaining capacity of the main labour market parties. In the three Scandinavian countries, confederations for both blue-collar workers and employers were established about 100 years ago. Individual unions had existed for a while, but the three LOs – the Swedish Federation of Trade Unions, the Danish Federation of Trade Unions and the Norwegian Confederation of Trade Unions – were founded in 1898, 1898 and 1899 respectively. The Danish Employers' Federation (DA) was founded already in 1896, while the other employer confederations followed soon after with the Norwegian Employers' Confederation (NAF – now Confederation of Business and Industry, NHO) being established in 1900, and the Swedish Employers' Confederation (SAF – now Confederation of Swedish Enterprise, SN) in 1902. In Finland, both the Central Organisation of Finnish Trade Unions (abbreviated SAK in Finnish) and the Finnish Employers' Confederation (STK – now the Confederation of Finnish Industry and Employers – TT) were founded in 1907.

Differences with regards to the nature and pace of industrialisation, together with variations in the distribution of guilds, are factors often applied to explain deviations in the main principles of unionism found in the four countries. Industrialisation affected Denmark first, but developed slowly. In addition, a strong guild tradition helps to explain the strong presence of craft and general unionism. In both Norway and Sweden, industrialisation emerged later, but developed more rapidly than in Denmark. This, coupled with much weaker guild traditions, helped to promote industrial unionism among blue-collar workers. Industrial unionism is also dominant in Finland, but here a political division between revolutionary and reformist socialism played an important role within the labour movement for several decades after the World War II.⁶

Unions and confederations for white-collar workers were founded later, and some white-collar unions opted to join the LOs, especially in Norway and Denmark. In Sweden, two predecessors of the Swedish Confederation of Professional Employees (TCO) were established already in the inter-war period. The two merged to form the TCO in 1944, and as such covered members both in the private and public sector. Later, agreements have been reached demarcating the organisational areas between LO and TCO unions. A central organisation for university-educated employees – SACO – was founded in 1947. In Denmark, the

⁶ See e.g. Elvander (1974) at 366 for further details.

Central Confederation of Salaried Employees (FTF) was established in 1952, while the confederation for university-educated workers – AC – was founded in 1973. In Finland, the Finnish Confederation of Salaried Employees (STTK) saw the light of day in 1946 and the Confederation of Unions for Academic Professionals (AKAVA) was set up in 1950. In Norway, the establishment of large and vital confederations for white-collar workers and graduates/professionals took somewhat longer. Two confederations outside the LO area, the Federation of Norwegian Professional Associations (AF) and the Confederation of Vocational Organisations (YS), were established in the late 1970s. AF was split in 1997, and a fourth confederation for professional employees (Akademikerne) came into existence the same year. In 2001 AF was dissolved, and the unions of teachers, nurses and police officers agreed to establish a new confederation called Utdanningsgruppernes Hovedorganisasjon or Confederation for Educated Employees.

The internal strength of unions and employer organisations varies considerably, and has also changed over time. In relation to collective bargaining, the centralised powers of both blue-collar unions and employer confederations are greater in Norway than in the other Nordic countries. For instance, a notice concerning work stoppage at the individual union level must be sanctioned at the confederate level. In addition, centralised control and authority is further strengthened by the fact that both individual unions/branch organisations *and* the confederations (LO/NHO) are party to the same collective agreements. Somewhat weaker mechanisms of obligatory approval for branch employers' organisations concerning new collective agreements exist at the confederate level in DA, and existed also in SAF until the early 1980s. The confederate union levels in Denmark, Sweden and Finland are significantly weaker than in Norway, and coordinated bargaining is therefore dependent on prior consensus. Such consensus was often present in all three countries until the 1980s, but is now a common phenomenon only in Finland.

Although most white-collar confederations are also weakly centralised, this is not always the case with regards to their bargaining cartels. In all three countries the public sector bargaining cartels have been very strong, particularly in the state sector, partly reflecting the existence of special legislations or Basic Agreements. In the municipal or local government sector, somewhat weaker cartels exist. In the private sector of Denmark and Norway there is no coordination or centralisation of bargaining among white-collar workers outside the two LOs. The Swedish Federation of Salaried Employees in Industry and Services (PTK), a bargaining cartel composed of private sector unions from both TCO and SACO, conducted centralised bargaining with SAF during the 1970s and 80s, but does not perform bargaining over wages any more. In Finland, centralised bargaining was also a reality for many white-collar employees in the private sector up till the mid 1990s.⁷

Until the 1970s developments in mediation services can to a large extent be explained by differences between the various blue-collar confederations in the Nordic countries.⁸ A shared objective of both governments and legislators in all

⁷ Suviranta (2000) at 170.

⁸ This hypothesis was first formulated by Elvander (1974), and has later been confirmed by

the Nordic countries has been not only to avoid open conflict, but also to centralise collective bargaining. These goals were particularly important in the post World War II-era, but surfaced already in the 1930s in both Denmark and Norway. The most empowered mediation institution has clearly been the Danish, which owes a lot to the traditionally weak control over member unions exhibited by the Danish LO. In addition, friction between unions for unskilled and skilled workers, and a strong historical tradition of carrying out membership ballots over proposals for new collective agreements, explains the introduction of more detailed legislation during the 1930s making it more difficult for unions to turn down mediation proposals than by simple majority vote. The new legislation also gave the mediator the right to treat several proposals for new collective agreements collectively, thereby making individual unions dependent on the overall result of the ballot.

The Swedish bargaining system, on the other hand, has been characterised by little intra-union opposition. Furthermore, Swedish LO did enjoy authority over its member unions especially during the first decades following World War II. This authority had little formal backing but it nevertheless prevailed until the early 1980s. A third factor concerns the handling of proposals for new collective agreements, which are not voted over in member ballots but decided over in representative bodies. These three factors serves to explain why Sweden until 2000 had the weakest mediation service among the Nordic countries.⁹

Finland has historically to a large extent adopted the Swedish regulatory system, but a greater degree of internal political tension within SAK has produced a slightly more empowered mediation system.

Norwegian unionism and mediation occupies a median role between Denmark on the one hand, and Sweden and Finland on the other. Because of industrial unionism and the formal powers of LO, there has been less tension in Norway than in Denmark. But LO-unions also employ membership ballots over new collective agreements, which serves to explain legislative change during the 1930s, and a stronger mediation institution than in Sweden and Finland.

other studies (*see e.g.* Nyström 1990, Stokke 1998).

⁹ During the first decades after World War II, many unions had by-laws regulating ballots over proposals for new collective agreements. But such regulations were intentionally evaded by the union leadership (*see e.g.* Schmidt 1972, at 32). Today, a few unions in the public sector (as for example teachers) use ballots over proposals for new collective agreements.

3 Mediation Today¹⁰

3.1 Coverage

The formal coverage of the mediation institutions varies somewhat between the Nordic countries. At the outset, the Swedish, Finnish and Norwegian institutions are all encompassing, covering employees and employers in all sectors. However, in the Norwegian case, collective labour relations in the state sector are subject to specific regulations through the Public Sector Labour Disputes Act. These include some special rules regarding also mediation. In Finland, disputes concerning public servants in both the state and local government sectors are subject to special regulations regarding the duration of the temporary peace duty during mediation, while other rules concerning mediation apply irrespectively of sector and status. In Denmark, “crown servants” among state and local government employees are not entitled to strike and are therefore also exempted from rules regarding mediation.

In Sweden, a major coverage reform was introduced through the new legislation in 2000. The background was the signing of an agreement on cooperation and bargaining procedure in the Swedish manufacturing industry in 1997 (see section 4.2). Eight trade unions and twelve employers' organisations agreed both on mutual starting-points for the future of the industry and for new procedures for the actual wage negotiations at the sectoral level. These procedures state that demands have to be made at an early stage of the bargaining process, that wages of a retroactive nature will not be paid if conflict breaks out, and that an impartial chairman may enter the negotiations if no solution has been reached one month before the agreement expires. The chairman can postpone industrial action for up till 14 days, propose arbitration over specific topics and act as a mediator. The procedures in this “Industry agreement” actually ignored existing mediation legislation, and an official committee appointed by the government to review the rules regarding mediation had to respond to this challenge. The committee proposed that in bargaining areas covered by negotiation rules similar to those in the “Industry agreement”, the proposed Mediation Institute may not appoint mediators without the prior consent of the parties.¹¹ This proposition was adopted by legislation, and meanwhile the success of the procedures in the “Industry agreement” led others to agree on similar procedures. Today, around 60 per cent of all employees in

¹⁰ Additional literature on the legal aspects of mediation is found in textbooks on collective labour law, monographs and articles. Of the more specialised literature, we can mention Schaumburg-Müller (1995) on Denmark, Suviranta (1989, 1992) and Tiitinen & Ruponen (1999) on Finland, Evju (1982, 1991) on Norway and Nyström (1990) and Fahlbeck (1989, 2000) on Sweden. Concerning the process and functions of mediation, see also Lindegaard (1983) and Due et al (1994) on Denmark, Elvander (1988, 2001) on Sweden and Elvander (1974), Nyström (1990), Stokke (1998) and Arbetslivsinstitutet (2000) for comparative Nordic approaches. In addition, governmental commission reports like SOU 1998:141 and NOU 2001:14 offer important background material and evaluations.

¹¹ The final report of the committee is entitled *Medling och lönebildning* (SOU 1998:141), see also Fahlbeck (2000).

the Swedish labour market are covered by such negotiation procedures, and the parties concerned are thus exempted from certain aspects of public mediation.

Rules enabling parties to agree on their own negotiation procedures and thereby avoid standard procedures for mediation are also found in Finland. They were introduced in 1970, but have hardly ever been invoked.¹²

3.2 *Mediation and Administrative Practice*

With the exception of the Swedish Mediation Institute, a national mediator leads all mediation services. In Finland and Norway this is a full time position while in Denmark three part time mediators divide the labour market between them.¹³ In Finland and Norway, additional part time mediators can also be appointed at the national level. These mediators play an important role, especially in Norway, since the number of mediations can reach around 100 a year. The government or relevant ministry appoints mediators, but the labour market parties exert strong influence in this regard.¹⁴ In Denmark this influence is even formalised by letting the Labour Court (where the main parties are represented as lay judges) propose candidates. In Finland, the national mediators have often come from the leading labour market organisations while in Norway and Denmark it is more common to recruit candidates from among judges, academics or other higher government officials.

The Swedish mediation service at the national level has traditionally relied on external mediators appointed on an ad-hoc basis. This allows the parties to the dispute a greater influence on the choice of mediator than in any of the other countries. A proposal for a national mediator was launched in a recent official report aimed at reforming the system of mediation (SOU 1998:141), but was met with opposition from the labour market parties, and subsequently rejected by the legislator in connection with the setting up of the new Mediation Institute in 2000. Nevertheless, the staff of the Swedish institution has been significantly increased and is led by a director with certain collective bargaining related duties. The spread of negotiation procedures similar to those in the “Industry agreement” has meant that former mediators have been employed as impartial chairmen. This could have led to a shortage for mediators available to the Mediation Institute, but an understanding has been reached on a sharing of manpower.

A special feature of Swedish legislation is the distinction between a negotiation chair and a mediator. The Mediation Institute can appoint a chair for the negotiations if requested by the parties concerned. The chair will have a less intrusive role than the mediator, and is believed to be best suited in situations

¹² Tiitinen & Ruponen (1999) at 34 and at 58.

¹³ Legislation in Finland (and in practice also in Norway, *see* Evju (1991) at 128) allows for the assignment of an additional assistant national mediator. In Denmark, an assistant mediator is also appointed and may replace any of the three.

¹⁴ In Finland, the President of the republic appoints the national mediator.

where the parties have not yet reached firm standpoints. A mediator can still be appointed at a later stage if agreement is not reached.¹⁵

The local mediation service in Sweden, Finland and Norway relies on part time mediators appointed for a specific period of time. Most local mediation cases deal with union demands for collective agreements in individual firms not previously covered by such, while cases at the national level usually deal with the revision of multi-employer collective agreements. Local mediators can also be appointed to handle disputes at the national level, in cases of work overload. In these respects, the mediation services are quite flexible.

Mediation is usually carried out by a single mediator. The Norwegian statutes open up for the establishment of mediation commissions, but these have been extremely rare. In Denmark, the three mediators may form a board and perform joint mediations, but this is never done. On the other hand, a mediator may decide to make use of conciliators to assist some of the parties in their more technical discussions. This is often the case when a large number of collective agreements are mediated at the same time, a situation often emerging during the revision of agreements between LO unions and DA branch organisations. These conciliators are appointed in the same way as mediators but do not have the powers of a mediator.¹⁶

In Finland, mediation commissions are also rare. Still, a commission was appointed as late as in the summer of 2001 during a long strike among doctors in the local government sector. The national mediator proposed a commission consisting of three representatives from each of the parties, and with him self as leader. The commission was formally appointed by the ministry, and was able to come up with a proposal to end the conflict.

Sweden is the country where mediation commissions have the longest tradition. Already during the 1920s, three-man commissions were used. They were sometimes composed of one chairman and two other members, enjoying, respectively, the confidence of employers' and employees' interests. The chairman might already have acted as both impartial chairman and mediator at earlier stages in the same dispute, implying a mediation process in three stages. Such a tradition was not viewed as particularly desirable, but still unavoidable in certain situations.¹⁷ The use of commissions continued until the 1980s, but had the additional disadvantage that while mediators were appointed by the mediation service the government appointed commissions. In several instances, the break down of an ordinary mediation was transformed into an appeal to the government to appoint a commission. In addition, the problematic role of the government as both appointer of mediation commissions and employer was highlighted. Thus, during the 1990s the appointment of commissions was *de facto* delegated to the mediation service and in 2000 this change of practice was secured through the already mentioned law reform. Today, it is common to appoint *two* mediators in the same dispute. One argument in favour of this arrangement is the opportunity to give new mediators a "soft" start.

¹⁵ Government Bill 1999/2000:32, at 95. *See also* Fahlbeck (2000), at 419.

¹⁶ *Cf* Lindegaard (1983) at 38.

¹⁷ Schmidt (1952) at 49-50.

The mediation institutions are located in the capitals, and all but the Swedish institution have localities in which the parties can meet with their delegations. Mediation might also take place in the localities of one of the parties concerned, in Sweden and Norway it is for example not unusual that the employers house the negotiations.

3.3 Process Control

The evolution of mediation in the Nordic countries is partly a history of increasing control over the bargaining process. Today, all the mediation institutions rest upon two basic principles: The duty of the parties to notify the mediation institution about industrial action and the duty to take part in mediation when called upon. Both principles are seen as fundamental ingredients for a well functioning mediation service. Following the amendment made to the Swedish regulations in 2000, the institutions also share a third principle: The right of the mediator or the mediation institution to postpone industrial action in order to safeguard sufficient time for mediation. However, the actual formulation and practice of all three principles vary considerably between the countries.

The obligation to notify the mediation institution about industrial action covers all forms of actions relating to interest disputes in Norway, Sweden and Denmark. In Finland, on the other hand, only “work stoppages” are covered by this obligation. This means that if a collective agreement has expired, workers may for example engage in partial resistance to work even though mediation has not been tried.¹⁸ Such action is not uncommon in the private sector and often takes the form of a ban on overtime work.

A violation of the obligation to notify is also treated differently. In Denmark and Norway industrial action becomes unlawful if it has not been notified in the correct manner. In Finland and Sweden, on the other hand, failure to give notice does not render the industrial action unlawful but the party responsible faces the risk of being fined by the state.¹⁹

Finland has the longest advanced notice period of the Nordic countries namely two weeks. In Sweden it is seven working days and in Norway four days.²⁰ In Denmark, the mediation Act hinges on rules regarding prior notice to which the parties have agreed. Such rules may in some instances imply a notice period stretching over a month, but the Act also makes reference to the rules regarding advanced notice between LO and DA, in which seven days is the normal procedure. The period between when the mediation institution receives a notice and when industrial action may start, is used in different ways. In Sweden and Finland, this period is used for mediation. In Norway, this period is used for

¹⁸ Tiitinen & Ruponen (1999) at 22.

¹⁹ In addition, payment of damages to the opposite party may also become relevant in this regard. See Fahlbeck (2000) at 422 and Tiitinen & Ruponen (1999) at 48-56.

²⁰ Collective bargaining in the state sector in Norway, covered by the Public Sector Labour Disputes Act, is always subject to mediation if negotiations break down. Mediation shall start within 14 days after the mediator has been notified about a failure to reach agreement.

considering whether the mediator shall issue a temporary ban on industrial action or not. Such a ban must be issued within two days of receiving the notice.

In Denmark, mediation has already been initiated when notices are given, this tends at least to be the case in the LO-DA-area. The reason for this is that labour market organisations in Denmark have a long tradition of agreeing on “negotiation schedules”, in which a more or less detailed plan for the renegotiation of an agreement is stated. Such schedules usually indicate when the negotiators will seek help from the mediation institution, and in the LO-DA-area this has a coordinating effect when as many as 500 collective agreements are up for revision. These “negotiation schedules” have never been part of the legislation on mediation, but have nonetheless inspired legislators in Sweden to order that the mediation institution shall assist the parties in agreeing on similar schedules.²¹ In Finland and Norway, no such traditions exist.

The duty to take part in mediation when called upon has primary relevance to situations where notices concerning work stoppages have been given. In principle, parties are also obliged to meet before the mediator even though no notice has been given. This latter obligation has some relevance for the Danish case, where the mediator might wish to search for possible solutions in the LO-DA-area even though notices have not been issued. The amendment made to the Swedish mediation rules in 2000 also gives the Mediation Institute a firmer backing for appointing mediators even though no notice concerning work stoppage has been sent, although it is too early to determine whether this amendment will have any practical consequences.

The “compulsory” element of mediation lies in the mediator’s power to call the parties to mediation, which is a right widely accepted today. In Denmark, the Labour Court might even be used to hear witnesses or relevant parties if the issues under consideration are unclear. In Norway, the mediator has the same powers as the Labour Court to hear witnesses. It is extremely rare that mediators turn to the Labour Court for help, the parties are usually willing to cooperate and to share the information necessary for mediation.

The temporary peace duty is the third source of power of the mediation institutions. In Norway, a notice concerning work stoppage can be postponed for 14 days, or 21 days if the dispute covers state employees. In Sweden, such postponement may be up to 14 days, in Finland 7 days (plus up to 7 days in addition if the dispute covers public servants) and in Denmark notices may be postponed twice, each up to 14 days.

Decisions concerning postponements are left to the mediation institutions, or to the Ministry on the recommendations of the mediator in Finland. Both in Sweden and Finland, the mediators will try to bring about a voluntary postponement first. If the parties refuse, the mediation institution tries to apply postponements selectively and also to vary the length of postponements according to the specific case. This is done in order to avoid the possibility of the parties speculating in postponements and thereby retarding the negotiations.²² In Sweden and Finland, mediation has usually taken place before

²¹ The duties are described in the Ordinance with Instructions for the Mediation Institute 2000:258.

²² See e.g. the discussions in the Government Bill 1999/2000:32, at 85 and Fahlbeck (2000), at

the issue of postponement becomes relevant. In Sweden, it is the prospects for a successful mediation that determines whether the mediation institution shall postpone industrial action or not, and in Finland a decision with regards to postponement is based on a combination of such prospects, and the possible damages caused by industrial conflict.

In Norway on the other hand, where the question of postponement usually arises before mediation has started, decisions to postpone have become a routine procedure.²³ Here, the law states that postponement shall be issued if a stoppage of work “(…) will prejudice public interests in the view either of the nature of the undertaking or of the extent of the dispute” (Labour Disputes Act sec 29 no 2). These criteria are subject to broad interpretations, and mediators prefer to mediate without the parties being engaged in industrial action.²⁴ In Denmark, no specific requirements concerning the nature of the dispute have to be met in order to issue the first postponement. But in case of a second postponement involving an additional 14 days, the dispute must endanger vital social functions, or have other far-reaching social consequences.

Taking into account the rules regarding notice and postponement, the mediation regulations in the Nordic countries reserve at least two weeks of industrial peace for mediation. The rules in Sweden and Finland are more flexible, allowing for shorter periods if the parties are able to agree or if the prospects for a successful mediation are weak. The Norwegian rules are more rigid, giving mediators 14 days to find a solution.²⁵ The temporary peace duty period reserved for mediation in Denmark may last as long as 28 days, in addition a special provision stipulates that industrial action can first start on the fifth day after postponement. This regulation, aimed at “cooling down” the parties in a possible state of unsuccessful negotiations, is unique among the Nordic countries and was expanded from the third day after postponement in connection with the 2000 bargaining round.

3.4 The Fate of the Mediator Proposal

A mediation may end in several ways but the three most common outcomes are: The parties reach an agreement on their own, a mediator proposal is put forward, or industrial action starts. Taking the last instance first, the various mediation institutions react somewhat differently to industrial action. In Denmark it is common for the mediators to withdraw from their activities, at least if they are not encouraged otherwise by the parties. In the other three countries, mediators are somewhat more active but only if the parties are willing to reschedule negotiations. In Norway alone, the law states that the mediator shall call upon the parties if a month has elapsed since mediation was terminated and the

420-21. Postponement has so far not been issued in Sweden, so these guidelines have not yet become tradition.

²³ In the state sector, mediation is always compulsory.

²⁴ Evju (1991), at 131.

²⁵ After minimum 10 days (14 days for state employees) one of the parties can claim a “break” in the mediation, thereafter runs a maximum of 4 (7) days.

dispute has still not been settled. The mediator is never obliged to put forward a proposal, and as a rule the mediator will not do so unless both parties are willing to recommend the content of the proposal.

One of the most debated topics in relation to mediation has been how the parties decide over the mediation proposals. The debate is mostly centred around the role of the unions, and whether proposals are to be decided upon in a representative voting system or, directly by union members in membership ballots. The debate will be discussed further in section 4.1, so what follows is just a short description of the rules.

Swedish and Finnish legislation are silent on the issue of how the parties may come to a decision over mediation proposals. Norwegian legislation has some rules regulating how a ballot shall be conducted, but whether or not to conduct the ballot is left to the unions to decide. Danish legislation is unique, giving the mediator both the right to demand a union ballot and the right to treat several proposals for new collective agreements as one entity. In addition, the mediation Act stipulates that if participation in the ballot is lower than 40 per cent, there has to be both a majority against the proposal and this majority has to account for at least 25 per cent of those entitled to vote, in order for the proposal to be rejected.

4 Major Issues

The mediation institutions play a visible role in collective bargaining, and are thus also frequently subject to considerable debate. Still, there is a clear discrepancy between the amount of debate and the amount of changes actually carried out to the systems. The institutions are undoubtedly marked by an organisational sluggishness not unknown in industrial relations, they are part of historical compromises subject to only incremental changes except at times of great crisis. This is not to say that the institutions function ideally, or that they don't have dysfunctional aspects.

The number of mediations taking place in Norway serves to illustrate this dysfunctionality in the Norwegian system. While the ideal for most bargaining parties is to revise collective agreements without recourse to mediation, negotiations often break down and notices concerning work stoppages are often issued on a routine basis. As a consequence, the number of mediations often reaches around 100 a year in the biannual main negotiations.²⁶ In comparison, the number of mediations in Finland usually stays between 20 and 40 a year, while in Sweden the number is even lower. A governmental commission has just recently evaluated the bargaining system in Norway, and concluded that bargaining parties too easily give up and activate mediation.²⁷ Different proposals making mediation less compulsory were nevertheless rejected, which seems to indicate that a certain degree of "misuse" is accepted.

²⁶ Collective agreements usually last for two years in Norway, in the other Nordic countries the duration varies somewhat between sectors and over time.

²⁷ Cf *Vårens vakreste eventyr...?* NOU 2001:14, at 105.

Dependency on mediation is also a feature in Denmark, where negotiations between LO unions and employer associations frequently end up in the mediation institution. In both Norway and Denmark, mediation has thus become an integral part of the bargaining system. This was surely not intended when the institutions were set up, but is nevertheless accepted today. One explanation may be found in the practice of union ballots over mediation proposals.

4.1 Union Ballots and Mediation

Union ballots over mediation proposals take place regularly in Norway and Denmark, and to some extent also in Finland. Ballots are held on a voluntary basis in Norway and Finland. In Finland they are regulated mainly through by-laws of the organisations, while in Norway regulation through basic agreements also play a role. The Labour Disputes Act in Norway incorporates some provisions on balloting, among other things a rule allowing the mediator to treat several proposals as one entity. This rule was introduced in 1935, and used regularly in order to bundle up mediation proposals in the private sector. The mechanism was especially useful in neutralising the votes from more militant LO unions or independent unions, since only the total number of votes had a bearing on the result. The practice of this rule rested upon the mediator actually having the right to demand a ballot, and precisely this question was tested in the Labour Court in 1982. The court ruled that the Labour Disputes Act did not provide such a right, which made the right to combine proposals quite illusive.²⁸ The tradition of holding ballots has nonetheless continued, and is believed also to strengthen the need for mediation. The argument is that union members will have a tendency to vote down a result arrived at without the use of mediation, because they know that an additional mediation round will make the result even better. This is what actually happened in the private sector in 1990, and even though the need for the more “therapeutic” aspects of mediation may vary the dependency on mediation is thus strong in many sectors.

In Denmark, the rule allowing the mediator to treat several proposals as one entity is backed by a right of the mediator to demand ballots. In addition, up till 1997 the Conciliation in Industrial Disputes Act stipulated stricter criteria with regards to the rejection of mediation proposals. It was set as a requirement that both a majority of all those voting, and at least 35 percent of all those entitled to vote, should have voted against it in order for a proposal to be legitimately rejected. The number of proposals rejected was thus low, and especially the employer side came to see these rules as vital to collective bargaining. One unintended consequence of these strict criteria concerning rejections, and which troubled the unions in particular, was the shrinking rate of participation in ballots. In some areas participation fell below 35 percent, making it impossible to turn down a proposal even with a 100 percent vote against. Such considerations led to an amendment of the Act in 1997, allowing for rejection by simple majority if

²⁸ Both the right to demand ballots and the right to treat several proposals as one entity are on the other hand clearly formulated in the Public Sector Labour Disputes Act covering state employees. To our knowledge, these rights have never been taken advantage of.

participation exceeds, or is equal to 40 percent. If participation in the ballot is lower than 40 per cent, there has to be both a majority against the proposal and this majority has to account for at least 25 per cent of those entitled to vote in order to turn down the proposal.

In 1998, the mediator proposal in private sector in Denmark was rejected by a majority of 57.8 percent and a participation rate of 47 percent. Although the proposal was recommended by 14 out of 15 LO unions involved, the majority of union members against triggered a major private sector conflict which affected manufacturing industries, transport, construction, and parts of private services. After two weeks a law adopting the mediator proposal, although with some amendments, was passed by parliament and peace duty was thereby re-established.

The view of Norwegian employers with regards to the use of ballots is twofold. On the one hand they favour a representative system as in Sweden because of the uncertainty connected with ballots. Rejections are actually more frequent in Norway than in Denmark, both because the lack of statutory rules regarding rejections, and because of more frequent bargaining at the sectoral level. The mediator proposal for the whole LO-NHO area was in fact rejected in 2000 by a majority of 64.3 percent and a participation rate of 65 percent. A major strike followed, but unlike in Denmark the parties were able to agree on changes to the proposal, which were approved by a clear majority in a second ballot.

The experience with events such as the one in Norway in 2000 tends to strengthen the role of ballots, because they are seen as an important channel for direct democracy in the trade unions. Norwegian employers have reluctantly accepted this, and have instead argued in favour of regulations that invigorate the possibility of the mediator to treat several proposals as one entity. This was the view expressed in a recent governmental commission with representation from both the union and employer side.²⁹ All the members from the employer side recommended an amendment of the Labour Disputes Act, with the view to allow the mediator the right to demand ballots over mediation proposals. This would also revitalise the right of the mediator to treat several proposals as one entity. Other members of the commission pointed to the problems caused by the Danish practice in this area in connection with international labour law.

Three complaints to the Committee of Freedom of Association (CFA) in the ILO have been submitted by independent Danish unions who have had their collective agreements made part of the larger LO-DA mediation proposal.³⁰ The committee concluded in all three cases that the complainants had their bargaining rights infringed on according to ILO conventions no 87 and 98, and recommended amendments to the mediation Act. One such amendment took place in 1997, requiring that the negotiation possibilities be exhausted before an agreement can be included in a package of agreements.³¹ But according to CFA

²⁹ Cf *Vårens vakreste eventyr...?* NOU 2001:14, at 105.

³⁰ Cf Committee of Freedom of Association cases 1418, 1725 and 1971. In addition, the issue is also raised by the Expert Committee of the European Social Charter in Conclusions XV-1 (1999-2000).

³¹ The amendment came as a consequence of the conclusions in the CFA case 1725. Whether

case 1971, this was not enough. The plaintiff in this case was a union outside Danish LO, organising personnel in aviation, and which had its mediation proposal linked up with the larger LO-DA mediation proposal in 1998. The Committee of Freedom of Association argued, amongst other things, that:

“[The government must] ensure that the view of the majority of workers in a given sector is not subordinated to the view of the majority of the entire labour market as concerns the possibility of continuing free collective bargaining of terms and conditions of employment and as concerns the possibility of undertaking industrial action.”³²

The government defended the practice, emphasizing the special characteristics of the Danish labour market. The collective agreements structure in the private sector is fragmented (around 600 agreements were in fact bundled up). Blue-collar and white-collar employees are covered by separate agreements, and there may exist several and partly competing collective agreements at the individual firm level. The opportunity to treat several mediation proposals as one entity is therefore necessary in order to avoid that small groups can prevent a return to work by stopping vital functions in modern enterprises.³³ The Committee of Freedom of Association responded to these arguments by stating that:

“The particularities of the Danish system raised by the Government, such as the existence of several different collective agreements in a given enterprise, make sense only in so far as they recognize the right of these many and diverse representative sectoral unions to undertake meaningful negotiations.”³⁴

Different interpretations of especially the last statement are possible, but the one that the minority in the Norwegian commission opted for stipulates that ILO conventions require that the practice of linking collective agreements is made voluntary. The parties to each collective agreement must be guaranteed meaningful negotiations, and the actual structure of collective agreements therefore limits the possible coverage of an enforced mediator proposal.³⁵

The question of whether the mediator shall have the right to demand ballots over a proposal or not, may also be debated independently of the right to treat several mediation proposals as one entity. A unanimous commission backed a proposal giving Norwegian mediators the right to demand ballots, although a minority argued that the right to demand ballots should only be made applicable to the local government sector.³⁶ This would make the local government and state sector in Norway subject to similar regulations. The argument was that the structure of collective agreements and collective bargaining in the local government sector is fragmented, and as such it would benefit from the

the negotiation possibilities are exhausted or not, is up to the mediator to decide.

³² CFA case 1971, para 52.

³³ CFA case 1971, para 35.

³⁴ CFA case 1971, para 51.

³⁵ NOU 2001:14, at 121. The same interpretation gets support in Nielsen & Rehof (1998), at 206 and Evju (2001), at 20-21.

³⁶ Cf *Vårens vakreste eventyr...?* NOU 2001:14, at 116-119.

formation of stronger trade union bargaining cartels. As an incentive, the right to demand ballots should not so much be used against the will of a bargaining cartel, but primarily against smaller independent unions unwilling to join a cartel. As such, the ballots would delay industrial action among independent unions that fail to recommend a mediator's proposal. Statutory rules requiring unions to hold ballots over mediation proposals face less problems vis-à-vis international labour law, than the practice of treating several mediation proposals as one entity.³⁷

The proposals from the commission were circulated for comments from labour market parties, and were met with criticism especially from the union side. Even the LO, which in the commission had backed the proposal giving mediators the right to demand ballots in the local government sector, now rejected such changes. So when the Government Bill was made public in March 2002, it was no great surprise that the controversial proposals from the commission were dropped. Instead, the Bill focused on only minor changes to the rules concerning mediation.³⁸ By not giving the mediator the right to demand ballots, the right of the mediator to treat several proposals as one entity will remain illusive. This is also intended by the Norwegian government, which supports the minority of the commission in the belief that a revitalisation of these rules would come in conflict with international labour law.

Similar proposals have also been discussed in Sweden. In 1996, the main employer organisation SAF proposed statutory rules requiring unions to hold ballots before engaging in industrial action (SAF 1996). The proposal was rejected by the governmental committee deliberating the rules for mediation and industrial action in 1998, and as such never reached parliament. Nevertheless, the proposal mirrors legislation introduced in Great Britain during the 1980s forcing unions to carry out membership ballots in order to win support for industrial action. The motive behind this legislation was to curb militant trade union officials by forcing them to comply with the vote of their members. As such the legislation was introduced under the banner "Democracy in Trade Unions".³⁹ Recent research indicates, however, that union ballots might have strengthened the bargaining positions of the trade unions and that the alleged mismatch between union leaders and their members is exaggerated. When unions hold ballots, their proposals are seldom turned down. Instead, large majorities in favor of industrial action is often the outcome and the bargaining position of the union vis-à-vis the firm is often strengthened, because the ballot is seen to generate a greater sense of unity among the members concerned.⁴⁰ In conclusion, experience both in the Nordic countries and in Great Britain indicates that ballots are complex features of the bargaining process. Furthermore, ballots are difficult to use in order to moderate union leadership, it

³⁷ See e.g. Ben Israel (1988), Gernigon et al (1998) and Evju (2001). Problems can still arise from the duration of a temporary peace duty imposed, or from possible discriminating practice.

³⁸ See Governmental Bill (Ot.prp.) no 46 (2001-2002).

³⁹ See e.g. Auerbach (1990), chapter 7.

⁴⁰ See e.g. studies discussed in Elgar & Simson (1993), McKay (1996) and Kessler & Bayliss (1998).

is not uncommon for union members to vote down recommended mediator proposals.⁴¹

4.2 *Developments in Sweden*⁴²

Although mediation has been a frequent subject of debate in all the Nordic countries, both the degree of debate and the amount of change that have actually taken place has been greatest in Sweden. The provisions of the 1920 Act on mediation, which slightly revised the 1906 Act, were transferred with only minor alterations into the 1976 Co-Determination Act, confirming the weakest mediation institution among the Nordic countries. Mediation was looked upon as a voluntary affair, more of a service to the bargaining parties if needed. Through the 1980s and especially the 1990s, increasing tension between the parties in both the public and private sector made mediation efforts more complicated. First of all, mediation was sometimes rejected by the parties and it would be contrary to Swedish tradition to appoint a mediator or a mediation commission without the consent of the parties, even if legal provisions allowed it. Secondly, the parties were sometimes reluctant towards voluntarily postponing notified industrial action during mediation. Thirdly, among the instructions of the mediators was to “bring about an agreement between the parties on the basis of proposals made by the parties themselves”.⁴³ This was seen by many to restrict the mediator’s room for manoeuvre to only the demands and offers of the disputing parties without taking broader interests into consideration.

The mediation provisions became debated, and were dealt with in several governmental commissions.⁴⁴ One expert commission (SOU 1991:13) went so far as to propose a system with a permanent national mediator, compulsory mediation, and with the possibility to postpone industrial action for a week. Such proposals provoked massive reactions from the trade unions, and were not followed up by any government at the time.

Following the rapid shift in the economic outlook of 1989, the social democratic government tried to intervene in collective bargaining by means of a legislation banning strikes and wage increases over a certain level. This intervention failed, and the government resigned. The new social democratic government appointed a commission consisting of four previous chief negotiators, with a respected mediator as its chair. This commission, popularly known as the Rehnberg Commission after its leader, succeeded in establishing a framework for collective bargaining for the years 1991-1993. Two members continued to act as mediators also after the commission had been dissolved, and they played an important role in the bargaining rounds of 1993 and 1995. Both the Rehnberg Commission and subsequent mediators had seen the necessity of

⁴¹ As Yemin (1981), at 136 argues, this problem is known in a number of countries.

⁴² For further debate, *see* Elvander (2001) and Fahlbeck (2000).

⁴³ Co-Determination Act sec 48, before amendment 2000.

⁴⁴ *Arbetsmarknadsstriden I-II* (SOU 1984:18-19), *Fack och samhälle* (Ds 1988:2), *Spelreglerna på arbetsmarknaden* (SOU 1991:13).

taking broader interests into considerations than the demands and offers of the parties, a clear development since the 1970s and 80s.

By the mid 1990s, the Swedish government once again became increasingly concerned about the effects of collective bargaining on the national economy. In 1996, the labour market organisations were encouraged to come up with proposals for reforms both in relation to the bargaining process as well as wage formation. The strengthening of the mediation service was one option, voluntary procedures was another. The “Industry agreement”, signed in 1997, was one response, and signalled that the bargaining parties in the manufacturing industry had managed to agree on both common goals for the development of the sector, and on procedures for collective bargaining that for instance gave the impartial chairman powers beyond those of the public mediator.

Even though similar negotiation procedures as those in the “Industry agreement” were signed in other sectors, it was unlikely that coverage would embrace all sectors. In addition, the employer side (especially SAF) had advocated stronger legal restrictions on industrial action and regulations concerning mediation. The government thus appointed a commission whose mandate was to propose institutional changes with the aim of “contributing to an efficient wage formation”. The commission delivered its report in 1998, and proposed several far-reaching measures.⁴⁵ Among the most controversial were the introduction of a permanent national mediator, compulsory mediation, longer notification period, the possibility of postponing industrial action for two weeks, a principle of proportionality⁴⁶ concerning industrial action, and a lowering of the tolerance level towards state intervention in collective bargaining. In addition, the commission proposed to convert the mediation service into the Mediation Institute among whose tasks was not only to mediate, but also in a variety of ways to promote a well functioning wage formation.

The proposals provoked significant debate, and a number of the most controversial issues were dropped when the government followed up the commission’s recommendations with a proposal for amendments to the Co-Determination Act in 1999. The most important changes proposed by the government and adopted by the parliament in spring 2000, were:

- The establishment of the Mediation Institute with the task of appointing mediators and promote a well functioning wage formation
- To extend the notice period for industrial action from 7 days to 7 working days

⁴⁵ Cf *Medling och lönebildning* (SOU 1998:141). See also Nyström (1999) concerning the debate on mediation and its relation to the development of agreements on collective bargaining procedures.

⁴⁶ Principles concerning proportionality have traditionally been virtually unknown in the Nordic countries (see Fahlbeck in this volume). In countries where such principles play a role, they can for example demand a “reasonable proportion” between measures taken in industrial action and the aims or consequences of such action. An overtime ban is for example easy to use but can cause severe damage for the firm.

- The introduction of provisions concerning compulsory mediation were made clearer and industrial action can now be postponed for up till 14 days if necessary
- The staff of the Mediation Institute was vested with the responsibility of promoting coordination and common understanding among bargaining parties, to follow, analyse and report on wage developments and to collect, analyse and publish wage statistics.

Parties who have agreed upon procedures for collective bargaining similar to those in the “Industry agreement” are exempted from compulsory mediation, but not from the coordinating efforts of the Mediation Institute. For example, the institute shall act at an early stage in the bargaining rounds by calling all major parties to deliberation, promote coordination of the duration of collective agreements, encourage the parties to agree on negotiation schedules so that agreements are revised before they expire, try to ensure that the exposed industries of private sector conclude agreements first, and in other ways deemed appropriate to promote a common understanding of the framework for bargaining.⁴⁷

Developments in relation to mediation in Sweden are complex in a comparative perspective. On the one hand, rules concerning mediation have been strengthened and we can speak of a convergence between the Nordic countries. On the other hand, a majority of employees in the labour market are not covered by these rules in Sweden, because the parties have the option of agreeing on their own rules. Such an option indeed exists in Finland but is in practice not taken advantage of, while similar proposals to this effect are extraordinary even in debates on mediation in Denmark and Norway. In addition, the Mediation Institute is equipped with duties that are unknown in any of the other Nordic mediation institutions although some of the tasks of the Mediation Institute might be taken care of by other institutions in the other countries. Still, we might speak of a convergence associated with the actual conduct of mediation when it comes to societal interests. This is further discussed below.

4.3 Mediation and Societal Interests

A common assumption about mediation is that the process in some way ends in a compromise splitting the differences between the parties to the dispute. Such a process of splitting the difference might have a “chilling” effect on the bargaining relationship because the parties avoid making compromises they otherwise might be willing to make, in order to preserve disagreement for the mediation process.⁴⁸

⁴⁷ The duties of the institute does not cover coordination of the actual content of collective agreements, this was made especially clear in the government proposal (Government Bill 1999/2000:32, at 51-53). For further discussion, *see* Fahlbeck (2000).

⁴⁸ *See e.g.* Kochan & Katz (1988), at 280.

This assumption seems to be based on bargaining models where there are only two parties to a dispute and the level of bargaining is the individual company or even the workplace. In a situation where bargaining is raised to the industry or even the national level, the mediator quickly faces a dilemma: Is it possible, or even desirable, to include references to the common good in the form of, for example, macro-economic policy objectives, in mediation? The dilemma gets even more problematic if most, but not all the labour market parties pursue a policy of wage moderation, focusing for example on real wage growth rather than nominal growth. Pursuing a strategy of splitting the differences between the parties to the individual dispute will favour minority groups, making it even more difficult for the majority to reach their goal.

Mediators in all four Nordic countries have faced this dilemma. In Norway, the mediators are very careful in forwarding more favourable solutions to groups that are not content with the pattern set by previous pace-setting agreements.⁴⁹ The same holds true for Denmark. The practice is especially evident in the Danish local government sector, where individual unions occasionally break out of common deals. These unions never gain anything through mediation, and strike action more often than not ends without a positive result.⁵⁰ In addition, oppositional private sector unions both inside and outside Danish LO routinely experience that the revision of their collective agreements is linked with other agreements, effectively neutralising the voice of their opposition.

This mediation practice in Norway and Denmark also rests upon other forms of legal intervention in collective bargaining. In Norway, compulsory arbitration has been a recurrent element both in stopping labour conflicts threatening essential services and in stopping militant unions. The use of compulsory arbitration has both historically and more recently been frequently used to suppress independent unions or YS unions competing with LO unions in the private sector. Up until the 1970s, both sea and coastal water transport were ridden by competing unionism, and especially two independent unions became repeatedly victims of state intervention by means of compulsory arbitration. Since then, the oil industry, with a fragmented union structure, has taken over this role. The National Wage Board, which is set up for both voluntary and compulsory arbitration, usually behaves similarly to the mediator in that it does not forward more favourable solutions to groups that are not content with the pattern set by previous agreements. Even LO unions have been treated in this way, although such breaking out behaviour has been more rare. Needless to say, several interventions in the form of compulsory arbitration have been met with criticism from the ILO and other international labour law bodies.⁵¹

In Denmark, interventions by the state covering parts of or even the whole labour market have also occurred. The connections to mediation are obvious, as former national mediator Lindegaard writes: “This possibility of a second postponement [of notices during mediation] fulfils two functions. It provides a further chance for negotiations between the parties and it alerts the Government

⁴⁹ Stokke (1998), at 379-82.

⁵⁰ See e.g. the 1999 bargaining round, analysed in Due et al (2000), at 136-38.

⁵¹ See Stokke (1999) and NOU 2001:14 for further details.

and gives it time to consider possible measures to avoid conflict.”⁵² The interventions usually take the form of confirming a rejected mediator proposal by means of legislation, or as in 1998 by confirming an altered proposal by law.⁵³

Such interventions in Norway and Denmark make it easier for the mediators to stay in line with what has been agreed to earlier in the bargaining round. Exceptions have occurred, for example in situations where employers are willing to concede more, where the labour market conditions are especially promising for certain groups, or in connection with low-paid groups. Still, these are exceptions and the tradition, which is at least as old as the post World War II era, is strong.

Even in Finland, there is a long tradition for mediators to keep to the “general guidelines” adopted in the labour market.⁵⁴ Such guidelines may come as a result of incomes policy negotiations, a centralised labour market solution, or pattern bargaining at the sectoral level. The coordinating efforts of mediation in Finland occasionally fail, and mediation may then result in a strike. When the strike has lasted for some time and the strikers have lost income, it seems easier to accept deviations from the “general guidelines”. The latest example was a strike among doctors in the local government sector, which lasted around half a year before it was ended with a proposal from a mediation commission. Such a strike could have easily triggered state intervention had it taken place in Denmark or Norway, and such measures were in fact discussed during the strike, although they are contrary to Finnish traditions.

Mediation in Sweden, on the other hand, developed in a different direction. Already before the “golden age” of Swedish collective bargaining, when LO and SAF totally dominated the arena in the 1950s and 60s, a mediator strategy was applied where a mediator worked from a rough draft through several drafts ending up with a final draft for a mediator proposal which was subjected to preliminary approval by the parties. However, as an early commentator has observed, “... on certain occasions new proposals may be made which in their final documentary form will win the approval of both parties.”⁵⁵ During the 1970s and 80s this willingness by mediators in Sweden to overrule their own “final” or even “ultimate” proposals with new ones, made deadlines elastic or even illusory. In addition, the single bargaining relationship was treated more in isolation, the mediators focused on the demands and offers of the parties more than the overall pattern of settlements. This especially served to provoke the employers’ organisations, and damaged the reputations of the mediators.

A new mediator strategy was introduced by the Rehnberg Commission, taking broader considerations.⁵⁶ Today, Swedish mediators seem aware of the

⁵² Lindegaard (1983), at 39. Today the government usually lets the conflict last for a while before considering and eventually proposing intervention.

⁵³ If no mediation proposal exists, the terms in the new agreement are set by parliament. In addition, compulsory arbitration has occasionally been used.

⁵⁴ Suviranta (1989, 1992), Tiitinen & Ruponen (1999), at 42.

⁵⁵ Schmidt (1952), at 53.

⁵⁶ Strictly speaking, the Rehnberg Commission did not perform mediation but was appointed by the government to try to moderate wage claims in the period 1991-1993. Still, the activities of the committee came close to mediation and the practice has had great impact on later mediations.

problems the old tactic might cause and try to avoid it. Mediators still often work from a rough draft through several drafts before ending up with a final proposal, but the first drafts are usually aimed at getting the consent of the parties to the overall framework and costs of an agreement. When such consent is established, the drafts become more detailed before ending up as a final mediator proposal.

5 Final Remarks

Although mediation is an old ingredient in collective bargaining in the Nordic countries, the employment of and demand for such a mechanism is most likely to be continued. Developments also illustrate that certain elements are central to a well functioning mediation process, namely the duty of the parties to notify both each other and the mediation institution about work stoppages, the right of the mediator to call the parties to mediation, and the right of the mediator or the mediation institute to secure enough time for mediation. Convergence among the Nordic countries at least indicate that such elements are essential in a labour market with collective agreements at the sectoral level, well organised labour market parties, and frequent ambitions towards coordination of collective bargaining.

Beyond these elements, mediation in the Nordic countries varies considerably. Some of the variation may be explained with reference to the labour market parties, while others are derived from more national characteristics or traditions that are not easily changed. Swedish developments also illustrate that the state need not be the sole provider for mediation services, although the state still has the overall responsibility in all the Nordic countries.

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