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26

INTRODUCTION TO EUROPEAN LABOUR LAW

Manfred Weiss

Il testo riproduce il capitolo “*Introduction to European Labour Law: European Legal Framework, EU Treaty Provisions and Charter of Fundamental Rights*” di Manfred Weiss, Goethe University Frankfurt, Germany, p.p. 23-27, incluso nella Parte prima del volume “*EU Labour Law: A Commentary* Edited by Dr. Monika Schlachter Published on 18/11/2014 by Kluwer Law International BV ISBN: 9789041149787”. Riprodotto con il consenso dell’Editore Kluwer Law International B.V., società del gruppo Wolters Kluwer.

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Edizione GENNAIO 2017

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KEY SRL

VIA PALOMBO 29

03030 VICALVI (FR)

P.I./C.F. 02613240601

ISBN 978-88-6959-641-4

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Collana diretta da Francesco Buffa

Il diritto in Europa oggi

26

INTRODUCTION TO EUROPEAN LABOUR LAW

Manfred Weiss

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The Work

The work reproduces the report made by the Author at the International meeting for European Judges and Prosecutors “EJTN Civil Law Sub-Working Group Seminar devoted to the topic ‘European Labour Law’”, organized by the European Judicial Training Network from Monday 16th to Tuesday 17th May 2016 at the Judicial Studies Centre (CEJ) in Lisbon (Portugal).

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CHAPTER I

EXCLUSION OF SOCIAL POLICY IN THE EEC-TREATY

European Labour Law was not on the agenda of the Treaty establishing the European Economic Community (EEC) in 1957. The focus was exclusively on the establishment of the Common Market between the six founding Member States (Belgium, France, Germany, Italy, Luxemburg and Netherlands). Therefore, the pillars of the Treaty were the so called market freedoms: free movement of capital, goods and services as well as the freedom of establishing a business throughout the Community. Another pillar of the Treaty was the fight against any distortion of competition. These elements of the Treaty have not changed in spite of the many amendments. They still play a crucial role. The big challenge nowadays is how to balance them with the social dimension which in the meantime has become an important part of the Treaty.

The underlying philosophy of the original Treaty was based on the assumption that social progress somehow will come by itself once the Common Market is established. Nevertheless the Treaty contained a Title III on Social Policy. According to the introductory article of this chapter Member States “agree upon the necessity to promote improvement of the living and working conditions of labour so as to permit the equalisation of such conditions in an upward direction” (Art. 117 par. 1). Or to put it differently: social policy was left to the efforts of the Member States who were encouraged to engage in a policy of collaboration and coordination. According to Art. 118 it was the aim of the Commission “to promote close collaboration between Member States in the social field”. However, no power to

legislate in the area of labour law was transferred to the level of the Community.

At first glance it may look as if there were exceptions of the policy of social abstention. The first indication might be the guarantee of free movement of workers in Art. 49 EEC Treaty. However, this is nothing else but another market freedom, aiming at an optimal allocation of the factor labour in the Common Market. It was exclusively motivated by economic reasons. Later on, due to the combination between free movement of workers and the guarantee of equal treatment with nationals of the host country in a comprehensive sense, the Court of Justice of the EU (CJEU, formerly ECJ), based on secondary European law¹, developed impressive case law², turning this market freedom in a far-reaching social right.

As a possible exception the guarantee of “equal remuneration for equal work as between men and women workers” (Art. 119) could be considered. However, this again had nothing to do with social policy, it also was exclusively motivated by economic reasons. The idea was to prevent distortion of competition by prohibiting the use of female cheap labour. Again it should be mentioned that later on due to a Directive on equal pay and due to the case law of the CJEU the social impact of the guarantee of equal pay for men and women became evident.

¹ In particular Regulation 1612/68/EEC of 15 October 1968

² Starting by Donato Casagrande v. Landeshauptstadt Muenchen, 3 July 1974, C-9/74, ECR 1974, 773

CHAPTER II

FIRST STEPS TO EUROPEAN LABOUR LAW IN SPITE OF THE TREATY

In the early Seventies of last century social problems – including high unemployment – in the Member States increased and it became evident that the assumption of an automatic social progress due to the establishment of a Common Market did not work out. Therefore, the Heads of States meeting in Paris at the Summit of October 1972 urged vigorous action in the social field and pushed the Commission to draw up a Social Action Programme (SAP). By a Resolution adopted 1974, the Council of Ministers approved the SAP involving more than 30 measures over an initial period of three to four years. The three main objectives were: the attainment of full and better employment in the Community, the improvement of living and working conditions, and the increased involvement of management and labour in the economic and social decisions of the Community and of workers in companies.

In spite of the lack of legislative powers of the Community in the area of labour law the SAP was implemented to a significant extent. Several Directives were passed (in particular equal pay for men and women³; on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions⁴; protection of workers in case of collective redundancies⁵ and in case of transfers of undertakings, businesses or parts of undertakings or businesses⁶). They were based on annex competences in the original Treaty (Art. 100 and 205) which

³ Directive 1975/117/EEC of 10 February 1976, OJ 1976, L 45/19

⁴ Directive 1976/207/EEC of 9 February 1976, OJ 1976, L 39/40

⁵ Directive 1975/129/EEC of 22 February 1975 OJ 1975, L 48

⁶ Directive 1977/187/EEC of 5 March 1977, OJ 1977, L 61

had nothing to do with labour law and which required unanimous voting in the Council. This shows that the Treaty is more or less irrelevant if there is a consensus between the Member States. In reference to minimum labour standards this was the case until 1979 when Margaret Thatcher came into power in the United Kingdom (U.K.). Her disagreement to such a policy brought the sequence of Directives to a sudden end. Fears that this already became the end of the Community's social policy replaced the euphemism of the years before.

CHAPTER III

THE EXTENSION OF LEGISLATIVE POWERS FOR EUROPEAN LABOUR LAW

The fact that social policy was revitalized in the eighties is mainly due to the dedicated engagement of the Commission's President of that time: Jacques Delors. He not only succeeded in inventing and marketing the label "European Social Dimension" ("L'Espace Social de L'Europe") but also to gain the support of the trade unions in the community. Thereby, he succeeded 1987 in amending the Treaty by so called Single European Act which brought a first important innovation for European Labour Law. According to Art. 118 a of this amendment the European legislator was empowered to develop minimum standards referring to "working environment, as regards the health and safety of workers" by qualified majority. The replacement of unanimous voting in the Council by qualified majority opened the door for legislation which no longer could be blocked by the U. K. This led to a whole sequence of Directives on health and safety, the so called Framework Directive⁷ shaping the structure of protection of health and safety and many daughter Directives coping with specific dangers for health and safety. The meaning of "work environment" became the subject of a controversial debate, ranging from very restrictive to very extensive interpretation. This controversy culminated when the Directive on Working Time⁸ was based on this Article. The U. K., which was overruled and was not willing to accept the defeat, went to the CJEU. The Directive's purpose was not only the limitation but also flexibilisation of working time. The Court⁹ interpreted the notion "work environment" in a very extensive

⁷ Directive 1989/391/EEC of 12 June 1989, OJ 1989, L 183

⁸ Directive 1993/104/EEC of 13 December 1993, OJ 1993, L 307

⁹ United Kingdom of Great Britain and Northern Ireland v. Council of the European Union, 12 November 1996, C-84/94, ECR 1996, 5755

way and, thereby, upheld the Directive. Only in reference to Sunday work the legal base was not accepted.

In the meantime, however, at least for 11 of the 12 Member States of that time the controversy on the meaning of “working environment” had become obsolete. Pushed by the Community Charter of the Fundamental Rights of Workers of 9 December 1989, a legally non binding declaration by the Heads of State of the Member States, the legislative powers of the Community for labour law were significantly extended by the Social Protocol of the Treaty of Maastricht of 1992, the amendment which promoted the EEC as a merely on the Common Market oriented project to the European Community (EC) with a broader perspective. The Social Protocol only was introduced into the Treaty in the very last minute of the negotiations after very controversial debates. The United Kingdom could not be convinced and opted out. The substance of the protocol was drafted by the European Confederations of the social partners, the European Trade Union Congress (ETUC) on the workers’ side, the Union des Industries de la Communauté Européenne (UNICE), later on renamed BUSINESS EUROPE, for the employers of the private sector and the Confédération des Entreprises Européennes Publiques (CEEP) for the public enterprises. As will be shown later on, the content of the protocol very much reflects this genesis. The Social Protocol not only extended significantly the EC’s legislative powers for labour law but succeeded to survive more or less unchanged until today. It was integrated into the Amsterdam Treaty of 1998 and is now part of the Lisbon Treaty on the Functioning of the EU (TFEU), in force since 2009. And with the Amsterdam Treaty the British opt out came to an end.

The legislative powers of the EU in labour law are now listed up in Art. 153 par.1 TFEU. It empowers for legislation in labour law in a very comprehensive way. Only “pay, the right of association, the right to strike and the right to impose lock-outs” are excluded (Art. 153 par. 5 TFEU). This exclusion is

to be explained by the genesis of the Social Protocol of the Maastricht Treaty. The European social partners did not want interference in their affairs by the European legislator. However, as will be shown later on, this exclusion has become very problematic in view of other developments and has changed the view of at least the ETUC.

In the areas in which the EU has legislative powers on labour law it is empowered to pass Directives containing minimum requirements (Art. 153 par 1 lit. b TFEU). This does not refer to a certain level of protection. It simply means that such Directives “shall not prevent any Member States from maintaining or introducing more stringent protective measures compatible with the Treaties” (Art. 153 par. 3 TFEU). The Directives, however, “shall avoid imposing administrative, financial and legal constraints in a way which hold back the creation and development of small and medium-sized undertakings” (Art. 153 par. 1 lit. b TFEU). This is to be understood as an appeal to the legislator to behave correspondingly rather than a judiciable provision.

By Art. 13 of the Amsterdam Treaty (now Art. 19 TFEU) the European legislator has been empowered to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation”. This empowerment exceeds the area of employment and occupation.

The European legislator’s powers in the area of labour law are not exclusive. The Member States may also legislate in this field. Since, however, European law has priority compared to national law, there was a fear that due to too much European law there might be no more space for national legislation, not only in labour law but also in other areas where both levels compete. This led to a debate whether the topics to be dealt with by the European legislator or the Member States should be identified and separated. This idea, however, was dropped soon and replaced by another mechanism which now is regulated by

Art. 5 TFEU (formerly Art. 5 TEC): the principles of subsidiarity and proportionality. According to the principle of subsidiarity “the Union shall act only and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States...but can rather...be better achieved at Union level” (Art. 5 par 3 TFEU). The principle of proportionality in this context requires, that “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties” (Art. 5 par 4 TFEU).

Originally these principles merely led to the fact that the European legislator carefully had to justify the need and the extent of its legislation. By the Lisbon Treaty the effect of these principles has been significantly increased. The “Protocol on the Application of the Principles of Subsidiarity and Proportionality” has introduced a very complicated procedure aiming at a better observance of these principles. Formerly it was sufficient that the Commission gave reasons to justify its view that the principles of subsidiarity and proportionality have been respected. Now each proposal of legislation – be it a Directive or a Regulation - has to be presented to the national Parliaments at the same time when it is presented to the European bodies of legislation. Within eight weeks the national Parliaments can declare in written and by giving reasons why in their view the proposal is not compatible with these principles. Each national Parliament has two votes and in two chamber systems each of the representative bodies has one vote. If at least one third of the votes of the total number for national Parliaments reject the proposal because of violation of subsidiarity or proportionality, the proposal has to be re-examined by the Commission. If the Commission wants to further promote the proposal, a new decision with reasons is necessary. The need for justification by the Commission is even stronger if a majority of the national Parliaments has rejected the proposal. It may well be predicted that national Parliaments will be inclined to stress subsidiarity and proportionality.

Afterwards it will be psychologically extremely difficult for the Commission to overrule a third or even the majority of national Parliaments. Therefore, the expectation for legislation in such a controversial area as labour law may be to a great extent a futile hope in the future. This protocol may help to increase the legitimacy for European law. But it may well be doubted whether it is an instrument to support and promote European integration.

In conclusion it may be correct to say that in spite of the extension of legislative powers in the area of labour law the obstacles for legislation in this field still are rather high.

CHAPTER IV

THE LEGISLATIVE PROCEDURE

Summary: 1. Qualitative Majority as a Rule - 2. The Integration of the Social Dialogue into the Legislative Process

1. Qualitative Majority as a Rule

In the beginning of the European project legislation was exclusively in the hands of the Council. The European Parliament (originally European Assembly) only had to be consulted. This in the meantime has changed significantly. Now the European Parliament has become an important actor in the process of legislation.

Legal acts in the area of labour law now are subject to the ordinary legislative procedure or the special legislative procedure. The ordinary legislative procedure is the rule, the special legislative procedure the exception. In each of them the Economic and Social Committee and the Committee of the Regions are to be consulted.

The ordinary legislative procedure shall consist “in the joint adoption by the European Parliament and the Council” (Art. 153 par. 1 in connection with Art. 289 par. 1 TFEU). In case of non-agreement between the European Parliament and the Council according to this rather complicated joint procedure, defined in Art. 294 TFEU, the proposal may be brought to a Conciliation Committee, composed of “the members of the Council or their representatives and an equal number of members representing the European Parliament” (Art. 294 par. 10 TFEU), in order to reach agreement on a joint text. If this cannot be achieved within six weeks, “the proposed act shall be deemed not to have been adopted” (Art. 294 par. 12 TFEU). But even if a joint text is agreed upon, it still has to be approved by the

European Parliament and the Council within a period of another six weeks to be adopted (Art. 294 par. 13). It is important to stress that the Council is “acting by qualified majority” (Art. 294 par. 13). Without going into further details of this procedure, it shows that in its context the European Parliament and the Council are on an equal footing in adopting legislative acts.

The list for which this procedure applies and for which qualitative majority in the Council is sufficient, is impressive. It starts with the “improvement in particular of the working environment to protect workers’ health and safety” (Art. 153 par. 1 lit. a) which is nothing else but what was already contained in Art. 118 a of the European Single Act. It continues with “working conditions” in its broadest sense (lit. b), “the information and consultation of workers” (lit. e), “the integration of persons excluded from the labour market (lit. h)”, “the equality between men and women with regard to labour market opportunities and treatment at work” (lit. i), “the combating of social exclusion” (lit. j) and “the modernisation of social protection systems” (lit. k).

There are still topics where unanimous voting in the council is required and where only the Council decides. The European Parliament merely has to be consulted as well as the already mentioned committees. This special legislative procedure refers to “social security and social protection of workers” (lit. c), to “protection of workers where their employment contract is terminated” (lit. d), to “representation and collective defence of the interests of workers and employers, including co-determination (lit. f) and “conditions of employment for third-country nationals legally residing in Union territory” (lit. g). Social security and social protection of workers in the sense of lit. c refers to substantial regulations whereas the modernisation of social protection system in the sense of lit. k only covers procedural modifications of existing systems.

2. The Integration of the Social Dialogue into the Legislative Process

The fact that the drafting of the Maastricht Social Protocol goes back to the Confederations of the social partners on European level may explain that these inter-professional social partners, the so called Social Dialogue, has been integrated into the legislative procedure if labour law is at stake. The Commission's exclusive right to initiate legislation remains untouched. However, if the Commission wants to elaborate a proposal of a legislative act, the social partners are to be consulted twice by the Commission: first on the question "whether" a specific piece of legislation on subject matters listed up in Article 153 par. 1 TFEU should be initiated and secondly on the question "how" such a piece of legislation should look like. In the latter consultation the social partners are entitled to take away the project from the Commission and are invited to try within a certain period to reach an agreement between them. Such an agreement then by the social partners can be brought via the Commission to the Council which may transfer it into a Directive. So far this happened three times: in case of parental leave¹⁰, of fixed term contracts¹¹ and of part-time work¹². If the social partners do not succeed in reaching an agreement within the given period, the project is taken up by the Commission which then is free to decide on how to proceed further. With the exception of a minor amendment of the Directive on Parental Leave¹³ the social partners have after the three mentioned Directives not succeeded any

¹⁰ Directive 1996/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and ETUC, amended by Directive 97/75/EC of 15 December 1997, OJ 1998, L 10/24

¹¹ Directive 1999/70/EC of 28 June 1999 on the framework agreement on fixed term contracts concluded by UNICE, CEEP and the ETUC, OJ 1999, L 175/43

¹² Directive 1997/81/EC of 15 December 1997 on the framework agreement on part time work concluded by UNICE, CEEP and ETUC, OJ 1998, L 14/9

¹³ Directive 2010/18/EU of 8 March 2010, OJ 2010, L 68/13

more to reach such an agreement. The negotiations for an agreement on Temporary Agency Work and on an amendment of the Working Time Directive are prominent examples of such failures.

The involvement of the social partners into the legislative machinery leads to quite a few problems which briefly are to be sketched. The first and evident one results of the fact that the European Parliament is not formally integrated in the procedure of transferring an agreement reached by the social partners into a Directive. Normally, if the Commission presents a proposal of its own the legislative procedures sketched above are to be applied. Particularly in the ordinary legislative procedure the European Parliament has a strong position. Whether the exclusion of the Parliament and its substitution by the social partners is helpful in overcoming the “democratic deficit” of the EC may well be doubted¹⁴. In my view the democratic structure thereby is replaced by corporatism. These doubts evidently must, to a certain extent, even be shared by the Commission which voluntarily informs the Parliament in such contexts. This is a gesture in the right direction but by far not sufficient¹⁵. Mere information cannot substitute the strong position the Parliament has in the ordinary legislative procedure: the Parliament has no opportunity whatsoever to influence the content of the Directive.

The second problem refers to the powers of the Council in transferring the agreement into a Directive. There is consensus that neither the Commission nor the Council are

¹⁴ See for this view M. Weiss, *The Significance of Maastricht for European Community Social Policy*, *IJLLIR* 1992, 3 (13) and in more detail G. Britz / M. Schmidt, *The Institutional Participation of Management and Labour in the Legislative Activities of the European Community: A Challenge to the Principle of Democracy under Community Law*, *European Law Journal* 2000, 45

¹⁵ For this view see A. Jacobs, *European Social Concertation*, in: *Comisión Consultativa Nacional de Convenios Colectivos* (ed.), *Collective Bargaining in Europe* (Madrid 2005), 347 (375)

entitled to change the wording of the agreement¹⁶. The Council only can transform the agreement as it is into European law or reject it. Whether this is a good pattern again may be doubted. The three Directives mentioned above are not at all a product of excellence in legal craftsmanship. Their content is a mixture of judiciable legal norms and political appeals. This makes the application and interpretation unnecessarily difficult.

The third problem is perhaps the most crucial one: the problem of representativeness. If social partners are entitled to play such an important role, even substituting the Parliament as already was shown, they evidently need legitimacy to live up to this role. Therefore, the question arises whether the three confederations mentioned above really represent all those for whom such an agreement transferred into a Directive will apply. Or to put it differently: do the three confederations - who traditionally and long before the social dialogue was introduced into the text of the EC-Treaty had put it up as an informal structure - ETUC, BUSINESS EUROPE (UNICE) and CEEP, have a monopoly in concluding agreements in the context of the social dialogue or do they have to share their powers with other European confederations representing specific groups of employees or employers? The de facto monopoly first was questioned in the context of the elaboration of the agreement which led to the Directive on parental leave. The Union Européenne des Associations des Petites et Moyennes Entreprises (UEAPME) which as a confederation of employers' associations represents the interests of the small and medium-sized companies in Europe claimed a right to participate in the elaboration of such an agreement and, therefore, attacked the Directive on parental leave in Court¹⁷. This claim was rejected by the Court of First

¹⁶ See A. Jacobs, *ibidem*, 372, documenting the tremendous support this view has

¹⁷ Case T-135/96, *UEAPME v. Council*, Judgement of the Court of First Instance of 17 June 1998, ECR 1998, 2235

Instance for procedural reasons. However, in its judgement the Court made perfectly clear that this problem of representativeness is a serious one and has to be resolved.

In the meantime a sort of *modus vivendi* has been developed by the Commission. Criteria to be met by the confederations were established. In essence the respective confederations have to cover national associations of possibly all Member States, these member associations have to be relevant actors within the national system of industrial relations and finally they must be entitled to participate in the collective bargaining system in the national context¹⁸. Those who meet these criteria are entitled to be informed and have a right to present their opinion, both in writing. It may well be doubted whether this is sufficient.

A very important spill-over effect should not be ignored which first became relevant in the context of the elaboration of the agreement which led to the Directive on parental leave. Before starting negotiations on this agreement, the European confederations became aware that they did not even have a mandate for an agreement with such far reaching effects. Therefore, they had no choice but to communicate intensively with their member associations in the different Member States in order to get such a mandate. This led to a significant reformulation of the by-laws of these confederations, bringing them and the member associations closer together. This vertical communication in the meantime even has increased and can be seen as an important step towards the building of real European actors who, on the long run, might become the base for a European system of collective bargaining.

¹⁸ See A. Jacobs, *op. cit.*, 364

CHAPTER V

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

Summary: 1. The Development - 1.1. The Need for a Charter - 1.2. The Elaboration of the Charter - 2. Fundamental Social Rights - 3. The Impact of the Charter for European Labour Law - 4. The Link to the European Convention on Human Rights

1. The Development

1.1. The Need for a Charter

The Charter of the Fundamental Rights of the EU (CFR) was promulgated as a ceremonial declaration in 2000 and became legally binding by integration into the Lisbon Treaty via reference in Art. 6 par.1 TEU.

Already very early in the development of the European project fundamental rights became an issue. When the jurisdiction of the CJEU destroyed any doubts about the supremacy of Community law over the law of the Member States, this position was questioned by those States who had a constitution containing fundamental rights. In particular the German Federal Constitutional Court was not willing to accept this dogma of supremacy as long as there was no guarantee that the level of fundamental rights as provided by the German constitution would be respected by the CJEU¹⁹. Since the Treaty mainly was focusing on the market freedoms in order to optimize market conditions, it was not at all clear what its position was towards fundamental rights. Therefore, the danger of a deconstruction of the platform of fundamental rights on

¹⁹ Federal Constitutional Court, Judgement of 29 May 1974, BVerfGE 37, 27

national level could not be excluded. It, however, soon turned out that fears of this kind were unjustified. By referring to the European Convention of Human Rights and to the constitutional traditions of the Member States the CJEU established a jurisdiction which was and still is based on fundamental rights²⁰. In view of this development the German Federal Constitutional Court gave up its opposition and declared to respect the supremacy of European Law as long as the CJEU is following this path²¹. The CJEU not only maintained but even strengthened the efforts to built its jurisdiction on the sound basis of fundamental rights²².

The practice as exercised by the CJEU later on was confirmed by the Treaties which referred to the European Convention of Human Rights, the constitutional traditions common to the Member States, to the European Social Charter and to the Community Charter of the Fundamental Social Rights of Workers. These references are kept until today (Art. 6 par. 2 TEU and 151 par. 1 TFEU).

The reference system, however, turned out to be insufficient. It was unclear in what way the texts the Treaties were referring to were to be observed, whether the referred Charters were only meant to be a point of orientation or whether each part of these Charters was directly to be applied. The latter was very unlikely. The most unspecific part was the reference to the constitutional traditions of the Member States. It was extremely difficult to specify what this meant. These constitutional traditions are very different from country to country. Some countries do have written constitutions, others don't. Some constitutions contain a bill

²⁰ For this development see J. H. H. Weiler, *The Constitution of Europe* (Cambridge, 1999), 107

²¹ Federal Constitutional Court, Judgement of 22 October 1986, BVerfGE 73, 339

²² See for this development in reference to fundamental social rights B. Hepple, "The Development of Fundamental Social Rights in European Labour Law" in A. Neal and S. Foyn (eds.), *Developing the Social Dimension in an Enlarged European Union* (Oslo, 1995),. 23

of rights, others don't. The fundamental rights guaranteed by these constitutions differ significantly. Is the mentioning of the constitutional traditions of the Member States a reference to a specific constitutional tradition or rather to the average, to the top or to the bottom? This remained to be unclear²³. In short and to make the point: it remained in the dark what fundamental rights were forming the basis of the EU and to what extent they were guaranteed. The citizens of the EU were unable to recognize these rights. Therefore, it becomes evident that there was an urgent need to specify the rights which are considered to be the basis for the Community and which define its specific profile.

1.2. The Elaboration of the Charter

During the German presidency the summit in Cologne in June 1999 took the decision to establish a body, the so called concilium, to elaborate a text for a Charter of Fundamental Rights. At the summit in Tampere in October 1999 the composition of this concilium was determined. This decision was based on the assumption that this drafting body should enjoy utmost legitimacy. This request was met by the fact that almost three quarters of the members of the concilium were members of parliaments: out of the 62 members of the drafting body 30 came from national parliaments and 15 from the European Parliament. Each Government of the 15 Member States and the Commission were each represented by one person. The concilium not only enjoyed a remarkable democratic legitimacy but was in addition supposed to perform its activities as transparently as possible and to include in its deliberations opinions of different groups of society.

As far as the content of the catalogue of fundamental rights was concerned, there was from the very beginning full

²³ For a profound discussion of this problem see J. H.H. Weiler, op.cit., 109

agreement that it was necessary to integrate into this catalogue all the rights contained in the European Convention of Human Rights. The question was of what to add in order to meet new challenges and to really provide a Charter of Fundamental Rights for the society of today and tomorrow. These deliberations led among others to the inclusion of the right to the protection of personal data (Art. 8) and of the right to education and to have access to vocational and continuing training (Art. 14), to just mention two prominent examples. The battle was on the inclusion of the so called fundamental social rights which now are listed up in the Chapter "Solidarity" (Art. 27 to 38). Two reports of groups of experts had strongly recommended to include fundamental social rights into the Charter. This position, however, met strong resistance throughout the deliberations of the concilium. Until the very end it was not at all clear whether fundamental social rights would remain to be included or not.

Fundamental social rights either were considered to be rights of a minor importance compared to the classical political rights or – even worse – they were considered to be no fundamental rights at all. They were categorized as being merely defining political goals, thereby creating illusions and expectations which cannot be met. The inclusion of such goals was supposed to de-legitimize all the rest of the Charter.

It is certainly correct that it is a characteristic of fundamental social rights to be judiciable only to a limited extent and to mainly formulate goals to be met by the State, or in the case of the EU-Charter by the European Union. There is quite often no or at least not yet an individual's right to be directly enforced but first of all an obligation to be fulfilled by the political authorities. This, however, does not say anything against these rights' quality as fundamental rights. In this context it is important to understand that fundamental rights are reflecting the value system a society is based upon. And

it is wrong to categorize fundamental social rights to be of a minor quality compared to the classical fundamental rights. The guarantees of freedom and equality only can be enjoyed in a substantial way if there is a social structure allowing the individual to take use of such rights. Therefore classical fundamental rights and fundamental social rights are the two sides of the same coin. It was this very insight which finally led to the inclusion of fundamental social rights into the Charter.

2. Fundamental Social Rights

Not only the rights as listed up in the chapter on “Solidarity” do have an impact on the social sphere, in particular on the employment relationship. There is a whole set of such rights of utmost importance in the social context. To just give some examples: the prohibition of forced labour (Art. 5), the protection of personal data (Art. 8), the freedom of thought, conscience and religion (Art. 10), the freedom of expression and information (Art. 11), the freedom of association..., which implies the right of everyone to form and to join trade unions for the protection of his or her interests (Art. 12), the already mentioned right to education and to have access to vocational and continuing training (Art. 14), the right to engage in work and to pursue a freely chosen or accepted occupation (Art. 15), the comprehensive prohibition of discrimination (Art. 21), the guarantee of equality between men and women (Art. 23), the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community (Art. 26) or the citizens’ right to free movement (Art. 45). All these rights do have a social side which cannot be separated from the remaining content.

The chapter on “Solidarity” contains twelve provisions of a very different nature. The articles referring to health

protection (Art. 35), to environmental protection (Art. 37) and to consumer protection (Art. 38) as well as the right of access to services of general economic interest (Art. 36) are mainly defining goals for the politics of the EU in a very broad and unspecific sense. However, the article on health care as well as the article on services of general economic interest at the same time establish an individual right to services under the conditions established by national law and practices. The provision referring to social security and assistance (Art. 34) abides exclusively to the latter pattern and establishes an individual right in the framework as established by national laws and practices as well as by Community law. Article 33 on protection of family life in its first paragraph contains an institutional guarantee and in the same paragraph a very vague and unspecific political goal (Art. 33 par. 1) as well as an individual right (par. 2). Prohibition of child labour and protection of young people at work is guaranteed as an individual right (Art. 32). The same is true for the rights of access to a free placement service (Art. 29), to protection against unjustified dismissal (Art. 30) as well as to the right to fair and just working conditions (article 31). The rights of collective bargaining and collective action are guaranteed as subjective rights either for workers and employers or for their respective organizations (Art. 28). Finally article 27 provides for a subjective right for either workers or their representatives on information and consultation (Art. 27).

It may well be doubted whether this mixture of putting together in one and the same chapter political goals and subjective rights is a strategy to be supported. The inclusion of political goals is inevitable. However, they should be strictly separated from subjective rights in order to make sure that they mean different things. Otherwise the effect of de-legitimizing subjective rights cannot be excluded. It is becoming difficult for the reader of the Charter to distinguish the different impact of the respective provisions all put

together in one and the same chapter and – as shown above – sometimes even in the same article.

In specifying the freedom of association as guaranteed already by article 12 par. 1 the Charter provides for the right to negotiate and conclude collective agreements and for collective action “at the appropriate levels” (Art. 28). This by necessity includes also the EU level. However, there is a dramatic inconsistency. The right embedded in article 28 only is guaranteed “in accordance with Community law and national law and practices”. And Art. 51 par 2 stresses expressively that the Charter “ does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaty”. This has to be related to article 153 par. 5 TFEU which denies the Community’s power to legislate in respect of “the right of association, the right to strike or the right to impose lock-outs”. The consequence is evident: the Community is obliged by the Charter to promote a right for which it has no legislative competence whatsoever. This is a contradiction which might lead to the conclusion that the guarantee as provided by Art. 28 is not meant to be taken seriously. Such an inconsistency certainly is not very helpful for the Charter’s legitimacy. Therefore, and in spite of Art. 51 par. 2 CRF it is necessary to reach consistency by eliminating Art. 153 par. 5 TFEU in order to empower the EU to build up a legal framework for transnational collective bargaining including transnational collective action.

The wording of Art. 28 (“collective action to defend their interests, including strike action”) might be misleading. It repeats the wording of article 6 par. 4 of the European Social Charter. There this passage has led to enormous controversies on the question whether merely the strike is guaranteed or also the right to lock-out; a controversy which up to now never was resolved in a satisfactory way.

The fact that after quite a bit of resistance the workers’ or workers representatives’ right to ”information and

consultation in good time” has been included (Art. 27) is important. Thereby a development is supported and further strengthened which in the meantime is shaping the social face of the EU: the focus on participation and cooperation instead of antagonism. However, it would have been better to formulate the text in a more open way, to make sure that future developments are covered.

Whereas the Charter limits the workers' or workers representatives' right to information and consultation, the expert group on fundamental rights went further by including “co-determination”. And even existing Community law goes further. Art. 11 par. 2 of the framework Directive on health and safety²⁴ provides that “workers shall take part in a balanced way, in accordance with national law and/or practices” which certainly is not confined to information and consultation. Therefore, it would have been better to put in Art. 27 CFR workers' participation in its broadest sense.

At least the authors of the chapter on “Solidarity” did not repeat the mistake made in previous drafts: to include the program of social policy as a whole. They – at least in principle – succeeded not to confuse the fundamental rights with the instruments necessary to promote the values as expressed by such fundamental rights. However, there are still irritating parts. To just give an example: The guarantee contained in Art. 31 par. 2 according to which “every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave” is nothing else but a specification of the guarantee provided by par. 1 of the same article, the right “to working conditions which respect his or her health, safety and dignity”. Such specifications do not belong in a Charter of Fundamental rights. They refer to the instruments by which health, safety and dignity of working conditions are to be achieved. If they are confused with fundamental rights, this

²⁴ Directive 1989/391/EEC of 12 June 1989 ,OJ 1989, L 183/1

well might lead to de-legitimise the Charter as a whole or at least of the chapter on “Solidarity”.

It also might well be doubted whether the “right of access to a free placement service” (Art. 29) belongs in such a catalogue of fundamental social rights or whether this is not merely an implication of the “right to engage in work and to pursue a freely chosen or accepted occupation” as guaranteed by Art. 15 par. 1 CFR.

It would have been very helpful and would have improved the interpretation of the text if the Charter would have made perfectly clear that nationals of third countries who are authorized to reside in the territories of the Member States are covered by the fundamental social rights to their full extent. The Charter, however, contains a different reference to nationals of third countries in different spots. In Art. 15 par. 3 nationals of third countries who are authorized to work in the territories of the Member States “are entitled to working conditions equivalent to those of citizens of the union”. This certainly covers also the job seeking procedure and thereby the guarantee contained in Art. 29. However, it is not at all clear whether this also refers to the collective rights as contained in Art. 27 and 28. One might assume that the reference has to be understood this way, but it would have been better to spell it out more clearly. As far as social security and social assistance are concerned, “everyone residing and moving legally within the European Union” is included (Art. 34). Such a reference, however, is lacking in the context of health care, of services of general economic interest, of environmental protection and of consumer protection. It may well be questioned why nationals of third countries authorized to reside in the territory of the EU are excluded from these fundamental social rights. If fundamental rights are at stake it should be clear that everybody residing legally in the EU is entitled to enjoy them. Otherwise the character of those rights as fundamental

rights is put into question: another danger to de-legitimise the Charter.

In spite of the deficiencies mentioned above, it should be stressed that the mere fact that a whole chapter of the Charter has been devoted to fundamental social rights is already in itself an important progress. It is the result of a very controversial debate during which compromises were reached. Therefore, it cannot be surprising that the Chapter does not contain an ideal structure and a fully coherent concept. And for the same reason the existing inconsistencies and deficiencies should not be overestimated. It, however, should not be forgotten that the existing compromise only was possible in view of the fact that as a compensation to fundamental social rights “the freedom to conduct a business” (Art. 16) now is recognized in the Charter. This means that always a balance will have to be found between the fundamental social rights and this freedom to conduct a business.

3. The Impact of the Charter for European Labour Law

The Charter is an expression of the fact that the EU is a Community based on values. The mere consciousness of this value orientation may help to overcome the legitimacy crisis within the EU. All powers given to the Community – be they legislative, executive or judicial - are to be performed respecting these fundamental values. The set of values contained in the Charter means for the population of the EU a new possibility to identify itself with the European project.

Fundamental rights as contained in the Charter facilitate significantly the role to be played by the CJEU. As already mentioned the CJEU has contributed in an impressive way in introducing fundamental rights into the Community by referring to external sources like the European Convention of Human Rights and by referring to internal sources like the

constitutional traditions of the Member States. However, it cannot be expected from the CJEU to develop a holistic and coherent concept of fundamental rights by itself. This would endanger the CJEU's legitimacy because the Court would have to play a role which is not the judiciary's one. The Charter takes away pressure from the CJEU by providing for the Court a reference system within which the CJEU can remain within its proper role. This does not mean that the CJEU will no longer be important in the context of fundamental rights. Just the other way around: the CJEU's legitimate and challenging function will be to interpret and clarify the vague notions of the Charter, thereby acting as a true Constitutional Court²⁵.

The mere fact that the Charter in one and the same text combines classical fundamental rights and fundamental social rights means a lifting up of the relevance of social policy within the Community. Social policy no longer can be understood as merely a marginal annex to EU politics: now it definitely has become an essential part of it. At least as important is the signal given by the content of the chapter containing the fundamental social rights. They include collective rights, they insist on the Community's and the Member States' responsibility for providing job security, for providing working conditions which respect the worker's health, safety and dignity and for protecting young people at work. They furthermore insist on measures to make family and professional life compatible and to provide social security as well as social assistance. Taken all this together it becomes pretty evident that this is a concept which would be incompatible with mere de-regulation, de-collectivization and de-institutionalization²⁶. Or to put it in broader terms: it would be incompatible with a strict neo-liberal approach.

²⁵ Whether and in how far the Court is to be restructured in order to be able to cope with this challenge, is a difficult question not to be dealt with here

²⁶ For an in-depth discussion of these concepts see B. Hepple, "Economic Efficiency and Social Rights" in R. Blanpain (ed.), *Law in motion* (Brüssel, 1997), 868

Thereby the chapter on “Solidarity” reconfirms the European social model and strengthens it.

4. The Link to the European Convention on Human Rights

The European Convention for the Protection of Human Rights was agreed upon in 1950 in the context of the Council of Europe as an international Treaty. It has been ratified by all Member States, among them also all Member States of the EU. Conflicts on the interpretation of the European Convention on Human Rights are adjudicated by the European Court on Human Rights (ECHR), seated in Strasbourg. Each individual of a Member State has access to the ECHR after fulfilling specific conditions within the respective Member State.

Art. 52 par 3 CFR states that “insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention....” (Article 52 par. 3). If there is such an overlap this means that the position of the ECHR describes the minimum content which cannot be undercut by those to whom the Charter is addressed. In this context it is important to know that the ECHR in its judgements²⁷ refers to the non binding “case law” of the European Committee of Social Rights which is supposed to interpret the European Social Charter of 1961, revised in 1996, and to the non binding “case law” of the respective committees of the International Labour Organization. Thereby, the CFR is supposed to integrate a wide range of sources.

²⁷ See in particular ECHR, Grand Chamber, *Demir and Baykara v. Turkey*, judgment of 12 November 2008 (application no. 34503/97)

CHAPTER VI

BASIC TRAITS OF EUROPEAN LABOUR LEGISLATION

Summary: 1. Individual Labour Law - 2. Collective Labour Law

1. Individual Labour Law

As already indicated above there is legislation on health and safety, on working time, on work and life balance, on atypical work, on protection of workers in case of collective redundancy, on transfer of undertakings and - most important – on prohibition of discrimination for all kind of reasons.

The core instrument for protection of health and safety is the Framework Directive of 1989, surrounded by a whole set of so called daughter Directives on specific risks for health and safety. The framework directive – at least in principle – covers all private or public areas of activity, contains the basic principles to fight risks of health and safety and lists up the duties of employers as well as of employees in this respect

The working time Directive of 1983 not only serves health and safety considerations but to a great extent is devoted to the organisation of working time flexibility. Mainly three issues covered by the directive have become very controversial: the very notion of working time, the period within which an average maximum working time per week has to be reached and the possibilities of opting out. Efforts to amend the Directive have not succeeded up to now.

In the area of work / life balance the Directive of 1996 on parental leave is a very small step in making work and family obligations more compatible. More important in the context of work / life balance is the directive of 1997 on part-time

work. Even if this directive can be understood as the lowest possible denominator, it contains two important elements: equal treatment pro rata in reference to working conditions and protection against dismissal if an employee refuses to transfer from full-time to part-time or vice versa. Thereby, part-time in quite a few member states has been elevated to a much better status than before.

Of course the Directive on part-time can also be put in the box “atypical work” together with the Directive of 1999 on fixed term contracts and the Directive of 2008 on temporary agency work²⁸ which have to be put in context with the Directive of 1991 on the health and safety of workers with a fixed-duration employment or a temporary employment relationship²⁹. The Directive on fixed term contracts contains two important elements: equal treatment with those in an undetermined employment relationship and prohibition of abuse of repeated fixed term contracts. However, the criteria for abuse are so wide that the repetitive use of fixed term contracts is almost unlimited. The Directive on temporary agency work is the result of a long and very controversial effort. In the very end a compromise was reached which is unsatisfactory. In principle equal treatment with the comparable employees in the user company is guaranteed. However, by way of collective agreement lower conditions for the temporary workers can be determined.

European legislation on labour law is exceeding the already mentioned areas. It includes in particular Directives on the employer’s obligation to inform employees of the conditions applicable to the contract of the employment relationship³⁰, on protection of young people at work³¹, on maternity

²⁸ Directive 2008/104/EC of 19 November 2008, OJ 2008, L 327/9

²⁹ Directive 1991/383/EEC of 25 June 1991, OJ 1991, L 206

³⁰ Directive 1991/533/EEC of 14 October 1991, OJ 1991, L 288/32

³¹ Directive 1994/33/EC of 22 June 1994, OJ 1994, L 216/12

protection³² and on protection of employees in case of the employer's insolvency³³.

One of the most spectacular pieces of European labour law is certainly the attempt to resolve the tension between the freedom of services and social considerations. In the early 1990s construction companies from member states with significantly lower levels of working conditions and labour standards provided their services in high wage countries. Their employees of course remained to be employees with employment relationships in their country of origin, not being covered by the equal treatment principle which would have to be applied if they would have become workers of the country where the services are performed. Therefore, due to much lower labour costs these companies were able to offer their services much cheaper than companies in higher wage countries. This led to a substitution effect: companies in higher wage countries had less work, many of them went into insolvency and many workers in the construction industry lost their jobs³⁴. This led in 1996 to the posting of workers Directive³⁵ according to which essential employment protection standards in the host country are to be applied to the posted workers. When later on further obstacles for the freedom of services were supposed to be removed requirements of labour protection were ignored by the draft of a Directive. It was focussing exclusively on the country of origin principle: not only the requirements for providing services but also the conditions for the posted workers were supposed to be those of the country of origin and not in line with the requirements and standards of the

³² Directive 1992/85/EEC of 19 October 1992, L 348/1

³³ Directive 2008/94/EC of 22 October 2008, OJ 2008, L 283/36

³⁴ For this development see M. Weiss, *The Implication of the Service Directive on Labour Law – A German Perspective*, in: R. Blanpain (ed.), *Freedom of Services in the European Union – Labour and Social Security Law: The Bolkestein Initiative*, The Hague 2006, 77 et seq. (78 et seq.)

³⁵ Directive 1996/71/EC of 16 December 1996, OJ 1997, L/1

host country³⁶. The idea was to facilitate trans-national services as much as possible. This led to strong protests of the trade unions and also to significant fears of workers in the potential host countries³⁷. The protests were successful. The service Directive of 2006³⁸ even strengthens the concept of the posting workers Directive by including duties of efficient monitoring to be established by the member states. The big problem of both Directives is that the indicated protection only covers employees in a traditional sense but not self-employed. Since the demarcation line between employment and self-employment is rather difficult to be drawn, the protection easily can be undermined.

Europe's by far most important legislative input into individual labour law has been in the area of discrimination. Based on the already mentioned Art. 13 of the Amsterdam Treaty two anti-discrimination-directives were passed in 2000³⁹. The already sketched Directive on equal opportunities for men and women has been brought fully in line with the spirit of these directives of 2000. The amendments now are integrated in a consolidated version of the equal treatment directive of 2006⁴⁰.

The scope of application of the first Directive of 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin exceeds the area of employment and covers also social protection, including social security and health care, social advantages, education and access to and supply of goods and services which are available to the public, including housing. This extension now – at least in principle - also applies to the area

³⁶ See for details of this initiative N. Bruun, The Proposed Directive on Services and Labour Law, in: R. Blanpain (ed.), Freedom of Services in the European Union, Bulletin of Comparative Labour Relations 58, 2006, 19

³⁷ For the trade unions' view see S. Passchier, The Point of View of the ETUC, in R. Blanpain (FN 35) 141

³⁸ Directive 2006/123/EC of 12 December 2006, OJ 2006, L 367/36

³⁹ Directive 2000/43/EC of 29 June 2000, OJ 2000, L 180 / 22 and Directive 2000/78/EC of 27 November 2000, OJ 2000, L 303 / 16

⁴⁰ Directive 2006/54/EC of 5 July 2006, OJ 2006, L 204 / 23

of sex discrimination, even if there are quite a few exceptions which result in the fact, that the scope of application is slightly smaller than in the case of racial or ethnic origin. The second Directive of 2000 establishing a general framework for equal treatment in employment and occupation prohibits discrimination for reason of religion or belief, disability, age or sexual orientation. Here the scope of application is much more limited. It is restricted to the field of occupation: access to employment and self-employment, access to all types of vocational training, employment and working conditions (including dismissals and pay) as well as membership of and involvement in professional organisations as trade unions and employers' associations.

This very sketchy list of the most important Directives in individual labour law only is supposed to give an idea of the areas covered by European legislation. However, it should be sufficient to demonstrate that the Community's legislative input into individual labour law has remained to be unsystematic and fragmentary.

2. Collective Labour Law

Perhaps even more important than the inputs into individual labour are the Community's legislative measures in the area of collective labour law: they shape the interaction and the power relationship between both sides of industry. In particular three legislative steps in the area of workers' participation are of utmost interest, two referring to trans-national undertakings and groups of undertakings and one referring to domestic structures within the member states.

The first step in this context is the Directive of 1994 on European Works Councils (EWC)⁴¹ which has been amended in 2009⁴². It covers trans-national undertakings

⁴¹ Council Directive 94/45/EC of 22 September, OJ 1994, L 254/64

⁴² Directive 09/38/EC of 6 May 2009, OJ 2009, L 122 / 28

and groups of undertakings with at least 1000 employees within the EU and with at least 150 employees of the undertaking or of different undertakings of the group in each of at least two different member states.

The focus of the Directive is on the establishment of a body representing the interests of all employees of the undertaking or group of undertakings within the Community: the EWC. In order to establish such an EWC a relatively complicated procedure is provided for. First, the employees' representatives in each undertaking or each group of undertakings must form a so-called Special Negotiating Body (SNB) composed of representatives of each Member State in which the Community-scale undertaking or group of undertakings employs at least 100 employees. Then the EWC has to be set up by written agreement between the central management of the Community-scale undertaking or of the controlling undertaking of the group on the one hand and the special negotiating body on the other. Where a Community-scale undertaking or group of undertakings has its central management or its controlling undertaking outside the EU, the EWC must be set up by written agreement between its representative agent within the EU or, in absence of such an agent, the management of the undertaking or of the group of undertaking with the largest number of employees on the one hand and the special negotiating body on the other.

This agreement must determine specific matters. If the special negotiating body decides by a two thirds majority not to request such an agreement, that is already the end of the matter. Only if the central management refuses to commence negotiations within six months of receiving such a request or if after three years the two partners are unable to reach an agreement do the subsidiary requirements of the Annex to the directive apply. These fall-back clauses are the only form of pressure available to the SNB. However, it should be pointed out that almost never in the more than

1000 cases where EWCs have been established the fall back clauses had to be applied. Solutions were found by way of negotiations.

The amendment of 2009 mainly has brought clarifications on the timing and content of information and consultation, has integrated ECJ's judgements into the directive and has strengthened the link between EWC and national workers' representatives. Far-reaching requests by the trade unions were not met.

The second step in this context was the Directive supplementing the statute for a European Company⁴³ with regard to the involvement of employees⁴⁴. This Directive has to be read together with the statute on the European Company which contains the rules on company law. The main goal of establishing a European Company as an option is to save transaction costs, to increase efficiency and transparency. It no longer should be necessary to create complicated structures of holding companies in order to overcome the problems arising from national company law.

The statute provides for two organizational alternatives: a two-tier system and a one-tier system. In addition to the shareholders' assembly the two-tier system has a managing board and a supervisory board whereas the one-tier system only has an administrative board. In the two tier system the members of the managing board are appointed and recalled by the supervisory board whose members are elected by the shareholders' assembly, whereas in the one-tier system all members of the administrative board are elected by this latter body.

A European Company only can be registered if the requirements of the Directive are met. Thereby it is guaranteed that the provisions on employees' involvement cannot be ignored. The structure of the Directive is very

⁴³ Regulation 2001/2157/EC of 8 October 2001, OJ 2001, L 294/1

⁴⁴ Directive 01/86/EC of 8 October 2001, OJ 2001, L 294/22

much the same as in the Directive on EWCs: it provides for a special negotiating body, lists up the topics for negotiation and leaves everything to negotiations. In case the negotiations fail, there is again a safety-net, the so called standard rules.

The Directive contains two different topics which have to be distinguished carefully. The first refers to information and consultation. Here the structure is very similar to the one developed in the Directive on EWCs. The application of the Directive on EWCs is excluded in the European Company.

The crucial and interesting topic of the Directive refers to employees' participation in company boards. Normally it is up to the negotiations how such a scheme has to look like. Only in case of transformation the agreement "has to provide at least the same level of all elements of employees' involvement as the ones existing within the company to be converted into a European Company". If in other cases a reduction of the participation level would be the result of the negotiations, qualified majority requirements apply which make sure that by way of agreement the existing highest level cannot be easily or carelessly reduced.

A European Company can be registered irrespective of employees' participation if none of the participating companies has been "governed by participation rules prior to the registration of the European Company." In this case neither an agreement is needed nor do the standard rules apply: the zero solution.

If the standard rules on participation are to be applied there is a maintenance guarantee: the highest pre-existing level of participation is to be applied. However, it should be stressed, that so far in all European Companies a solution was found by way of negotiations.

Whereas the two Directives mentioned above refer to the trans-national context, the Directive on a framework for

information and consultation of 2002⁴⁵ shapes the participation structure within the Member States. It covers public or private undertakings of at least 50 employees and establishments of at least 20 employees in Member States.

The Directive defines the structure of information and consultation. Information has to cover the recent and probable development of the undertaking's or the establishment's activities and economic situation in its broadest sense. Information and consultation has to take place on the structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged in particular where there is a threat of unemployment. Finally information and consultation has to take place on decisions likely to lead to substantial changes in work organisation or in contractual relations.

On the whole the Directive remains very flexible and leaves the structural framework and the modalities to a great extent to the Member States. Nevertheless it is an important step to promote minimum conditions for information and consultation throughout the Community. Since the directive only provides for a minimum framework it of course does not affect more favourable arrangements in Member States.

⁴⁵ Directive 2002/14/EC of 11 March 2002, OJ 2002, L 80/29

CHAPTER VII

SOFT LAW STRATEGIES

Summary: 1. Voluntary agreements in the context of the social dialogue - 2. European Employment Policy - 3. The Lisbon Strategy and “Europe 2020”

1. Voluntary agreements in the context of the social dialogue

The European input into labour law only can be fully understood if strategies beyond legislation are included.

The first example in this context are the voluntary framework agreements concluded by the parties of the the social dialogue. This means that the already mentioned European social partners are not only integrated in the legislative machinery but have another perhaps much more important task: They are entitled to conclude agreements to be implemented “in accordance with the procedures and practices specific to management and labour and the Member States”. Examples are the framework agreements on tele-work (2002), on stress at the workplace (2004), on harassment at the workplace (2006), on violence at the workplace (2009) and on inclusive labour markets (2010). These agreements are nothing else but an offer for the actors on national scale to give them some guidance and to enrich their imagination. Or to put it differently: they are to be understood as a European input intending better coordination of collective bargaining on national scale by offering ideas on how to cope with specific problems. The national actors are supposed to reflect on the basis of these framework agreements. This implies that the European actors have no choice but to convince the national actors of the advantages of the content of the framework agreement. Only close and continuous communication offers a chance

of success. This form of vertical communication is of utmost importance for the growth of real European actors of both sides of industry: a step towards a European collective bargaining system sometime in the future.

There is not only an inter-professional but also a sectoral social dialogue for the different branches of activity. The structure of the sectoral social dialogue is essentially the same. Here the confederations of trade unions and employers associations of specific branches of activity are put together. In the meantime there are European social dialogues for more than 40 sectors. The sectoral social dialogue as such is not even mentioned in the Treaty. It grew up as an informal structure and was somehow formalised by a Commission's program of 1998. So far the sectoral social dialogue was not very successful in producing framework agreements. They are still a rarity. The important aspect is that the sectoral dialogue has enormous potential in two ways. First it may help in an informal way to better coordinate collective bargaining in the Member States. And secondly it may be a helpful setting to improve the vertical dialogue between national and European actors in order to build up a multi-level-structure for all the sectors.

If bargaining patterns on European level are analysed one has to go beyond the social dialogue in a strict sense and include the already mentioned EWCs. Even if their role according to the respective Directive is limited to information and consultation, they have developed dynamics of their own and gone far beyond information and consultation towards negotiations, leading to agreements. These agreements refer to a whole variety of topics: health and safety; environment; fundamental rights, in particular trade union rights and data protection; corporate social responsibility, equal treatment at work, job security, codes of conduct, mobility management; mergers; closures; relocations and restructuring.

The legal effect of these agreements is totally unclear. Since, however, the bodies of workers' representation of the subsidiaries in the different Member States as well as national trade unions and their European confederations normally take part in the elaboration of such agreements, they are considered to be a product of a joint effort and, therefore, are respected in practice. The factual observance, however, is not yet legally formalised. Since in this context the interaction between national and European actors is far more developed than in the context of the inter-professional and sectoral social dialogue, the EWC pattern might be somehow the forerunner for a system of European collective agreements, of course confined to the respective groups of undertakings.

2. European Employment Policy

Another enlightening example for a soft law strategy is the European employment policy. By the Amsterdam Treaty a co-ordinated strategy for employment policy has been institutionalized. The genuine competence of the Member States in this very area remains uncontested. The Community is required to contribute to a high level of employment "by encouraging co-operation between Member States and by supporting and, if necessary, complementing their action" (Art. 147 par. 1 TFEU)

To make sure that this aspiration has a chance to be realized, the Chapter on Employment provides for several institutional arrangements: There is first the Employment Committee which is mainly supposed to monitor the situation on the labour market and the employment policies in the Member States and the Community and thereby help to prepare a joint annual report by the authorities of the EU. In fulfilling its mandate, the Committee is required to consult the trade unions and the employers' associations. In order to make sure that the activities of the Employment

Committee as well as the joint annual report by the Council – this is the body which is composed by the representatives of the 28 governments - and the Commission do not remain without consequences, the Chapter on Employment establishes additional powers for the Community. After examination of the joint annual report by the

European Council, another politically extremely important body which is composed by the heads of the 28 Member States, and on the basis of the European Council's conclusions, the EU authorities shall each year draw up guidelines. These guidelines of course are not legally binding. But they put pressure on the addressed Member States. In case of disobedience they have to justify why they did not follow the guidelines.

This arrangement has led to manifold measures and significantly increased the interrelated activities between the Member States. However, the results in detail are of less importance in the context to be discussed here. Important is the fact that the Chapter on Employment establishes a mutual learning process for the Community and the Member States, including not only governments but also trade unions and employers' associations. None of the Member States can escape the permanent dialogue and the permanent pressure implied by it. Best practices do not have to be reinvented all the time but can easily be communicated and imitated. The whole structure to an increasing extent is understood as a joint European activity. The goal - in spite of the wording of the Treaty - is a gradual de-nationalization and Europeanization of employment policy. In the meantime a catchword has been invented for such strategies focussing on mutual learning and benchmarking: the open method of coordination. Nowadays it plays a decisive role in labour law and labour market policy.

3. The Lisbon Strategy and “Europe 2020”

The Lisbon strategy did not come out of the blue. It has to be seen in the context and as a continuation of earlier developments, in particular with the already sketched development of European employment policy. In the 1990s the acceleration of the EU economic integration was on the agenda. The completion of the Single Market, the preparation of the European Monetary Union, the Stability Pact and – last not least - the Amsterdam Treaty considerably altered the national employment policy context. Another important input was Delors’ “White Paper on Growth, Competitiveness and Employment”, striving for a more balanced relationship between economic and social development. It set targets for entering the 21st century whereas later on the Lisbon strategy tried to do it for 2010.

The Lisbon strategy was launched in the turn of the century in 2000. Its objective for the EU was “to become the most dynamic and competitive knowledge-based economy in the world by 2010 capable of sustainable economic growth with more and better jobs and greater social cohesion and respect for the environment”.

A whole set of ambitious targets for 2010 were listed up, among them targets for employment rates, for full employment in 2010, for promotion of the knowledge society for everybody and for the turn of Europe into a space of research and innovation, to just mention a few out of far too many.

However, soon it turned out that the strategy was much too complex, that it was lacking a clear division of tasks between the EU and the Member States and that there was no really functioning governance structure. Therefore, the strategy was modified and re-launched in 2005. The new approach was more specifically focused on growth and jobs, reducing significantly the number of headline targets. And in particular a new governance structure based on partnership between

EU and Member States was established. Important elements of the latter were integrated guidelines adopted by the Council, providing multi-annual guidance and policy orientations. They became the policy basis for national reform programs. These were documents prepared by the Member States for a three year cycle. Also of great importance were country specific recommendations again adopted by the Council. They were meant to help the Member States to better realize the objectives in their national reform programs. And, of course, the already mentioned open method of coordination as a mutual learning strategy was the underlying philosophy of the whole exercise.

The impact of this strategy on growth and jobs is difficult to evaluate. First it is not easy to simply establish causality between the Lisbon strategy and political results. Mono-causal explanations are not appropriate in a world of multi-causality. Secondly the implications by the EU enlargements in 2004 and 2007, turning the EU in a much more heterogeneous community with new economic and social challenges, created a significant obstacle for the success of the Lisbon strategy. And thirdly the financial crisis, starting in 2008, reversed to a significant extent the development until then.

The Lisbon strategy, in particular in its re-launched version was definitely a good idea but suffered of significant structural deficiencies. Whether they will be overcome by the new concept "Europe 2020" is an open question.

The new agenda, a strategy for smart, sustainable and inclusive growth, again sets five headline targets for 2020: 75 % of the population aged 20-64 should be employed, 3 % of the EU's GDP should be invested in Research and Development, specific climate/energy targets should be met, the share of early school leavers should be under 10 % and at least 40 % of the younger generation should have a tertiary degree and finally 20 million people should be at risk

of poverty. These targets are to be reached by seven flagship initiatives which I will not list up here. If we have a look at the most relevant flagship initiative in our context, the agenda for new skills and jobs, there is nothing new. There is still the reference to the flexicurity agenda, to new forms of work-life balance, to the problem solving potential of social dialogue at all levels and to the European qualification framework. Not only the thematic part of the new strategy remains to a great extent within the old paths. The same is true for the governance part which again is mainly based on integrated guidelines and policy recommendations to the Member States. It reads very much like a continuation of the Lisbon strategy. Whether it makes sense to set again such ambitious targets in view of the budgetary problems some countries in the Euro Zone and beyond are struggling with, may well be doubted.

Nevertheless, "Europe 2020" is by no means a useless effort. As already the Lisbon strategy stimulates and keeps alive a permanent dialogue between the Member States, also involving the social partners. This definitely is a way to offer a chance to the Member States for mutually learning from each other.

CHAPTER VIII

CONCLUSION

Compared to the beginning of the European project where social policy was not on the agenda of the Community, much progress has been made up to now. The legal framework has significantly changed and the European legislator has produced quite remarkable results. However, European labour law still is in a somehow rudimentary stage, remaining a mere fragment. The perspectives for the future are rather mixed. Further legislation in this very controversial area has become very unlikely. The diverging interests of the 28 Member States make it difficult to even achieve a qualified majority in the Council.

There are quite a few alternative strategies putting soft pressure on the relevant actors in the Member States. The magic formula has become the open method of coordination. Whether this permanent discourse on the long run will have the effect to produce a floor of labour rights throughout the EU, remains to be seen. At first glance it might seem that social policy – as it was in the beginning of the European project in the context of the EEC – to a great extent is brought back to the Member States and that the role of the EU is mainly to coordinate national policy and to stimulate debates throughout the Member States. However, such a narrow perspective would ignore the impact of the changed legal framework made in the meantime and described above. In spite of the difficulties in producing hard law the role of the EU in social policy is now much stronger than in the times of the EEC. Hope in particular may be put into the case law of the CJEU which in view of the Charter of Fundamental Rights and in view of the new framework introduced by the Lisbon Treaty has the possibility to act on a new platform. Therefore, it is of utmost importance to analyse the Directives assembled in this commentary in this

very perspective in order to disclose their potential. But, of course, even if the CJEU uses its possibilities to their full extent, this mainly means strengthening the already existing pattern of European labour law in an incremental way. A systematic and coherent approach is – at least presently - not in sight.

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Aggiornato al 27 maggio 2016

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