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LABOUR AND SOCIAL LAW IN THE EU

– HUMAN RIGHTS ASPECTS –

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and cover throughout the book in the discussion of different areas of social policy. It examines the changing parameters of European social policy as mediated by the relationship between the economic and social dimensions of the Community and Union, and by the centrality of workers' as compared to citizenship rights. An attempt is made to assess the extent to which the Union has developed its own social policy competence, despite the constraints arising from strong national interests, the threat posed to national sovereignty and the persistence of diversity in welfare systems and practices. In conclusion, the prospects are examined for a more broadly based European social policy in the twenty-first century as the Union enlarges its membership eastwards.

Although the chapters in the book are linked by common themes and approaches so as to provide a cumulative and wide-ranging overview of social policy in the Union and its member states, each of Chapters 3 to 9 can be studied independently by readers wishing to explore any one policy area in isolation. To supplement the Bibliography, which covers works cited throughout the book, separate lists have been compiled of legislation and the key policy documents relevant to each chapter. References in square brackets in the text indicate the EU documents cited in the boxes at the end of chapters. They include materials produced by the Commission as COM documents or published in the *Official Journal of the European Communities* (abbreviated to *OJ*), and publications by the Office for Official Publications of the European Communities in Luxembourg (abbreviated to *OOPEC*). The boxes also contain web site addresses for internet sources.

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LINDA HANTRAIS

1 The Social Dimension of the European Union

When the Treaty establishing the European Economic Community (EEC) was signed in Rome in 1957 [1.2], the dominant political philosophy was market driven. The six original EEC member states – Belgium, France, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands – believed that, if enterprises were allowed to compete on equal terms, the distribution of resources would be optimized, enabling untrammelled economic growth which would automatically result in social development. Social harmonization was seen as an end product of economic integration rather than a prerequisite. For these reasons, the social provisions contained in the treaty did not define precise social policy objectives; they limited EEC responsibility to promoting co-operation (Collins, 1975; Shanks, 1977). Member states did recognize the need to establish a social fund to help declining areas of the economy, but it was to operate on a very small scale.

As the optimistic assumptions of the founder members proved to be ill conceived, and as Denmark, Ireland and the United Kingdom joined the European Community (EC) in 1973, a more active approach to social reform was advocated on the grounds that the unevenness created by giving free rein to market forces was unacceptable and not in the long-term interests of member states. The next 20 years therefore saw a growing commitment, at least in principle, to the social dimension as a component of European integration and a necessary complement to economic policy, rather than simply a spillover from it.

This chapter provides a brief overview of the historical development of Europe's social dimension within the context of its treaties, charter and social action programmes. Several of the central concepts underlying European social policy are introduced, including social space, social dialogue, social plinth, subsidiarity, proportionality and social dumping. As well as exploring why and how the social dimension became a concern for member states, the chapter seeks to identify and track the changing aims, objectives and nature of the European social policy-making process.

DEVELOPING THE SOCIAL DIMENSION

In several respects the Treaty of Paris, which set up the European Coal and Steel Community (ECSC) in 1951 [1.1], and the Treaty establishing the European Atomic Energy Community (EAEC) in 1957 [1.3] were more interested in social policy than the EEC Treaty. The ECSC had to deal with the social impact of structural change in two major industries and was endowed with funds to cover the resettlement of displaced workers. It also conferred responsibility for looking into the living and working conditions of miners and steel workers. The EAEC laid down basic standards for the health and protection of workers and the general public, as well as procedures for monitoring and checking their implementation. The EEC Treaty had a limited, albeit specific, social remit, for example through its commitment to raising standards of living (article 2), the provision of a social fund (article 3 §i) and the task of promoting close co-operation in the social field (article 118). It did not set the framework for a fully developed European social policy, as was done in 1961 by the Council of Europe in its European Social Charter, which was later to serve as a source of inspiration for the Community Charter of the Fundamental Social Rights of Workers [1.10]. This section tracks the development of social provisions through European legislation and policy statements since the 1950s. (for source materials see the documents and web sites listed in [1.21]).

The social dimension of the EEC Treaty

Twelve of the 248 articles of the EEC Treaty were devoted explicitly to social policy (articles 117–28). Since the aim of the treaty was to create an economic union, the relatively low priority given to social affairs was understandable. Justification for the inclusion of any reference to the social dimension can be found in the overriding principle that distortion of the rules of competition was to be avoided at all costs. In the negotiations leading up to the signing of the treaty, the French had argued that the high social charges imposed by the state in France on employers and employees in the best interests of the workforce, combined with the principle of equal pay for men and women, which was written into the French constitution, would put France at a competitive disadvantage. Consequently, they advocated harmonization of provision in these areas. The Germans countered the French case by arguing that social charges were a result of the operation of market forces and should not therefore be subject to regulation under EEC law.

A compromise solution was eventually reached whereby the treaty included a section on social policy (title III) but did not stipulate how most of the provisions should be implemented. Article 118, for example, specified that the Commission should promote close co-operation between member states in matters relating to training, employment, labour law and working conditions, social security and collective bargaining, but without specifying the form such co-operation should take (see Chapters 3 and 4). Article 119, which defined the equal pay principle in response to the demands of the French (see Chapter 6), and article 121, which was concerned with implementing common social security measures for migrant workers (see Chapter 9), were more explicit. Similarly, articles 123–8 set out specific arrangements for operating the European Social Fund. The ESF was intended to make the employment and re-employment of workers easier and to encourage geographical and occupational mobility within the EEC by providing assistance with the cost of vocational retraining and resettlement allowances (see Chapters 3, 8 and 9).

When discrepancies between the laws and practices of member states were considered to be distorting competition, article 117 of the treaty allowed for directives to eliminate any differences. The EEC was, however, premised on the principle that rules avoiding distortion of competition would make it unnecessary to interfere with redistributive benefits, which should remain a matter for individual state policies (1975, p. 9). Provision was made for equal pay, the improvement of standards of living and social harmonization only insofar as they supported the goal of economic integration (see Chapter 2).

A second justification for the 'social' concerns of the original member states was free movement of labour, which had been a fundamental aim of the EEC Treaty. In addition to the establishment of the ESF, provision was made in the two chapters of the treaty on the free movement of persons, services and capital for issuing directives on adopting other measures to facilitate the mobility of workers (articles 48–51) and the right of establishment (articles 52–8), concerning information on job availability in other countries, arrangements for mobile workers to retain social security entitlements and the recognition of professional qualifications (see Chapters 3 and 9).

Although the signatories to the treaty had flagged their concern in the social dimension of the EEC, the compromise that resulted from their failure to agree about objectives, and to set up mechanisms for achieving them, led to what could be described as a modest, cautious and narrowly focused social policy. The treaty which created the

ECSC, EEC and EAEC in 1965 [1.4] to constitute a single Council and a single Commission of the European Communities did not bring any formal changes in the social policy field, although the clear social protection remit of the two other treaties may have had some impact on the subsequent development of European social policy, particularly in the area of health and safety at work (see Chapter 4).

The 1974 Community social action programme

While the EEC's approach to social policy was cautious, the Council of Europe was much more explicit and affirmative in the social charter it adopted in 1961, described as the economic and social counterpart of the Convention on Human Rights. The charter guaranteed a number of fundamental rights for workers and citizens, making explicit reference to the rights of the family, mothers and children to social, legal and economic protection. Although it did not have the same legally binding status as the convention, the Council of Europe's social charter established a comprehensive and coherent set of policy objectives.

Signs of a growing political commitment to social legislation and to a more positive and interventionist social policy within the EEC can be found more than a decade after the Council of Europe's social charter in the Commission's social action programme. In 1974, a resolution from the Council of Ministers (subsequently referred to as the Council) 'concerning a social action programme' [1.9] noted that economic expansion was not to be seen as an end in itself but should result in an improvement of the quality of life. The programme provided for action in three areas, primarily concerned with the working environment. It set out to achieve several broadly based objectives: the attainment of full and better employment; the improvement of living and working conditions; the increased involvement of management and labour in economic and social decisions, and of workers in the life of undertakings. The Council's view of Community competence in the area of social policy at that time was presented in cautious terms, foreshadowing the concept of subsidiarity, which was to remain prominent in statements on social policy through to the end of the century:

[The Council] considers that the Community social policy has an individual role to play and should make an essential contribution to achieving the aforementioned objectives by means of Community measures or the definition by the Community of objectives for national social policies, without however seeking a standard solution to all social problems or attempting to transfer to Community level any responsibilities which are assumed more effectively at other levels. [1.9, p. 2]

Since the EEC Treaty did not require a social programme, and the Community did not have direct powers of intervention, its responsibility being confined to promoting co-operation between member states, action had to be justified on political rather than legal grounds. The resolution expressed the 'political will' [1.9, p. 2] to adopt the measures required. In keeping with the priorities of the treaty, the principles of free movement of labour and equalization of competitive conditions between enterprises were stressed, and the importance of the ESF was reiterated as a means of palliating the uneven effects of economic growth on weaker sectors of the population.

The social action programme thus set the scene for the development of the Community's social policy over the next decade. The 1970s saw a spate of action in the areas of education and training, health and safety at work, workers' and women's rights and poverty, leading to the establishment of a number of European networks and observatories to stimulate action and monitor progress in the social field.

The social dimension and the Single European Act

By the mid-1980s, pressure was building up for a more regulatory social policy. The idea of creating a social space (*espace social*), put forward by the French President, François Mitterrand, in 1981, was taken up by Jacques Delors when he became President of the Commission in 1985. The social space was first mooted during the French Presidency of the Community at a time when the revitalization of social policy was still very much associated with economic performance (Beretta, 1989, p. 5). In line with the policy-making stance adopted by France's own left-wing government, employment was placed at the heart of proposals for European social policy, the dialogue between management and labour was intensified, and co-operation and consultation on social protection were strongly advocated. Social policy was promoted as the means of strengthening economic cohesion and was therefore to be developed on the same basis as economic, monetary and industrial policy. According to this neo-functionalist logic, 'social policy grows as a functional prerequisite of economic integration' (Room, 1994, p. 21).

Delors made clear his own commitment to the social dimension of the Community, stating that: 'The European social dimension is what allows competition to flourish between undertakings and individuals on a reasonable and fair basis.... Any attempt to give new depth to the Common Market which neglected this social dimension would be

doomed to failure' (Delors, 1985, p. xviii). For Delors the social space was a natural complement to the completion of the internal market and a means of resolving the stalemate that had arisen over endeavours to establish the social dimension of the Community through legislation. Some member states opposed the legislative route on the grounds that it would go against national provision, but without legislation European social policy was not binding. By referring to a social space, Delors appeared to be seeking to introduce an equivalence of standards, which would be agreed by both sides of industry through social dialogue, a concept central to his thinking. The social dialogue was intended to make trade unions and employers act as the initiators of social policy, on the understanding that, in return, the Commission would refrain from developing new initiatives itself. The social partners would thus be concerned with principles and objectives, leaving member states to implement them within existing industrial relations frameworks, thereby achieving 'convergence in the employment and labour policy goals of the member states, rather than the standardisation of industrial relations institutions and processes' (Teague, 1989, pp. 69-70).

A series of discussions on socio-economic issues was organized at Val Duchesse (a castle in Belgium) in 1985 to secure the involvement of the social partners. Major participants were the European Trade Union Confederation (ETUC), the Union of Industries of the European Communities (UNICE) and the European Centre of Public Enterprises (CEEP). Although the talks fulfilled the objective of encouraging social dialogue between management and workers' representatives, the employers refused to sign the final texts unless Delors gave an undertaking that the Commission would not use the joint opinions as a basis for legislation, thereby preventing the outcome which he had been seeking to engineer. A more positive result was the renewed emphasis on social cohesion, involving closer co-ordination of the activities of the ESF to direct aid towards the poorer member states.

When the Single European Act (SEA) was signed in 1986 [1.5] by the then 12 member states, relatively little progress had been made towards building social policy into the legislative framework of the Community, although significant changes were introduced to speed up and facilitate the social policy-making process. A new article 118a, a supplement to article 118 of the EEC Treaty, stressed the importance of the working environment and the health and safety of workers, and provided for decisions to be taken in this area by qualified majority voting (see Chapter 4). By extending the use of this form of voting to health and safety at work, and by introducing a new co-operation

procedure, which imposed time limits for the passage of legislation and strengthened the role of the European Parliament, the SEA gave the Council an opportunity to tackle more controversial issues in areas of social policy where agreement had previously been difficult to reach.

Another new 118 article (118b) placed emphasis on the idea of a social dialogue at EC level, as initiated in the Val Duchesse talks in 1985. Article 100 on the approximation of laws was modified by 100a to enable decisions to be taken by qualified majority voting for the approximation of provisions aimed at the establishment and functioning of the internal market. Fiscal provisions, free movement of people and workers' rights continued to be governed by the unanimity rule. Under subsection IV, a new title V was added on economic and social cohesion (articles 130a-e). Article 130b aimed to strengthen economic and social cohesion, particularly through closer co-ordination of the structural funds, namely the European Social Fund (ESF), the European Regional Development Fund (ERDF) and the European Agricultural Guidance and Guarantee Fund (EAGGF) (see Chapter 8).

Despite these changes, the SEA left the issue of the social space largely unresolved. Interest in the proposal was, however, revived by the Belgian government during their presidency in the second half of 1987, when the idea was developed of a social policy based on a 'plinth' (*socle social*) of social rights that would not undermine established statutory guarantees for workers (Teague, 1989, p. 60). The Belgian Minister for Labour spoke of the need 'to establish a platform [*socle* in the French version] of basic rights which would give the two sides of industry a stable, common basis from which they could negotiate to guarantee that the internal market has a real social dimension' (Soisson, 1990, p. 10). In 1988, before the ETUC, Jacques Delors had stressed the need for a 'revival' of social policy, advocating a 'minimum platform of guaranteed social rights with a view to the implementation of the single European market of 1992'. Echoing the words of the Belgian Minister for Labour, he explained that: 'This regulatory platform could be negotiated between the two sides of industry and then incorporated into Community legislation. It would serve as a basis for the social dialogue and for strengthening European cohesion' (Soisson, 1990, p. 10).

The Community Charter of the Fundamental Social Rights of Workers

While the SEA did not provide a blueprint for European social policy, the preamble offered a statement of principle in which the signatories

agreed to work together to promote fundamental rights as laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter. Meeting in Strasbourg on 8-9 December 1989, the heads of all member states, with the exception of the United Kingdom, adopted the Community Charter of the Fundamental Social Rights of Workers [1.10], heralded as the social dimension of the SEA. The preamble to the charter stated resolutely that 'the same importance must be attached to the social aspects as to the economic aspects and..., therefore, they must be developed in a balanced manner'. Although preliminary drafts of the charter had referred to 'citizens' rather than 'workers', the final version did not define rights in terms of citizenship. Most clauses in the charter referred implicitly or explicitly to workers, a focus which was clearly identified in the title and in the section devoted to employment and remuneration, whereas the Council of Europe's social charter had included the right to social and medical assistance and social services without linking them to employment.

Like the Council of Europe's social charter, the Community charter did not have force of law and was not therefore binding on its signatories. As 'soft' law (Hervey, 1998, pp. 49-50), it took the form of a solemn declaration, leaving decisions on implementation procedures to individual member states. The social plinth had been an attempt to ensure that the areas to be covered by social protection would be accepted throughout the Community. Much of the debate about the charter focused on a related issue: whether the Community and its member states were aiming for a maximum or minimum level of social provision. Should equalization be based on an average, the highest or lowest level in the Community? Some states intent on defending what they considered as a higher level of social protection feared that the internal market would result in a downward alignment of social security allowances and benefits towards the lowest common denominator.

The nebulous terms 'adequate', 'sufficient', 'appropriate' and 'satisfactory', used in the charter to refer to the levels to be achieved, are indicative of the problems in reaching agreement over the definition of targets. They reflect the Council's reluctance to impose standards by regulation, the most binding form of legislation (Gormley, 1998, pp. 324-6). This lack of precision left open the possibility that some states would seek competitive advantage by not offering the same level of social protection to their workers, resulting in what has come to be known as 'social dumping', whereby companies may decide to move to countries such as Greece and Portugal, with lower labour and social

costs. The term 'dumping' was used in article 91 of the EEC Treaty, in the economic context, to describe the practice of differential pricing of goods with no economic justification. An example of what is meant by social dumping is the case of the firm Hoover, which decided in 1993 to move from Dijon to Glasgow where labour costs were lower. Since the United Kingdom had not accepted the stipulations of the Community charter, the French accused it of unfair competition. The term 'social dumping' was used (and disputed) to describe the advantage that the United Kingdom was gaining from not having to observe the same standards and conditions of employment as countries that had signed the charter. The reverse of the coin is that disparities in social protection between member states may also serve as an obstacle to mobility of labour and capital. It has been argued that firms will not invest in low social wage countries unless other factors, for example infrastructure and productivity, justify such investments, and that economic integration may lead rather 'to a more gradual and indirect process of social policy erosion' (Leibfried and Pierson, 1992, p. 350).

Another metaphor frequently found in this context is the 'level playing field' of competition, implying that everybody should be playing by the same rules and with equal chances of success in the market place. Accordingly, a higher level of social spending should be sought across member states to avoid putting national governments that do want to introduce more generous provisions at a competitive disadvantage.

These concepts were not invented with the SEA and the Community charter. Fears of social dumping and the creation of an unlevel playing field were, however, exacerbated when Greece joined the Community in 1981, and Portugal and Spain in 1986, since they were all countries with less developed social protection systems than in both the original EEC member states or those which became members in the 1970s (see Chapter 2). Although the charter may not have produced any innovations in the area of social protection, the surrounding debate did serve the purpose of focusing attention on a number of important issues concerning the social dimension of the Single European Market (SEM), or internal market, which came into operation on 1 January 1993. The different bodies of opinion that emerged over the interventionist role of the Community in social policy and the basis on which it should be founded were symptomatic of the diverging principles underlying systems of social protection in the 12 member states. They also signalled the concern felt in some countries about the possibility of losing national sovereignty and being forced to take action in areas where national governments have, at times, been reluctant to intervene.

In the absence of any direct legal means of enforcement, provision was made in the Community charter for an action programme. Under §28, the Council invited the Commission to prepare initiatives with a view to the adoption of legal instruments for the effective implementation of rights that fall within the Community's area of competence. The Commission responded with an action programme containing 47 initiatives for developing the social dimension of the SEM [1.11].

The Commission's description of its goals in the first annual report [1.12] is indicative of the status of the social dimension and the economic constraints within which policy makers were operating. The aim was 'to establish a sound base of minimum provisions, having regard on the one hand to the need to avoid any distortion of competition, and on the other to support moves to strengthen economic and social cohesion and contribute to the creation of jobs, which is the prime concern of completion of the internal market' [1.12, p. 5]. The measures proposed by the Commission were wide-ranging, covering all the topics dealt with in the charter and also adding a chapter on the labour market. The methods to be used for implementing the action programme relied heavily on the consultation process, mediated by advisory committees and the social dialogue.

The report reiterated the point raised at the Luxembourg Council meeting in June 1991 that the achievements made in implementing the SEM programme had not been accompanied by comparable progress in the field of social policy [1.12, p. 22]. This and subsequent annual reports stressed the importance of maintaining a balance between the three fundamental principles underlying the Commission's initiatives: subsidiarity, diversity of national systems, cultures and practices, and the preservation of the competitiveness of undertakings, thereby confirming the secondary status of the social dimension.

It has been argued that the SEA had added nothing new in the field of social welfare, which remained no more than an area of indirect and limited competence for the Community (Berghman, 1990, p. 9). Some co-ordination of national systems of social security was needed to ensure free movement of workers, but these contingencies had already been covered in the early 1970s by relatively uncontroversial legislation on the application of social security schemes to employed persons and to members of their families moving within the Community (see Chapter 9). In all the policy areas encompassed by the charter, action had been initiated before 1989. The charter and action programme can, however, be credited with providing an impetus for a more concerted and coherent approach to social affairs.

The social chapter in the Maastricht Treaty

The principles set out in the Community charter were taken up in the Agreement on Social Policy annexed to the Treaty on European Union signed in Maastricht on 7 February 1992 [1.6]. The Maastricht summit again illustrated the difficulty of reaching agreement over the social chapter, which, on the insistence of the United Kingdom, was removed from the body of the treaty. By including a separate Protocol on Social Policy, the other 11 member states could proceed with the Community charter and make decisions without taking account of the views of the United Kingdom.

Article 1 of the Agreement on Social Policy amended article 117 of the Treaty of Rome by removing the references to harmonization of social systems, and to the belief that improvements would naturally ensue from the functioning of the common market and the approximation of provisions. Instead, it identified specific objectives: the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion'. Significantly, these objectives were to be achieved through measures that 'take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy'.

Article 2 of the agreement assigned a complementary role to the Community in the areas of health and safety at work, working conditions, information and consultation of workers, equality between women and men, and the integration of persons excluded from the labour market. It empowered the Council to act in the area of social affairs to adopt, 'by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States'. It added that any constraints that might impede the creation and development of small and medium-sized enterprises should be avoided. Issues still requiring unanimous voting by the 11 signatories to the protocol were noted: social security and social protection of workers, protection of workers made redundant, representation and collective defence of workers and employers, conditions of employment for third-country nationals, and financial contributions for job promotion. The distinction between the areas subject to qualified majority and unanimous voting was important, since it tended subsequently to dictate the social agenda, limiting it to topics where some degree of consensus already existed.

As in article 118 of the EEC Treaty, the agreement stressed that the Commission's role was to monitor the social situation (article 7), consult, encourage co-operation and facilitate policy co-ordination (article 5). Member states were not to be prevented from introducing their own measures over and above those required at EU level (article 2 §5, article 6 §3). Action was, in any case, constrained by subsidiarity (article 3b of the treaty), one of the three principles regarded as 'cardinal' by the Commission. The principle of subsidiarity was set out in a communication of 27 October 1992 [1.13], and later in Protocol N° 30 of the consolidated EC Treaty [1.8]. Three related issues were emphasized: greater democratic control, more transparency in European legislation and respect of the principle of subsidiarity. While the treaty stipulated the competencies attributed to the Union, the principle of subsidiarity remained important in determining how those competencies should be exercised. By virtue of the principle, the Union is empowered to act when its aims can be more effectively achieved at EU rather than national level; for example in establishing minimum standards that member states should introduce, or in allowing them to maintain higher standards if this is not incompatible with the treaty. The burden of proof is on the Union's institutions to demonstrate a need to legislate at EU level and at the intensity proposed, with recourse to the most binding instruments as a last resort. Accordingly, wherever possible, preference should be given to support measures and framework directives rather than to detailed rules and regulations. The Union should only intervene if, and insofar as, the objectives of the proposed action cannot be satisfactorily achieved by member states themselves, judged by evaluating comparative efficiency and value added. Where the benefits being sought are, however, to be universally applied, EU-level intervention may be justified (Spicker, 1991, pp. 3-8).

The choice of the most appropriate policy instrument is made on the basis of the principle of both subsidiarity and proportionality. According to the principle of proportionality, the means employed should be commensurate with the objectives pursued. Decisions should be taken as closely as possible to the citizens themselves, without endangering the advantages to be gained from common action at the level of the Union as a whole, and without changing the institutional balance.

These constraints on action at EU level were to some extent offset by the new powers that the Agreement on Social Policy gave to management and labour. Article 3 required that the Commission should 'consult management and labour on the possible direction of Community action' (§2) and the content of proposals (§3), as well as enabling

them to forward an opinion or recommendation to the Commission and to initiate agreements with the Community (§4), thereby confirming the commitment to the social dialogue.

The green and white papers on European social policy

While the Community charter of 1989, the action programmes and the Agreement on Social Policy in the Maastricht Treaty together provided a clearer statement of thinking on social policy at EU level than was present in the EEC Treaty drawn up in the 1950s, they did not signal a strong commitment to social affairs as an objective in its own right, or on a par with economic union. Nor did they put in place the administrative structures needed for producing a common European social policy. By incorporating the principle of subsidiarity in the Maastricht Treaty, member states seemed to be confirming their continued reluctance to develop an overarching social policy that might impinge on national sovereignty. In 1993, however, the Commission published a consultative document, which demonstrated that the issue of a European social policy remained firmly on the agenda. The green paper on European social policy [1.14] announced a wide-ranging review of social policy in the Union, the *acquis communautaire* (legal attainments) and the areas where further action was needed. Government departments, social partners, the European Parliament, the Economic and Social Committee and other organizations and individuals were invited to assist the Commission in preparing the next phase of the Union's social policy. The green paper sought views on the objectives, targets and measures that would be acceptable to member states and social partners in the areas of the labour market, social protection and exclusion, equal opportunities and training, thereby reaffirming the wide range of issues that fell within the Union's competence. It also demonstrated that the Commission wanted to be seen to take account of the opinions expressed by other social actors. The green paper was intended as a stocktaking exercise rather than a prescription for future action.

The white paper on European social policy [1.15], published eight months later in 1994, went on to set the scene for European social policy through to the end of the decade by providing a comprehensive statement of policy directions and goals. The document described the 'vital part' social policy had to play 'in underpinning the process of change' [1.15, p. 7], by building on the achievements of the past and putting forward new proposals for the future. The aim was to ensure that the people of Europe benefit from 'the unique blend of economic

well-being, social cohesiveness and high overall quality of life which was achieved in the post-war period' [1.15, p. 7]. Future policy was to be broadly based, meaning that, although jobs would remain at the top of the agenda, categories of people who were not in work should also be taken into account, with a view to establishing 'the fundamental social rights of citizens as a constitutional element of the European Union' [1.15, p. 69], a goal that the Community charter had not espoused. Like previous policy statements, however, the white paper affirmed that the Union should not 'seek to supplant the responsibilities at national, regional and local level' [1.15, p. 7].

The social action programmes for 1995–2000

The white paper offered a long-awaited framework for the management of change and for action through to the end of the century. The Commission was quick to take advantage of the momentum by launching a medium-term social action programme for 1995–97 [1.16]. The first progress report on the programme opened with the statement that it was based on the concept of social policy as 'a productive factor facilitating change and progress, rather than a burden on the economy or an obstacle to growth' [1.17, p. 1], reflecting the Commission's increasingly proactive approach. The report also stressed how important the dialogue had been between political (member states), social (employers and unions) and civil (non-governmental organizations, NGOs) actors in enabling successful implementation of the programme.

The 1998–2000 social action programme maintained the pressure for recognizing the importance of the social dimension in responding to the major social challenges the Union was facing at the turn of the century [1.19]. Firstly, Economic and Monetary Union (EMU) was creating the economic conditions needed to underpin social progress. Secondly, population ageing and, more particularly, the ageing of the workforce were raising concerns about the implications of demographic trends for employment and social protection systems in Europe. Thirdly, the prospect of enlargement was fuelling debates about the role that social policy could play in the transition to a market economy in applicant states, raising questions about how they would bring their social legislation into line with other member states and develop adequate systems of social protection [1.19, pp. 2–3]. Echoing article 2 of the Treaty on European Union, the programme took as its starting point that 'economic and social progress go hand in hand' [1.19, p. 3]. The objectives set out confirmed a more proactive role for social policy

at the close of the century and beyond: 'social policy should promote a decent quality of life and standard of living for all in an active, inclusive and healthy society that encourages access to employment, good working conditions, and equality of opportunity' [1.19, p. 3].

The social dimension and the amended treaties

The Treaty of Amsterdam [1.7], signed on 2 October 1997, amended the Treaty on European Union and the Treaties establishing the European Communities. A consolidated version renumbering the articles in the original EEC Treaty was published in the same year [1.8]. Following the British opt-in, the Agreement on Social Policy was incorporated into the main body of the consolidated treaty under title XI on social policy, education, vocational training and youth, thereby endorsing the commitment of member states to the development of the social dimension as an important component in the process of European integration. Reflecting public concern about unemployment across the Union, the reference to 'a high level of employment and of social protection', which had been introduced into the Treaty on European Union in article 2 of the Principles in part I, moved into second place in the list of priority areas at the beginning of the amended EC Treaty. In line with the Union's policy on mainstreaming, 'equality between men and women' was inserted in third position before 'sustainable and non-inflationary growth'. On the insistence of the Germans, Dutch and British, the reference to 'convergence of economic performance' was amended to include 'competitiveness'. The reference to the environment was expanded to cover 'a high level of protection and improvement of the quality of the environment'. A new article 13 enabled action to be taken 'to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

Under the new title XI, the original EEC Treaty articles 117–28 on social provisions and the European Social Fund were replaced by renumbered articles 136–50, incorporating the text of the Agreement on Social Policy. The first article (136) in the chapter on social provisions opens with a reference to both the Council of Europe's and the Community's charters. In other respects, it is an amalgam of article 117 in the EEC Treaty and article 1 of the Agreement on Social Policy. Articles 137–9 reproduce articles 2–4 in the agreement, while article 140 conflates EEC article 118 and article 5 in the agreement. A new paragraph was added to article 141 (EEC article 119) on equal pay, endowing the Council with the authority to act to ensure the application

of measures on equal opportunities, treatment and pay, thereby giving this policy area a specific legal base. The reference in article 6 §3 of the agreement to member states not being prevented from taking specific measures to assist women was amended to read 'the under-represented sex' in article 141. Article 7 of the agreement became article 143, and EEC Treaty articles 120-2, unchanged except for the reference to the European Parliament, became articles 142 and 144-5.

A shortened chapter on the European Social Fund (renumbered articles 146-8) retained an amendment, added in the Maastricht Treaty, referring to the role of vocational training and retraining as a means of helping workers to adapt to industrial and technological change. A third chapter from Maastricht, replacing EEC 126-8, on education, vocational training and youth became articles 149-50.

Title XIII introduced article 152 on public health. Here, a number of insertions reinforced the complementary role attributed to the Union at the same time as the need to respect the responsibilities of member states in the organization and delivery of health services and medical care. Paragraphs were added stressing the importance of high standards of quality and safety, and can be seen as a response to the major public health issues of the 1990s.

While the new title XVII on economic and social cohesion and title XIX on the environment focus largely on economic aspects, reference is made, in both cases, to the role of the Cohesion Fund in contributing to progress in the environmental field. The link with the concern about public health is confirmed in article 174. The status of the environment as an area for attention was also written into a new article 6 in the first part of the treaty, requiring that environmental protection must be integrated into the definition and implementation of all Community policies and activities.

Few alterations were made to the chapters on the free movement of workers (articles 39-48), but a new and much disputed title IV (articles 61-9) was inserted covering visas, asylum, immigration and other policies related to free movement of persons across the Union's external borders. As many of the provisions concern issues of security and administrative procedures, they are not developed here. They are, however, relevant to the social dimension insofar as they impact on the living conditions of residents in member states and on questions of racial equality (see Chapter 9).

Arguably, the most significant change to the treaty, at least at the symbolic level, was the addition of title VIII on employment (articles 125-30), which set out the objectives and responsibilities of member

states and the Union, calling for co-operation and co-ordinated action. Despite the efforts by the French to try and persuade the other heads of government to attribute a more interventionist role to the Union and to commit additional funds (Duff, 1997, p. 64), as in other areas of social policy, the treaty reaffirms that Community action will be confined to a supportive and complementary role (article 127). In article 128, the Council and Commission are assigned the tasks of reporting on the employment situation, drawing up guidelines and examining the measures taken by national governments as well as their implementation. Article 130 empowers the Council to set up an Employment Committee, with advisory status, to monitor the employment situation and formulate opinions, in consultation with management and labour.

The priority given to employment in the treaty dominated the social scene in the period immediately following its signing. The Luxembourg European Council meeting on employment in November 1997 and the Council resolution of 15 December 1997, adopting the first employment guidelines [1.18], went much further than the treaty in agreeing an overall strategy and a common approach with regard to objectives, targets and means. Four main lines of action were identified, and retained in the 1999 guidelines [1.20], as the four pillars to be incorporated in the national action plans: improving employability, developing entrepreneurship, encouraging adaptability of businesses and their employees to enable the labour market to react to economic changes, and strengthening policies for equal opportunities. The guidelines confirmed the shift towards more active employability measures, with emphasis on training, but they also set out the means for encouraging job creation, including by making taxation systems more employment friendly. The social partners were invited to modernize work organization by negotiating over flexibility and removing barriers to employment. In accordance with the Union's commitment to mainstreaming gender, the guidelines contained recommendations on equal opportunities policies. The success of the plans was to be judged by their ability to improve the employment situation.

RECONCEPTUALIZING EUROPEAN SOCIAL POLICY

The preceding sections go some way towards answering the questions as to why and how the Union progressively, but cautiously, extended its intervention in social affairs. They provide an indication of the philosophy underlying its social policy and the possible interconnections between EU and national levels. This relationship is explored more



fully in subsequent chapters with reference to specific policy areas. In conclusion to the present chapter, an assessment is attempted of the way in which European social policy has been reconceptualized over the years since the founding of the Community.

Many of the early policy statements cited in this chapter were based on a conception of social policy as a handmaiden to economic objectives, and as a spillover from economic policies. By the 1990s, due in no small part to the efforts of the Commission, under the leadership of Jacques Delors, the social dimension had moved up the agenda. Since, by definition, economic policy was the justification for the EEC, Maastricht and Amsterdam Treaties, social policy was cast in a supporting role. If social affairs have become a more central concern of the Union and its member states, nowhere is the economic justification difficult to find. Just as the French had insisted on provision for equal pay between men and women in the EEC Treaty to prevent the distortion of competition, the principle of guaranteed access to adequate social protection in the 1989 Community charter was also justified on economic grounds. The development of a large European internal market based on free trade and economic progress dictated the priority given to economic objectives. Application of the principles of subsidiarity and proportionality meant that areas of Union competence in the social field were not easy to identify or demarcate. Neither the charter nor the Agreement on Social Policy gave clear guidance on how to define and legitimate minimum levels of provision across member states.

In the absence of a treaty commitment to a well-defined interventionist role, it could be argued that European social policy did not develop further because, apart from the case of migrant workers, the Union did not really need its own common social policy. Mark Kleinman and David Piachaud (1993, p. 18) have suggested that, if in the future the life chances of Europeans are going to be determined increasingly by economic integration and political union, the emergence of some form of European social policy becomes inevitable. Such a policy can be justified on grounds of efficiency, equity and solidarity, but it does not have to imply uniformity of social protection systems.

A common approach to social policy became a topical issue in the 1990s, when the Union was facing major social problems as a result of slow economic growth and persisting long-term unemployment, population ageing, the increasing cost of providing social protection, the pressures to meet the targets for EMU and the prospect of further enlargement. The decision to write employment into the Treaty of

Amsterdam, in response to public concern about unemployment, may have marked another turning point for the social dimension. The Union affirmed its commitment to achieving a high level of employment, and to adopting a more proactive and concerted approach. The 1998 employment guidelines [1.18] began the task of setting quantifiable targets. Policy statements produced by the Commission from the mid-1990s had been preparing the way for an upgrading of the social dimension. Addressing the European Forum on Social Policy in 1996, the then President of the European Commission, Jacques Santer, had stated: 'There can be no social progress without economic progress: but conversely, economic wealth cannot be built in a social desert.' He added that 'the social dimension is not a cost or a burden, but rather a source of dynamism that will enable us to take on the challenges of the future, including that of international competition'. These points were reiterated in the social action programme for 1998–2000 [1.19]. High social standards were presented as a key element in the competitive formula and a factor contributing to the efficiency of European society. The Commission had attempted to seize the initiative, at least insofar as the rhetoric was concerned, arguing for the productive and creative role that social policy could play as a more equal partner, although no plans were on the table for social union.

Box 1 Legislation and official publications relating to the social dimension of the European Union

PRIMARY LEGISLATION

- 1.1 Treaty establishing the European Coal and Steel Community (ECSC), signed in Paris on 18 April 1951.
- 1.2 Treaty establishing the European Economic Community (EEC), signed in Rome on 25 March 1957.
- 1.3 Treaty establishing the European Atomic Energy Community (EAEC), signed in Rome on 25 March 1957.
- 1.4 Treaty of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities (the Merger Treaty).
- 1.5 Single European Act (SEA), signed in Luxembourg on 17 February 1986 and at The Hague on 28 February 1986.
- 1.6 Treaty on European Union, signed in Maastricht on 7 February 1992; Protocol and Agreement on Social Policy, concluded between the member states of the European Community, with the exception of the United Kingdom.
- 1.7 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain



Original scientific article

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SOCIAL HERITAGE OF THE EUROPEAN COMMUNITY (EU) - ACQUIS SOCIAL COMMUNAUTAIRE -

1. THE EUROPEAN SOCIAL MODEL AND COMMUNITARIAN LAW

The concept of the European social model includes philosophical and ideological elements that serve as a legal framework for the European social model, labour law and social security law, and as constituent legal elements of that model. The philosophy of building a European social model lies in necessary social corrections of market economy functions, in the environment of political pluralism and rule of law, which leads to an affirmation of basic social rights, as the content of a European social model. Therefore, the European social model is based on common elements of national systems of labour law and social security law among European states, whose common content consists of basic social rights proclaimed in international and European conventions and charters on human rights; the standards of non-communitarian and communitarian law; basic institutional solutions reached by a comparative law study of social security law – “unity in diversity”¹

With regards to standards of non-communitarian law, i.e. standards within the Council of Europe, the core influence of the European Social Charter should be emphasized. Social rights included in the Revised European Social Charter can, basically, be divided into the rights which refer to human dignity at work, in the broadest sense of the word; special protection of children and family rights; social dialogue and tripartition; solidarity and social integration; mobility of workers. With regards to human dignity at work, the Social Charter prohibits forced labor, discrimination, mobbing, sexual harassment, proclaims the right on decent working conditions and the right on privacy. Non-communitarian standards in children and family protection are given within the rights of children and youth to special protection; family rights to social, legal and economic protection; the rights of workers with family obligations to equality of chances and treatment in employment and at work. Standards in social dialogue and tripartition include the right to organization and industrial democracy; right to collective negotiation; right to information and consulting in cases of collective discharge; right of workers' representatives to work benefits and special protection on the basis of performing union activities. Standards in solidarity and

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¹ M. Rigaux, *Projet: Memorandum sur le modele social europeen*, Antwerp, 2006, pp. 1-4.

social protection and integration refer to the rights in the area of health protection and new health risks – stress, new incurable diseases, ageing of the population, eliminating or eradicating poverty; social risk of unemployment; right to housing and protection against poverty and exclusion from society. Finally, non-communitarian standards referring to the mobility of workers, which is being connected with globalization and knowledge-based economy, include the rights regarding professional mobility (education and vocational training) and geographical mobility of worker-migrants. Positive action regarding migrant workers and their families prescribes simplification of administrative procedures for obtaining work and resident permits, etc.

1.1. The influence of Communitarian Law on the European Social Model

The significance of communitarian law for the European social model is manifold: it concerns the social goals of the European Union; the jurisdiction of the European Community in secondary legislation; the concept of European citizenship, or European social citizenship.

It is well known that the social goals of the EU include social progress (with sustainable economic growth), high level of employment (contributed to by the European social fund), and strengthening of social cohesion (with economic and territorial cohesion). Besides that, in social goals one should include social protection, equality among men and women, i.e. elimination of discrimination and social exclusion, high level of health protection, solidarity among member states. It is understood that reaching these goals implies further support to the development of social dialogue, both in concluding the European collective contracts, and in implementation of the directives, and also respect of the notion of subsidiarity (an action of the EC only in situations when the goals cannot be reached in a satisfactory manner by the activities of member states, i.e. if it is possible to improve at the EC level). Hence, the EC supports and supplements the activities of member states, takes measures of cooperation among member states, adopts minimal standards (directives), with member states preserving the right to define the basic concepts of their systems of social security themselves.

Minimal standards are set by directives in the areas of health protection and safety at work (the largest number of directives), work conditions (working hours, holidays, etc.) protection of employees in case of employers reorganization (transfer, ^{reducing} ~~bankruptcy~~ ^{dismissal} ~~surplus~~ of employees), equality of men and women, information, consultancy, participation in decision-making, etc. but the question of wages, the right to organization, the right to strike and lockout have been excluded from the EC jurisdiction, which means that communitarian standards are not a coherent whole, but in the greater part, a function of the internal market. Minimal standards are adopted either unanimously or with a qualified majority.

Nevertheless, the development of communitarian law moves towards the concept of European citizenship, which rests on the acknowledgement and guarantee of fundamental rights – personal, political, economic, but also social (with cultural and environmental) rights. Social rights enable the realization of the concept of social citizenship, which is confirmed by eliminating social exclusion, i.e. by social cohesion – professional and social inclusion in the community.² For

² C. Marzo, *European social citizenship*, European University Institute, Florence, 2006, p. 9.

securing direct results and direct effect of the fundamental social rights it is of the utmost importance that the Charter on Fundamental Rights (2000) becomes a legally binding act, which, nonetheless, did not happen due to the failure of the EU Constitution ratification process (in France and Holland). However, for the realization of the concept of a "Social Europe", and the concept of European social citizenship, it seems necessary that fundamental social rights acquire legally binding force, which would give a new impetus to the creative practice to the European Court of Justice.

With regards to the social and cohesion policy within the EU, which is lead in the context of the European social model (economic, social and territorial cohesion: sustainable economic growth and social progress), there are challenges which are the consequence of globalization and struggle against social dumping; challenges like the consequences of an ageing population, changes in family structure and the need to reconcile professional and family life; prevention of social exclusion, and the fight against poverty, and the improvement of basic education, as well as alleviating the dualization of society and the creation of social exclusion (especially the category of vulnerable persons), in conditions of pronounced economic migration on the internal market.

1.2. Synergy of the International and European Labor Law

The synergy between international standards with regards to fundamental rights is of special importance (eight fundamental conventions of the ILO: 87, 98; 29, 105; 139, 182; 100, 111). Universality in freedom of union organizations and activities (convention 87) is the common core of these different systems of industrial relations. The fundamental principles of ILO are given in these eight ILO conventions and they contribute to the synergy of international and European labor and social law. However, considerable differences remain, despite the influence of universal labor standards, between the European social model and (north) American model, even regarding the definition of fundamental collective rights of employees and employers. So, unlike the European social model, which is based on the concept of representative unions and employers associations, both on the national and European (EU) level, the American (USA) model is based on the concept of the exclusive representation of workers' interests by one union, which receives the majority support of the employees at (secret) elections, *ballot* and which has the obligation to, according to principles of conscientiousness, *(good faith)* represents the interests of all categories of employees (regardless of their belonging to the union). Regarding the right to strike in vital services, limitations set by American law are more detailed than in the European social model, according to the principles of the ILO Committee for the Freedom of Association. Finally, one important element of the European social model is the institution of the employee council and participation of employee representatives in the executive and supervising board of the relevant economic subjects, *enterprises* while the American model does not recognize the employee council nor the participation of the employees in *the management of the economic subject (company)*. *decision making process of companies* *inf. not with the mobility*

The key distinction between the European social model and the (north) American model regarding the individual's right to work is in the reasons for dismissal – the European social model is based on the concept of legitimate reason for dismissal (ability; behavior; needs), while the American model is characterized by employment at will, i.e. the concept that the employer is not

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specific of a plan

(for any reason, or no reason)

obliged to state the reason for dismissal, but that the reason must not be discriminatory. In case of discrimination at work, American law, according to the Law on Civil Rights, and Law on Equal Chances at Work, envisages also a special civil-legal sanction, a sort of private punishment (punitive damage). The European social model also has a considerable litigation protection in cases of lawsuits because of dismissal, because the EU Directive envisages that the burden of proof falls upon the defendant – the employer, which is very important for combating indirect discrimination. Regarding the sanctions for unlawful dismissal, the European social model envisages the possibility of ruling for reintegration or compensation, which should be a suitable reparation and satisfaction for the unlawfully dismissed, and an appropriate sanction for the employer. Therefore, the civil-legal sanction in the European social model also has a function of reparation (compensation for damages) and the function of satisfaction (larger compensation for discriminatory or and other unlawful dismissals).

emph. reparation
and v.l. satisfaction

2. THE PROPOSAL OF THE EU CONSTITUTION AND SOCIAL JUSTICE

The Proposal of the Constitution of the European Union signed in Rome on October 29th, 2004 by 25 chiefs of states, prime ministers and foreign ministers of the member states, which, however, was not ratified (in France and Holland) within two years of its signing, is based on the logic of the market, and the logic of basic human rights, including basic social rights, as well as on the logic of market economy – economic, social and territorial cohesion. Sustainable economic growth and social progress, with the consciousness of the European cultural, religious and humanistic heritage, and common values – inalienable human rights, democracy, equality and the rule of law, are stressed in the Preamble of the Proposal of the European Union Constitution, as a Union of states and Union of citizens.

2.1. Social Rights

– Philosophy of the Market and the Philosophy of Rights

Philosophy of the market and the philosophy of human rights find balance in the "spirit" of the Proposal of the European Union Constitution. Sustainable economic development, protection of the environment and preservation of human health, high level of employment and social protection, and fight against social exclusion and discrimination, together with high level of education and professional qualifications, are the main elements of the concept of market, ecological and social European Union (Art. III 117-119 of the EU Constitution).

The introduction of the Charter of Basic Rights in the European Union, adopted in Nice in 2000, into the Proposal of the Constitution of the European Union, was supposed to have historical significance since the Charter is the first international, hence European (communitarian), instrument which makes equal, by importance, the basic social rights with other (personal, political, economic) rights. In that way, the traditional dualism in the approach to international regulation of basic rights is abandoned – within the UN (International Pact on Civil and Political Rights; International Pact on Economic, Social and Cultural Rights) or the Council of Europe (Convention on the Protection of Human and Basic liberties; European Social Charter). Philosophy of the market and

philosophy of human rights find their balance in the Proposal of the European Union Constitution, since the Proposal of the EU Constitution, in its second part contains the Charter on Basic rights of the Union (the so-called Nice Charter), which in its hexagon of basic rights, awards an equal place to social rights: Headline IV – Solidarity.

Even before the Proposal of the EU Constitution was established, in the context of "general legal principles of the communitarian law", as a source of law, it was appropriate to include rules on basic human rights, which necessarily include a body of basic social rights. Charters on human rights, and in particular charters on basic social rights, express the philosophy of integration processes which cannot be reduced to the concept of economic integrations, but includes the concept of basic human rights. So, charters on basic social rights are the inspiration for the concept of "social Europe".³ This philosophy (idea) of social rights gradually developed and matured, which was increasingly confirmed by the practice in the European Court of Justice (e.g. case Frankovich).⁴ Communitarian charters on social rights, although multilateral agreements which did not have the character of formal source of communitarian labor law, indirectly played a very important role in the development of communitarian labor law – above all as a guiding idea for communitarian action (in accomplishing the goals of common social policy), but also as an inevitable element of legitimacy of communitarian labor law.⁵ In that context of legitimacy one should understand that the initiatives of the Nice Charter included in the Proposal of the European Union Constitution finally gave results which codified the belief in "basic social rights of the citizens as a constitutional element of the European Union".⁶

A special chapter in the Charter, entitled "Solidarity", is a confirmation of the new philosophy of EU development – philosophy of the market and philosophy of (all) basic rights are brought into balance.⁷ In that way, the introduction of the basic human, including social rights, in the European Union Constitution remained an unrealized concept due to the failure to ratify the Constitution, which raises a question of a possible adoption of a special contract on social rights (very unlikely) or an approach to certain amendments of the Proposal of the EU Constitution so it could be ratified.

In its content, the Nice Charter, first in Headline I "Dignity", advocates that human dignity is inviolable and that it must be respected (Art. II-61), and afterwards envisages a ban on forced (and slave) labor (Art. 65). In Headline II "Freedoms", the right to work is advocated ("Freedom of choice of profession and the right to be employed") (Art. II-75). In the same way, the so-called national treatment is envisaged, i.e. equality in treatment in terms of working conditions of the citizens of third countries who have a work permit in the territory of an EU member state with the working conditions of domestic citizens (Union citizens). In Headline III "Equality", the principle of non-discrimination is pronounced.

³ X. Blanc-Jouvan, *Bilan et perspective de l'Europe sociale*, Journées de la Société de législation comparée, 1995, pp. 173-192.

⁴ M. Zuleeg, *Social Rights in the European Community, Social Protection by Way of International Law*, eds. B.B. Von Maydell, A. Nusberger, Berlin, 1996, pp. 65-66.

⁵ B. Teyssié, *Droit européenne du travail*, Paris, 2001, p. 19.

⁶ L. Hantrais, *Social Policy in the European Union*, New York, 2000, p. 14

⁷ S. Rodota, *op. cit.*, pp. 9. and 20-21.

Therefore, discrimination in employment can be put in the wider context of ban on discrimination (Art. II-81). The principle of equality of men and women is particularly pronounced, including equality in employment, at work, in terms of wages (Art. II-83). Besides that, this chapter stipulates the professional integration of the persons with a handicap (Art. II-86). Finally, in headline V "The Rights of the Citizens", the freedom of movement of the citizens of the Union is pronounced (Art. II-105), which implicitly includes the freedom of movement and stay for employment.

In Headline IV "Solidarity", the EU Constitution, i.e. the Charter stipulates the following basic social rights (whose systematization is not without flaws): individual rights of workers: right to free access to employment services (Art. II-89), right to fair and righteous working conditions, which include health protection, safety and dignity at work, as well as limiting working hours, the right to daily, weekly and paid holiday (Art. II-91); protection in case of unlawful dismissal, according to the law of the Union, national law and practice (Art. II-90); a ban on child labor and protection of youth at work, which asks for the adjustment of work conditions to age and protection from economic exploitation and work which could endanger their safety, health or physical, mental or social development, or to jeopardize education (Art. II-92); protection, i.e. balancing of family and professional life which includes legal, economic and social protection of family, as well as protection from dismissal due to pregnancy and motherhood. In the same way, the right to paid maternal leave and leave for nurturing a child after labor or adoption is envisaged (Art. II-93);

a) collective rights of workers: the right to information and consultancy in a company, which means that the workers' representatives have the right to timely information and consultancy in cases and under conditions determined by European laws, and in accordance to the laws and practice of member states (Art. II-87); the right to collective negotiations, and the signing of collective contracts on work at different levels, as well as the right to collective action in the case of collective interest work disputes, including the right to strike (Art. II-88);⁸

b) the right to social security for social risks such as pregnancy (motherhood), sickness, work accidents, old age and exhaustion, unemployment, with the recognition of the right to social payments to persons who stay or move in the Union, as well as the right to social welfare (protection) with the aim of fighting social exclusion and poverty (Art. II-94).⁹ In addition to this, the EU Constitution proclaims the right to health protection, i.e. a high level of health protection of humans in defining and implementing all politics and activities of the Union (Art. II-95). In connection to that, the support for a high level of environmental protection, since improvement in the quality of the environment must also be integrated into the policies of the European Union and in accordance with the principle of sustainable development (Art. II-97). Finally, in the Headline "Solidarity" it is stipulated that Union policies will also ensure a high level of consumer protection (Art. II-98).

With regards to the collective rights of workers, one can notice that the Headline "Solidarity" does not state freedom, which is the right to association (of

⁸ G. Giugni, *Diritto sindacale*, Bari, 2001, p. 28-29.

⁹ R. Blanpain, F. Handrickx, eds., *European Labour Law and Social Security Law*, Codex, Kluwer, 2002, p. 27-29.

workers and employers). This is done from nomographic reasons, because the freedom of union associations and associations of employers are put in a wider context – freedom of association in general. Therefore, the freedom of association is given an appropriate place under Headline "Freedoms".¹⁰ At the same time, the influence of the European Convention on Human Rights on the formulation of freedom of association can be noticed in the Nice Charter.

2.2. Economic, Social and Territorial Cohesion

The philosophy of the market economy ("social economy") is very noticeable in the number of provisions of the Proposal of the European Union Constitution that promote the concept of economic, social and territorial cohesion (Art. I-3, Art. III-122): the Union will act on the sustainable development of Europe based on the balanced economic growth and stability of prices, a high competitive social market economy, with the aim of fulfillment of full employment and social progress, as well as a high level of protection and improvement in the quality of environment... the "union will fight social exclusion and discrimination, by promoting social justice and social protection, equality among men and women, inter-generation solidarity and protection of the right of children" (Art. I-3). The union will promote economic, social and territorial cohesion and solidarity among member states (Art. I-3, p. 3 of the Proposal of the EU Constitution). However, the principle of solidarity is not limited only to relations among EU member states, it is in a certain way built into the EU's relationship with the world in general, so, that among other things, it is stressed that the European Union will contribute to the "eradication of poverty" on the planet in general (Art. I-3, p. 4 of the Proposal of the EU Constitution). In the questions of social policies, as well as the issues of economic, social and territorial cohesion it is envisaged that the Union and member states have divided jurisdiction (Art. I-14 of the Proposal of the EU Constitution), and this divided jurisdiction also covers the areas of environmental and consumer protection, and common security in the matters of public health. However when one talks about the economic and employment policies, the Proposal of the EU Constitution in these areas envisages coordination of the economic and employment policies of member states, where the Council of Ministers adopts measures, or guidelines for these policies (Art. I-15 of the Proposal of the EU Constitution). Finally, in the areas of education and professional qualifications (of youth and sport), it is envisaged that the Union supports, coordinates or adds to actions of member states (Art. I-17 of the Proposal of the EU Constitution). In all these issues the advisory auxiliary bodies of the Union take important positions: the Economic and Social Committee and the Committee of the Regions. The Economic and Social Committee consists of the representatives of employee and employers associations and the representatives of civil society (Art. I-32, p. 3) of the Proposal of the EU Constitution). The Committee of the Regions consists of the representatives of territorial autonomies (regional) and representatives of local self-governments (Art. I-32, p. 2 of the Proposal of the EU Constitution).

Provisions on economic, social and territorial cohesion can be found in part III, Headline III, Chapter III, and Section 3 of the EU Constitution. With the aim of reducing differences in the level of development of different regions, and in

¹⁰ *Ibidem*, p. 25.

particular rural areas, areas hit by industrial changes, and in less populated regions, a certain policy of economic, social and territorial cohesion will be conducted. Because of that the structural funds were established: European Agricultural Fund; European Social Fund; European Fund for Regional Development (Art. III-221).

The European Fund for Regional Development has the aim of reducing regional imbalances within the Union by participating in financing of development and structural adjustments of less developed regions (Art. III-222).

The Cohesion Fund was established by European law (ex. Regulation) with the aim of providing financial assistance to projects in the area of environmental protection and trans-European roads (Art. III. 223).

Provisions for the European Social Fund are also in Section 3, which is dedicated to economic, social and territorial cohesion. The special importance of the European Social Fund demands further analysis of the development, status and role of this structural fund.

The European Social Fund was established by the founding Treaty (Art. 146, ex Art. 123). The Fund is operated by the Commission and aided by the tripartite Social Fund Committee.¹¹ The Social Fund Committee consists of the presidents of governments, which finance the European Social Fund, unions, employers association, and is presided over by a member of the Commission (Art. 147. ex Art. 124). Decisions on the organization of the European Social Fund are made unanimously by the Council, with the opinion of the European Parliament.¹² In addition to this and by qualified majority, the Council brings (implementing) decisions regarding the European Social Fund, according to procedures from Article 251, and with consultations with the Economic and Social Committee and Regional Committee (Art. 148, ex Art. 125).¹³

With the aim of improving employment possibilities within the internal market, the European Social Fund has the role to facilitate employment of workers, and increase the geographical and professional mobility of the workers (Art. 146).¹⁴ In addition to this role of the European Social Fund envisaged by the Treaty of Rome, the Treaty of Maastricht added a new role to the European Social Fund.¹⁵ The increase in the mobility of workers in the internal market particularly presumes continuous professional education and training, in a manner, lifelong education and training; so workers can adapt to the changes in economy, industry and production systems more easily (Art. 146 of the Treaty). In this way, the European Social fund assists the harmonious development of the Community, as well as the strengthening of economic and social cohesion.¹⁶

More than half of the resources of the European Social Fund is tied to employment programs in regions which lag behind in development;¹⁷ around one quarter of the funds is connected to the fight against exclusion from the labor

¹¹ *Ibidem*, p. 242.

¹² *Ibid.*, p. 21.

¹³ D. Lopandić, ed., *Osnivački ugovori Evropske unije*, Beograd, 2003, p. 130.

¹⁴ P. Rodière, *Droit social de l'Union européenne*, Paris, 1998, p. 236.

¹⁵ *Ibidem*.

¹⁶ *Ibid.*

¹⁷ P. le Mire, *op. cit.*, p. 304.

market, especially for endangered categories of persons (those unemployed for an extended period; young; women); 13%¹⁸ goes for workers' adjustment to industrial changes and the evolution of production systems; 12% goes to programs in the regions for overcoming crises.¹⁹ For certain projects the Fund grants up to 75% of total costs, whereas for other projects up to 50% of the costs is granted.²⁰

Communitarian assistance as co-financing or subventions²¹ from the European Social Fund was granted mostly to Spain, then Germany (for East Germany, the former GDR), Italy (for less developed regions mainly in the south of Italy, but for some programs in the north of Italy as well), Great Britain, Portugal and Greece.²² Owing to the policy of economic and social cohesion and structural funds there has been, among other things, faster economic growth in the less developed EC and EU countries: Ireland, Spain, Portugal and Greece.²³

In the eastern part of Germany there has been reconstruction and economic development owing to the involvement of the structural funds as well: the European Social Fund and the European Fund for Regional Development.²⁴ Ireland recorded a rapid economic development owing to the activities of the European Social and other structural funds.²⁵ In Spain and Portugal, especially in rural areas, the structural funds assisted cohesion of economic and social development.²⁶

Accession of new members to the EU, especially the countries of Central and eastern Europe, resulted in a reduction of planned structural fund activities for the period 2005 – 2010 goals (from six) to the three main ones: a) development of underdeveloped regions (whose GDP per capita is less than 75% of the average in the Community); b) assistance in the development of agricultural and undeveloped urban areas; c) human resource development, education programs, training and employment. One of the more important programs ("programs of the Communitarian Action") has the goal of combating discrimination and inequalities in employment.²⁷

3. STATE ASSISTANCE IN EMPLOYMENT – THE PRINCIPLE OF COMPETITION

In a certain way state assistance in employment is an expression of the program character of the right to work, which, however, cannot be included in the list of non-litigious rights, having in mind that this right is protected from discrimination in employment, at work and on the occasion of the termination of a work relationship (the lawsuit is most commonly constitutional, but it can be

¹⁸ *Ibidem*, p. 305.

¹⁹ P. Rodière, *op. cit.*, p. 241.

²⁰ *Ibidem*.

²¹ P. Rodière, *op. cit.*, p. 242.

²² *Ibidem*.

²³ P. le Mire, *op. cit.*, p. 306

²⁴ *Ibidem*, p. 301.

²⁵ *Ibid.*, p. 300.

²⁶ *Ibid.*, p. 301.

²⁷ *Ibid.*, p. 308.

condemnatory).²⁸ The Treaty of the EC allows financial assistance that a state intends for the economy, i.e. employers who hire under very restrictive conditions. The restrictive legal regime of this assistance is characterized either by a general prohibition of financial assistance because it violates the principle of competition in the internal market (Art. 87, ex Art. 92) or it allows this assistance under very restrictive conditions "as assistance for the improvement of the economic development of an area ... with pronounced unemployment" (Art. 87, p.3, al a),²⁹ or if it is approved by communitarian institutions (Art. 88, ex Art. 93).³⁰

The Court of Justice of the European Communities evaluates state assistance from the standpoint of its results, and effects, and not from the standpoint of the nature of goals, so not even the social goal of financial assistance by itself can justify non-application of the provision from Article 83 (ex Art. 92) of the Treaty – the principle of competition.³¹ Therefore, the state economy, oriented towards fulfilling certain social goals (e.g. employment of persons who are unemployed for an extended period of time – e.g. case *Beentjes*³²) can be granted an exemption from the restraint (violation of competition), of Article 92 of the Treaty. Article 87 (ex Art. 92) refers only to financial assistance which "favors certain companies or certain productions" – a criterion of the selectivity of measures, while this article does not apply to measures of general nature.³³

Article 87 (ex Art. 92) of the Treaty refers only to assistance directed to a company, but not to assistance whose recipients are the employees or employment seekers (employment assistance or professional training).³⁴ Therefore, the assistance that is given for regional development or the recovery of the sector of activities in economic difficulties can be approved based on the declaration of consent.³⁵

With regards to the procedure of exemption approval, it is envisaged that a member state sends its assistance proposals to the Commission, which performs a discretionary evaluation³⁶ in decision-making on giving consent – approval of the exemption. In implementing the discretionary power the Commission takes into account the following criteria: selectivity criteria; proportionality criteria (with regard to the set goal of social nature); temporal criteria (so the company could achieve a position of regular competition as soon as possible).³⁷

²⁸ V. Dimitrijević, M. Paunović, *Ljudska prava*, Beograd, 1997, p. 94.

²⁹ D. Lopandić (ed), *op. cit.*, p. 89.

³⁰ P. Rodière, *op. cit.*, pp. 242-243; D. Lopandić (ed), *op. cit.*, p. 90; R. Vukadinović, *Pravo Evropske unije*, Beograd, 2001, pp. 146-147.

³¹ P. Rodière, *op. cit.*, p. 243.

³² R. Nielsen, *European Labour Law*, Copenhagen, 2000, p. 362.

³³ P. Rodière, *op. cit.*, p. 245.

³⁴ *Ibidem*.

³⁵ *Ibid.*, p. 246.

³⁶ Therefore, the Court of Justice of the European Communities does not evaluate the reasons, but only if the decision of the Commission was legal, and the assistance in employment is evaluated not exclusively from the standpoint of national context, but also from the communitarian context; P. Rodière, *op. cit.*, p. 246.

³⁷ Rodière, *op. cit.*, p. 246; R. Nielsen, *op. cit.*, pp. 360-361.

Communitarian bodies have the aim to control (approve or decline) state assistance in employment, and, to a lesser degree, to limit it, with reference to the principle of competition. The role of the state (public authority) in creating conditions for exercising the right to work – equal accessibility to all jobs under equal conditions, is done by measures of active employment policy. The concept of active employment measures (active role of the state and local self-government in adopting programs of active employment policy) and active employment seekers, assist in exercising the right to work, which means that the right to work is not just a proclamation.

Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility

JEFF KENNER*

INTRODUCTION

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

(UN Vienna Declaration and Programme of Action, 25 June 1993)¹

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity . . .

(Charter of Fundamental Rights of the European Union, 7 December 2000)²

WHEN JUXTAPOSED THESE statements—both of which stem from the Universal Declaration of Human Rights (UDHR)³—allude to a seamless, non-hierarchical affirmation of inalienable rights and shared societal values that are at once intertwined and capable of promotion and protection in equal measure without reference to crude and artificial categorisations.

However, the language of indivisibility, although frequently utilised, obscures the reality of a 50-year long schism between 'classic' civil and political rights and freedoms, the foundations of which were laid in the eighteenth century,⁴ and 'modern' or 'second generation' economic and social rights and principles, associated with the twentieth century welfare state and the introduction of international labour standards.⁵ In February 1952, at the height of the Cold

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¹ World Conference on Human Rights, A/CONF. 157/23, point 5.

² OJ 2000 C364/1, second para of the preamble.

³ Adopted by UN General Assembly resolution 217 A (III) of 10 December 1948.

⁴ In particular, the American Declaration of Independence, 1776, and the French Declaration of the Rights of Man and the Citizen, 1789.

⁵ Following the establishment of the International Labour Organisation (ILO), after the signing of the Treaty of Versailles in 1919, in order to establish 'fair and humane conditions of

...proclaimed in the 1940s and two separate covenants, one concerning civil and political rights,⁸ the other addressing economic, social and cultural rights,⁹ each legally binding under international law. These developments were mirrored at regional level where the newly established Council of Europe drafted two separate treaties, the European Convention on Human Rights 1950 (ECHR)¹⁰ and the European Social Charter 1961 (ESC),¹¹ prioritising the former over the latter and establishing 'different mechanisms for enforcement and monitoring'.

In the ensuing period, at both a theoretical and practical level, civil and political rights have received broad support and recognition in liberal democracies, whereas economic and social rights tend to have a subordinate status and remain highly contested.¹² To an extent this can be understood as an inevitable consequence of disagreements about the framework of 'rights' and 'citizenship'¹³ and the almost overwhelming desire of political leaders to reach constitutional settlements based on 'the right to have rights'.¹⁴

These disagreements all too often lead to decisions to downgrade or exclude economic and social rights, often on the basis of highly contentious assumptions about the overriding importance of liberalism, individualism and the sanctity of

labor. These post-war developments coincided with the codification of economic and social rights at national level, most notably, the Mexican Constitution, 1917, the Constitution of the Soviet Union, 1918, and the Constitution of Weimar, 1919. See further, L Betten & N Grief, *EU Law and Human Rights* (Harlow, Longman, 1998) pp 4–5.

⁸ The United States, which had been initially supportive of economic and social rights, following President Roosevelt's avowal of 'freedom from want' in 1941, reversed its position, fearing that the imposition of state obligations associated with the realisation of these rights would lead to growth in communism and Soviet influence.

⁹ General Assembly resolution 543 (VI) of 5 February 1952, overturning General Assembly resolution 224 (V) of 4 December 1950. See further, A Eide & A Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge' in A Eide, C Krause & A Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Dordrecht, Martinus Nijhoff, 1995) 15–19.

¹⁰ International Covenant on Civil and Political Rights (ICCPR), adopted by General Assembly resolution 2200A (XXI), 16 December 1966. The ICCPR entered into legal force on 23 March 1976.

¹¹ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by General Assembly resolution 2200A (XXI), 16 December 1966. The ICESCR entered into legal force on 3 January 1976. For analysis, see M Craven, *The International Covenant on Economic, Social and Cultural Rights* (Oxford, Clarendon Press, 1995).

¹² Adopted in 1950, 87 UNTS 103. The ECHR entered into force in 1953. See further, D Harris, M O'Connell & C Warbrick, *Law of the European Convention on Human Rights* (London, Macmillan, 1995).

¹³ Adopted in 1961, 529 UNTS 89. The ESC entered into force in 1965. For analysis, see D Harris, *The European Social Charter*, 8th edn (Charlottesville, University of Virginia Press, 1984), O Kahn-Freund, 'The European Social Charter' in F Jacobs (ed), *European Law and the Individual* (North-Holland, Amsterdam, 1976) 181–211.

¹⁴ See Eide & Rosas, above n 7 at 15.

¹⁵ See J Waldron, *Law and Disagreement* (Oxford, OUP, 1999) 107–18.

¹⁶ The phrase has been widely attributed to Hannah Arendt. For discussion see, C Lefort, *Democracy and Political Theory* (Cambridge, Polity Press, 1988) at 37; and R Bellamy, 'Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act' in T Campbell, K Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford, OUP, 2001) 15–39 at 15.

to life and freedom of expression, are regarded as 'absolute' and therefore directly enforceable or justiciable. Such rights are viewed as truly 'fundamental' in the sense that they connote the inherent rights of the individual and, as such, often traverse conventional political boundaries. The state's obligation is one of non-interference rather than positive action. By contrast, many economic and social rights, such as rights to housing or social assistance, are often not regarded as 'rights' at all,¹⁶ or at least not *fundamental rights*, but rather as mere policies or programmes capable of progressive realisation¹⁷ and non-justiciable in the sense that they are deemed incapable of being invoked in a court of law or applied by judges.¹⁸ Moreover, international labour rights, such as the right to work or organise, which are understood by some as essential for the practical realisation of human dignity, are regarded by others as ideologically driven because they create positive obligations on states to intervene and, it is argued, may undermine the enjoyment of individual freedom and distort the functioning of free markets.¹⁹ On a more practical level the hierarchy of rights has been reinforced by the inescapable fact that while many civil and political rights are relatively cost free,²⁰ the full realisation of economic and social rights requires a substantial investment of resources, the establishment of an effective infrastructure and progressive taxation over a sustained period.

Many of these arguments are oversimplified and fallacious. Categories of rights cannot logically or practically be separated or compartmentalised and indeed are mutually dependent.²¹ For example, the right to freedom of association, generally regarded as a civil and political right,²² is contingent upon the right to organise and bargain collectively, usually labelled as an economic and social right,²³ and vice versa.²⁴ Furthermore, the role of the state, in respect of civil and political liberties, such as the general right to equality, is not merely

¹⁵ For a summary, see the annotations on the Text of the Draft International Covenants on Human Rights, UN Doc A/2929 (1955) p 7. See further, P Alston & H Steiner, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, 2nd edn (Oxford, OUP, 2000) pp 237–45, and A Eide, 'Economic, Social and Cultural Rights as Human Rights' in Eide *et al*, above n 7 at 21–40.

¹⁶ See M Cranston, *What are Human Rights?* (London, Bodley Head, 1973).

¹⁷ For example, see the obligation on states under Art 2(1) of the ICESCR. For further discussion in the context of the rights to social security and social assistance, see J Tooze, in this collection; in the context of the right to health, see T Hervey, in this collection.

¹⁸ For a critique, see M Scheinin, 'Economic and Social Rights as Legal Rights' in Eide *et al*, above n 7 at 41–62.

¹⁹ Alston & Steiner, above n 15 at 237.

²⁰ See Eide, above n 15 at 22.

²¹ See Alston & Steiner, above n 15 at 247; Hervey, in this collection at p 195. On this point, see also the views of the European Court of Human Rights in *Airey v Ireland* Series A No 32 (1979) 2 EHRR 305, para 26.

²² See Art 22 ICCPR and Art 11 ECHR.

²³ See Art 8 ICESCR and Arts 5 and 6 ESC.

²⁴ As demonstrated by ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise (1948). See B Ryan, in this collection, sections on freedom of assembly, pp 69–72 and 74–76.

negative or defensive because active steps are required to ensure meaningful participation in society and equal opportunities for all.²⁵ In addition, economic and social rights, such as those contained in the ESC, are often envisaged as justiciable²⁶ and can be formulated in such a way as to be capable of protection through systems of adjudication.²⁷ Indeed, despite the formal separation between the ECHR and the ESC, a series of attempts have been made in recent years to render economic and social rights more legally effective.²⁸ Nevertheless, despite the strength of the case, achieving change has been a complex and difficult process.

The proclamation of the Charter of Fundamental Rights of the European Union (the Charter) as a unified, composite text can be understood as part of a much broader fundamental rights dialogue that seeks to transcend the artificial and somewhat arid debate about the labelling of 'rights' and places emphasis on the institutional duties of states and international bodies to respect and protect core rights and values as a matter of obligation. With much fanfare it has been proclaimed, on behalf of the 'peoples of Europe', that 'in creating an ever closer union among them', they 'are resolved to share a peaceful future based on common values'.²⁹ Hence, the Charter has been imbued with immense iconographic significance for a Europe of peoples as distinct from markets.³⁰ Put simply, the objective is to make the process of European integration more open and legitimate by furnishing it with a layer of rights embodying values with which, intrinsically, most people can readily identify.

Undoubtedly the Charter carries with it a deep political desire to give resonance to the values that it propounds and yet it has been widely recognised that European integrationists have long been ambivalent about fundamental rights

²⁵ See M Weiss, 'The Politics of the EU Charter of Fundamental Rights' in B Hepple (ed) *Social and Labour Rights in a Global Context* (Cambridge, CUP, 2002) 73–94; M Bell and C Costello, in this collection.

²⁶ For example, see the 'Limburg Principles' of 1986 enunciated by a group of experts examining the implementation of the ICESR, UN doc. E/CN.4/1987/17. See further, J Tooze, in this collection, p 163, fn 5 and the literature cited therein.

²⁷ See further, F Jacobs, 'The Extension of the European Convention on Human Rights to Include Economic, Social and Cultural Rights' (1978) 3 *Human Rights Review* 166, and A Berenstein, 'Economic and Social Rights: Their Inclusion in the European Convention on Human Rights, Problems of Formulation and Interpretation' (1981) 2 *Human Rights Law Journal* 257. For full analysis, see B Bercusson, 'Fundamental Social and Economic Rights in the European Community' in A Cassese, A Clapham & J Weiler (eds) *Human Rights and the European Community: Methods of Protection* (Baden-Baden, Nomos, 1991) 195–291 at 198–201.

²⁸ See Scheinin, above n 18 at 56–58. For example under the ESC, following the 1991 Amending Protocol, a more effective European Committee of Social Rights (ECSR) has replaced the Committee of Independent Experts. The amended provisions are now contained in the RevESC 1996. For discussion, see N Casey, 'The European Social Charter and Revised European Social Charter' in C Costello (ed), *Fundamental Social Rights: Current Legal Protection and the Challenge of the EU Charter of Fundamental Rights* (Dublin, Irish Centre for European Law, 2001) 55–75, and T Novitz, 'Remedies for Violation of Social Rights within the Council of Europe' in C Kilpatrick, T Novitz & P Skidmore (eds), *The Future of Remedies in Europe* (Oxford, Hart, 2000) 231–51.

²⁹ First recital of the preamble of the Charter. Emphasis added.

³⁰ On this point, see J Weiler, 'Editorial: Does the European Union Truly Need a Charter of Rights?' (2000) 6 *European Law Journal* 95 at 95.

in general and economic and social rights in particular.³¹ The institutions of the EU, including the European Court of Justice, have utilised the language of rights cautiously and selectively where necessary for the purposes of furthering the integration process and enhancing its legitimacy.³² Although the Charter offers the prospect of a more comprehensive approach to the legitimisation of rights within a complex, multi-level transnational polity, this chapter, by tracing the evolution of economic and social rights within the European Union, will aim to show how it is also reflective of the 'dynamic ambiguity'³³ of a European integration project that oscillates between centralising and decentralising axes.³⁴

ECONOMIC AND SOCIAL RIGHTS AND THE INTEGRATION PROCESS

Market Integration—No Room for Economic and Social Rights?

When the foreign ministers of the European Coal and Steel Community gathered at Messina in 1955 to launch the process of European economic integration their primary concern was to establish a common market and a functional apparatus to support it. Any other considerations, moral or social, were secondary³⁵ and would have been seen as a diversion from the immediate task. The Community's founders formed the view that there was no need to duplicate the work of other international institutions that were well established and best placed to formulate and monitor the observance of transnational standards for fundamental rights.³⁶ Moreover, by differentiating economic integration from fundamental rights, the fledgling Community would be able to prioritise market building while minimising interference with well-established and jealously guarded national systems of social protection, labour law and industrial relations. It followed that, from the perspective of the late 1950s, the social provisions in the EEC Treaty,³⁷ including the commitment to equal pay between men and women,³⁸ amounted to no more than a network of policies and programmes rather than an enforceable set of legal principles.³⁹

³¹ On the EU's 'ambivalent constitutionalism' see G de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26 *European Law Review* 126 at 126–28.

³² See esp, G de Búrca, 'The Language of Rights and European Integration' in J Shaw & G More, *New Legal Dynamics of European Union* (Oxford, Clarendon Press, 1995) 29–54 at 39–43.

³³ I would like to thank Stephen Weatherill for suggesting this phrase.

³⁴ See M Pólares Maduro, in this collection.

³⁵ See de Búrca in Shaw & More, above n 32 at 29.

³⁶ See A Clapham, 'A Human Rights Policy for the EC' (1990) 10 *Yearbook of European Law* 291.

³⁷ Arts 117–122 EEC.

³⁸ Art 119 EEC.

³⁹ For a classic exposition, see O Kahn-Freund, 'Labour Law and Social Security' in E Stein & T Nicholson (eds), *American Enterprise in the European Common Market: A Legal Profile*, Vol 1 (Ann Arbor, University of Michigan Press, 1960) 297–458 at 298–361.

Within the Community sphere, economic and social rights were to be subsumed by the market imperative. There was a consensus that the establishment of the common market would lead to rapid improvements in productivity and, axiomatically, social standards. Furthermore, the effect of an integrated market would be benign, for two reasons. First, the interests of workers would be taken into account because trade unions in the Member States were strong and second, there was a general desire among governments of the Member States to meet broad social aspirations.⁴⁰

Satisfied with these convenient assumptions, and respectful of the demarcation lines between international institutions, the Community did not directly address the issue of fundamental rights until the 1970s when a vision began to emerge of a politically integrated Europe capable of transcending economic integration and addressing the social rights deficit.⁴¹ Europe's 'political imagination'⁴² now embraced a formative notion of citizenship based on the recognition and protection of rights, including economic and social rights, through the political objectives of a 'Union'.⁴³

In 1979 the European Commission sought to give meaning to the idea of political union by publishing a memorandum urging the Council to discuss the prospect of the Community's accession to the ECHR.⁴⁴ Whilst the Commission's memorandum was little more than a kite flying exercise, it provoked a debate about the visibility of rights in the Community based on the simple but novel assertion that the 'European Citizen' has a 'legitimate interest in having his rights *vis-à-vis* the Community laid down in advance'.⁴⁵ Once the Commission had aired the issue no legislative proposal ensued. The Commission's non-decision can partly be explained by a degree of uncertainty over the Community's competence to accede to the ECHR,⁴⁶ but it also reflected

⁴⁰ See the 'Ohlin Report' on the *Social Aspects of European Integration* (1956) 74 *International Labour Review* 99; and the 'Spaak Report', *Rapport des chefs de délégation aux ministres des affaires étrangères* (Brussels), 21 April 1956. For discussion, see S Deakin, 'Labour Law as Market Regulation: the Economic Foundations of European Social Policy' in P Davies, A Lyon-Caen, S Sciarra & S Simitis (eds), *European Community Labour Law: Principles and Perspectives* (Oxford, Clarendon Press, 1996) 62–93, and J Kenner, *EU Employment Law: From Rome to Amsterdam and Beyond* (Oxford, Hart, 2003) pp 1–21.

⁴¹ See M Poiarés Maduro, 'Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU', in P Alston (ed), *The EU and Human Rights* (Oxford, OUP, 1999) 449–72 at 466. See also, Lord Wedderburn, 'European Community Law and Workers' Rights: Fact or Fake in 1992?' (1991) 13 *Dublin University Law Journal* 1.

⁴² On the search for a European political philosophy see, I Ward, 'Beyond Constitutionalism: The Search for a European Political Imagination' (2001) 7 *European Law Journal* 24.

⁴³ The 'Tindemans Report', COM(75) 481, Bull EC Supp 1/76, p 26. See also, European Parliament Resolution of 10 July 1975 on a 'Charter of the Rights of the Peoples of the European Community', OJ 1975 C179/28.

⁴⁴ See Commission Memorandum of 4 April 1979, EC Bull Supp 2/79, p 5. Discussed by K Economides & J Weiler, 'Accession of the Communities to the European Convention on Human Rights: Commission Memorandum' (1979) 42 *Modern Law Review* 683.

⁴⁵ *Ibid* p 686.

⁴⁶ The Commission had good reason for caution. Fifteen years later the Court advised that the Community did not possess competence to accede to the ECHR in *Opinion 2/94* [1996] ECR I-1759. The Court's judgment was based on the notion of conferred powers and the duty of the Community

a certain ambiguity about both the Community's identity as a human rights actor and its relationship with other international institutions operating in this arena. These factors have led to sensitivity and caution whenever proposals have been put forward to incorporate rights or obligations derived from other international sources of law. Indeed, a prime motivation for adopting the Charter some 20 years later was to offer an alternative to EU accession to the ECHR.

Following the publication of the Internal Market 'White Paper' in 1985,⁴⁷ there was widespread concern about the possible negative effects of the internal market on social conditions in the Member States arising from, first, a shift in market share to countries with lower production costs and, second, downward pressure on wages and social standards generally because of the demands of competition.⁴⁸ The demand for a 'social dimension' to counteract the dangers of a deregulatory 'race to the bottom' was pressing.⁴⁹ However, in the absence of a consensus among the Member States for an increase in the Community's competence to introduce minimum standards in the area of social policy,⁵⁰ the Community began to explore the possibilities of an alternative approach based on identifying a catalogue of 'fundamental social rights' to be observed by the Member States and to act as a spur for legislative and programmatic activity at both Community and national levels.

The Community Social Charter—Social Citizenship Denied?

The first indication of a new approach can be found in the third recital of the preamble of the Single European Act of 1986, where it was declared that the Community was:

to act within those powers under Art 5 EC. Although Art 5 was added to the Treaty at the time of the TEU, the notion of conferred powers can be derived directly from Art 308 EC, which only permits action to further 'one of the objectives of the Community'. The Court concluded, 'no Treaty provision confers on the Community institutions any general powers to enact rules on human rights or to conclude international conventions in this field' (para 27).

⁴⁷ COM(85) 310.

⁴⁸ See *The Social Dimension of the Internal Market*, reproduced by the Commission in *Social Europe*, Special Ed (Luxembourg, European Communities, 1988).

⁴⁹ The 'race to the bottom' or 'meltdown' theory arises in a deregulatory federal system where states are allowed to unilaterally lower their social standards in order to undercut other states. Businesses relocate in response and the other states respond by lowering their standards in order to compete. See further, C Barnard, 'Social dumping and the race to the bottom: Some Lessons for the European Union from Delaware?' (2000) 25 *European Law Review* 57 at 57–63.

⁵⁰ At the insistence of the United Kingdom a rider was attached to Art 100a [now 95] EC whereby, under para 2, approximation measures concerning the establishment and functioning of the internal market did not apply to provisions 'relating to the rights and interests of employed persons'. Unanimity would be required for social policy measures in all policy areas except measures concerning 'the working environment, as regards the health and safety of workers' under Art 118a [now 137] EC. On the scope of these provisions, see Case C-84/94 *United Kingdom v Council (Working Time Directive)* [1996] ECR I-5755. See further, J Kenner, 'A Distinctive Legal Base for Social Policy?—The Court of Justice Answers a "Delicate Question"' (1997) 22 *European Law Review* 579.

Determined to work together to promote democracy on the basis of fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably (freedom, equality and social justice)

Undoubtedly this statement was designed to be little more than diplomatic plumage, but it provided a foundation, albeit a shallow one, for a bold proposal from the Economic and Social Committee⁵¹ for a framework directive setting out 'inalienable basic social rights' inspired by ILO conventions, the ECHR and the ESC.⁵² The Committee's aim was to offer a Community guarantee of basic social rights 'immune to competitive pressures'.⁵³ In a subsequent Opinion, the Committee rejected the idea of a separate Community Social Charter and recommended instead that such a guarantee should be aimed not at establishing new rules but as a means of taking account of existing rules already agreed in other transnational fora.⁵⁴

In the event the Commission decided to press ahead with its own proposal for a 'Social Charter'.⁵⁵ Seeking to reaffirm the concept of a distinctive 'European Social Model', while drawing inspiration from international human rights law, the Commission offered its own categorisation of fundamental social rights for citizens.⁵⁶ For example, under its proposals, all 'citizens', irrespective of their employment status, were to have rights to adequate social protection, an income in retirement, education and training.⁵⁷ The Commission's proposals were designed to be socially inclusive, with no attempt to limit citizenship to nationals of the Member States. Indeed the breadth of this approach was consonant with the views of some commentators who envisioned the emergence of a European 'social state' (*Sozialstaat*)⁵⁸ founded on a 'European sphere of entitlements to a decent livelihood'.⁵⁹

The Commission's bold attempt to promote a vision of European social citizenship was premature for three reasons. First, the immediate priority of the Member States was to respond to the demands of trade unions for workers' rights and greater involvement of the 'social partners'. Second, there was no competence for the Community to act, independently of the market integration

process, in areas such as education, health and social welfare. Whereas 'workers' had a clearly established status in Community law as 'market citizens', the 'European citizen' had yet to be conceived.⁶⁰ Third, the Charter was to be addressed to the Member States for whom any notion of a European *Sozialstaat* was anathema. The idea of the Community seeking to override the priorities of national social assistance and social protection systems was simply untenable. The Member States would have been extremely wary of the concept of 'social citizenship' because it carries with it ideas of entitlements and guarantees.⁶¹

Hence, although a second Commission draft had reinforced references to the social rights of citizens,⁶² the French Presidency presented a drastically revised draft that formed the basis for the final text. Most significantly, the title of the document had been changed to the 'Community Charter of the Fundamental Social Rights of Workers'.⁶³ All references in the draft to 'citizens' had been deleted and replaced with 'workers' or 'persons'. Whereas the original text had placed emphasis on the need to address the concerns of the unemployed and socially excluded, the 'Workers' Charter'⁶⁴ excised and diluted these references.⁶⁵ Provisions concerning social protection,⁶⁶ and the rights of the disabled and elderly persons⁶⁷ remained in place but only on the basis that these were areas where the Community would have influence but, in accordance with the principle of subsidiarity,⁶⁸ would not be able to dictate policy to the Member States who alone would be responsible for the implementation of the Community Social Charter. The vision of a Community Social Charter had been narrowed to the extent that it now promoted health protection and safety at work,⁶⁹ but not public health;⁷⁰ and a minimum age of employment for children,⁷¹ but not education.⁷² Paradoxically, the Community Social

⁶⁰ See M Everson, 'The Legacy of the Market Citizen', in Shaw & More, above n 32 at 73–90. For comment, see Poirares Maduro, above n 41 at 462.

⁶¹ See Everson, above n 60, at 82–83.

⁶² COM (89) 471.

⁶³ For a very useful comparison between the draft and the final text, see Annex 1 of the Fourth Report of the Employment Committee of the House of Commons Session 1990–91, *The European Community Social Charter* (London, HMSO, 1991).

⁶⁴ On this point, see L Betten, 'The EU Charter on Fundamental Rights: a Trojan Horse or a Mouse?' (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 151.

⁶⁵ The reference to unemployment in para 3 of the draft preamble was excised altogether. Moreover, para 7 of the draft preamble referred to the need to combat 'every form of social exclusion'. The final text merely stated that 'it is important to combat social exclusion', para 8.

⁶⁶ Point 10.

⁶⁷ Points 24–26.

⁶⁸ See the fifteenth recital of the preamble and point 27 of the Community Social Charter. For discussion, see J Shaw, 'The Scope and Content of European Community Social Law: A Review of Progress and a Bibliographical Note' (1992) 14 *Journal of Social Welfare and Family Law* 71 at 74–75.

⁶⁹ Point 19 of the Community Social Charter.

⁷⁰ See M Kleinman and D Piachaud, 'European Social Policy: Conceptions and Choices' (1993) 3 *Journal of European Social Policy* 1 at 3.

⁷¹ Point 20.

⁷² Kleinman and Piachaud, above n 70 at 3. The European Parliament had earlier proposed that these areas should be included in the Charter: EP Doc. A2–399/88.

⁵¹ Doc CES 1069/87, 19 November 1987. Based on a discussion of an earlier report, Doc CES 225/87, 17 September 1987.

⁵² *Ibid* para 2.1.

⁵³ *Ibid* para 1.6.

⁵⁴ Doc CES 270/89, 22 February 1989.

⁵⁵ COM (89) 248, reproduced in *Social Europe* 1/90. For analysis of the Social Charter and the background to its adoption, see Kenner (2003) above n 40 at 109–52.

⁵⁶ *Ibid* para 5 of the draft preamble.

⁵⁷ *Ibid* Title I, draft points 9, 13 and 22.

⁵⁸ See S Leibfried & P Pierson, 'Prospects for Social Europe' (1992) 20 *Politics & Society* 333 at 336, and B Hepple, 'The Implementation of the Community Charter of Fundamental Social Rights' (1990) 53 *Modern Law Review* 643, who explains, at 653, that the notion of a *Sozialstaat* is derived from the German public law principle of 'social government based on the rule of law'. In essence, the *Sozialstaat* requires the state to create a just social order.

⁵⁹ See Leibfried & Pierson, *ibid*.

Charter protects workers who are not citizens but not citizens who are not workers.⁷³

On the one hand, by limiting the scope of the Community Social Charter to workers, the majority of Member States⁷⁴ were seeking to resist any attempt to extend the Community's limited competence in the area of social policy under the guise of fundamental rights while, on the other hand, deploying the discourse of rights to legitimise Community action to protect and lay down minimum standards in the workplace and combat the threat of social dumping. In this way, targeted programmatic legislative and non-legislative measures could be pursued but there would be no prospect of a 'spill-over' from social-market rights for workers to social rights for citizens.⁷⁵

Nevertheless, in the intervening years, the Community Social Charter has been remarkably influential for several reasons. Firstly, notwithstanding the fact that the Community Social Charter itself has no legal effect,⁷⁶ it still has legal consequences. As a high level declaration of intent, it has provided a dynamic for Community action programmes and legislation. During the 1990s, the Community Social Charter was referred to 43 times in Community legal instruments⁷⁷ often serving to reinforce an otherwise shaky legal foundation. For example, the trinity of directives on pregnancy and maternity, the organisation of working time and young workers—all based on the health and safety imperative in Article 118a (now 137) EC—each contain references in their preambles to the Community Social Charter as a source of inspiration.⁷⁸ Once such a reference is made in the preamble of a directive it may be used for interpretative purposes by the EU courts.⁷⁹ Thus, when the European Court of Justice (the Court) upheld the validity of the Working Time Directive,⁸⁰ it was able to draw upon references in its preamble to the Community Social Charter⁸¹ to support a broad interpretation of the concepts of 'health and safety' and the 'working environment'.

⁷³ House of Commons Report, above n 63 at paras 52–54. There are several references in the Community Social Charter to rights extending to 'every worker of the European Community' (points 1, 8, 9, 10, 11, 15 and 24). There is no apparent restriction concerning nationality or citizenship. Indeed, the preamble explicitly provides for equal treatment of workers who are legally resident nationals of non-member countries and members of their families (para 9).

⁷⁴ The United Kingdom refused to sign the final text which was adopted as a non-binding 'solemn declaration at the Strasbourg European Council of December 1989. The text of the Community Social Charter is reproduced in ch 2 of *Social Europe 1/90*.

⁷⁵ See W Streeck, 'Neo-Voluntarism: A New European Social Policy Regime?' (1995) 1 *European Law Journal* 31 at 45.

⁷⁶ See the introduction to the Commission's second annual report on the application of the Community Social Charter, COM (92) 562.

⁷⁷ See Betten (2001) above n 64 at 158.

⁷⁸ Respectively, Directive 92/85/EEC, OJ 1992 L348/1, fifth recital (point 19 of the Charter); Directive 93/104/EC, OJ 1993 L307/18, fourth recital (points 7, 8 and 19); and Directive 94/33/EC, OJ 1993 L216/12, third recital (points 20 and 22).

⁷⁹ See Case C-292/99 *R v The Immigration Appeal Tribunal, ex parte Antonissen* [1991] ECR I-745 at 778.

⁸⁰ Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755.

⁸¹ Para 76.

Secondly, the Community Social Charter has provided a platform for Treaty amendments and, in turn, a review of the Court's case law on fundamental rights. When the Treaty on European Union (TEU) annexed the Agreement on Social Policy to the EC Treaty,⁸² its explicit purpose was to 'implement' the Community Social Charter on the basis of the *acquis communautaire*.⁸³ Now that the Agreement on Social Policy has been fully incorporated into the EC Treaty, following the Treaty of Amsterdam,⁸⁴ the revised Article 136 EC⁸⁵ refers to 'fundamental social rights' derived from the Community Social Charter and the ESC as the basis for its social policy activities. Although this reference is merely declaratory, it signifies the autonomy of an emerging social policy rooted in the concept of rights.

In February 2000, the significance of this evolution was recognised by the Court in *Schröder*⁸⁶ and related cases⁸⁷ concerning the exclusion of part-time workers from occupational pension schemes contrary to the principle of equal pay between men and women under Article 119 [now 141] EC. In its previous jurisprudence, the Court had observed that economic rather than social factors were the motivating force behind this obligation,⁸⁸ which it was later to recognise as a 'fundamental right' that forms part of the principle of non-discrimination on grounds of sex.⁸⁹ Drawing on this case law, the Court was prepared to authorise a decision by Germany to backdate pensions for the affected workers, notwithstanding any negative economic consequences, on the basis that the economic aim pursued by ex-Article 119 EC, and consequently the revised Article 141 EC, must now be regarded as secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.⁹⁰ Although the facts of the cases predated the Treaty of Amsterdam, the judgment reveals an acute awareness on the part of the Court of the autonomy of the social provisions now contained in Articles 136–145 EC.⁹¹

⁸² Effective from 2 November 1993.

⁸³ This commitment was contained in the preamble of the Agreement, annexed to Protocol 14 on Social Policy. The Protocol provided that the Agreement applied to all Member States except the United Kingdom.

⁸⁴ Effective from 1 May 1999.

⁸⁵ Ex-Art 117 EEC.

⁸⁶ Case C-50/96 *Deutsche Telekom AG v Schröder* [2000] ECR I-743. Discussed by Kenner (2003) above n 40 at 458–65.

⁸⁷ Cases C-234–235/96 *Deutsche Telekom AG v Vick and Conze* [2000] ECR I-799, and Cases 270–271/97 *Deutsche Post AG v Sievers and Schrage* [2000] ECR I-929.

⁸⁸ Case 43/75 *Defrenne v Sabena II* [1976] ECR 455, paras 9–12.

⁸⁹ Case 149/77 *Defrenne v Sabena III* [1978] ECR 1365, paras 26–27, Cases 75/82 and 117/82 *Razzouk and Beydoun v Commission* [1984] ECR 1509, para 16, and Case C-13/94 *P v S and Cornwall CC* [1996] ECR I-2143, para 19.

⁹⁰ Para 57.

⁹¹ This also helps to explain the Court's approach in Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, where the Court upheld the Dutch system of compulsory pension funds because of the social task that they perform by protecting all workers, notwithstanding the fact that the operation of such funds might violate Community competition law.

Thirdly, the Community Social Charter has indirectly elevated the status of the ESC in the EU's legal order. Many of the economic and social rights contained in the ESC were replicated in the Community Social Charter including, for example, the right of workers to safe and healthy working conditions,⁹² to a fair remuneration, and to bargain collectively.⁹³ While the ESC creates positive legal obligations on the contracting parties in international law, its provisions are not self-executing or directly effective. Without incorporation into domestic law it has, at most, a 'reflex effect'⁹⁴ as a source of law in the Member States and also, more importantly for our purposes, the EU. Where the rights contained in the ESC are regarded as 'fundamental' by the Court they can be invoked as part of the general principles of law the observance of which the Court is bound to protect under Article 220 EC,⁹⁵ providing that the issue at stake is within the framework of the structure and objectives of the Community.⁹⁶ Thus, in cases such as *Rutili*,⁹⁷ *Johnston*,⁹⁸ *Wachauf*⁹⁹ and *P v S*,¹⁰⁰ the Court has been able to identify Community provisions as specific manifestations of more general principles enshrined in the ECHR and national constitutions¹⁰¹ and therefore reflective of common values,¹⁰² an approach now formally recognised in Article 6(2) TEU. On rare occasions the Court has referred directly to the ESC and ILO conventions,¹⁰³ but all too often, provisions in international law concerning economic and social rights have been interpreted through the prism of the ECHR, reflecting a tendency to give greater credence to civil and political rights.

For example, in *Albany International*, Advocate General Jacobs drew on an extensive range of international law when seeking to determine whether the Community recognised the right to bargain collectively. The Advocate General noted that, although Article 11 ECHR has been held to safeguard the freedom of trade unions to protect the occupational interests of their members,¹⁰⁴ this

⁹² Art 3 ESC, Point 19 of the Community Social Charter.

⁹³ Art 6 ESC, Point 12 of the Community Social Charter.

⁹⁴ See, generally, R Rogowski & T Wiltshagen (eds) *Reflexive Labour Law* (Deventer, Kluwer, 1994).

⁹⁵ Art 220 EC states that: 'The Court of Justice shall ensure that in the interpretation and application of the Treaty the law is observed' (emphasis added).

⁹⁶ Case 11/70 *Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle Getreide* [1970] ECR 1125, para 4. See generally, B de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in Alston, above n 41 859-97, and P Craig & G de Búrca, *EU Law—Text, Cases and Materials*, 3rd edn (Oxford, OUP, 2002) 317-70.

⁹⁷ Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219, para 32.

⁹⁸ Case 222/84 *Johnston v Chief Constable of the RUC* [1986] ECR 1651, para 18.

⁹⁹ Case 5/88 *Wachauf v Germany* [1989] ECR 2609, para 19.

¹⁰⁰ Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143, para 18.

¹⁰¹ See Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, paras 14-16.

¹⁰² See Craig & de Búrca, above n 96 p 324.

¹⁰³ See Case 149/77 *Defrenne v Sabena III* [1978] ECR 1365; and Case 24/86 *Blaziot v University of Liège* [1988] ECR 379.

¹⁰⁴ See Case 67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751 above n 91. On this point see *National Union of Belgian Police v Belgium* Series A No 20 (1975) 1 EHRR 578 para 40.

only protects a core of specific activities.¹⁰⁵ It does not include any right for a trade union to be consulted by the state,¹⁰⁶ nor an obligation on the state to conclude collective agreements.¹⁰⁷ There is no direct reference in the case law of the European Court of Human Rights to a right to bargain collectively.¹⁰⁸ In the view of Advocate General Jacobs, Article 6 ESC, and other international instruments upon which the Member States had collaborated,¹⁰⁹ were not sufficiently strong to create a fundamental right to collective bargaining.¹¹⁰ In the absence of such a clear-cut right in international law it was, by implication, inappropriate for the Court to move at a faster pace than the European Court of Human Rights when interpreting the scope of corresponding rights recognised by the Community.

Thus, although the Community Social Charter has been remarkably effective as a soft law tool, acting as an impulse for change, its effectiveness has ultimately been constrained by its limited vision of social citizenship and its place at the periphery of the integration process. What was now required, in the wake of the 'legitimacy crisis' of the mid-1990s,¹¹¹ was a more all-embracing approach to provide the EU with a human rights foundation with economic and social rights at its core.

THE EU CHARTER OF FUNDAMENTAL RIGHTS—TOWARDS INDIVISIBILITY?

In 1996 the report of an ad hoc *Comité des Sages*¹¹² called for a 'bill of rights' encompassing both civic and social rights. Although this was not acted upon at the time of the Treaty of Amsterdam, the baton was soon seized by a group of legal experts appointed by the Commission who published a report on affirming fundamental rights in the EU.¹¹³ The experts called for full recognition of

¹⁰⁵ See paras 143-45 of the opinion. In fact the only right expressly recognised by the Court has been to be heard by the State, *ibid* para 39, and *Swedish Engine Drivers' Union v Sweden* Series A No 20 (1976) 1 EHRR 617 para 40.

¹⁰⁶ *Belgian Police*, above n 104 at para 38.

¹⁰⁷ *Swedish Engine Drivers*, above n 105 at para 39.

¹⁰⁸ In para 148 the Advocate General cites the *Swedish Engine Drivers* case, (above n 105) where the majority of the Commission of Human Rights had argued in favour of interpreting Art 11 ECHR to include a right of trade unions to engage in collective bargaining. The Court, however, held that it did not have to give a ruling on that question since, it said, such a right was not at issue and was granted to the applicant union under national law.

¹⁰⁹ ILO Convention Nos 87 & 98; Art 22 ICCPR, and Art 8 ICESR.

¹¹⁰ Paras 146-47. In para 149 the Advocate General points to the restrictive interpretation of Art 6 ESC in the cases concerning the *Belgian Police*, above n 104 at para 38; and *Swedish Engine Drivers*, above n 105, para 39. In both cases the European Court of Human Rights commented upon the meaning of Art 6(1) ESC in the course of interpreting Art 11 ECHR. For further discussion of *Albany*, see B Ryan, in this collection, at p 75.

¹¹¹ See further, G de Búrca, 'The Quest for Legitimacy in the European Union' (1996) 59 *Modern Law Review* 349.

¹¹² *For a Europe of Civic and Social Rights* (Luxembourg, European Communities, 1996).

¹¹³ *Affirming Fundamental Rights in the European Union Time to Act* (Brussels, European Commission, 1999). Available at: <http://europa.eu.int/comm/justice_home/univ/charte/index_en.html>.

economic and social rights contained in the ECHR, the ESC and ILO conventions, and concluded that all rights should be set out in a single text to be inserted into the Treaties.¹¹⁴ The publication of the report coincided with the 50th anniversary of the UDHR and a separate report calling for the establishment of a EU centre for monitoring human rights.¹¹⁵ In addition, the adoption of the Revised ESC (RevESC) in 1996, and the launch of the ILO's Declaration on Fundamental Principles and Rights at Work in 1998,¹¹⁶ increased the visibility of economic and social rights on the international stage. In response to these developments, the Cologne European Council of June 1999 decided to establish a Charter of Fundamental Rights in order to make their overriding importance and relevance *more visible* to the Union's citizens.¹¹⁷ Significantly, the European Council referred to a specific 'citizens' guarantee' of economic and social rights in Article 136 EC derived from the Community Social Charter and the ESC.¹¹⁸

The stage was now set for a unique drafting process involving a novel EU body composed of representatives of governments, the Commission, the European Parliament and national parliaments. The body, which renamed itself the 'Convention', was designed to furnish the process with legitimacy although in practice it lacked a formal mechanism for involving 'civil society' in its work.¹¹⁹ Moreover, national governments steered the process to ensure that discussions were 'not about minting new rights but rather an exercise in increasing the visibility of existing rights'.¹²⁰ They also ensured that the Charter of Fundamental Rights of the European Union would be directed at the EU institutions rather than the Member States, who are bound as sovereign governments under international law. By the conclusion of the negotiations it was clear that the Charter would be issued as a non-binding political declaration and, although drafted on the basis that it would eventually have 'mandatory legal force',¹²¹ the question of its legal status would be deferred.¹²² Nevertheless, the Charter's legal status will be revisited in 2004¹²³ and, in the meantime, its unan-

imous endorsement in the form of a joint institutional proclamation¹²⁴ and the legitimacy bestowed on the drafting process, will ensure that it is taken into account by each of the institutions when proposing or adopting legislation or performing any executive or judicial functions.

For the purposes of this chapter, I will seek to explore the Charter's assertion of indivisibility by evaluating a selection of the rights in Chapter IV on Solidarity, Articles 27–38 EUCFR, which contains most but not all of the economic and social rights in the Charter.¹²⁵ Several of the recitals in the preamble of the Charter help us to understand both the boldness of this commitment and also its limitations.

For example, the Charter's proclamation of indivisible values and its express reference to solidarity alongside dignity, equality and freedom,¹²⁶ sends a clear message that the EU institutions, when carrying out their obligations, will be bound to take note of the more elevated position that economic and social rights now occupy. Therefore, the Charter's social values are capable of having a mainstreaming effect¹²⁷ applying to all EU legislative and programmatic action, and serving as a point of reference for judicial interpretation of EU law within the scope of application of the Treaties. Also, it is equally important that, by contrast with the Community Social Charter, the 'common values' in the Charter are recognised as universally applicable¹²⁸ and, in most cases, contain an explicit guarantee to 'everyone' or 'every worker'.¹²⁹ Hence, the Charter seeks to address concerns about legitimacy by promoting inclusiveness, extending its coverage to third-country nationals, without altering the parameters of binding EU social law.¹³⁰

The fifth and seventh recitals of the preamble to the Charter send out further ambiguous messages. In the fifth recital, rights derived from the common constitutional traditions of the Member States, the Treaties and international law are reaffirmed, including, explicitly, the two 'Social Charters' (the Community Social Charter and the ESC), subject to the 'powers and tasks of the Community and the Union' in accordance with the principle of subsidiarity.¹³¹ Thus the Charter signifies a deepening of the process of political integration within a framework of decentralisation and strictly limited EU competence. In the seventh recital, there is a seemingly innocuous reference to the 50 'vertical'

¹¹⁴ *Affirming Fundamental Rights in the European Union Time to Act* p 17.

¹¹⁵ *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000* (Florence, EU, 2000).

¹¹⁶ Available at: <www.ilo.org>. For discussion see J Bellace, 'The ILO Declaration of Fundamental Principles and Rights at Work' (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 269.

¹¹⁷ Cologne Presidency Conclusions, Annex IV, para 1. Emphasis added.

¹¹⁸ *Ibid* para 2.

¹¹⁹ See de Búrca (2001) above n 31 at 126.

¹²⁰ See Lord Goldsmith, 'A Charter of Rights, Freedoms and Principles' (2001) 38 *Common Market Law Review* 1201 at 1207.

¹²¹ See COM(2000) 559 final, para 3.

¹²² Both the Commission and the European Parliament called for a legally binding Charter. See COM(2000) 644, para 11, and European Parliament resolutions A5–0064/2000 and B5–767/2000.

¹²³ This will be the task of the Convention on the Future of Europe established by the European Council in December 2001. The new Convention has been closely modelled on the Convention formed to draft the Charter.

¹²⁴ For the full text of the Charter with explanatory notes produced on behalf of the Convention, see CHARTE 4473/00, CONVENT 49; Council, *Explanations Relating to the complete text of the Charter* (Luxembourg, Office for Official Publications of the European Communities, 2001) accessible from <http://www.europa.eu.int/> (the Explanatory Document).

¹²⁵ See further Kenner (2003) above n 40 at 511–45.

¹²⁶ First recital.

¹²⁷ See M Gijzen, 'The Charter: A Milestone for Social Protection in Europe?' (2001) 8 *Maastricht Journal* 33 at 42.

¹²⁸ First recital.

¹²⁹ See C Costello, 'The Legal Status and Legal Effect of the Charter of Fundamental Rights of the European Union' in Costello, above n 28, 127–50 at 144.

¹³⁰ See Gijzen, above n 127 at 38.

¹³¹ Fifth recital.

provisions of the Charter as a collection of 'rights, freedoms and principles'.¹³² Whilst the language used is strictly neutral, is it possible to distinguish between specific enforceable rights and freedoms and general unenforceable principles¹³³ that do not equate with rights and are not truly 'fundamental'? According to Lord Goldsmith, who was the United Kingdom Government's representative on the Convention,¹³⁴ such an interpretation is implicit because, he suggests, the economic and social rights contained in the Charter are merely 'principles' that will only be realised as exercisable rights 'to the extent that they are implemented by national law or, in those areas where there is such competence, by Community law'.¹³⁵ Goldsmith asserts that economic and social rights are different and, by implication, less important than civil and political rights because they are 'usually not justiciable' and are recognised and given effect to in different ways in the Member States who have primary competence in most of these areas.¹³⁶ For Goldsmith, the Charter conveys a hierarchy of rights backed up by a hierarchy of laws, a double blow to the notion of indivisible enforceable rights. Goldsmith's analysis is based on a number of challengeable assumptions about the non-justiciability of economic and social rights discussed in the first part of this chapter, but how far, if at all, does the substance of the Charter support his case?

Chapter IV of the Charter, entitled 'Solidarity', Articles 27–38 EUCFR, contains the following core labour rights:

- information and consultation within the undertaking (Article 27);
- collective bargaining and action (Article 28);
- protection in the event of unjustified dismissal (Article 30);
- fair and just working conditions (Article 31);
- prohibition of child labour and protection of young people at work (Article 32);
- protection from dismissal for a reason connected with maternity and the right to paid maternity leave and parental leave (Article 33(2)).

In addition the Solidarity Chapter recognises the right of the family to legal, economic and social protection,¹³⁷ 'recognises and respects' the entitlement to social security,¹³⁸ and the right to social and housing assistance.¹³⁹

¹³² Seventh recital.

¹³³ See A Heringa & L Verhey, 'The EU Charter: Text and Structure' (2001) 8 *Maastricht Journal* 11 at 14.

¹³⁴ Goldsmith, above n 120 at 1212. Lord Goldsmith's article was written in a personal capacity prior to his appointment as the Attorney General in the United Kingdom Government.

¹³⁵ *Ibid* at 1213. Some of the contributors to this collection take issue with Goldsmith's interpretation; see, J Tooze, in this collection, at p 164; T Hervey in this collection, at p 203.

¹³⁶ *Ibid* at 1212.

¹³⁷ Art 33(1) EUCFR, based on Art 16 ESC. For further discussion, see M Barbera, in this collection.

¹³⁸ Art 34(1) EUCFR, which is sourced from Arts 137 and 140 EC, Art 12 ESC and point 10 of the Community Social Charter. For further discussion, see J Tooze, in this collection.

¹³⁹ Art 34(3) EUCFR, which draws on Arts 30–31 ESC and point 10 of the Community Social Charter. For further discussion, see J Tooze, in this collection.

Miscellaneous rights include access to a free placement service for job seekers,¹⁴⁰ health care,¹⁴¹ and a 'high level' of environmental and consumer protection. It should be noted that certain rights that may come under the broad penumbra of 'fundamental social rights' are found elsewhere in the Charter. Examples include: the prohibition of forced or compulsory labour;¹⁴² the right to education;¹⁴³ freedom to choose an occupation and engage in work;¹⁴⁴ equality between men and women;¹⁴⁵ rights of the child;¹⁴⁶ and rights of the elderly.¹⁴⁷

Even if we include these provisions, it is apparent that the Charter provides a less than comprehensive catalogue of economic and social rights. Moreover, as we shall see below, several of the labour rights are so heavily qualified that it is questionable whether they can be described as rights at all.¹⁴⁸ Despite the explicit reference to the 'visibility' of the ESC and the Community Social Charter in the Cologne mandate, the drafting Convention was highly selective in its approach to these texts. Key omissions include the right to work,¹⁴⁹ the right to a fair remuneration¹⁵⁰ and the right to housing.¹⁵¹ It is perhaps not coincidental that these rights fall in areas that touch most closely upon national sovereignty and have significant resource implications.

Goldsmith justifies these exclusions on the basis that, in his view, economic and social rights are not justiciable in the same way as other rights.¹⁵² It is undoubtedly the case that certain social rights, such as the right to social assistance or housing, concern positive social entitlements provided by governments, but that does not mean that they are inherently non-justiciable.¹⁵³ As the South African Constitutional Court has shown in *Grootboom*, the right of access to housing can create both positive and negative obligations for the state when

¹⁴⁰ Art 29 EUCFR, based on Art 1(3) ESC and point 13 of the Community Social Charter.

¹⁴¹ Art 35 EUCFR, derived from Art 12 ESC and point 10 of the Community Social Charter. For further discussion, see T Hervey, in this collection.

¹⁴² Art 5(2) EUCFR, based on Art 4(2) ECHR.

¹⁴³ Derived from the common constitutional traditions of the Member States and Art 2 of the Protocol to the ECHR. The right to education also includes vocational and continuing training—Art 10 ESC and point 15 of the Community Social Charter. For further discussion, see C Wallace and J Shaw, in this collection.

¹⁴⁴ Drawn from Art 1(2) ESC and the case law of the Court—eg Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

¹⁴⁵ Based on Arts 2, 3(2) and 141 EC. Other sources are Art 20 RevESC and point 16 of the Community Social Charter. For further discussion, see C Costello, in this collection.

¹⁴⁶ Based on the New York Convention on the Rights of the Child of 20 November 1989. For further discussion, see M Bell, in this collection.

¹⁴⁷ Drawn from Art 23 RevESC and points 24–25 of the Community Social Charter. For further discussion, see M Bell, in this collection.

¹⁴⁸ See C McCrudden, *The Future of the EU Charter of Fundamental Rights*, UACES On-line Reflection Papers, No 1, February 2002, www.uaces.org, p 17.

¹⁴⁹ Art 1 ESC.

¹⁵⁰ Art 4 ESC and point 5 of the Community Social Charter.

¹⁵¹ Art 31 of the Revised ESC.

¹⁵² Goldsmith, above n 120 at 1212.

¹⁵³ See M Craven, 'A View from Elsewhere: Social Rights, the International Covenant and the EU Charter of Fundamental Rights' in Costello, above n 28, 77–93 at 87.



fulfilling its constitutional duties.¹⁵⁴ The state has to balance these obligations whilst recognising that the purpose of the Constitution is to transform society into a more just and equitable place where people can fulfil their potential as human beings.¹⁵⁵ The Charter does not easily equate with the South African Constitution because it does not have a similar transformative constitutional dynamic, but neither is it a static document that merely purports to uphold the economic and social status quo. Hence, although it would be difficult to provide for a right to an adequate level of housing in a legal text,¹⁵⁶ that should not absolve the EU and the Member States from a general duty to formulate policies and programmes in a manner consistent with international guidance.¹⁵⁷

The exclusion of these rights suggests that, from the perspective of the EU, certain economic and social rights are insufficiently fundamental to warrant visibility. If we accept Goldsmith's explanation that these 'rights' have been excluded because they are non-justiciable, what then is the status of the remaining provisions in the Solidarity Chapter? Upon detailed examination what emerges is a mix of individual rights, guiding principles that the EU recognises and respects, and pure objectives.¹⁵⁸ The distinction between 'rights' and 'principles' is far from clear.

For example, Article 30 EUCFR recognises the right of 'every worker' to protection against unjustified dismissal in accordance with Community law and 'national laws and practices'. During the negotiations the United Kingdom had to 'fight very hard'¹⁵⁹ to add this rider. This was an important consideration because under the United Kingdom's employment legislation workers who are in the first year of their employment contract are excluded from protection against unjustified dismissal.¹⁶⁰ Moreover, Article 137(2) EC, which allows for the adoption of binding Community directives concerning the 'protection of workers where their employment contract is terminated' is subject to a requirement of unanimity among the Member States when voting in the Council of the EU. Let us suppose that the Commission, at a future date, publishes a draft directive under Article 137(2) EC to protect all workers against dismissal from the first day of their employment in order to give full effect to the clearly expressed right in the Charter. In those circumstances what would be the legal effect of the rider if and/or when the Charter enters into legal force?

¹⁵⁴ *Government of the Republic of South Africa v Grootboom* [2001] (1) SA 46 CC, paras 20 and 34. For discussion see, P De Vos, 'Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *South African Journal of Human Rights* 258; and S Liebenberg, 'The Right to Social Assistance: the Implications of Grootboom for Policy Reform in South Africa' (2001) 17 *South African Journal of Human Rights* 232.

¹⁵⁵ De Vos, *ibid* at 260.

¹⁵⁶ Goldsmith, above n 120 at 1212.

¹⁵⁷ Craven, above n 153 at 89.

¹⁵⁸ See B Hepple, 'The EU Charter of Fundamental Rights' (2001) 30 *Industrial Law Journal* 225 at 228.

¹⁵⁹ Goldsmith, above n 120 at 1213.

¹⁶⁰ See Betten (2001) above n 64 at 163.

In seeking to answer this question it is necessary to refer to the 'horizontal' provisions in Articles 51–54 EUCFR that are designed, in part, to have a constraining effect on its interpretation and scope.¹⁶¹ Under Article 51(1), the Charter is addressed to the 'institutions and bodies' of the EU 'with due regard to the principle of subsidiarity' and to the Member States 'only when they are implementing Union law'. In accordance with their respective powers they shall 'respect the rights, observe the principles and promote the application' of the Charter. This might suggest that the Commission is now obliged to bring forward this hypothetical proposal. However, Article 51(2) EUCFR states 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 Treaties'. The purpose of this clause is to close down the perceived danger of the Charter being used as a 'Trojan horse' to extend the Community's powers in the event of it entering into legal force.¹⁶² In addition, Article 52(2) EUCFR, concerning the scope of guaranteed rights, declares that rights recognised by the Charter, which are based on the Treaties, 'shall be exercised under the conditions and within the limits defined by the Treaties'.

Therefore, although the wording of the Charter appears to create an institutional imperative on the Commission to bring forward a legislative proposal under Article 137(2) EC, it only creates a moral duty on the individual members of the Council to act. Notwithstanding the fact that the United Kingdom's service qualification denies many workers the 'right' promised in the Charter, it would be perfectly entitled to exercise its veto or to seek to secure an amendment that would enable it to continue to exclude the most vulnerable workers from protection against unjustified dismissal. The United Kingdom, and indeed any other Member State in a similar position, would be able to rest certain in the knowledge that, as the Charter is addressed to the institutions of the EU, it is assumed that Member States are already adhering to their international obligations.

Articles 27 and 28 EUCFR, which are concerned with collective labour rights, contain a similar rider, reflecting the sensitivity of Member States in this area and the limitations of Community competence. However, whereas the right to protection against unfair dismissal in Article 30 EUCFR is clearly *expressed* as a fundamental right, Article 27 EUCFR, concerning workers' right to information and consultation within the undertaking appears to blur the rights/principles distinction. Article 27 EUCFR declares that workers or their representatives at the appropriate levels are 'guaranteed' the right to information and consultation within the undertaking in good time 'in the cases and under the conditions provided for by Community law and national laws and practices'.¹⁶³

¹⁶¹ For analysis see Kenner (2003) above n 40 at 528–43.

¹⁶² See Betten, above n 64 at 151. But see M Barbera, in this collection, text at p 152.

¹⁶³ Art 27 EUCFR is consistent with Art 21 RevESC and points 17–18 of the Community Social Charter. It also incorporates the notion of social dialogue contained in Arts 138 and 139 [ex 118b] EC.

Hence, although Article 27 EUCFR reinforces the Community's general obligation to act to promote worker involvement in corporate decision-making processes, it offers no more than a qualified guarantee to the individual, leaving scope for local and national actors to determine the levels at which information and consultation takes place and the precise conditions under which the guarantee will operate.¹⁶⁴ Moreover, the guarantee in the Charter falls short of the right of workers to take part in the determination and improvement of working conditions and the working environment, an important feature of the RevESC.¹⁶⁵

Article 27 EUCFR highlights the difficulty, and perhaps the undesirability, of seeking to draw up a uniform set of rights and principles in a pluralistic legal order in which rights are recognised as 'fundamental' at multiple levels.¹⁶⁶ There is no single model of employee involvement in the decision-making structures of companies in the European Union and attempts by the Commission to impose one in the 1970s were firmly resisted by a combination of several Member States and national trade unions and employers' organisations.¹⁶⁷ As the ILO noted in a report on workers' participation in 1981, this is an issue where the 'diversity of methods is as great as the diversity of aims'.¹⁶⁸ Article 27 EUCFR is indicative of a more differentiated approach to rights that seeks to promote a degree of political autonomy in the workplace, without imposing what one critic of the Charter has described as 'a unitary conception of constitutionalism whereby all must abide by a uniform set of standards'.¹⁶⁹ Directive 2002/14/EC on establishing a general framework for informing and consulting employees in the European Community¹⁷⁰ is consistent with the pluralistic approach of the Charter, providing for mandatory information and consultation of workers in larger companies while allowing for diversity in national and sectoral systems. Article 27 EUCFR is a masterful compromise but it also reveals the limitations of the concept of 'Solidarity' at the level of the European Union because ultimately it fails to address the central issue of the inequality of the employment relationship that is, after all, the very foundation of labour law.¹⁷¹

Our discussion of Articles 27 and 30 EUCFR has focused on the limitations of the Charter in areas that fall within the legislative scope of Article 137 EC. Article 28 EUCFR, concerning the right of collective bargaining and action, is an example of a Charter provision that seeks to guarantee collective rights that may be regarded as outside Community competence altogether or, at the very

¹⁶⁴ See Hepple (2001) above n 158 at 228–29.

¹⁶⁵ Art 22 RevESC.

¹⁶⁶ See further, N Walker, 'Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism' in Campbell *et al.*, above n 14, 119–41; and D Chalmers, 'Post-nationalism and the Quest for Constitutional Substitutes' (2000) 27 *Journal of Law and Society* 178.

¹⁶⁷ See Kenner (2003) above n 40 pp 62–69.

¹⁶⁸ *Workers' Participation in Decisions within Undertakings* (Geneva, ILO, 1981) p 21.

¹⁶⁹ See Bellamy, above n 14 at 16.

¹⁷⁰ Directive 2002/14/EC, OJ 2002 L80/29.

¹⁷¹ See B Hepple, 'Social Values and European Law' [1995] *Current Legal Problems* 39 at 52.

least, outside the social provisions. Article 137(5) EC excludes pay, the right of association, the right to strike and the right to impose lock outs from the legislative remit of that Article. Notwithstanding this exclusion Article 28 EUCFR purports to grant workers, *inter alia*, the right 'in cases of conflicts of interest, to take collective action to defend their interests, including strike action' in accordance with Community law and national law and practices. However, if the Charter enters into legal force, far from guaranteeing the right to strike it may, paradoxically, subvert it. Any proposal to legislate to harmonise national laws on the right to strike at EU level¹⁷² would conflict not only with the exclusion in Article 137(5) EC but also with Article 52(2) EUCFR which, according to the Explanatory Document,¹⁷³ preserves the system of rights and conditions conferred by the Treaties and Community legislation. Even if the proposal were to be based on the need to approximate the common market under Article 94 EC, to prevent social dumping,¹⁷⁴ Article 51(2) EUCFR might inhibit the Community from exercising its powers in this respect, making it difficult to justify the need to legislate. The combined effect of these provisions renders the Charter's proclamation of a right to take collective action nugatory.

By contrast, Article 31(2) EUCFR, which grants 'every worker' the right to limit their maximum working hours, to daily and weekly rest and an annual period of paid leave, is not fettered by any reference to national laws or practices. Each element contains a right that is *per se* justiciable. Moreover, the immediate source of each of these rights is a Community Directive on the Organisation of Working Time.¹⁷⁵ The unconditional nature of Article 31(2) EUCFR calls into question the status of Article 18(1)(b)(i) of the Directive which permits Member States—in practice only the United Kingdom—the option of introducing a voluntary opt-out for individual workers from the average 48-hour maximum working week.¹⁷⁶ Although any worker unwilling to work longer hours must not be subjected to any detriment by the employer, this safeguard only provides limited protection against coercive practices in sectors where low pay and long, often unsociable, hours are the norm. This clause is due to be reviewed by November 2003 and it is difficult to see how it can be reconciled with Article 31(2) EUCFR.¹⁷⁷

¹⁷² See further, P Germanotta & T Novitz, 'Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action' (2002) 18 *International Journal of Comparative Labour Law and Industrial Relations* 67.

¹⁷³ The Explanatory Document; CHARTE 4473/00; CONVENT 49, p 48.

¹⁷⁴ On the basis that this would prevent distortions of competition and help to establish the 'common market' in accordance with Art 2 EC. Utilisation of Art 94 EC in this regard would be possible notwithstanding the limited scope of the narrower 'internal market' concept in Art 14 EC and its distinct legal base for approximation measures in Art 95 EC. On this point see Kenner (2003) above n 40 pp 86–87.

¹⁷⁵ Directive 93/104/EC, OJ 1993 L 307/18.

¹⁷⁶ Art 6 of the Directive.

¹⁷⁷ On 21 March 2002 the Commission issued the United Kingdom with an initial warning letter regarding, *inter alia*, the way in which 'voluntary' working time is measured. This letter marks the first stage in possible infringement proceedings under Art 226 EC.

Article 31(2) EUCFR was raised in pleadings in *BECTU*,¹⁷⁸ a trade union challenge to the validity of a United Kingdom law that denied employees the right to accrue paid leave until after 13 weeks of their employment. *BECTU* argued that this rule was incompatible with the Charter right as expressed in Article 7(1) of the Directive which grants 'every worker' the right to paid leave. In practice many workers in the entertainment industry were unable to exercise their right to paid leave because they were employed for shorter periods. The United Kingdom countered this argument by referring to a rider attached to the provision in the Directive where it is stated that it applies 'in accordance with the conditions for entitlement . . . laid down by national legislation and/or practice'. Although the wording in the Directive is almost identical to similar limitations contained in Articles 27–28 and 30 EUCFR, discussed above, no such restriction can be found in Article 31(2) EUCFR.

In his opinion Advocate General Tizzano drew from the Charter 'as a substantive point of reference'¹⁷⁹ and placed the rider in the Directive in context. The reference in the Directive to national laws and practices concerning the 'conditions for entitlement' means that, although Member States have some latitude in defining the arrangements for the enjoyment of paid leave, it does not permit national rules that negate that entitlement¹⁸⁰ or affect its scope.¹⁸¹ The Charter is not, in itself, legally binding but, by reaffirming rights in other instruments, it provides 'the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right'.¹⁸² It follows that the right to paid leave in the Directive is 'an automatic and unconditional right granted to every worker'.¹⁸³ The Court was able to reach the same conclusion without making a direct reference to the Charter. It was implicit that the Charter merely reaffirmed the fundamental right to paid leave contained in the Directive.

BECTU demonstrates the potential of the Charter to reinforce rights derived primarily from the Treaties and Community legislation. By contrast, *Bowden*,¹⁸⁴ another case from the United Kingdom concerning the right to paid leave in the Directive, reveals its limitations. *Bowden* concerned the rights of a group of 'non-mobile' workers in the transport sector who were excluded from the scope of the Directive.¹⁸⁵ No reference to the Charter was made in either the opinion or the judgment, even though the legislative exclusion denied the workers in question the 'fundamental right' of 'every worker' to paid annual leave that had been deemed 'automatic and unconditional' by the same Advocate

General in *BECTU*. The workers in question fell outside the scope of the Directive and were unable to rely on the right to paid leave.

In part this ruling can be understood as an act of deference to the Community legislature that had recently adopted a Directive that would extend the scope of the Directive to cover 'non-mobile' transport workers such as the workers in question.¹⁸⁶ More compellingly, even though Article 31(2) EUCFR is expressed in unconditional terms, unlike other provisions in the Solidarity Chapter, it is trumped by the horizontal clause in Article 52(2) EUCFR that effectively precludes the Court from applying the Charter in these circumstances because it can only be 'exercised under the conditions and within the limits' defined by the Treaties. Therefore even if the Charter had been legally binding the Court would have been unable to uphold the apparently unconditional right in Article 31(2) EUCFR deemed a fundamental right by the Advocate General in *BECTU* on the basis of the same Directive.

Article 31(2) EUCFR can be compared with Article 34 EUCFR under which the EU 'recognises and respects' a range of entitlements to social security benefits and social services¹⁸⁷ and the right to social and housing assistance 'so as to ensure a decent existence for all those who lack sufficient resources' in order to combat social exclusion and poverty.¹⁸⁸ These are perhaps the clearest examples of rights expressed as mere principles. As the entitlements referred to in Article 34 EUCFR are entirely matters of national competence, this statement may be understood as only a moral obligation. It is clearly not intended to be justiciable and, although it covers areas not included in the Community Social Charter, it does not alter the status quo. Hence, the purpose of this Article is to reaffirm the European model of social protection while respecting national competences.

One question that is central to the debate over the indivisibility of the rights enunciated in the Charter concerns the approach of the Court to the interpretation of provisions derived from the ESC and the RevESC. Hitherto the Court and its Advocates General have tended to refer primarily to the ECHR and to underplay the status and autonomy of both the ESC and the authority of the legal experts on the European Committee of Social Rights that oversees its operation.¹⁸⁹ The approach of Advocate General Jacobs in *Albany International*, discussed above, provides a vivid example of this trend. Does the inclusion in the Charter of rights drawn selectively from each of these texts serve to elevate their

¹⁸⁶ Directive 2000/34/EC, OJ 2000 L 195/41.

¹⁸⁷ Based on Arts 137(3) and 140 EC, Art 12 ESC and point 10 of the Community Social Charter.

¹⁸⁸ Derived from Arts 30–31 RevESC and point 10 of the Community Social Charter. For a discussion of the possible implications of these provisions, see J Tooze, in this collection.

¹⁸⁹ The ECSR consists of nine experts assisted by an observer from the ILO. Under the Amending Protocol of 1991 its functions are to examine the national reports and make a legal assessment of the states' observance of their legal obligations. For further discussion, see Casey, above n 28 at 56; and Novitz, above n 28 who notes, at 250, attempts by the Parliamentary Assembly of the Council of Europe to establish either a 'parallel European Court of Social Rights' or the absorption of the ESC within the ECHR 'in order to create the basis for strict legal observance': *Recommendation No 1354 on the Future of the European Social Charter* (1998) para 18.

¹⁷⁸ Case C-173/99 *R v Secretary of State for Trade and Industry, ex parte BECTU* [2001] ECR I-4881.

¹⁷⁹ Opinion, para 28. Emphasis added.

¹⁸⁰ Paras 34–35.

¹⁸¹ Paras 39–45.

¹⁸² Opinion, para 28. Emphasis added.

¹⁸³ Paras 29–30.

¹⁸⁴ Case C-133/00 *Bowden and others v Tuffnells Parcels Express Ltd* [2001] ECR I-7031.

¹⁸⁵ Art 1(3) of Directive 93/104/EC.

status within the EU legal order? The evidence suggests that the present hierarchical approach will be maintained. Most importantly, unlike the European Court of Human Rights, the European Committee of Social Rights does not have the status of a fully functioning court and is not regarded as an equivalent body by the Court, which prefers to engage in intra-judicial dialogue.¹⁹⁰ This is problematic because the European Court of Human Rights is concerned only with the interplay between the ESC/RevESC and the ECHR when interpreting and applying the rights protected by the latter. The European Committee of Social Rights alone has the expertise and responsibility to produce a regular, coherent overview of these texts. In carrying out its institutional responsibilities under the Charter, the Court must address the requirement of indivisibility by placing greater weight on the findings of the ESCR, and yet the Charter itself reinforces this hierarchy of adjudication in Article 52(3) EUCFR. Under this horizontal provision, where rights correspond with those guaranteed by the ECHR 'the meaning and scope of those rights shall be the same as those laid down by the said convention'. According to the Explanatory Document this is intended to ensure consistency between the ECHR and the Charter as determined both by the text of the ECHR and the case law of the European Court of Human Rights.¹⁹¹ The Charter is silent on the status of the European Committee of Social Rights and its adjudications. By implying the superiority of the ECHR and its Court, the Charter appears to be reaffirming the 'second generation' status of economic and social rights.

CONCLUSION

Labour lawyers have traditionally been sceptical about human rights¹⁹² and there is little in the Charter of Fundamental Rights of the European Union to assuage their distrust. The Charter, whatever its ultimate legal status, offers the 'peoples of Europe' only tantalising glimpses of 'rights' that are, at once, visible and yet unattainable. In particular, a detailed evaluation of the Solidarity chapter reveals that the Charter's bold affirmation of indivisible rights is a mirage. The Charter contains a highly selective and incomplete list of 'fundamental social rights' that distinguishes between enforceable rights, many of which are conditional, and recognition of vague principles.¹⁹³ For the EU institutions, the Charter creates an obligation to promote each of the enumerated rights but denies them the capacity to extend their powers or tasks to secure its objectives.

For individuals, the Charter may be visible, as with any other official document available under the transparency principle, but it neither directly affects workers' and/or citizens' social rights, nor does it guarantee basic social entitlements. For EU Member States, the Charter is a reminder of their international human rights commitments but, other than at the point of implementing EU law, it adds no new obligations even in areas that are outside the scope of the Treaties and, therefore, beyond the remit of the EU institutions to whom it is primarily directed.

Despite these misgivings, and perhaps because of them, the Charter may yet serve to raise the status of economic and social rights in the EU's legal order. Indeed the very ambiguity of the Charter derives from the fact that it preserves the status quo and yet simultaneously signifies the onset of deeper integration as part of a grand design that places fundamental rights at the pinnacle of the process of constitutionalisation of the EU.¹⁹⁴ It is in this context that the positioning of civil, political, cultural, social and economic rights in a single unified text must be understood. For the Charter marks what Hunt has described elsewhere in this collection as a 'shift in ethic'¹⁹⁵ whereby the value of economic and social rights are recognised and transformed within both the legal and political spheres.¹⁹⁶

As part of this process of recognition and transformation, the EU institutions now have a duty to address gaps in the content of the Charter and limitations on its effectiveness. Lessons can be learned from the experience of the Community Social Charter which, as this chapter has shown, has provided an inspiration for Community social legislation and judicial interpretation notwithstanding its non-binding status. Moreover, the Charter projects a much wider conception of social citizenship than the Community Social Charter and has a far more elevated status in the integration process from which to influence events. As a living instrument, the Charter's influence will lie with its capacity to energise and give direction to legislative and programmatic action at EU and national level. For the Court the challenge is to translate the Charter's vision of indivisible rights and draw upon its sources to give full effect to the wide range of economic and social rights, many of which are potentially justiciable, in so far as interpretation of those rights falls within its jurisdiction. Most importantly of all, the Charter, by acting as a beacon of fundamental social values, can form part of the construction of a pluralistic 'European social constitution' that would seek to guarantee, over time, a more effective system of protection of economic and social rights within the EU's multi-level legal order.

¹⁹⁰ See B Fitzpatrick, 'European Union Law and the Council of Europe Conventions' in Costello, above n 28, 95-108 at 101.

¹⁹¹ The Explanatory Document; CHARTE 4473/00, CONVENT 49 p 48.

¹⁹² For a stimulating discussion see S Fredman, 'Scepticism under Scrutiny: Labour Law and Human Rights' in Campbell *et al*, above n 14 197-213.

¹⁹³ See 'Editorial Comments: The EU Charter of Fundamental Rights still under discussion' (2001) 38 *Common Market Law Review* 1 at 3.

¹⁹⁴ For further discussion, see M Poiries Maduro, in this collection.

¹⁹⁵ See J Hunt, in this collection, p 45.

¹⁹⁶ See the conclusions of B Ryan, in this collection, on pp 89-90.

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THE EU AND HUMAN RIGHTS

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Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU

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It has been repeatedly stated that European integration has promoted economic freedom while leaving social rights and policies in a secondary position. The impact of Community law on social rights has been as a function of economic integration, promoting economic freedom and deregulation, while challenging national social rights. This process has not been compensated by the development of European social rights. It has even been argued that the programme of European market integration is also a programme in favour of economic freedom and competition. In this light, the Treaty of Rome is conceived as an economic neo-liberal constitution whose aim is to protect market freedom from public power and whose underpinning legitimacy lies in voluntary market transactions and enhanced economic efficiency. On the other hand, European integration has also been conceived as a safeguard of the welfare state. In the latter perspective, the European Union is the new forum in which social rights, no longer viable at national level due to economic competition among States, are re-introduced. Moreover, European integration gives a stronger voice to the European States in shaping the rules of global economic competition and protecting the 'essentials' of the welfare state.

This chapter approaches these two constitutional perspectives of the European Union from both descriptive and normative perspectives, while reviewing the balance between economic freedom and social rights. In doing this, I will also attempt to highlight new forms of conceiving the relationship between economic freedom and social rights. The focus will be on the constitutional balance between economic freedom and social rights, and not on the treatment and status accorded to specific economic freedoms or social rights. This will allow me to take into consideration a very broad conception of social rights, including provisions that, arguably, do not have the status of fundamental rights in national constitutions. It will also allow me to work with three dimensions of social rights: first, as constitutional interpretative authority; secondly, as rights of participation and representation; thirdly, as social allocations.

The first section will review the concept of the European Economic Constitution arising from the case law of the European Court of Justice and the challenges it poses

to social rights. This will be related to the promotion of economic freedom through market integration. In the second section, the focus will be on the issues regarding the position of social rights in the 'European Constitution' by looking at the two forms of fundamental rights discourse developed by the Court: on the one hand, the judicial development of a EU fundamental rights catalogue based on international law sources and the 'constitutional traditions common to Member States' to which the Court refers;¹ on the other hand, the construction of the free movement and other market integration provisions of the Treaty of Rome as fundamental rights.² The third section of the chapter is of more general scope and ambition: it analyses the relationship between the normative ideals of social rights and the process of European market integration in the context of the global process of economic competition among States. This will be done while addressing some of the key normative questions faced by European economic integration, such as the choice or balance between negative and positive integration, the 'regulation' of competition among States, and the role of efficiency and redistribution goals in the European Union.

I. FROM MARKET INTEGRATION TO MARKET FREEDOM?

The core of the European Economic Constitution lies in market integration. It was under the legitimacy granted by market integration and through the rules provided in the Treaties for its achievement that the Court has developed the notion of a European Constitution. I have explained elsewhere how this process took place, highlighting the relationship between the process of constitutionalization³ of the Treaties and the rules of market integration (notably, free movement and competition rules).⁴ Though the Treaty of Rome also contains social provisions (for example, Articles 117 to 119, now Articles 136–141), the core of market integration is the free movement provisions promoting market access to the different national markets. However, the borderline between securing access to the market for further market integration and securing access to the market to enhance economic freedom is thin and often non-existent. When reviewing national measures with an effect on

¹ See, e.g., Case 4/73, *Nold KG v. Commission* [1974] ECR 491 and Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

² See, e.g., Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, at 37.

³ The history and character of such process of constitutionalization of the Treaties are, by now, well known: the Court of Justice conceived Community law as an autonomous legal system, founded on the rule of law and based on principles such as supremacy, direct effect, fundamental rights, and the separation of powers. In the words of J.H.H. Weiler, '[t]he Constitutional thesis claims that in critical aspects the Community has evolved and behaves as if its founding instrument were not a Treaty governed by international law but, to use the language of the European Court of Justice, a constitutional charter governed by a form of constitutional law': 'The Reformation of Constitutionalism' (1997) 35 *J. Common Mkt. Stud.* 96. See also K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 28 *AJCL* 205; E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 *AJIL* 1; J.H.H. Weiler, 'The Transformation of Europe' (1990–1) 100 *Yale LJ* 2403.

⁴ See M. Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (1998).

free movement the Court of Justice is deciding both on the acceptable degree of restriction on trade and the level of market regulation.

The case law of the European Court of Justice on the market integration rules of the EC Treaty (mainly free movement and competition rules) has, at times, appeared to subscribe a neo-liberal, '*laissez-faire*', conception of the European Economic Constitution and promoted deregulatory consequences at national level with negative effects on social rights. Such deregulatory consequences at the national level are not, however, a product of a neo-liberal vision of the economic constitution by the Court but the functional result of the need to promote integration (requiring negative integration in the form of judicial review of divergent state regulations restricting trade). Moreover, the Court has limited the effects of negative integration on national regulation whenever national regulations corresponded to a European majoritarian policy.⁵ If a certain social regulation is shared by a majority of Member States it has normally been upheld by the Court even if restricting trade. Thus, from a European perspective, deregulation has been limited, and it will be more appropriate to talk of a judicial harmonization of national legislation. Nevertheless, the impact on national social rights exists, even if it is the combined result of the promotion of market integration, through an expanded application of the free movement rules, with a majoritarian review of national legislation. More protective national social regulations which were not shared by a 'European majority' were normally considered incompatible with Community law and the objective of market integration. It has been social protective regulation (corresponding to social rights) that has been under attack as raising restrictions to trade while the promotion of common social rights has not been used to the same extent in furthering trade under equal conditions of competition.

The fundamental rights character granted to the free movement provisions and the widening of its scope of action in order to extend European supervision over national regulation and support the constitutionalization of Community law has led to a spill-over of market integration rules into virtually all areas of national law. As a consequence, many national social rights and policies have been challenged under the free movement provisions. The balance between economic freedom and social rights in the European Economic Constitution has largely been defined by the balance between market integration and national social rights.

The Court has long applied the free movement of goods (and, to a less extent, the freedom to provide services) to national rules the effect of which on trade is not a consequence of discrimination against imports, but simply a side-effect of the restriction imposed even on domestic trade as a consequence of market regulation. This extension of the scope of the free movement of goods and services has raised challenges to almost any regulation of the market and limited the social and economic policies of Member States. Several non-discriminatory national regulations protecting or promoting social rights have been challenged as giving rise to restrictions on the free movement of goods or the freedom to provide services. That has

⁵ I have coined the approach of the European Court of Justice in this area of the law as 'majoritarian activism': *ibid.*, at 61–78.

been the case with legislation regarding working hours,⁶ the organization of work, and the monopoly of workers' associations,⁷ public systems of labour procurement services⁸ or prices regulations,⁹ all of which can be said to be related to social rights. In general, the application of some of the free movement rules has been seen as promoting deregulation and preventing Member States from pursuing national social policies, even without intents of protectionism.

At the same time, the Court has always denied that social arguments of an economic nature can be used to justify national regulations capable of restricting free movement. In particular, although the States can still justify some of those policies on the basis of social goals related to efficiency, redistribution became more difficult to pursue through regulation, since economic arguments cannot be used in the context of market integration rules. This approach has its basis on the Treaty rules, which allow only limited exceptions to the free movement provisions and do not authorize the use of economic arguments to justify national regulations in breach of those rules (such economic arguments are feared immediately to open the door to protectionism). However, that could be related to an understanding of the free movement provisions prohibiting only national measures which discriminate against foreign products and nationals. Since the Court of Justice broadened the scope of the free movement rules (notably, in a first stage, the free movement of goods) to include non-discriminatory national regulations with an impact on trade, it has itself extended the list of public goals that can justify a restriction on trade.¹⁰ It can be argued that such an extension should include the protection of interests associated with social rights. In fact, this protection does not require express Treaty or legislative recognition, and should be conceived as part of the respect that the European Union legal order owes to fundamental rights (including fundamental social rights).

The Court has referred to the free movement provisions as 'fundamental freedoms',¹¹ granting them a status similar to that of fundamental rights in national constitutions. This conception of the free movement provisions as fundamental rights has played a key role both as an instrument of market integration (in co-operation with individual litigants and national courts) and, at the same time, as a form of legitimization of Community law and market integration. Community law was presented as a new source of individual rights and the integration process associated with a rights discourse supported by the participation of individuals and national courts. However, the character of such fundamental freedoms has long remained

⁶ See the Sunday Trading cases, notably Case 145/88, *Torfaen Borough Council v. B&Q plc* (Sunday Trading) [1989] ECR 3851.

⁷ Case C-179/90, *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA* [1991] ECR I-5889.

⁸ Case C-41/90, *Höfner and Elser v. Macrotron GmbH* [1991] ECR I-197 and Case C-134/95, *USSL v. INAIL* [1997] ECR I-195.

⁹ See, e.g., Case 65/75, *Tasca* [1976] ECR 291; Joined Cases 88-90/75, *Sadam* [1976] ECR 323; Case 13/77, *GB-INNO-BM v. ATAB* [1977] ECR 2115; and Case 82/77, *Openbaar Ministerie v. Van Tiggele* [1978] ECR 25.

¹⁰ At least with regard to national regs. equally applicable to national and foreign goods: see Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) [1979] ECR 649.

¹¹ See, e.g., Case C-55/94, *Gebhard* [1995] ECR I-4165, at para. 34.

grey. For some, they are an expression of the more general principle of non-discrimination: free movement of goods, services, and persons will be secured by protecting the different national companies, workers, and goods from being discriminated against by any Member State. Others have proposed a more far-reaching understanding of the fundamental rights character of the common market freedoms, arguing that they should be conceived as fundamental economic freedoms limiting public power and safeguarding competition in the free market. Underlying the latter interpretation is a neo-liberal conception of the European Economic Constitution whose legitimacy is derived from the individual rights granted against public power.¹²

The broad scope given by the European Court of Justice to the free movement of goods could suggest that the latter interpretation dominates the European Economic Constitution favouring economic freedom against social rights. The Court of Justice has, until the recent *Keck and Mithouard* decision,¹³ adopted an interpretation of the rule of the free movement of goods that subjected almost any national regulation to a test of proportionality similar to a cost/benefit analysis.¹⁴ Any rule with an impact on trade (even a non-discriminatory impact) was considered a measure having an equivalent effect to a quantitative restriction on imports (Article 28, *ex Article 30* of the EC Treaty) and would only be upheld if necessary and proportional to one of the public goals set out in Article 30 (*ex Article 36*) or recognized by the Court in its *Cassis de Dijon* decision.¹⁵ This brought virtually any public regulation of the market under close scrutiny and promoted deregulation of the market at the national level. That can be seen as a negative impact of European economic integration on social rights resulting from the spill-over of market integration rules into national economic and social regulations. Free movement provisions were granted fundamental rights status and used to promote access to the national markets, which sometimes became confused with a general right of access to the market. The expansion of market integration rules impacted on other areas of the law relating to social concerns and not trade protectionism. This process of spill-over raises conflicts between the values of market integration and/or free markets and the values embodied in social rights and policies. As stated by Davies, for example, a question then arises on how the Court 'has balanced the competing policies behind the free movement provisions of the Treaty, on the one hand, and the national labour law provisions on the other'.¹⁶

This 'negative' impact on social rights has been limited by the approach followed by the Court in the review of national regulations. The fact that national regulations

¹² See E.J. Mestmäcker, 'On the Legitimacy of European Law' (1994) 58 *RechtsZ* 615, and E.-U. Petersmann, 'Proposals for a New Constitution of the European Union: Building-Blocks for a Constitutional Theory and Constitutional Law of the EU' (1995) 32 *CML Rev.* 1123.

¹³ Joined Cases C-267 and C-268/91, *Keck and Mithouard* [1993] ECR I-6097.

¹⁴ See Poiares Maduro, note 4 above, at 61-8.

¹⁵ Case 120/78, *Rewe-Zentral AG v. Bundes-Monopolverwaltung für Branntwein* (Cassis de Dijon) [1979] ECR 649. This extension of the list of public interest objectives that may justify *prima facie* invalid national measures under Community law is not exclusive of the free movement of goods and has also been established with regard to the free movement of persons or the principle of non-discrimination (Art. 12, *ex Art. 6* of the EC Treaty).

¹⁶ P. Davies, 'Market Integration and Social Policy in the Court of Justice' (1995) 24 *ILJ* 51.

were caught under the broad scope of Article 28 (*ex Article 30*), for example, did not establish an automatic violation of the free movement of goods. It would all depend on the test of necessity and proportionality applied by the Court in the review of those national rules. As mentioned above, such test has not been guided by concern about the limits to public intervention in the market but by an assessment of those rules in view of the majoritarian policy followed in the different EU Member States. The Court would normally strike down or uphold a national regulation depending on the regulatory policy followed in that regard in the majority of the Member States.¹⁷ In fact, there have not been many circumstances in which the Court has struck down what could be foreseen as a fundamental social right (in particular, if one takes the majority in the European polity as the yardstick of such fundamental social rights). The extent to which economic freedom has been promoted at the cost of social rights depends, in this respect, on whether a national or European perspective is taken. The Court has imposed limits on State regulation, not public regulation. Deregulation has occurred only if one takes as the relevant level of analysis the national state and not the European Union. The Court has not promoted negative integration at the lowest common denominator but it has equally not accepted the highest levels of social regulatory protection if not shared by a European majority.

This reading of the Court's case law on the Economic Constitution is equally supported by its decisions on the review of Community legislation with regard to economic fundamental rights derived from the constitutional rules and practices common to the Member States or international sources such as the European Convention on Human Rights (ECHR).¹⁸ The Court has recognized as fundamental rights protected in the Community legal order the right to property, the freedom to pursue a trade or business, and the freedom of economic activity,¹⁹ but it has also been quite careful in applying these rights in the context of the review of Community legislation. It has never, to my knowledge, struck down Council legislation for violation of such economic rights and freedoms.²⁰ In other words, the Court has been quite generous towards the general interests pursued by the Community which restrict economic freedom. Moreover, it considers that such economic freedoms 'are not absolute but must be viewed in relation to their social function'.²¹

As a preliminary conclusion, one can state that the 'negative' impact of the European Economic Constitution on social rights has been limited and a function of mar-

¹⁷ See Poiars Maduro, note 4 above, at 72-8.

¹⁸ For a deeper analysis of the case law of the Court in the area of fundamental rights see the contribution of Bruno de Witte to this vol.

¹⁹ See, for some recent examples of the Court of Justice and the Court of First Instance, Case C-44/94, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organizations* [1995] ECR I-3115; Case C-280/93, *Germany v. Council* [1994] ECR I-4973; Case T-521/93, *Atlanta AG and others v. European Commission* [1996] ECR II-2109; Cases C-248/95 and C-249/95, *SAM Schiffahrt und Stapf v. Bundesrepublik Deutschland* [1997] ECR I-1167.

²⁰ In the same sense, see the contribution of Bruno de Witte to this vol. See note 24 below for a recent and rare case of Council legislation partially struck down as violating the fundamental right to non-discrimination.

²¹ Case C-44/94, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organizations and Others* [1995] ECR I-3115, at para. 28. This reference to the limits imposed on these economic rights by the general interest or the social function of the protected rights and activities is present from the outset in the *Nold* and *Hauer* decisions: see Case 4/73, *Nold* [1974] ECR 491, at para. 14; Case 44/79, *Hauer* [1979] ECR 3727. See also the other cases referred to above.

ket integration and judicial harmonization of national social and regulatory policies, not the result of a neo-liberal conception of the European Economic Constitution by the Court of Justice. The European majoritarian perspective followed by the Court means that the deregulatory effects have occurred only at the national level. If one takes the European majority polity as the yardstick by which to judge the impact of free movement rules on regulation, then there has been hardly any deregulation as a consequence of the application of free movement provisions. However, the fact remains that the broad scope granted to some free movement rules has allowed a growing litigation challenging national regulations protecting social rights. The free movement of goods and the freedom to provide services have been used by national litigants to favour economic freedom and change social policies at the national level. Moreover, the fact that the European Constitution is mainly a result of the judicial development of the Treaty rules supported by litigation means that the European Constitution will be a result of representation and participation in such a judicial process.

II. SOCIAL RIGHTS IN THE COMMON MARKET

Market integration has also promoted the development of European social rights. However, the functional use of market integration rules to further social rights has been more limited than in the case of economic freedom. At the same time, the development of social rights appears to be prisoner of the values of market integration and not a consequence of a political conception of the social and economic protection deserved by any European citizen.

The most representative example of a social right enshrined in the Treaty is Article 141 (*ex Article 119* of the EC Treaty) that establishes 'the principle that men and women should receive equal pay for equal work'. The Court has interpreted this rule very broadly and has, in effect and in conjunction with Community secondary legislation, transformed it into a general principle of equality of treatment for men and women with regard to work.²² The Court has picked up a norm the social content of which was, in its original construction, instrumental to the aim of protecting equal conditions of competition, and raised it to the status of a true fundamental social right. This social right also benefits from a unique status in the context of fundamental rights protection in the European Union, since it applies horizontally (*i.e.* among private parties) and to purely national situations.²³

A more general principle of non-discrimination derived from the constitutional traditions common to the Member States is part of the EU legal order.²⁴ Such a

²² In some cases going even further than this. See the contribution of Catherine Barnard to this vol.

²³ With the exception of the free movement provisions mentioned above, fundamental rights in the EU legal order only apply, in principle, to the review of Community legislation. There are, however, substantial and very important cases in which they, in fact, may apply to national legislation (see the contribution of Bruno de Witte).

²⁴ For a recent and rare example of Council legislation partially struck down as violating such a principle of non-discrimination see Cases C-364/95 and C-365/95, *Firma T. Port GmbH v. Hauptzollamt Hamburg Jonas*, [1998] ECR I-1023.

principle, however, does not apply in the case of purely internal situations of the Member States in conformity with the status of fundamental rights protection in the EU legal order. European fundamental rights are not incorporated into national legal orders and apply only to the review of Community acts and legislation (with some important exceptions).²⁵ The recent Treaty of Amsterdam has inserted in the EC Treaty a general principle prohibiting discrimination on the basis of sex, race, ethnic origin, religion, beliefs, disabilities, age, or sexual orientation.²⁶ But such principle does not appear to have direct effect and is more an empowering clause for future EU action in this area.

Non-discrimination has been, in any case, a driving force behind some of the most important developments on the protection of social rights in the European Union. The prohibition of discrimination on the basis of nationality (Article 12, *ex* Article 6 of the EC Treaty) has been used by the Court to extend the protection conferred by social rights in a given Member State to nationals of any Member State in that State.²⁷ Also in this case, market integration, through the free movement of workers, has been functional to the development of an important body of decisions extending social rights granted in one Member State to any worker in that State who is a national of another Member State. The Court has required the abolition of discrimination based on nationality among workers in one Member State with regard to many issues apart from those mentioned in Article 39 (*ex* Article 48): 'employment, remuneration, and other conditions of work and employment'. The Court included in the prohibition of discrimination related to the free movement of workers such things as a right to education or vocational training, or rights not to be discriminated against with regard to social security protection or family rights. This has been facilitated by the direct effect granted to the principle of non-discrimination on the basis of nationality established in Article 12 (*ex* Article 6 of the EC Treaty). Such principle is only effective within the scope of application of the Treaty but, once a certain social right can be conceived as instrumental to the protection of the free movement of workers, such right must be applied in a non-discriminatory manner, even though it may not directly concern 'employment, remuneration and other conditions of employment'. Once someone comes within the scope of Community law by virtue of the free movement of workers, the protection which is granted to him or her against non-discrimination is broader than would result simply from Article 39 (*ex* Article 48).

This process culminated in the recent *Martinez Sala* decision where the Court appears to confer almost absolute protection against discrimination by a Member State to a national of another Member State lawfully resident in that State. So long as that is the case, a national of any Member State in another Member State is

²⁵ See note 23 above.

²⁶ Art. 6A (now Art. 13) of the Treaty of Amsterdam, which is not yet in force.

²⁷ In the words of Carlos Ball: '[t]he Court of Justice has interpreted Community Law provisions that provide individuals with justiciable economic rights in a way that prohibits Member States from treating their own citizens better than the citizens from other Member States working within their borders. This has contributed significantly to the formation of a European social citizenship: 'The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community's Legal Order' (1996) 37 *Harv. Int'l LJ* 314.

granted the same social rights and protection accorded by that State to its own nationals. The Court stated:

Article 8(2) of the Treaty attaches to the status of citizen of the Union rights and duties laid down by the Treaty, including the right, laid down in Article 6 of the Treaty, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty.

It follows that a citizen of the European Union ... lawfully resident in the territory of the host Member State, can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law, including the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State.

Since the unequal treatment in question thus comes within the scope of application of the Treaty, it cannot be considered to be justified: it is discrimination directly based on the appellant's nationality and, in any event, nothing to justify such unequal treatment has been put before the Court.²⁸

The limit posed by the condition that the 'unequal treatment in question comes within the scope of application of the Treaty'²⁹ is much less significant than one could initially think, as the case in question confirms. In fact, it is difficult to conceive of any area which is still *ratione materiae* outside the scope of Community law,³⁰ much less when any unequal treatment among nationals of different Member States in a Member State can be said to restrict the free movement of persons. In this area, the scope of application *ratione materiae* of Community law will basically depend on its scope of application *ratione personae*. In other words, it will depend on the extent to which all European citizens are given a general right of free movement. If they are granted such general right, the logical consequence will be that they should not be discriminated against independently of the State in which they choose to live.

The limits imposed on the free movement of persons have however, been one of the main reasons for the secondary position of social rights with regard to economic freedom in the context of market integration. The Court has long interpreted the rules regarding the free movement of persons more strictly than those on the free movement of goods and (to a lesser extent) the freedom to provide services. As we have seen, in the field of the free movement of goods (and, to a more limited extent, services), the Court has for long considered as restrictions to trade national regulations that do not discriminate against imports, but may, nevertheless, affect trade by affecting market access in general. In this way, many national regulations limiting economic freedom (including regulations protecting social rights) have been challenged under Community rules since the limits to economic freedom are also conceived as limits to free trade and market access. The same broad scope has not been

²⁸ Case C-85/96, *Martinez Sala v. Freistaat Bayern*, judgment of 12 May 1998, at paras. 62-64.

²⁹ The Court establishes two conditions: that the facts of the case must fall within the scope *ratione materiae* and *ratione personae* of the Treaty. The latter is linked to the interpretation to be given by the Court to the general right of free movement of persons established in Art. 8A (now Art. 17) which the Court considered unnecessary to do in this case.

³⁰ It is not necessary for specific Community rules to address an issue for it to come within its scope of application. Otherwise, the Court would not need independently to apply Art. 6 (now Art. 12).

given to the free movement of workers, which could be used to challenge national regulations restricting certain social rights. In fact, in the same way that it is possible to argue that regulation of the market creates barriers to trade, it would be possible to argue that workers will need a minimal degree of protection effectively to exercise free movement. For example, it could be argued that a prohibition, in a Member State, on striking or becoming a Union member could deter workers from other Member States where those rights existed from moving to that Member State.³¹ It may seem an argument quite distant from the original wording and intent of the Treaty rules on the free movement of workers, but it is in no way different from the arguments in favour of deregulation which have been accepted in the context of the free movement of goods.³²

The broader scope granted to free movement of goods in comparison to the free movement of workers has favoured economic freedom litigation against social rights litigation. However, the recent case law of the Court signals a shift in the judicial activism of the Court which favours a limitation of the scope of the application of the free movement of goods and a broader application of the free movement of persons. The limits set in *Keck* to challenges, under Article 28 (*ex* Article 30), to national rules the effect of which is to limit the commercial freedom of traders³³ will reduce the impact of the free movement of goods on national legislation protecting social rights.

Instead, a broader use of the free movement of workers may now be available to promote social rights in the European common market. The recent *Bosman* decision is a good example, supporting a right to work and the freedom of workers to choose their work and employment.³⁴ This decision prohibited rules that, albeit not discriminating against workers of other Member States, reduced their free movement by imposing limits on their freedom to leave their employer and to choose between different employment contracts. The consequence of the recent expansion of the free movement of persons provisions beyond the simple prohibition of discrimination on

³¹ Note that the two examples of social rights given do not require any type of legislative action (as normally happens with social rights of a programmatic character) and could be established simply by judicial recognition.

³² It is sufficient to think of the arguments, regarding Art. 28 (*ex* Art. 30), used to challenge national regulations which prohibited shops from opening on Sundays, prevented certain marketing and advertising methods, or imposed the use of recyclable bottles.

³³ Joined Cases C-267 and C-268/91, *Keck and Mithouard* [1993] ECR I-6097. In this decision, the Court restricted the scope of application of Art. 30 (now Art. 28) with regard to national measures regulating 'selling arrangements' which do not discriminate against imports (no longer considered as capable of restricting trade in the context of the free movement of goods). The traditional interpretation of Art. 30 (now Art. 28) is, however, maintained with regard to national measures on product characteristics. On *Keck* see: S. Weatherhill, 'After *Keck*: Some Thoughts on How to Clarify the Clarification' (1996) 33 *CML Rev.* 885; L. Gormley, 'Two Years After *Keck*' (1996) 19 *Fordham Int'l. L.J.* 1; J. Mattera, 'De l'arrêt "Dassonville" à l'arrêt *Keck*: l'obscurité clarté d'une jurisprudence riche en principes novateurs et en contradictions' [1994] *RMUE* 117; D. Chalmers, 'Repackaging the Internal Market—The Ramifications of the *Keck* Judgement' (1994) 19 *EL Rev.* 385; M. Lopez Escudero, 'La jurisprudencia *Keck* y *Mithouard*: Una Revisión del Concepto de Medida de Efecto Equivalente' [1994] *Revista de Instituciones Europeas* 379; N. Bernard, 'Discrimination and Free Movement in EC Law' (1996) 45 *JCLQ* 82; J. Higgins, 'The Free Movement of Goods Since *Keck*' (1997) 6 *IJEL*; and M. Poiares Maduro, 'Keck: The End? The Beginning of the End? Or Just the End of the Beginning?' (1994) 1 *IJEL* 30.

³⁴ Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman* [1995] ECR I-4921.

the basis of nationality may be the recognition of a set of European social rights required for effective protection of the free movement of persons.³⁵ Developments in this sense will depend much on the sophistication and capacity of social actors to raise litigation combining Community law arguments with fundamental social rights.³⁶

The litigation that has helped to 'mould' the European Constitution has been based on market integration rules (notably free movement of goods) and dominated by some actors (notably companies that often appear as repeated litigants). Due to the character of those rules and to the information and organization costs involved in participating in the Community judicial process, it has been mainly companies which have started the discovery process of Community law and the European Constitution. The European Constitution (and its approach to fundamental rights) is a product of judicial construction fuelled by litigation arising from certain actors and free movement provisions. In particular, the 'preference' given to the free movement of goods has favoured litigation pushing for economic freedom. This pattern is reinforced by the character of the litigants who make use of Community rules. In the same way that formal constitutions are a product of representation and participation in the political process, the European Constitution is, to a large extent, a product of representation and participation in the judicial process.

The current shift in the Court's case law which restricts the scope of application of the free movement of goods and favours an extended application of the free movement of persons (including the free movement of workers) may help to redefine the actors and the interests promoted by litigation related to market integration. This may have important consequences on the balance between economic freedom and social rights in the European Economic Constitution.³⁷ It will be important for social rights to be inserted into the discourse of market integration and the European Economic Constitution. An important step will be the inclusion of social rights in the jurisprudential catalogue of social rights developed by the Court to be applied to Community legislation and, in some cases, national legislation (notably, whenever a national rule restricts one of the free movement rules).³⁸

There is a hard core of social rights which have tentatively been developed by the Court in different circumstances and under different doctrines. We have already highlighted the development of the right not to be discriminated against, equality between men and women, free movement of persons (with some limits to be clarified³⁹), the right to work, and the right freely to choose a job and employment. Other rights (such as those regarding worker participation) have been affirmed by the Court, but

³⁵ See section III A below.

³⁶ That has not been the case hitherto. In this sense, see E. Szyszczak, 'Future Directions in European Union Social Policy Law' (1995) 24 *ILJ* 31.

³⁷ However, it must be stressed that the shift towards a more restrictive interpretation of Art. 28 (*ex* Art. 30) (prohibiting mainly discriminatory restrictions on trade) will not prevent the use of the free movement of goods and services provisions to challenge national social rights. As mentioned by Davies (note 16 above, at 51), 'it is possible to construct arguments whereby protective social rules in a Member State are said to be directly or, more likely, indirectly discriminatory against imports' (and, it must be remembered, in some cases it will continue to be possible to challenge national rules restricting economic freedom and market access even where such rules do not discriminate against imports).

³⁸ See the contribution of Bruno de Witte to this vol. for a thorough explanation of the cases in which EU fundamental rights are applied by the Court of Justice to the review of national legislation.

³⁹ See section III A below.

following Community legislation⁴⁰ and without the recognition of a constitutional and fundamental rights status. The European courts have also referred to general sources of social rights protection, such as the European and Community Social Charters.⁴¹ Such references have, however, been limited, and rarely has the Court of Justice affirmed, as general principles of Community law, some fundamental social rights, contrary to what has happened with regard to the rights to property and economic activity which have frequently been applied in the review of Community acts and legislation.⁴² On the other hand, the Court of First Instance, in the *Comité Central d'Entreprise de la Société Générale des Grands Source v. Commission* decision,⁴³ was unclear about the status as fundamental rights of the rights of workers to the preservation of their jobs and the right of their representatives to be consulted and informed. The Court restrictively interpreted the rights of workers to be heard and informed by the Commission in the context of a decision declaring a concentration compatible with the common market and did not deal with the argument, advanced by the employees' representative organizations, that some fundamental social rights of the Community legal order were at stake (the rights of workers to the preservation of their jobs and the right of their representatives to be consulted and informed).

It is this uncertainty regarding the status and catalogue of fundamental social rights in the EU legal order that has led to calls for the introduction of a list of fundamental social rights in the Treaties.⁴⁴ This is reflected in the proposals of the *Comité de Sages* responsible for the report on a Europe of Civic and Social Rights prepared for the IGC leading to the Amsterdam Treaty. The Committee argued that it was necessary to provide the Court with a stronger legal basis in the Treaties empowering it to review Community legislation (and national legislation within the scope of Community law)⁴⁵ under the criteria of fundamental social rights. To this end, the Committee used a classical distinction in the realm of fundamental social rights between rights immediately effective and judicially enforceable and rights of a programmatic character expressing goals which are to be attained on a gradual basis.⁴⁶ The Committee proposed that both types of rights should be recognized and listed in the Treaties, but, at the first stage, only the first were to be given judicial protection. This first type of rights would constitute a hard core of social rights and were understood by the Committee as being shared by all Member States. They included:

⁴⁰ This is better developed and explained in the contribution of Silvana Sciarra to this vol.

⁴¹ See, e.g., Case C-246/96, *Magorrian and Cunningham v. Eastern Health and Social Services Board and Department of Health and Social Services* [1997] ECR I-7153; Case C-191/94, *AGF Belgium v. European Economic Committee* [1996] ECR I-1859; Case T-135/96, *UEAPME v. Council*, judgment of 17 June 1998. See also Szyszczak, note 36 above, at 31 and the references therein.

⁴² Carlos Ball notes 'the relative ineffectiveness of the social policy provisions found in the Treaty and in other sources of primary Community law': note 27 above, at 316.

⁴³ Case T-96/92, [1995] ECR II-1727.

⁴⁴ See B. Hepple, 'Social Values and European Law' (1995) 48 *Current Legal Problems* 39; R. Blain, B. Hepple, and S. Sciarra, *Fundamental Social Rights: Proposals for the European Union* (1996). See also the Molitor Group Report, section on labour law, proposal 1, *Agence Europe Documents* No. 1947 (4 Aug. 1993).

⁴⁵ Thus, the degree of incorporation of EU fundamental rights into national legal orders would not be changed.

⁴⁶ European Commission, *For a Europe of Civic and Social Rights—Report of the Comité des Sages* (1996), 17–18. There is an old constitutional debate on the judicial protection of programmatic social rights. The Committee preferred not to raise that discussion at this stage in the European Union.

equality under the law; prohibition of any form of discrimination; equality between men and women; free movement within the Union; freedom to choose a profession and an educational system within the Union; freedom of association and the right to defend one's rights; and the rights to collective action and collective bargaining.⁴⁷ The Treaty of Amsterdam, however, has not included such list of rights. The steps taken were smaller than the Committee proposed. The Social Chapter was inserted into the Treaties and Article 136 (*ex Article 117*) in the title on social policy now includes a reference to 'fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers'. Contrary to the Committee's proposals no catalogue of fundamental social rights was inserted, neither were such rights given the same status as other fundamental rights whose respect by the Union is imposed immediately in Article 6 (*ex Article F* of the TEU). Moreover, the reference in Article 117 appears to share the programmatic character normally attributed to this norm.

Article 117 is, perhaps, the Treaty provision that most embodies and promotes social values. Even before the Amsterdam Treaty it stated: 'Member-States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained'. The Court of Justice has considered that such a provision 'is essentially in the nature of a programme'.⁴⁸ The Court has, in consequence, denied the application of such rule to the review of national regulation that would, arguably, reduce the level of social protection.⁴⁹ However, the Court has also stated:

The fact that the objectives of social policy laid down in Article 117 are in the nature of a programme does not mean that they are deprived of any legal effect. They constitute an important aid, in particular for the interpretation of other provisions of the Treaty and of secondary legislation in the social field. The attainment of those objectives must nevertheless be the result of a social policy which must be defined by the competent authorities.⁵⁰

This careful application of the social objectives enshrined in Article 117 coincides with the approach normally followed by national constitutional courts in the application of social rights of programmatic nature. Yet it is important that the fundamental social rights to which Article 117 now refers will not all be considered as dependent upon policy or legislative implementation. The right to collective bargaining, the freedom of association, the right to collective action, and the other rights of the first type mentioned in the report of the *Comité des Sages* are either expressly protected by other Treaty provisions or should be considered as part of the 'constitutional traditions common to the Member States'. Though certainty and coherence could have been gained by the introduction of a catalogue of fundamental rights into the Treaties the difficulty of reaching an agreement on a specific catalogue

⁴⁷ The second type of rights included the right to education, the right to work, the right to social security, etc.

⁴⁸ See Case 149/77, *Defrenne v. Sabena* [1978] ECR 1365; Case 170/84, *Bilka-Kaufhaus v. Weber von Hartz* [1986] ECR 1607; Case 126/86, *Gimenez Zaera v. INSS* [1986] ECR 2261, at para. 13.

⁴⁹ See *Gimenez Zaera v. INSS*, *ibid.*

⁵⁰ *Ibid.*, at para. 14.

has always prevented that from happening. This should not exclude from the concept of fundamental rights which has been developed by the Court a hard core of fundamental social rights which are either part of the common constitutional traditions of the Member States and/or referred to in other EU or international sources.⁵¹

Developments in the area of fundamental social rights protection will continue to be, to a large extent, dependent upon the judicial 'construction' of the European Economic Constitution. There are two main steps to be taken in this area: first, to free the fundamental rights discourse from the exclusive logic of market integration; secondly, to alter the patterns of litigation which have moulded the European Economic Constitution.

Social rights in the common market have been developed as a function of market integration, not as an element of European citizenship. This is visible in the conception of one of the most important social rights granted by European integration: the free movement of persons. Although the Court has extended the protection granted by Community law to students or job-seekers, there has been no general right of free movement of persons granted with direct effect.⁵² The free movement of persons has been developed as a function of economic efficiency: the intent is an optimal allocation of labour under the mechanisms generated by market integration. There is no free movement of persons conceived as a right to choose between different models of life and regulatory regimes (including social protection). The potential that European integration has to grant to individuals a choice between different polities with different choices regarding efficiency, redistribution, and social protection has not yet been promoted in the European Union. Persons can move only as market agents: workers, self-employed persons, and companies. Everson has coined the form of citizenship arising from these rights as 'market citizenship'.⁵³ And, even in this capacity, there are many restrictions remaining as a result of the conditions upon which its practical implementation depends. In the main, contrary to the other areas of market integration, Community legislation regarding the free movement of persons and (in some cases) the rights of workers is still subject to the requirement of unanimous decision-making.⁵⁴

Community legislation in the area of the free movement of persons should be enhanced by being subject to the same decision-making process that applies in the

⁵¹ Such as the Community Charter of Fundamental Social Rights of Workers. See, for a recent international example, including some of the rights which it has been argued constitute fundamental social rights: the ILO Declaration on Fundamental Principles and Rights at Work, approved at the 86th Session, Geneva, June 1998. Available at <http://www.ilo.org/public/english/10ilc/ilc86/com-dxt.htm>.

⁵² Much will depend on the reading to be made of Art. 8a (now Art. 18) introduced by the Maastricht Treaty that establishes that 'every citizen of the Union shall have the right to move and reside freely within the territory of Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'. Of importance will also be the new title on free movement of persons, asylum, and immigration introduced by the Amsterdam Treaty.

⁵³ M. Everson, 'The Legacy of Market Citizen', in J. Shaw and G. More (eds.) *New Legal Dynamics of the European Union* (1995), 73.

⁵⁴ See Arts. 100A(2), 118, and 118A (the latter provisions will change after the entry into force of the Amsterdam Treaty, when they will become Arts. 95(2), 137, and 138 but several areas regarding labour and social law will continue to be subject to unanimity). The Court has interpreted the legal bases on social rights in a manner which favoured Community legislation under majority decision-making, therefore enhancing social rights legislation. See Case C-84/94, *United Kingdom v. Council* [1996] ECR I-5755. For a deeper analysis of European social policy see the contribution of Silvana Sciarra to this vol.

other areas of the creation of an internal market (majority decision-making). This would require a Treaty revision unlikely in the near future. In the meanwhile, the Court should continue the recent extension of the scope of the rules on the free movement of persons. The shift in activism in the Court's case law from the area of the free movement of goods to the area of the free movement of persons is perfectly logical if one has regard to the available alternatives to judicial intervention in those areas of market integration. Market integration in the area of the free movement of goods can, since the Single Act, be promoted through Community harmonizing legislation (which is subject to majority decision-making). The same does not happen in the area of the free movement of persons (still subject to the requirement of unanimity) which demands greater intervention by the Court to promote market integration in this area.

The Court of Justice should also focus its attention on the concept of European citizenship in developing fundamental rights. It should start by clarifying the status of the general right of free movement of persons introduced by the Maastricht Treaty.⁵⁵ In the *Martinez Sala* decision the Court did not consider it necessary to clarify the status of Article 8(1) (now Article 18(1)) and its direct effect (which was argued by the Commission).⁵⁶ For reasons which I will give more fully below, I am in favour of direct effect being granted to such provisions. Moreover, it would be particularly important for the rights arising from European citizenship to be interpreted as fundamental rights, restrictions on which should be interpreted in a limited and exceptional manner.

The process of economic constitutional litigation has remained prisoner to the constitutional limits of the Treaty and the formal and functional interpretation of market integration rules. The gap between negative and positive integration has generated spill-over effects favouring economic freedom against social rights at the national level. The recent developments in the case law of the European Court of Justice may help to balance economic litigation arising from market integration and its impact on the European Economic Constitution. They must be supported by a fundamental rights discourse which is no longer functionally attached to market integration. At the same time, the relationship between the fundamental rights arising from free movement rules and the classical economical and social fundamental rights has to be clarified. Moreover, the European Court of Justice must take into consideration broader social and economic values in the application of those rules. On the one hand, it must assume that conflicts will inevitably arise between the broad scope granted to the free movement rules and the economic and social values embodied in national regulations that, albeit not discriminating against foreign nationals or products, have an effect on free trade. In the same manner in which national rules restricting free movement should conform with fundamental rights, so too should the application of the free movement rules be made in light of fundamental rights, including validating otherwise invalid restrictions to trade.⁵⁷ On the other

⁵⁵ Art. 8a (now Art. 18).

⁵⁶ Case C-85/96, *Martinez Sala v. Freistaat Bayern*, judgment of 12 May 1998, at paras. 58-59.

⁵⁷ In this regard, it may be appropriate to accept that economic integration must still allow some sort of discrimination in favour of weaker social and economic groups. States' discrimination in favour of

hand, the Court should elevate the assessment of the reasonableness of public intervention in the market from market integration rules to the realm of classical social and economic fundamental rights. In this respect, the time may be right for the Court to develop a more sophisticated approach to the review of Community legislation under economic and social fundamental rights. The growing importance of majoritarian decision-making in the EU legislative process may require a higher degree of activism with regard to Community legislation.

Much of what has been argued for also depends on a clarification of the goals to be pursued by European integration, in particular the balance between efficiency and distributive justice. Equally or even more important are the choices and discourses between the different national and EU institutions entrusted with the pursuit of such goals. Accepting that the European Constitution and its fundamental rights policy will continue to be, to a large extent, the result of a discursive process between different EU and national actors, it is important to stress the need to discuss such values and institutions and to reshape the European constitutional discourse so as to broaden its basis of participation and representation and break the legal self-referential character that has prevented the introduction of political debate in order to safeguard the process of legal integration.

III. THE EUROPEAN SOCIAL DEFICIT?—MARKET INTEGRATION, EFFICIENCY, AND DISTRIBUTIVE JUSTICE

The social rights deficit *vis-à-vis* economic freedom in European integration is more a story of what has not been than what has been. As a result either of legal constraints or the constraints of economic competition, European economic integration (in parallel with global economic integration) has generated pressures towards deregulation and challenged social standards and welfare. This has not been (at least totally) compensated for by social policies arising at the level of the European Union. It is easier to promote integration by reducing state legislation interfering with economic activities (negative integration) than by creating common standards and regulatory frameworks for economic agents (positive integration). The latter requires an agreement on social policies and rights normally expressed in the form of legislation, and difficult to achieve in the EU context of different national interests and ideological standpoints. The problems and successes in developing a European social policy are dealt with in another paper.⁵⁸ Here, I will be concerned with the balance between economic freedom and social rights that arises from the balance between negative in-

these groups is the consequence of a higher degree of solidarity that still supports national political communities. However, the expansion of the logic of market integration to all economic and social regulations has hindered such forms of solidarity, since national exceptions on social-economic grounds are usually seen as unacceptable forms of protectionism. The introduction of social rights into the EU legal discourse requires the authorization of such types of discrimination. The safeguarding of some social rights is dependent on permission to discriminate in favour of a certain group of nationals. Social rights should be the measurement and criteria of validity of this sort of discrimination.

⁵⁸ See the contribution of Silvana Sciarra to this vol.

tegration and positive integration and the institutional choices behind such mechanisms of decision-making.

Promotion of economic integration through free trade is understood to increase efficiency and wealth maximization. However, many fear that such gains may occur at the cost of weaker social groups or are not fairly distributed between all members of society. Underlying this discussion is the old conflict between efficiency and distributive justice or, in other words, between promoting competitiveness and wealth maximization and securing a certain degree of social protection to all members of the community. Among those who defend the welfare state, European integration is seen in different perspectives. For some, the European Union and its common market are just one more (albeit considerable) step in a current trend that tends to favour global economic competition and efficiency against the solidarity and distributive justice expressed in social rights and policies. For others, the European Union is an attempt to answer to those current global market competition trends by creating a new forum in which protective social rights and policies can be agreed and enforced. There are also those who highlight the freedom and efficiency gains of economic integration and see in the limits that such process imposes on public powers one of its greatest advantages. In this light, the political programme of European integration is the promotion of efficiency and the allocation of resources through free market transactions. The market will be the most efficient and, in many cases, the more just allocator of resources.

The balance between economic freedom and social rights in the European Union will be a consequence both of the model and ideal of European integration adopted and, in general, our preferences with regard to efficiency and distributive justice. There are two basic dilemmas that intersect in this issue: the first concerns the choice between wealth maximization and distributive justice; the second concerns whether we favour a model of economic integration or a model of political integration for Europe.

The impact of Community law on national social rights, through negative market integration, has generally been seen as 'negative' by social lawyers because it restricted the capacity of States to enact social provisions. Community law has been understood as favouring economic freedom against social rights. However, the opposite has normally occurred when Community law is addressed by social lawyers from the perspective of positive market integration in the form of social legislation enacted at the EU level. This is so, even though the competence of the EU on social issues has generally been limited and moved slowly. Community law has been seen, in particular among labour lawyers, as a source of the defence and promotion of social policies against predominant deregulatory ideologies at the national level. The ideology of deregulation is not uniform among the Member States and labour lawyers hope to mobilize the more 'social' States to push, at the European level, for social rights and policies that they are not able to establish at the national level. At the same time, the arguments in favour of deregulation often stress the need to be competitive in the European market, which requires States with more protective social rights to reduce their degree of protection. Thus, labour lawyers try to reinstate the primacy of social rights over the market through common regulations at the European level.

There are two strategies of European economic integration which lead to different conceptions of the balance between economic freedom and social rights: negative integration and positive integration. They reflect the broader debate between global economic competition and the protection of the welfare state: the viewpoint of negative integration stresses the function of European market integration in promoting efficiency through economic competition between the States; the viewpoint of positive integration stresses the value of European integration as a defence against such deregulated global economic competition and establishes a common level playing field and a hard core of social rights. Things are made even more complex in the European Union context by the introduction of the debate between economic integration and political integration. For those who argue in favour of a model of European integration restricted to economic integration, the goal is to maximize wealth (efficiency) through free trade and market integration. Social rights may be required, but only as a form of securing a level playing field and fair competition. For those who argue in favour of a model of political integration, wealth maximization has to be complemented by some criterion of solidarity and distributive justice in the new political community. Social rights will be a requirement independent of fair competition and arising from membership of that political community.

It is common to associate efficiency with resource allocation by the market and distributive justice with the establishment of social rights by the political process. However, that is not always the case, as a deeper analysis of those institutions would show.⁵⁹ In effect, market decisions may only represent the interests of some of those affected by them and that fact may produce inefficient decisions (since not all costs and benefits are taken into account). The problem that economists characterize as externality can also be conceived of as a problem of lack of representation of some of the affected interests in the decision-making institution (the market). Social rights can be forms of introducing that representation and enhancing efficiency.

The transfer of decision-making from the market to the political process can be advocated in two situations: either because there are market imperfections (such as those relating to externalities, transaction costs, or information costs); or because it is believed that distributive justice requires the replacement of the market efficient allocation of resources for a more just and equitable distribution of resources made by the political process, which takes into account interests which are not directly affected by the market transaction (the typical example would be redistribution through taxation). However, decision-making in the political process is also, to a large extent, a result of representation and participation in that process and is also subject to institutional malfunctions. In some cases, for example, the political process may be captured by interest groups, and what is presented as the protection of a social right aiming at a fair distribution of resources may be no more than the reinforcement of the interests of a few, with high costs both in terms of efficiency and distributive justice.

The balance between social rights and economic freedom in the European Union requires an analysis of the institutions of the market (responsible for negative inte-

⁵⁹ See Poiares Maduro, note 4 above, at 103–49. See also N. Komesar, *Imperfect Alternatives—Choosing Institutions in Law, Economics and Public Policy* (1994).

gration) and the EU political process (responsible for positive integration). It also requires a debate about the goals of European integration, notably the balance between efficiency and distributive justice. This cannot be undertaken within the limits of this chapter, but some suggestions will be advanced regarding the role and future of fundamental social rights in the European Union, taking into account goals of efficiency and distributive justice.

A. Social Rights and an Efficient Common Market

Market integration generates competition between the national economic and legal systems subject to the goal of efficiency. Even if normatively it is not imposed on States in order to lower their social standards, economic competition opens the national legal systems to competition and efficiency criteria, *de facto* subjecting normative ideals to economic reasoning. This also explains why economic freedom is enhanced without necessarily requiring the incorporation of economic fundamental freedoms into national legal systems.

The consequences of this process are deregulation at the national level and a reduction in political control over the economic sphere. The argument in favour of a European social policy attempts to reintroduce such political control over the economic sphere at the European Union level. The European Union would become the relevant level for the establishment and protection of social rights. Economic competition in the European Union should occur within a legal framework that includes a set of social rights. Those arguing against the development of a European social policy and European social rights prefer to subject those policies and rights to market competition itself. There is nothing new about this. When the EC Treaty was drafted there were two divergent opinions on whether the prior harmonization of social policy was necessary. One side (coinciding with French interests, France having the most protective social legislation), argued in favour of European legislative harmonization of social policies. The other side (namely Germany) opposed such harmonization, preferring to 'rely on normal competitive forces to achieve it in the long run'.⁶⁰ Article 141 (*ex Article 119*), requiring equal pay for men and women, is a result of the compromise reached in the Treaty.

In reality, both systems of managing economic and regulatory competition in integrated markets (negative and positive integration) generate harmonization of social rights and policies. The difference lies in the institutional framework through which such harmonization arises and its impact on the final outcome of harmonization. As stated by Trubek:

Once economic interdependence reaches a certain point, and borders no longer serve as major barriers to economic movement, there is a pressure towards uniformity in economic policies. These pressures may come about to ensure fair competition and the smooth functioning of economic enterprises that span national borders ('level playing field'), or they may be the result of 'regulatory competition' among sovereignties in a unified space.⁶¹

⁶⁰ E. Haas, *The Uniting of Europe* (1968), 516.

⁶¹ D. Trubek, *Social Justice 'After' Globalization—The Case of Social Europe*, typescript (Nov. 1996), 5.

The question we face in the context of the European Union is when or with regard to which issues we should accept competition between the different States with regard to social rights and policies or when we should establish common rights and policies to which such competition should conform.

Negative integration generates competition between States, but at the same time allows States to maintain their own policies (at least formally). On the contrary, common social rights are dependent on normative statements which need to be incorporated into the national legal systems affecting what are now considered purely internal situations. Thus, they require an extension of the reach of EU law in national legal orders, a process of complex legitimacy and effectiveness. For some, to impose common social standards will reduce the gains of efficiency arising from competition between States and will deprive the different States (and their citizens) from autonomy in deciding their preferred social model. For others, competition among States will lead to harmonization at the lowest common social denominator resulting in a 'race to the bottom'.

Those who focus on the European Union as an area of free trade and a common market envisage the Union as an instrument of efficiency and wealth maximization. The goal is to increase societal net gain through market integration without concerns about how such wealth is distributed within the Union. Many believe that the best way of achieving market integration and maximizing wealth is through the mutual recognition of national rules and the almost absolute free movement of goods, services, and factors of production. This will generate a process of regulatory competition subject to market choice. Companies and persons will move to where the regulatory environment is more favourable to their objectives (less regulation, lower taxes, more jobs, better social protection, etc.). Consumers could choose goods and services conforming to different national regulations and, in this way, those regulations will also be competing in the market. There are different economic analyses praising or criticizing such strategy of market integration and regulatory competition. Some stress the efficiency gains, others the risks of a 'race to the bottom'. This discussion will not be reviewed in depth here. Instead, I would like to call attention to some of the assumptions underlying this model and the role to be played by social rights in that context. Assuming we want to maximize wealth and efficiency, what is the role of social rights in a system in which the allocation of resources is left to the market?

There is much that is captivating in the notion of competition among States, but such a model subjects the different States' balances between social values and economic freedoms to market choice. This raises a key question: if we have social regulation and social rights which are normatively imposed on the market it is precisely because we do not trust the market. Why, then, should we submit that regulation to a decision of the market? Why should those that regulate the market trust in the market to judge that regulation? The answer is that the market which judges regulations is not the same as the regulated market. The market to which we are referring in this case is a political and economic market participation in which must be granted to all those affected by the regulation/deregulation choice (including labour, the unemployed; companies etc.). A market operating at its best will be a market in which de-

cisions are the result of voluntary transactions in which all those affected participate, and in which all costs and benefits and alternative transactions are taken into account. Such a market would be an ideal decision-maker from the point of view of resource allocation efficiency. This is not incompatible with social rights and social justice. An ideal decision in terms of resource allocation efficiency must, for example, take into account the labour costs of the relocation of a company production site or the costs involved in the insecurity of more flexible labour legislation. Moreover, resource allocation efficiency will tend to favour social justice: this is so because, contrary to what is sometimes assumed, the measurement of efficiency does not value in the same manner the wealth of high-income and low-income people. The criteria depend on how much each person will value the protection of a certain interest or the use of a certain resource. If we were to have only one Euro available it would be more efficient to allocate it to a low-income person than to a high-income person (that latter values a Euro less than the former). What makes people suspicious about resource allocation efficiency are two things: first, it is normally used to legitimize a decision that increases efficiency, although there could be alternatives that would promote a higher degree of efficiency; secondly, resource allocation efficiency is normally implemented through a narrow conception of the market conceived as the economic voluntary transactions market. In this market, people express their preferences by how much they are able to pay and, in consequence, this market tends to favour those with a higher income. However, in the conception of the market which supports competition among States generated by negative integration there are other forms of participation in the market beyond voluntary market transactions. The market responsible for choices in a competitive model is much more than the sum of voluntary market transactions. It also involves such things as 'voting with the feet', political votes, lobbying, or strikes.

Much of the economic jargon used in this area is about democratic questions and requires social rights. One may speak in this regard of the options of voice and exit,⁶² and adjust these concepts to the different forms of expression people may have, either within the jurisdiction to which they are subject or by actually leaving that jurisdiction in favour of another jurisdiction. *Voice* refers to situations in which choices are made or stances taken which express a preference for a certain regulation but do not involve leaving the jurisdiction (this includes voting and lobbying, market transactions within that jurisdiction, but also, for example, worker participation and strikes). *Exit* refers to situations in which preferences for a certain regulation over another are expressed by moving to a different jurisdiction (and thus the relocation of factors of production but also consumers, taxpayers, and unemployed people).

⁶² These concepts have been crafted by A. Hirschman in his well-known book, *Exit, Voice and Loyalty—Responses to Decline in Firms, Organizations and States* (1970). For two different examples of the use of these concepts see T.R. Dye, *American Federalism*, No. 102, at 17 and Weiler, 'The Transformation of Europe', note 3 above, at 2411. My use of these concepts, however, does not fully coincide with that of these authors or with the original definition given by Hirschman. In particular, I include all market transactions within a jurisdiction (e.g. both buying a product or stopping buying it) in the domain of voice.

When the efficiency of the market is assessed under the present constitutional analysis in order to choose the 'best' regulation, the possibilities of *exit* and *voice* in the market and in the political process should be taken into account for all the different interests affected by the regulation. In this respect, the system requires a set of social rights that can be said to guarantee participation and representation in market decisions and, by internalizing costs which tend to be ignored in those decisions, increase efficiency. Those social rights are related to forms of voice and exit in the market.

One of the first requirements of an effective system of regulatory competition among States is that of mobility. This is required not only for companies, capital, or workers but also for all those who are affected by the regulations and wish to express their preferences by choosing a certain jurisdiction in which to live. In the European Union, free movement of persons has been limited to workers or self-employed persons, and, even within these categories, it has been subject to many limits arising from national legislation. The greater development of the free movement rules relating to goods, services, companies, and capital means that those associated with the promotion of such rules are much more effective in expressing their preference or opposition to a certain social regulation. Workers, self-employed, and unemployed persons have few opportunities to choose between different jurisdictions with different social regulations. Thus, the results of competition between social regulations will tend to reflect the higher participation (through voice and exit) of companies and capital. An efficient and democratic process of competition between national regulations requires that free movement of persons be fully implemented and given equal status to that of the other free movement rules.

There are or may be other problems of representation in the market. Even among those that are able to move, not all have the same capacity for mobility: capital, for example, normally has much more mobility than labour. The same can be said of *voice*, where not all have the same opportunities: unemployed people have much less voice than unionized labour or organized capital, for example. Social rights will have an important role to play in this regard. Social rights of participation and collective action should constitute common ground on which the competitive process may take place. This system further requires forms of participation within some of these collective actors' decision-making. Thus, company decisions on where to move should allow for some sort of participation by the workers affected by that decision.

Free movement of persons and rights of participation and representation such as the freedom of association, the right to collective bargaining, and the right to collective action should be considered as instrumental to a fully functioning integrated market which can increase efficiency and wealth maximization. The argument in favour of these fundamental social rights arises not from the need for a level playing field but from the need of the competition system itself to achieve the goal of efficiency. At the same time, such rights will enhance the concept of European citizenship by providing new forms of participation and representation in a European forum of decision-making which is normally ignored in the debates regarding the democratic deficit: the European common market.

B. Social Rights and Redistribution

Another question remains: should the European Union protect only that limited set of social rights? Perhaps better, should European integration only be about wealth maximization, while distributive justice should and could be left to the States? Or does the European market needs to be complemented by some degree of distributive justice? Market integration increases efficiency and wealth, but it also diminishes the instruments for distribution of such wealth at national level. As we have seen, market integration has challenged the regulatory powers of the States, which are in many cases aimed at protecting or promoting social rights such as the rights to education, health, and social protection, fair working conditions, minimum income, and, in a broader sense, other 'social' rights, such as consumer and environmental protection. Many of these rights are recognized in the Treaties as goals of the European Union.⁶³ However, their status as fundamental rights and their interpretation varies among Member States. Maybe that explains their limited use as an interpretative authority in the European Court of Justice's application of market integration rules to the review of national legislation. This has meant that the internal logic of market integration has prevailed, even where conflicts with social rights arose. Yet it could be argued that States should be left sufficient policy autonomy to ensure 'the continuation of welfare states traditions, albeit under new economic constraints'.⁶⁴ It always becomes a question of where we draw the line. We want to ensure market integration and the efficiency gains it brings, but we also want to protect the States' autonomy to maintain their welfare states. Wherever we do come to draw the line, it appears that our conception of fundamental social rights must change and can no longer be opposed to economic freedom. We have come to distrust the law and realize the end of its normative empire. But we are yet to find the right balance between wealth maximization and distributive justice. Moreover, in the European Union, we are also yet to find the right balance between economic integration (promoting wealth maximization) and political integration (promoting an European entitlement to distributive justice).

The assumption of economic integration was increased growth without interference in the distribution function. But a viable and sustainable integration is only workable if economic growth is fairly distributed. Moreover, as was stressed earlier, economic integration has also challenged redistribution policies at the national level, since these policies can be argued either to restrict trade or to reduce the competitive ability of the national economies. Two further proposals are, in consequence, advanced: first, as mentioned in the first part of this report, fundamental social rights should be used as criteria for accepting national measures which restrict trade on social and economic grounds; secondly, a concept of distributive justice, including a redistribution policy, should be developed at the European Union level to compensate for the restrictions imposed on the redistribution function at national level and to legitimize the economic integration process with its gains in wealth and efficiency. The

⁶³ See, e.g., Arts. 2, 3, 117, and 118 of the EC Treaty, which are now Arts. 2, 3, 136, and 137.

⁶⁴ S. Silvana, *How Global is Labour Law? The Perspective of Social Rights in the European Union*, EUI Working Papers, Law No. 96/6, at 32.

introduction of European social rights at this level may be particularly important, as it will allow the establishment of such redistribution process independently of national divisions. Entitlements should derive directly from European citizenship.

The recognition of such rights accorded to all European citizens would follow from a notion of citizenship that can no longer be exclusive of those which can profit from the 'community of economic circulation'⁶⁵ created by market integration. Otherwise, many Europeans will feel themselves strangers with regard to European citizenship.⁶⁶ The recognition of a minimum European safety net with a small core of social rights attached to European citizenship will allow the discourse to be universalized. It will concern redistribution among individuals and not among nation States. A first starting point would be the transformation of already existing social programmes and piecemeal legislation⁶⁷ into individual rights accorded to European citizens. A second starting point could be through the creation of rights which would finance mobility in areas such as education and vocational training. A third starting point would concern studies and small steps directed towards the harmonization of social security systems even to control the strain on national security systems which will result from the free movement of persons. All this will not be peaceful. Debates on efficiency versus distributive justice never have been, and that will be even less the case in the context of a 'doubtful' European political community whose degree of cohesion and solidarity is, at best, weak. What is needed is a discussion on the ideology of European integration which can no longer be a simple function of market integration that is assumed to be unquestionable.⁶⁸

⁶⁵ The expression is from G. Peebles, 'A Very Eden of Innate Rights of Man? A Marxist Look at the European Union Treaties and Case Law' (1997) 22 *Law & Soc. Inquiry* 592.

⁶⁶ *Ibid.*

⁶⁷ E.g. the programmes on the fight against poverty.

⁶⁸ See Weiler, 'The Transformation of Europe', note 3 above, at 2477.

From Strasbourg to Amsterdam: Prospects for the Convergence of European Social Rights Policy

SILVANA SCIARRA*

I. A HISTORICAL INTRODUCTION: THE CIRCULATION OF INTERNATIONAL LABOUR STANDARDS

The main purpose of this chapter is to demonstrate the persistent circulation within the European Union of international labour standards which are either inherent in the cultural and legal traditions of Member States or have become a relevant part thereof because of the slow and yet penetrating influence of international organizations. This argument will be developed in order to show that the interdependence of international legal sources is one of the many variables characterizing the construction and consolidation of social rights within the European Union. The existence of different levels of decision-making, whereby nation States strenuously defend the competence, and indeed the better ability, of domestic legislatures to intervene in social matters, is a significant sign of the specificity and perhaps of the unpredictability of European integration in this field.

It will also be argued that, because of this specificity, justifiable on historical as well as political grounds, the most delicate task assigned to the reformers of the European legal order is to look for changes and adaptations, while not dispersing deeply rooted European legal values. Challenging in itself, this task must be pursued under the pressure of globalized markets, taking into account the uncertain borders of supranational legal systems. Nonetheless, the debate preceding the signature of the Amsterdam Treaty showed signs of a stronger commitment, in both political and academic circles; it is important to underline this, even when facing disillusion over the lacunae which have not yet been filled.

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The process of expanding social rights is an endless one. As such, it attracts the attention of all political actors and provokes the activism of institutions. It also represents for the writer the best historical link with the Universal Declaration of Human Rights,¹ which is at the origin of this collective effort to suggest a critical analysis and to advance new proposals, taking it as a source of inspiration for its 'universal' and 'positive' affirmation of rights addressed to all men, rather than to citizens of a country or of a region. The language adopted for universal human rights usefully applies to social rights: 'freedoms' rest on the assumption that States will abstain from intervening; 'powers' require active state policies for their enforcement.²

This chapter will concentrate on social rights and social policies resting within the domain of employment contracts: both the increasing activity of EC legislature and the attention paid to it by national labour law systems have opened up a wide research field. Active employment measures, as well as measures to fight unemployment, must be included in this wide angle of legal analysis. This will bring new evidence to the philosophical distinction between 'freedoms' and 'powers' and will transfer the practical consequences of this to the process of expansion and enrichment of a supranational legal order.

A. The Treaty of Paris and the Treaty of Rome: Two Early Visions of Social Rights

Looking back at the early days of the European Coal and Steel Community (ECSC) we find a valuable confirmation of the theory according to which European integration was oriented towards functional objectives, reflecting specific national interests rather than well-identified common interests. Furthering a broader political plan and achieving a more consistent interdependence of the economic systems appeared a very improbable objective because of the dominating strength of national interests. Specific peculiarities were nonetheless visible within the European Community; nothing but a 'false analogy' could be made when comparing the EC with other international organizations active at the same time, since none of them raised the problem of limiting national sovereignty while achieving co-operation.³

This is a crucial point in the understanding of social policies developments and must be read in conjunction with the introduction into the Treaty of Rome of unanimity as the golden rule in decision making within the European Council. If we go back to the Coal and Steel Community, we find an interesting key for the interpretation of early social measures, which can also be used in framing later developments in the field. As part of the aids addressed by the Community to the two industrial sectors in question, social measures were subordinate to the fact that major economic

¹ Adopted and proclaimed by GA Res. 217 A (III) (1948). In United Nations, *A Compilation of International Instruments* (1994), i. Part 1, 1.

² N. Bobbio, 'Presente e avvenire dei diritti dell'uomo' [1990] *L'età dei diritti* 17, and especially 41. Mengoni argues that social rights are an expansion of the principle of equality and are linked to emerging needs of the civil society, whereas fundamental freedoms are historically intended to protect the individual against political power. Unlike the latter, social rights do not bring about direct enforceability as individual subjective rights, but objectively bind the legislature: L. Mengoni, 'I diritti sociali' [1998] *Argomenti di diritto del lavoro* 1.

³ A.S. Milward, 'L'Europa in formazione', in M. Aymard, P. Bairoch, W. Barberis, and C. Ginzburg, *Storia d'Europa* (1993), 196.

choices had to be favoured within some nation States, in order to enhance the competitiveness of the newly born common market, by favouring free trade of coal and steel.

Restructuring or closure of activities brought with it unemployment benefits for coal miners, training for steel-workers made redundant, financial aid to move to other jobs, and similar measures which showed the purely instrumental nature of social protection. The main guarantee for workers had to do with the availability of resources allowing them to change occupation;⁴ this was a quite extraordinary measure, when we think that at the time at which it was conceived, the prevailing pattern was that of permanent and never changing employment. Since the High Authority had no power to intervene in social policies, it was remarkable that it achieved all this through co-operation between nation States. What was favoured, in the absence of normative powers, was the gathering of information on national labour law systems which resulted in very interesting early attempts to build up a common legal culture, through comparative analysis.⁵

It can be maintained that a negative—albeit very pragmatic—rationale inspired social measures at that time, since social aids were considered to be a mere repercussion of broad industrial policies, lacking in continuity and in autonomy, linked as they were to decisions of a political and economic nature, taken at the national level. This explanation can also be read in the light of contemporary events and measured against the aforementioned inability of States to surrender sovereignty in favour of common social goals.

This is still a reality within the European Union, particularly, as we shall see later, when measures on employment are at stake.

In the Treaty of Rome, the debate on European social rights was influenced by the weakness and narrowness of the legal basis and by the strict connection established with mechanisms of market regulation, in order to avoid distortion in competition. These two points made the development of social policies largely dependent on competition rules; principles of fairness and efficiency within the market included only a limited number of social rules and made them functional to goals which would, otherwise, be considered outside the scope of national labour law systems.

The Spaak Report (1956)⁶ is an illuminating document in this respect, inasmuch as it shows the theoretical inspiration which then led the founding fathers to draw a map of social rights within the borderlines of economic efficiency. The Report thought that a 'gradual coalescence' of social policies would become one of the elements of a well-functioning common market. The precondition was that harmonization could be furthered only where specific distortions of competition were visible. As a result of this the French government could ensure that labour law rules to be inserted into the Treaty would be measured against its own internal system, particularly with regard to parity of wages and social costs. It all resulted in the

⁴ G. and A. Lyon-Caen, *Droit social international et Européen* (1993), 160.

⁵ S. Sciarra, 'European Social Policy and Labour Law: Challenges and Perspectives' (1995) 4 *AEL* 312.

⁶ Spaak Report: *Comité Intergouvernemental créé par la conférence de Messine, Rapport des Chefs de Délégations aux Ministères des Affaires Etrangères de 21 avril 1956*. The Committee, comprising the heads of delegations, was established at the Messina conference in June 1955 under the chairmanship of M. Paul Henri Spaak, then Belgian foreign minister.

compromise of Article 136 (*ex Article 117*), characterized by its two sides, the first one being more prescriptive, the second more predictive.⁷

This analysis, albeit from the very specific and perhaps limited perspective of social rights, confirms the overall interpretation, highlighted above, which sees the creation of a common market as the outcome of strong national economic interests, particularly French ones. First with the ECSC, then with the EEC, national post-war reconstruction had to proceed and be favoured, without obstacles in its way.⁸ It is not surprising that relevant Articles of the Rome Treaty would be inspired by this philosophy and produce a mechanism whereby assimilation of national legal systems should be the last resort and the Commission should only be given the power either to grant subsidies to correct distortions or to promote collaboration among Member States in the social field, as stated in Article 137 (*ex Article 118*).

Even Articles 141 and 143 (*ex Articles 119 and 120*)—the former then become a cornerstone for equality legislation—were inspired by French legislation and forced into the Treaty by the representatives of the French government. Both aimed at establishing equal rules governing contracts of employment, which would ensure the cohesion of the market.⁹

An important provision in the Treaty—regarded as the most significant achievement in the field¹⁰—was Article 51 (now Article 42), establishing the right of employees to social security measures, while moving freely within the common market. Both as the origin of very relevant legislation and as a fundamental principle established in order to counterbalance the risks inherent in labour mobility, this measure opens up a wide and complex scenario, the implications of which are still at the heart of institutional reforms both at a national and supranational level.

A strict unanimity rule had to govern the whole field, at least until the reforms brought about by the Single European Act in 1986. Before the timid derogation from such a principle, expressed in Article 138 (*ex Article 118a*) (introduced by the SEA), Article 100 (now Article 94) was the only legal basis for the approximation of social legislation. Unanimity was required for the directives on collective dismissals and transfers of undertakings adopted during the 1970s. No doubt this legislation must be included in the list of important achievements of the Commission in the framework of its social action programme. The attention shown towards important employees' rights had nevertheless to be ascertained against the background of economic instability and industrial restructuring; distortions in competition, even at that later stage of economic integration, had to be avoided, the result being that social rights were once again made adaptable to the prevailing interests of companies, put under pressure by new market demands.

The marginal position of social rights within the Treaties of Paris and Rome can fruitfully be compared with other international sources. A line is drawn between economic, social, and cultural rights on the one hand, and civil and political rights on

the other, in the United Nations human rights covenants of 1966.¹¹ Although a lot has been said on the generation gap dividing the former rights from the latter, pointing out that values inspiring all human rights are by definition 'variable' and open to absorb changes due to cultural and social factors,¹² it still remains true that the evolution of social rights continues to be much slower and highly controversial, even in advanced legal systems.

Various historical reasons are behind this assertion, some of which may prove central to the argument which is developed in this chapter, namely the importance of balancing national traditions against the supranational construction of social rights and of keeping this exercise in law-making within a multi-level framework of competencies and compatibility. It will be maintained throughout this chapter that when it comes to social rights, the process of European integration must not be such as to preclude national initiatives and obscure national traditions. In order to move in this direction, a digression will be necessary towards other international sources, different from Community sources and yet relevant for the understanding of current trends in the field.

Rather than attempting to offer a complete overview of relevant sources and of their enforcement, a few cases will be selected. This will be done in relation to one European country in particular, as far as ILO sources are concerned. The United Kingdom has in fact acquired a unique position in comparison to other countries of the Community, because of the drastic changes in labour legislation brought about by the Conservative administration from 1979 onwards.

Testing the new labour law regime against ILO standards proved to be a very important exercise, both for the quantity and the quality of condemnations undergone by the UK. The implications for European social rights are indirect and yet very relevant, as will be shown in the next section.

B. Renewed Centrality of ILO Standards—The Case of the United Kingdom

In the history of European social policies, the obstinate opposition shown by both the Thatcher and Major administrations to approving legislation in the social field leaves a very clear legacy. On the one hand the limits inherent in unanimity voting and the difficulties of operating on the narrow and contested terrain of Article 118a (now Article 138) became progressively more evident. This led to the Maastricht compromise which, by way of derogation from Article 148(2) (now Article 205) of the Treaty, excluded the United Kingdom from the scope of the agreement on social policies.

¹¹ See the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, adopted by GA Res. 2200 A (XXI) (1966): *International Instruments*, note 1 above, at 8 and 20; and A. Eide, 'Economic, Social and Cultural Rights as Human Rights', in A. Eide, C. Krause, and A. Rosas (eds.), *Economic, Social and Cultural Rights* (1995), 21. From this distinction, unlike the overall approach followed in the Universal Declaration of Human Rights, assumptions then followed that civil and political rights were to be considered 'absolute' and 'immediate', whereas social, economic, and cultural rights were 'programmatic' (Eide, at 22). Similar terms are adopted when describing the latter category of rights in Community sources. See below.

¹² Bobbio, note 2 above.

⁷ O. Kahn-Freund, 'Labour Law and Social Security', in E. Stein and T.L. Nicholson (eds.), *American Enterprise in the European Common Market. A Legal Profile* (1960), i, 300.

⁸ Milward, note 3 above, at 191–2.

⁹ C. Barnard, 'The Economic Objectives of Article 119', in T.K. Hervey and D. O'Keefe (eds.), *Sex Equality Law in the European Union* (1996), 32.

¹⁰ Kahn-Freund, note 7 above, at 320–1.

On a different—and yet connected—side of labour law policies, the UK showed its reluctance to ratify new ILO Conventions (only one of the twenty-five Conventions adopted between 1979 and 1996 was ratified) and its readiness to denounce previous Conventions.¹³ While vetoing the approval of Community law, the UK wanted to prove the impenetrability of the system by international labour standards and, at the same time, wanted to show its ability to legislate against the mainstream of fundamental principles shared by the majority of countries within the Community.

Two conventions in particular were in the middle of the hurricane affecting the UK: conventions No. 87 (1948) and No. 98 (1949), dealing respectively with Freedom of Association and Protection of the Right to Organise and Right to Organise and Collective Bargaining.¹⁴ Leading cases started in the public sector and had to do with the Government's attempt to exclude some categories of public servants from the scope of Convention No. 87.¹⁵ They were intertwined with cases on the limitation of the right to strike,¹⁶ with the result that the whole conservative legislation in collective labour law was put under regular scrutiny and led to a series of condemnations.

Later, the 1993 Trade Union Reform and Employment Rights Act, and particularly the narrow interpretation of this Act offered by the House of Lords,¹⁷ kept all ILO bodies busy preserving freedom of association from the invasion of limiting employers' practices. It was held that Article 13 of the Act would 'discourage' collective bargaining if it were to be interpreted as allowing the payment of incentives for employees moving from collective agreed terms and conditions of employment to individual contracts. Annual condemnation by the ILO of the UK government became an exhausting ritual, in which the ILO showed its commitment and proved to have had a long-term perspective, waiting for substantial innovations to take place, once a change of government occurred.

In the early cases, the Committee on Freedom of Association and the Committee of Independent Experts were both called upon and made to play, each within its own competence, a very interesting institutional game, forcing the British government to amend legislation when in breach of ILO Conventions.¹⁸ In the later cases too the

¹³ B. Hepple, 'New Approaches to International Labour Regulation' (1996) 26 *ILJ* 356.

¹⁴ In ILO, *International Labour Conventions and Recommendations* (1996), i, 435 and 524.

¹⁵ The *Government Communications Headquarters (GCHQ)*, Case No. 1261, 234th Report of the Freedom of Association Committee, ILO, 87, on which see particularly Lord Wedderburn, *The Worker and the Law* (1986), 276. This case did not reach the Strasbourg Court due to the Commission on Human Rights' decision that the restrictions in question were justified under Art. 11(2), ECHR; on the consequences of this leading case and the still ongoing debate, see S. Mills, 'The International Labour Organization, the United Kingdom and Freedom of Association: An Annual Cycle of Condemnation' (1997) 2 *EHRLR* 43. See also *Report of the Committee of Experts on the Application of Conventions and Recommendations* (1995) and (1996); and the *Schoolteachers' Pay and Working Conditions Case*, Case No. 1391, 256th Report of the Freedom of Association Committee, ILO, 39–89. As for GCHQ, the initiative was taken by the government in the summer of 1997 to restore the right to belong to a trade union, although with some restrictions. See briefly on this, Hepple, note 13 above, at 365.

¹⁶ All analysed by B. Creighton, 'The ILO and Protection of Freedom of Association in the United Kingdom', in K. Ewing, C. Gearty, and B. Hepple (eds.), *Human Rights and Labour Law* (1994), 10.

¹⁷ *Associated Newspapers Ltd v. Wilson and Associated British Ports v. Palmer* [1995] 2 AC 454, discussed in Mills, note 13 above, at 39.

¹⁸ Creighton, note 16 above, at 11.

ILO was able to substantiate its position with wide and well argued criticism of the legislation in its entirety. As a consequence of this long and controversial confrontation, a critical ground has been prepared for the new Labour government; on its side, it would be hard to show scepticism and disregard towards international labour standards and to leave things as they are. There will be a need to go through previous legislation and revise it, while keeping very close scrutiny on new legislation to be adopted in the field. Furthermore, ratifying ILO conventions will appear as an opportunity to gain consensus in the international community.

The widespread and convincing opposition expressed in scholarly work to the lowering of ILO standards¹⁹ was also accompanied by a militant view on the part of the unions. Such discovery of a new centrality for the ILO and for its labour standards has run parallel with a more balanced and inspired position of British academia towards the EC. The contribution of British scholars, particularly labour lawyers, in building up a critical—and yet constructive—evaluation of Community social policies was remarkable. An analogy can be drawn to a similarly active role of practising lawyers, interest groups, and specialized agencies in taking cases to the ECJ through preliminary ruling procedures.

Both examples show the misgivings of the British legal system about accepting structural changes in labour law and the wish to keep some of its characteristics intact, by referring to international and Community sources.

This was a test of some importance for the ILO, especially at a time when its political role appeared weaker, in the light of the new political order following the collapse of Eastern States, and because of the reduced weight of employees' representatives within it.²⁰ In a sense, the role played by the ILO with respect to British legislation went against both these elements and indicated that, despite its feeble capacity for imposing sanctions, an international organization can maximize its supervisory machinery and use its power to expose national governments to moral condemnation²¹ and help them towards the implementation of international standards.

However, despite the peculiarities inherent in a tripartite organization like the ILO, in which standards are constantly revised and the voice of non-governmental organizations is regularly heard, the notion of 'best practice', as the final outcome of political options made in enforcing labour standards, might need to be revised.²² This policy suggestion is also related to the ever stronger position of new organizations such as the WTO. The inclusion of labour standards within the regulation of

¹⁹ K. Ewing, *Britain and the ILO* (1994); K. W. Wedderburn, 'Labour Standards, Global Markets and Labour Laws in Europe', in W. Sengenberger and D. Campbell, *International Labour Standards and Economic Interdependence* (1994), 245.

²⁰ A. Nussberger, 'Summary of Discussions: Is the International Labour Organization in a State of Transition?', in B. Maydell and A. Nussberger (eds.), *Social Protection by Way of International Law: Appraisal, Deficits and Further Development* (1996), 213–15.

²¹ G. Gaja, 'Organizzazione internazionale del lavoro' (1981); XXXI *Enc. Dir.* 336; H. Bartolomei de la Cruz, 'Standard Setting Activities in the Field of Social and Labour Law: International Labour Law: Renewal or Decline?', in Maydell and Nussberger, note 20 above, at 46.

²² L. Swepston, 'Supervision of ILO Standards' (1997) 13 *Int. Jour. of Comp. Lab. Law and Ind. Rel.* 344.

free trade, despite the proclaimed commitment to the observance of ILO standards, may introduce dangerous limitations into the latter.²³

Regional legal systems—like the Community system—need to be carefully evaluated, whilst also questioning the efficiency of international enforcement mechanisms. Homogeneity of technical standards can best be achieved at regional level, while maintaining a common core of fundamental principles. To take one example currently in the public eye, flexibility within the labour market must be measured against binding minimum rules rather than being left to national legislatures with wide options.

This exercise becomes even more crucial for the cultural identity of a regional legal system if we look at the very general and often vague indications addressed to governments by institutions such as the World Bank.²⁴ This is why the political and legal confrontation between the ILO and the UK becomes an exemplary case. It supports one of the main arguments in this chapter, namely the need to strengthen fundamental social rights—and in particular the right to organize—at Community level and to adopt specific monitoring mechanisms aiming at the convergence of international labour standards.

C. Article 11 of the ECHR: Shall We Listen to the Strasbourg Court?

In referring to the relevant sources of the Council of Europe, there is a tendency to confirm a separation of territories, historically significant, as well as politically remarkable: on one side the prevailingly individualistic approach of the 1950 European Convention on Human Rights, on the other the opening up of some collective rights in the 1961 European Social Charter.

Particularly if we take Article 11 of the ECHR, the most relevant within the general framework of this chapter, we are bound to see the close correlation with the provisions of the ESC and the way these two sources are made to function separately and yet in such a way that they can supplement each other.²⁵ The 'flavour of liberal principle combined with uncertainty of meaning',²⁶ which can be also tasted in reading Article 11, makes the Charter an essential supplement to the ECHR. First defined as a big footnote to the Convention,²⁷ the Charter has been constantly improving its moral and legal standing and acquiring a position of its own among international sources.

Dynamism in this development is confirmed first by the 1988 Additional Protocol, which had the merit of expanding the competence of the Charter to information and consultation rights, the most contemporary expression of the right to organize col-

²³ See, e.g., the Singapore Ministerial Declaration of 13 Dec. 1996. WT/MIN(96)DEC.

²⁴ The World Bank, *World Development Report 1995: Workers in an Integrating World* (1995); World Bank, *The State in a Changing World* (1997). A classification of labour standards is offered by K.E. Maskus, 'Should Core Labour Standards be Imposed through International Trade Policy?' [1997] *The World Bank Development Research Group* 8.

²⁵ D. Harris, *The European Social Charter* (1984); D. Gomein, D. Harris, and L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (1996).

²⁶ K.W. Wedderburn, 'Freedom of Association or Right to Organise? The Common Law and International Sources', in Lord Wedderburn, *Employment Rights in Britain and Europe* (1991), 140.

²⁷ O. Kahn-Freund, 'The European Social Charter', in F.G. Jacobs (ed.), *European Law and the Individual* (1976) 182.

lectively.²⁸ A protocol amending the Charter followed in 1991, bearing important consequences for a more effective functioning of the Committee of Ministers and for the sanctions to be applied in cases of non-compliance.

Finally, we should mention the innovations brought about by the 1995 Protocol on collective complaints, empowering NGOs, international and national organisations of workers, and employers to bring complaints directly. This 'model' can be particularly useful in the discussion following the incorporation of the Maastricht Social Agreement into the Amsterdam Treaty. If we take the words of Article 1 of the 1995 Protocol, we can see an analogy with the status of the European social partners, namely that of 'international organisations of employers and trade unions'. As much as the definitions coincide, the European organizations are given important tasks within the overall architecture of the Treaty without any power to complain. Indeed, the ECJ's competence to review collective agreements was debatable under the Maastricht Treaty²⁹ and still remains so, under the new provisions, in the absence of any explicit mention to this effect.

In May 1996 a new version of the ESC was adopted, which should be running in parallel with the previous one. New rights have been added at the end, in order to leave untouched the structure of the text and the division in parts I and II. Some of the new provisions are inspired by other international sources.³⁰

The Council of Europe Parliamentary Assembly has expressed a strong commitment towards speeding up the process of ratification and introducing a distinct European Court of social rights to guarantee observance of obligations under the Charter.³¹

These recent developments should be kept in mind by observers of and commentators on Community law developments; in particular, after the reference to the ESC introduced in the Amsterdam Treaty, an approach oriented towards future changes should be adopted. While indirectly absorbing these new values into the ECJ's frame of reference, account should be taken of a process which will bring about innovation,³² although the process of ratification of the new Charter may prove very slow and possibly disappointing. In particular, the new procedure for collective complaints should be looked at very closely, in view of the increasingly active role played by employers and labour organizations in the social policy field.

The paradox of the European debate, as we shall see later, is that two core social rights explicitly ousted from the Community competence—namely the right to organize and the right to strike—are those better enshrined in the Council of Europe

²⁸ Embarrassment at the non-ratification of the Protocol by the UK is reported by V. Shrubbsall, 'The Additional Protocol to the European Social Charter—Employment Rights' (1989) 18 *ILJ* 39.

²⁹ S. Sciarra, 'Collective Agreements in the Hierarchy of European Community Sources', in P. Davies, A. Lyon-Caen, S. Sciarra, and S. Simitis, *European Community Labour Law Principles and Perspectives: Liber Amicorum Lord Wedderburn* (1996), 193.

³⁰ Some examples of convergence can be quoted. Protection of employees in the event of the employer's insolvency draws inspiration from ILO Convention No. 173, in ILO, *International Labour Conventions and Recommendations 1977–1995* (1996), 374. The right to be informed on conditions of work partially recalls EC Dir. 91/533 [1991] OJ L288/32.

³¹ Council of Europe Parliamentary Assembly, *Future of the European Social Charter*, Doc. 7980 (1998).

³² D. Harris, 'The European Social Charter and Social Rights in the European Union', in L. Betten and D. MacDevitt (eds.), *The Protection of Fundamental Social Rights in the European Union* (1996), 110.

sources. It is the interpretation of these rights which has given rise to interesting case law of the Strasbourg Court, in convergence with the activity of the Committee of Independent Experts.

We shall emphasize only a few aspects of this case law, in order to demonstrate to what standards in concrete terms the European Court of Justice would have to refer, should it want—or need—to take into account social rights kept outside the scope of European law.

Article 11 of the ECHR includes the rights to 'form and join trade unions' within the more general right to 'freedom of peaceful assembly and to freedom of association with others'. The most interesting outcome of the case law, for the limited purpose of this chapter, has to do with the negative freedom of association and with the possible expansion of the right to form a union in the direction of neighbouring rights, such as the right to bargain and the right to strike. Both developments, relevant in themselves, are marginal in the European debate and must be contextualized in the most current developments.

It is historically interesting to look at the impact of the *Young, James, and Webster* decision³³ on British academia and on British trade unions.³⁴ The strenuous defence of the closed-shop system, alien to the majority of continental systems, was so effective as to convince even the most determined critics and to prove that pluralism was a genuine and solid part of European traditions, in which it was possible to combine different forms of protection of the individual in exercising his/her right to join or not to join a union.

The Conservative administrations, from 1979 onwards, in some way pulled the plant out by its roots, progressively reducing the role and the function of the closed shop. The value of the negative freedom, even in the light of such legislative changes, remains incommensurable and needs to be kept alive within the Community, with particular emphasis on the constitutional traditions of Member States, which are also the result of deeply rooted practices in national labour movements.

If we look at the 1993 case of *Sibson*³⁵ (again a British case), we discover that it is not a violation of Article 11 to dismiss a vehicle driver from his union for dishonesty and to threaten him with strike action if he continued to work at the same depot, having joined another union. The employer requested the applicant either to rejoin the union or work in a different depot; both options were refused and dismissal followed, which gave rise to the claim. The European Court, declaring that there was no violation of Article 11, made a significant reference to *Young*, a case which dealt with the very substance of the freedom of association interfering with the freedom guaranteed by Article 11, thus implying that *Sibson* did not, and that it would be risky to expand the interpretation of the negative freedom.

Another series of cases touch upon breaches of Article 11 for lack of consultation with the unions. In *National Union of Belgian Police*³⁶ the claim was that the Belgian

government had refused to classify the union in question as representative, and had not consulted with it on some questions related to the contract of employment. The Court held that the union's freedom to present claims for lack of consultation was a sufficient sign of its presence and of its right to be heard. The same conclusion was reached in *Swedish Engine Drivers' Union*,³⁷ where the alleged violation of Article 11 was the refusal of the negotiating body to conclude agreements with the applicant. The Court indicated that the union, once excluded from the bargaining table, could engage in other activities and demonstrate that it was otherwise fulfilling an active role towards its members.

What emerges from this case law is how the Court succeeds in releasing the pressure to expand the scope of Article 11. The Court adopts a very narrow definition of freedom of association, proposing an individualistic rather than collective interpretation³⁸ which could have the effect of lowering the potential of the freedom itself. Article 11 is not seen as a supportive or auxiliary measure for trade unions, but rather as a source of individual guarantees. Intervention by the States is indispensable for the effectiveness of this right, which would otherwise remain an empty principle.

If we move on to cases dealing indirectly with the right to strike, we have a clear picture of the Court's self-restraint while engaging in interpretation which would overly broaden the horizon of Article 11. In *Gustafsson*,³⁹ the applicant, not bound by any collective agreement and having refused to sign one regarding a labour market insurance scheme, was hit by a boycott declared by the unions and by sympathy industrial action. The Court held—by twelve votes to seven—that Article 11 had not been violated for the lack of state protection against strikes, which, according to the applicant, would have limited his freedom of association.⁴⁰ The result of this case is that a refusal to enter negotiations and collective bargaining is implicitly admitted; quite a dangerous counter-effect to the justified self-restraint on the part of the State in not entering the delicate field of industrial relations.

In *Schmidt and Dahlström*⁴¹ the crucial point was whether members of a union could be denied certain benefits, because of a strike in which they had not taken part. The Court had to confirm, as in previous cases, that the right to strike is only one of the many expressions of the freedom of association, having to choose whether to give flesh to a right which is not part of the ECHR, or whether to adopt a more moderate view which reduces the meaning of the expression 'for the protection of his interests', referred to in Article 11. The Court chose a minimalist interpretation.

Limited protection only is provided and the freedom of association is somehow unnaturally separated from its broader context. The Court was not prepared 'to read into the Convention a code of industrial relations law',⁴² nor to invade the territory of the ESC.

³⁷ *Swedish Engine Drivers' Union v. Sweden*, 1 EHRR 617 (1976).

³⁸ This critique addressed to the Court and Commission is presented in D.J. Harris, C. Warbrick, and M. O'Boyle, *Law of the European Convention on Human Rights* (1995), 432.

³⁹ *Gustafsson v. Sweden* (1996) 22 EHRR 409.

⁴⁰ Critical remarks on the applicability of Art. 11 in T. Novitz, 'Negative Freedom of Association' (1996) 26 ILJ 86.

⁴¹ *Schmidt and Dahlström v. Sweden*, 1 EHRR 632 (1976).

⁴² J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (1993), 142.

³³ *Young, James and Webster v. United Kingdom* (1982) 4 EHRR 38.

³⁴ F. von Prondzynski, 'Freedom of Association and the Closed Shop: The European Perspective' (1982) 41 *Columbia LJ* 256 and 259; Wedderburn, note 26 above, at 144.

³⁵ *Sibson v. United Kingdom* (1995) 17 EHRR 193.

³⁶ *National Union of Belgian Police v. Belgium*, 1 EHRR 578 (1975).

A tentative conclusion, following this brief account of the case law on Article 11, indicates that the lack of a fundamental social right in Community sources is not totally compensated for by reference to the ECHR. The circulation of international labour standards also serves the purpose of showing that solutions internal to specific legal systems must be tailored, whenever they reflect specific traditions and practices.

On the road to Luxembourg new landscapes need to be discovered.

II. GLOBALIZATION VERSUS EUROPEANIZATION OF SOCIAL RIGHTS

A dilemma is at the centre of what has been described as the third period of post-modern legal pluralism.⁴³ Whereas in the first period it is relatively easy to distinguish between legal orders, in the second it becomes more difficult to draw a line between state and non-state social regulation through law. In the third period, the state becomes a 'contested terrain': many external constraints are imposed on it by trans-national practices, while there is a need to expand and reproduce its own role. Globalization brings about a contrast between the local and the trans-national which may threaten the solidity of fundamental rights, as if a change in legal tradition was an inevitable price to pay for the opening up of wider and more competitive markets.

The argument to be developed in this regard, when looking at Europe as 'the local' within 'the global', is that there is a specificity of European legal culture to be maintained despite the impelling power of the external markets.⁴⁴ This specificity emerges in an even clearer perspective when dealing with social rights. The main reasons for this can be tentatively suggested.

(a) Social rights are 'embedded' in local traditions and reflect—possibly more than economic and political rights—the history of deeply rooted associations and interest-groups. The attempt is being made to co-ordinate more closely national organizations within European associations; significant in this regard is the reform of the statute of European Trade Union Confederation (ETUC), which aims at balancing the power of national membership in order to specify the mandate of the supranational confederation. In spite of all this, and notwithstanding the active role of all interest organizations in proposing reforms and in achieving a well-informed presence in the institutional debate, there is no new supranational culture and nothing which yet resembles a European labour movement. The weight of national traditions, very heavy for employers' organizations too, makes the search for a common core of interests to be defended a very challenging one.

⁴³ B. de Sousa Santos, 'State, Law and Community in the World System: An Introduction' (1992) 1 *SLS* 132.

⁴⁴ S. Sciarra, 'How Global is Labour Law?', in T. Wilthagen (ed.), *Advancing Theory in Labour Law and Industrial Relations in a Global Context* (1998), 99.

(b) The institutional role of the social partners, traditionally very strong in most European countries, is acquiring its own standing at a Community level. This quasi-public function of management and labour, when it comes to being interlocutors of the European institutions, has gained ground over the years, and it now results in a coherent attitude towards social policies, as well as towards macro-economic policies.

This latter attitude has been particularly visible since the Maastricht Treaty and the enforcement of Article 99 (ex Article 103), on economic policies and criteria for their convergence⁴⁵ and could, by analogy, have important consequences for the implementation of employment policies under the Amsterdam Treaty. The consultation of the social partners was started, beyond the requirement of the law but within a political climate, fostered at Community level, which also reflects national practices, accurately described as 'technical' concertation.⁴⁶

The 1998 Employment Guidelines,⁴⁷ anticipating the implementation of the new provisions of the Treaty, openly indicate that social partners at all levels have an important contribution to make, the outcome of which will be assessed every six months—as was the case under the previous procedures for macro-economic policies. They are also urged 'to conclude as soon as possible agreements' at various levels, with a view to increasing all means indicated by the Council for 'employability', flexibility, improving work organization and the like.

(c) Rather than emphasizing an a-critical dependence of the social partners on macro-economics, in view of the achievement of monetary union, attention should be paid to the co-ordination established between national economic policies and supranational targets, through the active role of unions and employers' associations. The extraordinary opportunity offered to the social partners in the years to come is for them to be actors rather than spectators in the launching of the single currency, while monitoring very closely the first stage of implementation of the new Community measures on employment. The historical divide between monetary and social policies, whereby the latter would be graded on a lower scale and be rarely mentioned on the political agenda, still exists and has been criticized while looking at recent developments in Community law.⁴⁸ After the introduction of the single

⁴⁵ Sciarra, note 29 above, at 208. A recent resolution of the European Council of 13 Dec. 1997 ([1998] OJ C35/01) on economic policy co-ordination in stage 3 of EMU and on Treaty Arts. 109 and 109b (now Arts. 111 and 113) indicates that despite the likelihood of closer convergence of cyclical developments, as a consequence of EMU, wage determination should remain a national responsibility and yet be subject to Community surveillance should it influence monetary conditions. This is a meaningful indication of the implications that will be brought about by the single currency and by the new centralized powers of the Central European Bank. With regard to social partners and national collective bargaining the implications might be quite relevant, both in setting homogeneous wage standards in homogeneous sectors of the economy and in keeping inflation under control, in close co-ordination with the guidance which will no longer come from a national central bank.

⁴⁶ C. Crouch, 'The Unloved but Inevitable Return of Social Corporatism', in P. Kettunen and J. Valanta (eds.), *Hallinto ja Kansanvalta: Festschrift för Voitto Helander* (1997).

⁴⁷ COM(97)676 final. See also COM(98)316 final, at 2, for examples of countries which have adopted the method of consultation with social partners.

⁴⁸ A. Calon, L. Frey, A. Lindley, A. Lyon-Caen, A. Markmann, H. Perez Diaz, and S. Simitis, *The Social Aspects of Economic and Monetary Union*, Report prepared for DG V of the EC (1992).

currency, this divide deserves new attention and requires further action on the part of the social partners.⁴⁹

(d) This analysis should be kept very central when writing an agenda of social rights for the new millennium. The argument developed in this chapter is that Europe is slowly and yet unceasingly searching for its own political and cultural identity; this implies the reconsideration of fundamental rights, as for the entitlement, function, and legal enforcement of the rights themselves. The specificity of social rights, within the broader definition of fundamental human rights, requires at times the adoption of different legal parameters and of a different legal language.⁵⁰

If we take the points made in (b) and (c), we are made to face a practical reality, well beyond the black letter of the law. Spaces are opened up for actors—the social partners—which are not mentioned as among Community institutions. They interact with national governments as much as they do with the Commission, the Council, the Parliament, and possibly with the ECJ. Procedures are informal, and yet their transparency and proper functioning become a crucial element within the complex decision-making machinery which then leads to opting for one particular solution or for maintaining the *status quo*. It can be argued that procedures leading to the creation or consolidation of political consensus are a modern—and still mysterious—side of supranational collective labour law.

Because of the mysteries hidden behind this new practice of concertation and sometimes because of the limited impact the social partners may have on very relevant issues, it must be maintained that procedures can only function at their best when they rest on the solid ground of positive norms. Some of them constitute a precondition for the proper functioning of the procedures themselves,⁵¹ others are to be viewed as a point of arrival. Social rights create the natural habitat in which procedures may flourish and be effective; on the other hand, ways of implementing social rights may at times be the content of procedures, thus representing the final result all actors should be jointly aiming at. We can project this last point into the new title on employment in the Amsterdam Treaty, and see whether it will generate similar procedures to those set in motion by economic and monetary policies.

(e) If we accept that consensus-building mechanisms and procedures to establish co-operation with the social partners are so very central for the furthering of politi-

⁴⁹ T. Padoa-Schioppa, *The Genesis of EMU: A Retrospective View*, Jean Monnet Chair Papers 40, Robert Schuman Centre (1996). The argument in this paper is that the 'inconsistent quartet'—as the author describes the combination of fixed exchange rates, free trade, complete capital mobility, and national independence in monetary policies—is what the launching of EMU should consider, transforming inconsistency into the reconciliation of the four elements of the quartet. The argument to be added is whether in such reconciliation a fifth player should be included, making the quintet play the music of employment policies as well. This should be the implied indication when talking of co-ordination between the two relevant titles of the Amsterdam Treaty.

⁵⁰ It also forces labour lawyers fully to understand and adopt the distinction suggested in the so-called 'Limburg Principles', a guide for the interpretation of economic and social rights, as stated in the United Nations Covenant on Economic, Social, and Cultural Rights, as far as state obligations are concerned. Obligations of result imply an immediate justiciability, whereas obligations of conduct allow this to happen over time. See Eide, note 11 above, at 39. Interesting implications may be envisaged for the new title on employment in the Amsterdam Treaty.

⁵¹ See below, Recommendation No. 3 arguing in favour of the introduction of the right to organize as a fundamental right in the EU.

cal and economic objectives within the Union, we should then look at other and inter-dependent sides of the same machine.

This procedural apparatus inevitably ties the social partners to the institutions; it almost confuses different actors' languages into a common expression of political intentions. In order to reconcile this quasi-institutional role of the social partners with well established legal traditions in Member States, it must be argued that rights exercised collectively and often built on a constitutional basis at a national level should not be infringed nor diminished. Although national collective bargaining machinery was asked to function in compliance with the Maastricht convergence criteria, adopting wage moderation as a leading criterion and helping to combat inflation, macro-economic policies should not invade the social partners' autonomous sphere of action, or impose on them pre-manufactured solutions.

At this point, it may be interesting to quote a complaint brought by the Federation of Public Services of the General Union of Workers (FSP-UGT) and the State Federation of Teachers (FETE-UGT) against the government of Spain for non-compliance with ILO conventions, in deciding unilaterally not to increase the salaries of public employees for 1997. The Committee on Freedom of Association, while analysing the case, mentions that the decision was taken 'to protect the predominant general interests which require moderation of the public deficit' and that the respect of the economic convergence criteria imposes a 'sacrifice painful but necessary'. The Committee's recommendation indicates to the Spanish government to return to the practice of 'mutual respect' in collective bargaining, stating, however, that no infringement of ILO Conventions had occurred.⁵²

(f) One last example can be given from this non-exhaustive list, which should serve to identify some significant 'local' traditions and to strengthen the argument that the Europeanization of social rights is an open process, reactive towards globalization and 'emancipatory' in its own peculiar way.⁵³

The debate on market efficiency, on the one hand, and the consolidation of workers' rights, on the other, have relit the flame of workers' participation at company level. Hidden in the dossier on the European Company Statute, this issue was at the centre of a long and passionate confrontation among Member States during the 1970s and onwards. The way the debate has been recently re-opened in the Davignon Report⁵⁴ shows that there may be an original way to introduce a social right, while furthering market integration and offering companies the opportunity to acquire a European statute.

Whereas information and consultation rights have already been absorbed into Community legal practice, through the Directive on the European Works Councils (the EWC Directive),⁵⁵ participation, even in the mild and flexible proposal put forward in the Davignon Report, still finds strong opponents in its way. The importance of this controversial innovation may be better understood if framed within the

⁵² Case No. 1919, 308th Report of the Committee on Freedom of Association, ILO (1997).

⁵³ B. de Sousa Santos, 'Toward a Multicultural Conception of Human Rights' (1997) 24 *Sociologia del diritto*.

⁵⁴ Following the appointment by the Commission of a *Comité des sages* and the publication of the final report of the group of experts, *European Systems of Worker Involvement* (May 1997).

⁵⁵ Council Dir. 94/45/EC, [1994] OJ L254/64.

consensus-building scheme previously described. Participation could serve the purpose of establishing good practices of industrial relations at company level, while being part of a wider machinery of bargaining and concertation. The danger, never fully admitted by the proponents of these new rights, is that the way in which they will be exercised at Community level may tend to diminish the role of trade unions. The EWC Directive leaves the option open whether workers' representatives should be elected or appointed, and even attracts some criticism whether the exercise of information rights may, in the long run, pre-empt collective bargaining.⁵⁶

Dilemmas faced by the advocates of new European social rights must also take into account the fear that some solid pillar in national towers of rights may be seriously shaken and even collapse. This is where legal theory can again help us to find the right way. It has been argued that progressive forces which resort to human rights reconstitute 'the language of emancipation' at a time when tensions occur between the State and civil society, as well as between nation States and wider legal orders, be they regional or global systems.⁵⁷ The aim should be to adopt the emancipatory potential of human rights theories, apply it to social rights as part of this larger family of rights, and prove that wherever one sees cultural fragmentation there must be attempts to reconstruct social relations around strong legal identities.

In the multicultural scenario of the European Union the Europeanization of social rights may create the basis for new emancipatory politics of rights: emancipation from the external impositions of the global market, emancipation from an approach to market-building which, as history proves, has often been the reflection of national interests, rather than the fulfilment of a common goal.

The European Union and the future stages of its integration constitute a peculiar and original response to globalization; the more we look at this process with the eyes of local legal traditions, the more we are likely to adopt emancipatory policies, for the very reason that they are closer to the needs of people and respectful of their cultures. The agenda of European human rights is now filled with new intentions and with universal aspirations; this allows us to turn to a more technical analysis of expected reforms and of changes occurring in the Amsterdam Treaty.

III. THE IGC AND THE TREATY OF AMSTERDAM

The debate preceding the IGC was fairly rich in relation to social rights and engaged both academic circles and European institutions. Some of the most relevant proposals will be presented in this section, the main purpose being to highlight points of convergence and to indicate further work that needs to be done. Despite the marginal impact of such proposals, some changes are visible in the overall philosophy inspiring the Amsterdam Treaty. If this perception of moderate—and yet progres-

sive—change is correct, some conclusions can be drawn for the future of social rights and some further projects can be pursued for the years to come.

In a pamphlet written by four academics and signed by a number of professors and experts in labour and social law from various countries of the European Union⁵⁸ a few suggestions were presented to the IGC. The main idea put forward in this proposal is that reformers of the Treaty could not ignore the revision of Article 117 (now Article 136) of the EC Treaty, whose inspiration and purpose appeared more and more to contrast with the evolution of social policies. Harmonization as a magical outcome of market integration could be envisaged in the early days of the Communities when, as previously indicated (section I.A, above), functional objectives were leading the most powerful nation States; that approach was the engine of a social policy which proved ancillary to market needs and never acquired a strong identity of its own.

It was emphasized that, because of the constraints caused by market building, the programmatic function of Article 117 proved of limited strength in favouring legislation,⁵⁹ despite the attempts made by the ECJ in leading cases. No mention of social policy was made in the activities of the Community (Article 3 EC), nor, later on in the Maastricht Treaty, among the objectives of the Union (Article B (now Article 2)). It is of some significance, therefore, that the suggestion was made to start the whole reform process by revising Article 117.

According to the authors of the proposal, ten fundamental rights should have been written into it. Some of them may appear provocative in their adopted wording and perhaps inconceivable even in a highly developed supranational legal system, whereby nation States would still be defending their sovereignty in adopting legislation (the right to work, the right to life-long education, the right to equitable remuneration); others may be seen as a completion and enlargement of existing provisions (the right to equality of opportunity and equality of treatment, without distinction of any kind, the right to health and safety in the working environment); yet others may be projected in the future, such as the right to protection for children, young persons, women who have recently given birth, and the elderly, the right to personal privacy.

The incipit of the suggested new Article 117, in particular, may attract criticism from the most disenchanted commentators, for its romantic reminiscence of the 1944 Philadelphia Declaration, which became part of the ILO Constitution. 'Labour is not a commodity', as has recently been proved in well-documented and enlightening scholarly work,⁶⁰ is much more than a principle or an aim set out in an international source. It has been powerful enough to inspire other sources and to favour the inclusion in them of the right to fair remuneration for workers, 'such as

⁵⁸ R. Blanpain, B. Hepple, S. Sciarra, and M. Weiss, *Fundamental Social Rights: Proposals for the European Union* (1996).

⁵⁹ S. Simitis and A. Lyon-Caen, 'Community Labour Law: A Critical Introduction to its History', in Davies, Lyon-Caen, Sciarra, and Simitis, note 29 above, at 4. References to relevant ECJ cases can be found in Poiare's contribution to this vol.

⁶⁰ P. O'Higgins, 'Labour is not a Commodity'—An Irish Contribution to International Labour Law' (1997) 26 *ILJ* 225–34.

⁵⁶ K.W. Wedderburn, 'Consultation and Collective Bargaining in Europe: Success or Ideology' (1997) 26 *ILJ* 1–2 and 6.

⁵⁷ De Sousa Santos, note 53 above, at 27–8.

will give them and their families a decent standard of living', as in Article 4 of the 1961 European Social Charter, echoed later by the Community Charter.

The words 'rights' and 'principles' are used interchangeably in this document; the same semantic device is adopted in a later report, which will be examined shortly. Both documents, albeit with different forms of expression, draw a distinction between fundamental rights and other objectives of social policies or 'instrumental' rights, thus distinguishing between different levels and different stages of implementation.⁶¹ This aspect of the overall proposal is a very delicate one⁶² and could lead to the maintenance of the *status quo*, if no precise division of responsibilities was set between the States and the Community.

It is also indicated that the 1961 Social Charter of the Council of Europe is referred to in Article F(2) (now Article 6) TEU, together with the 1989 Community Charter of Fundamental Social Rights for Workers, following the already existing reference to the 1950 ECHR. As for expanding the competence of the Court of Justice, amending Article 46 (*ex* Article L) of the TEU, the proposal is intentionally weak. The proponents' self-restraint runs parallel to the consideration that the heat of very delicate institutional mechanisms could only be felt by political reformers, who could properly balance the expansion of judicial powers in this as well as in other fields of law.

The suggested new version of Article 136 (*ex* Article 117) is drawn upon common constitutional traditions of the Member States and existing international labour standards. This safety-net, built on the convergence of existing sources, is wider than Community law and is meant to be the reference point for the ECJ, whose responsibility will also be to indicate which fundamental rights are capable of having direct effect. In order to prove the dynamic nature of the same rights, a new method of implementation is envisaged in assigning to a committee of experts the power regularly to review the compliance of national laws with the obligations arising from Article 117.

Finally, while suggesting the incorporation of the Maastricht Social Agreement into the Treaty, the authors did not go into the details of how the Treaty should be consolidated, since the purpose of this concise publication was to air the problems and to promote discussion. They did, however, indicate the cumbersome presence of Article 2(6) (excluding Community competence for the right of association, the right to strike and lock out, pay) in the Social Agreement, and the need to abrogate this provision, while writing fundamental social rights in the Treaty.

In the second Social Action Programme, adopted in April 1995, the Commission decided to set up a *Comité des Sages*, with the particular aim of looking at the future of the Community Charter of Fundamental Social Rights of Workers, in the light of impending reforms of the Treaties. The *Comité*, chaired by Maria de Lourdes Pintasilgo and composed of leading figures from different countries, decided to extend the scope of its remit and to open up to the consideration of broader social-policy issues. The result was a very articulated and intense report,⁶³ which took into account

⁶¹ This point is stressed in particular by M. Weiss, *Fundamental Social Rights for the European Union* (1996), at 14–15.

⁶² As correctly pointed out by B. de Witte, 'Protection of Fundamental Social Rights in the European Union: The Choice of the Appropriate Legal Instrument', in Betten and MacDevitt, note 32 above, at 71.

⁶³ *Comité des Sages, For a Europe of Civic and Social Rights*, European Commission, Directorate General for Employment, Industrial Relations, and Social Affairs (1996). While this paper was still at the

a large range of topics and even indicated different stages for the implementation of social rights.

A point of similarity with the pamphlet examined before can once again be underlined, inasmuch as both documents are aware of the fact that for some social rights there is an urgent need to become visible in the treaties, whereas for others active intervention by individual Member States is necessary. Institutional reforms, such as those required to amend the treaties (expand qualified majority voting, insert a new chapter on employment, ban discrimination based on all grounds, and so on), should not be kept separate from other legislative reforms, which involve costs in order to provide benefits and services (training and education, health care, work and fair conditions of work and pay, minimum income, and pensions). The latter are, however, different kinds of reforms, based on the assumption of fundamental rights and dependent on them, but projected in the sphere of national legislative initiatives. A list of eight rights is indicated which should have 'full and immediate effect': together with equality of treatment, equality between men and women, ban on discrimination, freedom of movement, and the right to choose one's occupation, some collective rights—so described in the most common labour law terminology—make an appearance, namely the right to organize and the right to collective bargaining and action. The 'objectives', different from rights in terms of enforceability, are described as long-term projects which should be deferred to the second stage, like the definition of minimum standards and contents.⁶⁴

The point of contact, in terms of feasibility of both plans, albeit in different stages, lies in the urgency and coherence of political choices which need to be made both at a supranational and at a national level. One of the original points of the report is the suggestion that, after the first stage, culminating in the work of the IGC preceding the Amsterdam summit, such choices should be the result of a widespread consultation across Europe, favouring the identification and the rise of new social rights from the bottom of civil society to the top of the institutions. This is an insightful suggestion, which may be linked to the idea that there should be regular opportunities to review European sources, making the IGC a safe point of arrival for an open process, during which other mechanisms for adjusting and improving the Treaty could be envisaged.⁶⁵

While emphasizing the need to open up a broad and enriching process of amplification for social rights, the *sages* are aware of the judicial implications, in terms of the existing legal basis, with regard to the ECJ's competence. The report suggests, on the one hand, expanding the scope of Article 6 (*ex* Article F), including references to the Community Charter of Fundamental Social Rights of Workers and to other international agreements signed by the Member States; and on the other hand to free Article 6 (*ex* Article F) from the restrictions of Article 46 (*ex* Article L) which explicitly indicates the areas on which ECJ's competence is to be exercised and which does not include Article F.

proof stage the new expert group, chaired by S. Simitis, and entrusted by the Commission to follow up the debate started by the Pintasilgo Committee, published its Report: 'Affirming fundamental rights in the European Union—time to act', European Commission Unit V/D.2, Feb. 1999.

⁶⁴ Following the 'Limburg Principles', note 50 above, the 'objectives' indicated by the *sages* should form the content of an obligation of conduct on the part of the States.

⁶⁵ J.H.H. Weiler, 'Editorial: Amsterdam, Amsterdam' (1997) 3 *ELJ* 310.

Through these proposals, the report puts forward a very lively vision of social Europe, not only based on new rights and principles to be enforced, but also supported by real people, whose voices should be heard and taken into account. There are signs of innovation in this report which go beyond the rituals of exercising political pressure on law-makers. Since some of the proposals have now become part of Community law, there is a hope that a red thread has been thrown and will continue to be followed in pursuing social goals.

As well as the two proposals examined so far, a third one must be mentioned,⁶⁶ which occupies 'a particular place in this discussion', in between academics and institutions.⁶⁷ The manifesto, written by academics under the auspices of the European Trade Union Institute, expresses both the authors' concern for the separation of social from economic integration and their commitment to bringing about new approaches. Rather than engaging in detailed technical suggestions addressed to the IGC, they chose to offer a careful explanation of the changes that have occurred to work in the whole of Europe. The result is a collection of essays, attractive for a militant and well-documented style and for melding together different national and professional experiences.

The manifesto is built around the idea of incorporating the 1989 Social Charter into the Treaty, despite the fact that it originated as a contested political declaration—not signed by the UK—and was afterwards successfully referred to as a programme for social policies, rather than as a declaration of fundamental rights. The authors argue that the nature of social and economic rights has changed during the 1970s and 1980s in revised constitutions of the Member States, becoming essentially programmatic. In the light of this assumption, a series of alternatives is presented, as to whether the Charter should be 'Commission-oriented' or 'European Court' oriented, finishing with the indication that in both cases it would have to be deeply transformed in order to be addressed to 'non-standard' workers, not included within its present scope.⁶⁸

Particularly in view of these changes, the technicalities of the incorporation remain unclear; the real aim of the authors is to prove the Charter's lasting validity as far as the fundamental principles enshrined within it are concerned. Even less clear—and perhaps slightly contradictory⁶⁹—is the combination of this strategy with the incorporation of the Maastricht Social Agreement; the latter, it is said, should work as an implementation mechanism, whereas the programmatic fundamental rights would be provided for in the Charter.

One other publication must be mentioned, in connection with that specifically addressed to the IGC. In a book reporting the proceedings of a colloquium held in Amsterdam, several points of view are taken into account and an attempt is made to summarize the debate, while formulating a proposal, which does not come from all the authors in the book, but from the first of the two editors only.⁷⁰ According to Betten there should be a Bill of Rights in the TEU, enforceable throughout the

⁶⁶ B. Bercusson, S. Deakin, P. Koistinen, Y. Kravaritou, U. Muckenberger, A. Supiot, and B. Veneziani, *A Manifesto for Social Europe* (1996).

⁶⁷ This is the comment by A. Lo Faro, 'The Social Manifesto: Demystifying the Spectre Haunting Europe' (1997) 3 *ELJ* 300.

⁶⁸ Bercusson *et al.*, note 66 above, at 149–51.

⁷⁰ Betten and MacDevitt, note 32 above.

⁶⁹ As implied by Lo Faro, note 67 above, at 303.

Union by way of amendment to Article 46 (*ex Article L*); the 1961 European Social Charter should be mentioned in Article 6 (*ex Article F*). As one can see, even though the proposals came from different circles and groups of experts, not working together at the same time, a few points of convergence were the result of this intense and diversified research.

Some of the issues discussed so far were echoed during the IGC and even amplified, leading to reforms of the Treaty, which will certainly bring about further changes and will long be debated.

A reflection group chaired by Carlos Westendorp, at the time Spanish State Secretary for European Affairs, presented a report⁷¹ at the Madrid Summit, in December 1995; the group was highly representative of national governments and European institutions and proved to be an open forum for discussion.⁷² In this document the idea was put forward of rewriting Article 103 of the Maastricht Treaty and including employment among the objectives of the Union, as one of the economic choices to be shared by Member States.

The Swedish representative's proposal was more precise, suggesting that a new title on employment should be inserted into the Treaty and that social partners should be involved in its implementation, both at a Community and at a decentralised level. The Finnish position was even more straightforward, and indicated that the Union should have the obligation horizontally to examine employment policies and enact a European strategy, including in the Treaty specific provisions on monitoring the existing situation.⁷³

At the European Council held in Turin in March 1996 the French '*Memorandum pour un Modèle Social Européen*'⁷⁴ was put forward and specified even more strongly the need to make employment the main priority for the European Union and use it as a 'criterion' of all European initiatives.

Furthermore, it is reported that the *Renault-Vilvoorde* case⁷⁵ had a tremendous political impact on the discussion and facilitated decision-making so that in the last two weeks the Growth and Stability Pact was completed by the employment side. A determined opposition was maintained to formally linking the new employment chapter with EMU;⁷⁶ this serious limitation to the reform of the Treaty must be taken as a starting point for current policies and for future revisions.

⁷¹ General Secretariat of the Council of the European Union, 1996 *Intergovernmental Conference: Reflection Group Report and Other References for Documentary Purposes* (1995).

⁷² M. Petite, 'Le traité d'Amsterdam: ambition et réalisme' (1997) 3 *RMUE* 19–20, and 23.

⁷³ The Swedish position was expressed in a note of July 1995 on the fundamental interests of Sweden with a view to the 1996 Intergovernmental Conference, expressed in a Cabinet Office note. See also the report of the Finnish Government, 27 Feb. 1996 on Finland's objectives for the IGC. The overall role played by Nordic countries in the IGC seems to have led to a very positive contribution, coming from States with a longstanding tradition of efficient welfare states. The British position is taken into account by C. Barnard in 'The United Kingdom, the "Social Chapter" and the Amsterdam Treaty' (1997) 26 *ILJ* 275.

⁷⁴ See also the Commission's position on this matter in its opinion 'Reinforcing Political Union and Preparing for Enlargement', COM(96)90 final; and the European Parliament in its Resolution A4–0068/96 of 13 Mar. 1996 [1996] OJ C96/77.

⁷⁵ Whereby rights to information were infringed by the management of the Belgian company, and massive lay-offs were announced: see M.-A. Moreau, 'A propos de "l'affaire Renault"', (1997) 5 *Droit Social* 493–509.

⁷⁶ Observatoire social européen, *Analytical Review of the Treaty of Amsterdam*, Working Paper (Sept. 1997).

A. Innovations in the Treaty of Amsterdam

It is reasonable to believe that the widespread circulation of ideas, like that summarized above, had an impact on the IGC; this more policy-oriented discussion had indeed been preceded by solid academic research in all Member States, mainly oriented to prove the need for substantial changes in the Treaty and the limits suffered by social policies because of the still over-dominant unanimity principle.⁷⁷

It is with this open-minded approach that we shall look at the main innovations in the Amsterdam Treaty; criticism of it for what has not yet been achieved must be placed within an ongoing discussion, which sees academic research oriented towards an expansion of social rights.

(a) The Treaty establishing the European Community and the Treaty on European Union have been consolidated and Articles have been renumbered (references will be made to this version).⁷⁸

(b) Article 6 TEU (*ex* Article F) refers to the ECHR only. The choice made at Amsterdam confirms the previous position of the Community and of the Union with respect to the Convention: the Union is not subject to it, unlike all the Member States, but the Court of Justice has the power to review respect for fundamental rights by the Community institutions. The ECJ's judgment,⁷⁹ dealing with the accession by the Community to the ECHR, had a freezing effect on a long-lasting debate. The acknowledgement, on the part of the Court, of the 'constitutional significance' that the Community's entry into a distinct international system would have had, was not taken by the IGC as an invitation to amend the Treaty; the result is that, in the words of the judgment, the Community has no competence to accede to the ECHR.

This implies that some questions are left open. Would it still be desirable to establish better links between the Luxembourg and the Strasbourg Courts? Should the ECJ take into account the ECHR's principles in a dynamic perspective and consider the case law of the Court in Strasbourg as equally relevant? Would this be the only way to verify that the principles of the ECHR are truly incorporated into domestic legal systems? What should it do in cases of non-incorporation of the ECHR by Member States?⁸⁰

⁷⁷ References cannot be exhaustive: W. Däubler (ed.), *Market and Social Justice in the EC—the Other Side of the Internal Market* (1991); K.W. Wedderburn, 'European Community Law and Workers Rights after 1992: Fact or Fake?', in Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law* (1995); A. Lyon-Caen and S. Simitis, 'L'Europe sociale à la recherche de ses références' (1993) 4 *RMUE* 109–22; M. Rodríguez-Piñero and E. Casas, 'In support of a European Social Constitution', in Davies *et al.*, note 29 above; Weiss, note 59 above; and A. Ojeda Aviles, *La calidad social europea desde la perspectiva de los derechos fundamentales* (1998).

⁷⁸ Research had been carried on in this direction, in order to enhance the readability of European primary law and the transparency of the Community legal system. See 'A Unified and Simplified Model of the European Communities Treaties and the Treaty on European Union in Just One Treaty' 1996, a report prepared under the auspices of the Robert Schuman Centre at the EUI and submitted to the European Parliament in Sept. 1996.

⁷⁹ *Opinion* 2/94 [1996] ECR I–1759.

⁸⁰ For the Irish abortion case and for a thorough analysis of the open questions see G. De Búrca, 'Fundamental Human Rights and the Reach of EC Law' (1993) 13 *OJLS* 283–319. For the British debate on incorporation see T. Bingham, 'The European Convention on Human Rights: Time to Incorporate' (1993) 109 *LQR* 390–400. In general see B. Dickson, *Human Rights and the European Convention: The Effect of the Convention on the United Kingdom and Ireland* (1997).

(c) Following a suggestion of the Reflection Group, in view of the accession of new States with weaker democratic traditions (see the amendment to Article O (now Article 49), setting the conditions for applicant countries), Article 7 imposes penalties on Member States failing to respect fundamental rights. These measures, to be considered exceptional, even though the possibility of expelling a Member State is not envisaged, are—not surprisingly—kept within the competence of the Council.⁸¹ It could be argued that a similar measure should be applied for the violation of the social rights enshrined in the Treaty, as well as of those protected by the ECHR and by the constitutional traditions of Member States.⁸² It seems unlikely that the Council will interpret this norm extensively; therefore the issue should be raised in relation to the new agenda and to the new sanctions to be considered for the protection of social rights.

(d) Article 46 (*ex* Article L) in its new letter (d) includes Article 6.2 among the new areas of law within the competence of the Court. This amendment is little more than an optical illusion, if we consider that the respect for fundamental rights 'as general principles of Community law' will not much change the current situation. The Court now has such rights within the written sources to which it can refer; as general principles they can only inspire the Court's decisions, not bind it to precise enforcement mechanisms. This does not lead to an incorporation of the 'rights', but to a stronger relevance of the 'principles', albeit with two limits: the Court can only review the acts of the institutions and must remain within the bounds of its jurisdiction.

The voice of the *sages* has been—at least partially—listened to on this matter, although other Articles of the Treaty, which now introduce the reference to the 1961 ESC, will not be susceptible to judicial review. The indirect relevance of external international sources puts the Court in the position to choose how and when to take them into consideration, incorporating the principles in its judgments, without being bound by the source itself. This point will be considered again in the recommendations⁸³ as one of the most controversial items to be inserted into a new agenda for social rights.

(e) Article 13 (*ex* Article J.3) TEC introduces a new non-discrimination clause. It includes a very broad ban on discrimination based on the grounds of sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation. It does not have direct effect; furthermore secondary legislation based on it still requires unanimity. This choice reflects the ambiguities of the IGC as far as freeing new areas of social rights from the 'unanimity trap' is concerned.⁸⁴ In view of further steps to be taken, it is now the responsibility of the Member States to put flesh and bones on this innovative measure. Another weakness of this norm has to do with the merely consultative role of the Parliament, sought by national delegations for fear of being caught in co-decision mechanisms.⁸⁵

(f) As expected after the change of government in the UK, the Maastricht Social Agreement has been incorporated into the Treaty, in Title XI, which also includes

⁸¹ Petite, note 72 above, at 25–6.

⁸² See below, Recommendation No. 1.

⁸³ *Ibid.*

⁸⁴ F. Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration' (1988) 66 *Public Administration* 239–78.

⁸⁵ Petite, note 72 above, at 26.

Articles on social policy. Some of these have been deleted, either because they are superfluous (as in the case of Article 118a on health and safety) or because they are replaced by a corresponding Article (Article 138, which also includes the former Article 118b on the so-called social dialogue). This new order in the relevant sources should also favour a more dynamic approach as regards the choice of the legal basis, although unanimity is still required for key subjects, such as legislation in the case of termination of an employment contract, representation, and collective defence of workers, including co-determination.⁸⁶

Social exclusion makes its appearance among the subjects to be decided with a qualified majority, albeit not in the original wording, which included the elderly and the handicapped. This is a field of remarkable potential for development in social policies, considered very urgent, and to which a special heading of the financial perspective is addressed.

(g) Some incoherence can still be revealed: the last paragraph of Article 136 (ex Article 117) still mentions the harmonization of social systems as an outcome of the functioning of the common market; the first paragraph of the same Article proclaims that harmonization and improvement must be maintained while pursuing the objectives of promoting employment, living and working conditions, whereas Article 137(2) (ex Article 118) still mentions minimum requirements for gradual implementation. The impression is that two souls are kept alive inside one body; this can be intriguing at times, although it should not be too difficult to offer a systematic interpretation of the whole new Title.

Article 136 recalls the 1961 Social Charter and the 1989 Community Charter (see (b) above). This is an innovation of symbolic value which cannot be undervalued. It must be noted, however, that in the attempt to re-establish an equilibrium between all Council of Europe sources the choice of the *sedes materiae* seems to prove that even symbols are made to have a different impact: whereas the ECHR is mentioned in Title I on Common Provisions, the Social Charter is placed in the niche of social provisions. Furthermore, the exclusion of Community competence on the right of association, the right to strike and pay, confirmed in Article 137(6), is in sharp contrast to some of the fundamental social rights proclaimed by the Social Charter.⁸⁷ Again, we have to rely on the indirect relevance of international sources, which, particularly in the case of the right to organize and the right to strike, must be read in conjunction with the constitutional traditions of the Member States, which, even if not mentioned in the opening of Title XI, are always on the horizon of the ECJ.

(h) The new Title VIII on employment follows the Title on economic and monetary policy and introduces new procedures according to which Member States and

⁸⁶ A proposal to make qualified majority voting the rule when deciding on all Union policies was presented to the IGC by the Commission. On the contrary, the UK maintained strong opposition to the expansion throughout the IGC. See respectively Commission Opinion, note 72 above, and Foreign and Commonwealth Office, *A Partnership of Nations: The British Approach to the European Union Intergovernmental Conference 1996*. See also the Labour Party's *Business Manifesto* (1997) expressing unwillingness to change unanimity voting on key matters such as social security and co-determination.

⁸⁷ Similarly B. Ryan, 'Pay, Trade Union Rights and European Community Law' [1997] *Int. Jour. of Comp. Lab. Law and Ind. Rel.* 305.

the Community 'shall work' together for the co-ordination of new strategies, within the general objectives set in Article 2. A 'high level of employment' is now one of the objectives of the Union. Relevant in itself and also in view of future involvement of the social partners, as happened for economic and monetary policies (see above, Section II (b) and (c)), this Title is already being implemented, before the ratification of the Treaty. A special Employment Committee, with advisory status, has been created (Article 130 (ex Article 109s)) to promote co-ordination between Member States and is indeed already operating, ideally in strict co-operation with the Economic Policy Committee. This is only an informal thread, which should bind together two key bodies, potentially very important in view of achieving formal co-ordination in the two policy fields. The Committee should also monitor employment initiatives in Member States, while consulting with the social partners. We are clearly facing a situation in which multi-level policy-making is conceived by a variety of institutional and quasi-institutional actors. This open-ended procedure, under which it is difficult to conceive of a 'right to work' in traditional terms, does not specify sanctions against Member States, or specific enforcement mechanisms for individual rights.

Activism on the part of the Commission is expressed through soft-law measures which have preceded the employment chapter⁸⁸ and which are now part of its implementation.⁸⁹

IV. CONCLUSION: FURTHER PROPOSALS TO EXPAND SOCIAL RIGHTS IN THE HUMAN RIGHTS AGENDA FOR THE YEAR 2000

In the course of this chapter an empirical debate has been confronted with a more theoretical approach. The latter can be summarized as follows.

(1) The strategy of incorporating broad international legal principles into the European legal order is still a current one, as it results from some of the innovations in the Amsterdam Treaty. Especially when related to social rights, this strategy brings about the idea of adaptation of international sources to distinctly European legal traditions.⁹⁰ It also proves that Member States belonging to a wider international legal order have potential advantages in having recourse to sources other than Community sources. From Strasbourg to Luxembourg, passing through Geneva, the road is paved with good intentions, but travelling across these places may still not be an easy task for the individual citizen, whose rights are infringed or threatened.

⁸⁸ COM(95)273 final.

⁸⁹ COM(97)676 final.

⁹⁰ It would suffice to quote Art. 23 of the Universal Declaration (right to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment, right to equal pay for equal work, right to just and favourable remuneration) in order to have a sufficiently broad basis of rights from which the European legislature should draw inspiration. The concept of adaptation of international sources is used in this chap. as equivalent to that of convergence: both concepts imply that initiatives should not be taken at the European level without consideration of the implications of wider international sources.

(2) The 'emancipatory' function of human rights, as opposed to their mere dependency on market mechanisms, helps legal scholarship to rediscover the centrality of social rights and to look ahead for new measures to strengthen their enforcement. In particular, the European Union represents a test of how to create internal coherence among principles and objectives, thus offering an answer to the dispersion of legal values and the weakening of rights within the global legal order.

Emancipatory theories should modify the definition of rights at the place of work, as well as the expansion of minimum standards world-wide.

In interpreting Community sources and in tracing new policies, the challenge is to reconcile the old and the new. Community sources are included in the wider circle of international sources and form a smaller circle, delimited by its own circumference.⁹¹ In the process of European integration the adoption of new social rights is very slow and may not coincide with the emergence of new rights which expand the circumference of the wider circle.

It can be argued that an emancipatory theory of social rights in the European Union rests on all the rights referred to in the Treaty and on those indirectly included in it through the free and discretionary interpretation of the Court of Justice. The fact that the latter must also take into account the 'constitutional traditions common to the Member States' as a further and necessary criterion in its decisions forces the 'emancipatory' theory to go a step further and to insist on the peculiarities of the European debate. The most suitable suggestion for the years to come is that the concentric circles be kept as they are, the smaller included in the wider one and yet autonomous with regard to the implementation of social rights and for reviewing acts of the Community in breach of international standards. The area common to the two circles could become an even more homogeneous ground for the ECJ, if other reviewing mechanisms were introduced into the scene. These new bodies should have the function of filling in the ground with converging and coherent standards, through interpreting all relevant legal sources and closely following their implementation in Member States.

Out of the metaphor of the circles, we can obtain indications that we should strengthen those sources within the smaller circle, by way of inserting into the Treaty some fundamental social rights and by ensuring appropriate means of enforcement, especially through new monitoring mechanisms.

The remarkably rich and varied range of proposals circulated before the IGC and the innovations in the Amsterdam Treaty continues to leave several questions unanswered. Only a few points will be selected as urgent items to be inserted into the agenda for the year 2000, in the understanding that institutional reforms have wider priorities than those indicated in this chapter.

⁹¹ The metaphor of concentric circles has been used by Lenaerts and re-interpreted here. See K. Lenaerts, 'Fundamental Rights to be Included in a Community Catalogue' (1991) 16 *EL Rev.* 367.

V. RECOMMENDATIONS

1. In the Amsterdam Treaty references are made to the ECHR and the ESC. This indirect inclusion of international sources in the Treaty—which could also be described as a tendency to convergence—leaves untouched the competence of the Strasbourg Court on the ECHR and the monitoring of the ESC by the Committee of Independent Experts, while expanding the standards to which the ECJ may refer. There is no indication in the Treaty that the concrete implementation of human rights should inspire the ECJ, still less bind it. The ECJ's judgment on accession by the Community to the ECHR reflects a careful internal balance between institutional powers and frees the ECJ from obedience to the rulings of institutions external to it.

Furthermore, the limited consideration shown by the IGC for amending Article L (now Article 46) TEU, with regard to the expansion of the ECJ's competence, is a strong political indication, inspired perhaps by realism. It is also in accord with the choice of the EU not to accede to the ECHR. The fear has prevailed that two legal orders governing fundamental rights, running parallel for quite some time, could suddenly collide and clash.

Rather than insisting on the politically impractical solution aimed at expanding the ECJ's competence, efforts should be concentrated on the creation of new bodies, similar to the European Social Charter's Committee of Independent Experts.⁹² It has been emphasized correctly that when referring to a source external to the EU, its entire range should be retained, particularly with regard to its concrete translation into the living law of the States bound by it.⁹³ The suggestion is not to duplicate procedures, but to make them converge towards institutional co-operation. In concrete terms, the new body should have both monitoring powers and powers to refer to the Commission when infringements of social rights are discovered. It should be built into the Community legal order and include representatives from other international organizations, such as the Council of Europe and the ILO, thus enhancing convergence of international standards.

If an analogy with Article 7 (*ex Article 4*) of the Amsterdam Treaty were to be drawn, one could envisage that this monitoring mechanism might also bring, in exceptional cases, to the indication of sanctions to be applied to Member States failure to respect fundamental social rights.

2. References in the Amsterdam Treaty to the 1989 Social Charter cannot be compared to those made to Council of Europe sources. Notwithstanding the symbolic value attached to this innovation, we should not confuse the legal nature of these different sources. The Community Charter remains a programmatic and political document which has given flesh and bones to Community social policies; it will need to be revised also in the light of the achievements made so far in adopting legislation in various fields and in view of new emerging needs, especially related to active

⁹² See the proposal by Blanpain *et al.*, note 58 above, and the further indications of the report by the sages, note 63 above.

⁹³ Harris, note 32 above.

employment policies. A careful reading of the Charter confirms the validity of the two levels of analysis previously suggested in the search for new and more efficient means of implementation of social rights. What the *sages* describe as different stages in what should be a new and beneficial reform of the Treaty are indeed different levels of legal analysis, and they force us to reconsider the distribution of powers among the Union and the Member States.

The Protocol on the application of the principle of subsidiarity and proportionality, annexed to the Amsterdam Treaty, should be interpreted in innovative terms when it comes to considering social rights. Article 5 indicates that Community action is justified when the objectives in question cannot be sufficiently achieved by Member States' action. This difficult balancing exercise is facilitated by some guidelines, which would need to be read in the light of a broad programme of action, a new social rights agenda for the Commission, with the indication of political priorities.

In particular, following Article 5 of the Protocol, in order to justify Community action, the transnational relevance of the issue should be recalled, as well as the possible conflict with the requirements of the Treaty, due to lack of Community action, such as to correct distortion in competition or to strengthen economic and social cohesion.

Employment is again the area to investigate for an innovative definition of the borderline between the powers of the Community and those of the Member States, in the light of Article 5 of the EC Treaty (*ex* Article 3b EC), which must be viewed as the most solid constitutional ground for subsidiarity. In this field a regime of shared competences, such as that which is taking shape in this early stage of enforcement of the new Title VIII, opens up space for yet another form of co-ordination of policies. It should be maintained, though, that an incumbent and unavoidable priority must be given to Community action, and such a power must be accompanied by precise monitoring mechanisms on national employment plans.

3. The peculiar nature of certain social rights (collective rights, procedural rights), confirms that the mere abstention of the nation States—or of the EC as such—could not suffice to guarantee its true enforceability. The right to organize and, more recently, the right to information and consultation are examples of individual rights to be exercised collectively, which, because of this peculiarity, can be enforced only through legislation at the national level. Emancipation consists in providing deep Community roots for social rights and, at the same time, assigning competencies to national and supranational legislatures.

It must be pointed out that what for some commentators appears to be the most daring reform of the Treaty and for others the most unnecessary, namely the insertion of the right to organize into the EU fundamental social rights, is indeed the most urgent and important one.

Two reasons support this recommendation:

- this right would acquire a new function in an evolving supranational legal order, in which private associations are asked to participate and be active and to fulfil quasi-institutional roles;

- this fundamental right, as suggested earlier,⁹⁴ does not receive sufficient support from the mere convergence of other international sources. Its specificity within the European legal debate can certainly be drawn from constitutional traditions in the Member States, but an even more specific function is emerging at Community level, where the right to organize appears as a precondition for exercising other collective rights (the right to bargain, the right to be informed and consulted) which at the moment lack full institutional legitimization. In again adopting the distinction between freedoms and powers, suggested earlier,⁹⁵ the fundamental right to organize would fall into the second category and require specific supportive legislation at Community level.

A renewed and stronger legitimacy of supranational associations, whose representativity should be ascertained following the criteria established in soft law, would also entitle them to new rights, such as introducing collective complaints when social rights are infringed by Member States, as well as when insufficient action is taken to permit the correct exercise of the rights themselves. It would be advisable for such complaints to be filed with the Commission, whose monitoring exercise on the state of enforcement of social rights should become even more critical and timely.

The Council of Europe Social Charter will undergo changes in the years to come, to which attention should be paid. In particular, the new procedure on collective complaints could prove a useful analogy and an occasion for bringing closer international standards and making them converge towards more cohesive measures of human rights protection.

⁹⁴ See the criticism of Art. 11 ECHR, which emerges from the case law of the Strasbourg Court. See Part I, Sect. C, above.

⁹⁵ See Sect. I, above, and Bobbio, note 2 above.

PROF. DR BRANKO LUBARDA*

**FLEXICURITY - EUPHEMISM OF NEOLIBERALISM OR
A PHENOMENON INHERENT TO GLOBALIZATION AND
AGING PEOPLE**

Abstract: The paper deals with the process of transformation of the European social model in the context of the process of globalization, economical and informational changes (internet), aging people, and enlargement of EU. The documents of European Commission – Green Paper of the European Commission “Modernising Labour Law to Meet the Challenges of the 21st Century” (2006), and the “Communication on Common Principles on Flexicurity” (2007) are analyzed. Some critical remarks are given on flexicurity based on the implementation and protection of fundamental social human rights, values of solidarity, humanity, social cohesion, and social progress.

Key words: Flexicurity, Flexibility, Employment security, Social security, Globalization, Aging people.

INTRODUCTION

The concept of *flexicurity*, or flexicurity strategies, as a new integrated approach to social model, which can be found in the Communication “Towards Common Principles of Flexicurity,” is represented as an alternative to the traditional European social model. The European social model includes philosophical and ideological elements that served for the constitution of the legal framework of the European social model, and Labor Law and Social Security Law, as the constitutive legal elements of this model. The philosophy of the European social model is based on the necessary social corrections of the market economy, within the terms of the political pluralism, and the rule of law, which led to fundamental human rights promotion in the European social model. As a consequence, the European social model is based on common elements of the national labor law systems and social security law within European countries, whose common content is made of basic social rights proclaimed by the international and European conventions and treaties on human rights; standards of non-communitarian and communitarian law: basic institutional solutions,

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reached through the comparative examination of labor law and social security law – “unity in diversity”.¹

The alternative to the traditional European social model is given by the concept of flexicurity, which is in its advanced stage in the Communication “Towards Common Principles of Flexicurity” (2007). The concept and term flexicurity provokes a dilemma of whether it is about a phenomenon inherent to globalization, economical and informational changes (internet), population aging, partly about the enlargement of the EU, or it is about an euphemism of neoliberalism, a decomposition of the traditional European social model. The “Communication on Common Principles of Flexicurity” was brought at an advanced stage of the process of liberalization of the European labor market, especially concerning broadening of significance of flexible forms of employment and contractual arrangements, which diminished the significance of the standard form of employment - full time open-ended contract. Thus, the Green Paper of the European Commission “Modernising Labour Law to Meet the Challenges of the 21st Century” was adopted prior to the Communication “Towards Common Principles of Flexicurity”.

I GREEN PAPER OF THE EUROPEAN COMMISSION “MODERNISING LABOUR LAW TO MEET THE CHALLENGES OF THE 21ST CENTURY”

The European Commission adopted the Green Paper “Modernising Labour Law to Meet the Challenges of the 21st Century” at the end of 2006, with the aim of opening a public debate within the EU on matters of how can a reform of labor legislation strengthen the Lisbon Growth and Jobs Strategy,² aimed at achieving sustainable economic growth with better working opportunities. The reform or modernization of labor law should provide better adaptability of employees and employers (companies) in the context of the Community’s goals to achieve full employment, work productivity and social cohesion. Adaptability of workers is necessarily conditioned by securing certain means at the level of the Community and the level of member states, in order to educate and train the labor force using newly developed

¹ M. Rigaux, *Project: Memorandum sur le Modele Social Europeen*, Antwerp, 2006, p. 1-4. *at Council*

² The Lisbon Strategy is a document which contains conclusions of the Council of Europe (2000), committed to defining goals of the European Union in order to strengthen employment, economic reforms and social cohesion as a part of the economy based on knowledge.

standards, which are adaptable to labor force market demands and fast challenges from the globalization and population aging factors.³

The European labor market should face the challenge of combining more flexibility (in employing and working), which is achievable by various forms of contracts regarding the engagement of the labor force, different from the standard form (full time open-ended contract – “insiders”, unlike non-standard forms – “outsiders”) with the need of providing security - security of income (wages), relative stability of employment and decent working and living conditions (including social security). The increase of the external labor force – “outsiders”, however, increases uncertainty of employment and social uncertainty; creates more uncertainty about prospects of future employment, with consequences on private life arrangements (family planning, solving residence problems). Unlike standard forms of employment, which provide more security of employment through the norms of labor legislation, regulating valid reason (justified cause) for dismissal, a minimum notice for dismissal, complex dismissal procedure, and larger expenses for individual and collective dismissal, the non-standard forms of employment assure far less protective provisions of security of employment, and working and living conditions. Because of this, there is a need to reform labor legislation in order to promote greater flexibility, and, at the same time, good employment security, and protection of the labor force engaged in non-standard forms of employment. In that manner, the segmentation of the labor market would decrease; the differences within positions of workers and related forms of engagement would also decrease. To achieve these, somewhat contradictory, goals is unimaginable without the key role of social partners. Optimal solutions for “insiders” and “outsiders” at the level of companies and at higher levels of social dialogue (collective negotiation) are needed. This implies a transfer from one labor group to another, taking into account the needs of employers (companies) for better flexibility in the area of engaging the labor force in given economic conditions, as dictated by constant innovations and changes, and reorganization of employers (transfer, collective dismissal, insolvency) needed for competition.⁴

The key elements of the flexicurity concept include lifelong learning; active employment policy; more flexible rules in the area of social insurance/security for the categories of workers transferring from the regime of flexible employment into the regime of temporary unemployment, and *vice versa*.

³ *Green Paper on Modernisation of Labour Law*, European Commission, 2006, p. 3.

⁴ *Green Paper on Modernisation of Labour Law*, European Commission, 2006, p. 3-4.

The Green Paper emphasizes the individual labor law, and greater liberty of non-standard forms of contracts; the matters of the collective labor law are somewhat suppressed. Social dialogue, on contrary, should be for the benefit of individual adaptability in the process of work engagement, and less for the benefit of the collective labor law development. In other words, social partners, the state, and other actors of the market should contribute to finding the “magic formula” called “flexicurity”, which enhances flexibility, but also ensures stability of employment (independent of the employment contract form), and everything that leads to the decrease of unemployment and the increase of employment.⁵

In the process of labor law modernization, one should take into consideration the operating cost of social rights, expenditure, as well as certain administrative expenses imposed by communitarian or national law (for example, expenses of establishing small and medium-sized enterprises, keeping business records for labor, expenses /contributions/ of submitting applications for obligatory social insurance, etc.), with clear definition of rights and commitments of employees and employers, with special emphasis on small and medium-sized enterprises.

The goals defined in this manner are contained in the Green Paper (2006), and were advanced by the adoption of the Communication “Towards Common Principles of Flexicurity” (2007).

II THE COMMUNICATION ON COMMON PRINCIPLES ON FLEXICURITY

The European Commission adopted the Communication with the aim of encouraging the debate within the institutions of the EU, within the Member States of the EU, social partners at the European and national level, and other actors (including public debate participation of labor law and industrial relations experts, as well as other experts within the areas of economy and sociology), and in order to enable the Council of Europe to adopt common principles on flexicurity by the end of 2007.

This Communication appeared as a EU possible answer to challenges of deep changes within areas of work and life of the European citizens, provoked by the processes of globalization, new technology developments - informatics and communication (internet), demographic changes conditioned by aging of population, and by changed family

⁵ *Green Paper on Modernisation of Labour Law*, European Commission, 2006, p. 4.

structure (large number of divorces and single-parent families), strong labor market segmentation, especially by an increased labor force in small and medium-sized enterprises, as well as an increased number of employees working in non-standard forms of employment engagement – “insiders”.

The standard form of employment, the full time open-ended contract, makes room for flexible employment and labor engagement – “outsiders”. This calls for an increased necessity to reorganize economies of member-countries of the EU, especially to provide greater flexibility of employees and companies due to rapid changes in the conditions of international economic integrations. There is a need for a flexible labor market, but with prospects of maintaining security (security of employment, not security of a specific place of work, and a social security), in the conditions of new risks (especially risks due to stress at the work place). Hoping to achieve the Lisbon Strategy goals in creating more and better jobs, there is a need to find new forms that can combine the flexibility and maintain the security.

The expression “job for life” (employment within the same company during the entire working era) is becoming the fact of the past; the employees are expected to embrace a new reality - the need for a greater geographic and professional mobility, which would be based on a constant need for adjustment in a lifelong learning, and which would lead to greater work innovations and contribute to maintaining competition among employers.

The necessity to modernize the European social model led to flexicurity proposals, as an integrated model, which leads to greater flexibility on the labor market, changes in the organization of work, and changes in the legal regime of the labor relations, with preservation of security - security of employment and social security. Employment security means security based on realistic prospects of finding employment during the entire working career, increased capability of finding a job based on attained professional skills which are constantly being improved (lifelong learning), and finding ways to professional integration in conditions of constant economic changes related to globalization. However, employment security imposes a special responsibility of Member States, which should increase the prospects of finding employment with their active employment policies, especially concerning the employment of certain categories of people - certain ethnic minority groups, women, disabled persons, etc. If assured these goals of the EU would reflect positively in preserving economic and social cohesion.

Flexicurity is defined as an integral strategy, which tends to increase flexibility on the labor market, preserving security of employment and social security on a new basis no longer on a rigid labor legislation that prescribes complex procedures of reducing the number of employees (collective dismissal), relatively high amounts of redundancy (dismissal) compensations, increasing geographic and professional mobility of employees - from school to work, from one working place to another, from temporary unemployment to employment, and from the working era to retirement. Flexibility includes, from the point of view of an employer, a good organization of work, with the commitment of the employer to enable the employees to gain professional skills, which *de facto* make them more attractive on the internal and external labor market (investing in the human resource development, training the employees and thus making it easier for them to adjust to the working environment and accept the necessary changes in the organization and methodology of work). In other words, flexicurity means more mobility (geographical and professional) in labor market – more freedom in recruiting, as well as in licensing (dismissal; layoff; redundancy).

The European Commission and Member States have achieved consensus on the policy of flexicurity, which is based on four general principles that Member States will manage by implementing the flexicurity concept: flexible contract arrangements, lifelong learning strategy, effective active employment policy measures, and modernizing the social security system.

1. Flexible contract arrangements - softening of the protective character of labor legislation

Flexible contract arrangements should reduce the gap between those in non standard – “outsiders” and those in permanent, full time jobs – “insiders”, i.e., provide softening of the traditional norms of labor legislation related to strict protection from economic dismissal. It is estimated that strict protective labor legislation decreases economically related dismissals (complex procedure, payouts of compensation for dismissals), but, also, decreases mobility on the market from unemployed to employed persons.

When making decisions on recruiting workers, employers consider the fact that eventual dismissal of employees out of economic reasons will represent for them a significant expense, especially if the employer is a small enterprise (business). Moreover, and *vice versa*, employers, especially small enterprises, would hire new employees far easier, if the norms of the labor legislation could provide less expense of

an eventual dismissal from non-economic reasons, and if constant changes on the market and reasons of preserving competition would impose such decisions.

Strict labor legislation makes harder the employment of vulnerable categories of people (long-term unemployed persons, elderly persons, young persons, women, disabled persons). Bringing more flexibility in recruiting new employees and abandoning the strict labor legislation would enable these categories to find a job much easier in some form of flexible employment – fixed-term contract, contract on temporary work, contract on occasional work, tele-home work contract, etc. Under conditions of flexible employment, the employers could be encouraged to invest in training and human capital in general, which contributes to a better productivity. Finally, flexible forms of employment have an additional convenience for employees and employers - they enable easier reconciliation and harmonization of professional and private life.

Certain risks of geographic and professional increase of work mobility make their full appearance when considering rights to financial compensation on the account of economic dismissal (collective dismissal of employees). The frequent reorganization (restructuring) of employers leaves employees in a more inconvenient position when being dismissed for economic reasons, because the amount of financial compensation is traditionally related to a period spent working within a company, which is used for dismissing labor. In order to overcome this bitter, unwanted element of mobility encouraging, the Communication "Towards Common Principles of Flexicurity" points out to possible abandoning of the traditional way of understanding compensation, first introduced in the new Austrian labor legislation. The Austrian system of compensation payouts (severance pay system), through changes made in 2003, has enabled the establishment of a form of personal account benefiting the employee, and the employee being dismissed for economic reasons maintains the right to dismissal compensation, which is calculated on the basis of the entire working time, not only on time spent working for that one employer.⁶

Flexicurity strategies should contribute to the development of the internal flexicurity – move up the career ladder, and external flexicurity – across the job market.

⁶ Communication: "Towards Common Principles of Flexicurity" ..., p. 21.

2. Strategy for lifelong learning

The capacity of adjustment (adaptation) of individual person and of enterprises to changing environment caused by technological and informational progress and globalization of market of goods and services is inevitably related to lifelong learning. Strategy for lifelong learning, or employer's investment in human resources, is a necessary element of the need to respond to demands imposed by frequent economic changes and innovation. Competition of economic subjects within a knowledge based economy is to a large extent based on this strategy. It is vital to provide a high level of education in educational facilities at all levels, but employer investments to constant upgrading of employees is also an element of preserving competitiveness. By gaining professional knowledge and skills, a highly educated and trained employee can better adjust to economic changes and obtain a longer period of work. Beside the benefits of the lifelong learning process that highly educated personnel might have, lifelong learning provides employees with lower levels of education the benefits of attaining additional know-how skills, maintaining their presence on the market. Member States should have employment policies that allow employees with flexible forms of employment to be included in programs of constant knowledge and skills obtaining, especially concerning the elder employees, unemployed, women, youth, to invest in their specialization in order to keep them as an integral part of the labor market. The strategy for lifelong learning requires active participation of employers and employees, as well as social partners and governments, in both conceptualizing the strategy and securing its means through employment services and other institutions.

3. Modernizing the social security system

Flexicurity strategies include modernizing the social security (protection) systems,⁷ providing adequate income support during periods of unemployment. Active employment policy and compensation in case of unemployment – unemployment benefit are also in correlation. During temporary unemployment, an unemployed person, who lost his job unwillingly and not by his fault, should have the right to unemployment benefit, which should provide social security. In that way, if one leaves aside the tradition of strict labor legislation regarding economic dismissals, the employee which is about to be dismissed, should not fear for social security. The amount of compensation and the period of using

⁷ F. Pennings, *Introduction to European Social Security Law*, Kluwer, 2001; B. B. von Maydell, A. Nusberger, eds., *Social Protection by Way of International Law*, Berlin, 1996; J-P. Chauchard, *Droit de la sécurité sociale*, Paris, 2001.

it must create a sense of security, which will compensate liberalization and ease the strictness of the traditional labor legislation concerning collective dismissals. Of course, the deeper meaning of the flexicurity concept is that the appropriate social security of the unemployed person, which is achieved by measures of an active employment policy, as well as by the concept of an active job seeker, encourages greater mobility on the labor market, and provides maximum engagement of an unemployed person in searching for another job. In that sense the key role is not only in measures of active employment policy, which ask for significant means (more qualifying stuff, public works, self-employment), but also in measures that do not ask for those means, but are still effective – job clubs, employment fairs, etc. Results of analysis show that workers feel better protected if the unemployment benefit based on insurance in case of unemployment is set at an appropriate level, rather than on strict legal protection form dismissal (based on economic reasons). Danish experience shows that the sense of security (employment security and social security) is related to an integral approach to the flexicurity concept - fair unemployment benefit, effective measures of an active employment policy, dynamics/mobility on the labor market (better jobs).⁸

Solid social protection of unemployed persons implies higher unemployment benefits, but active job-seeking (rights and duties of unemployed person as active searcher for job). The Commission sets out number of typical pathways (best practices) to help Member States draw up their national strategies for flexicurity.

III COMMENT ON THE FLEXICURITY CONCEPT - EUPHEMISM OF NEOLIBERALISM OR FREEDOM WITH(OUT) SOLIDARITY

1. Flexicurity and Fundamental Social Human Rights

The concept of flexicurity, offered by the European Commission in its Communication (2007) could be considered as part of a developed stage of the liberalization process and the decomposition of traditional features of the European social model, which is being rapidly developed in the last decade of the 20th and at the beginning of the 21st century, along with the globalization process, the development of new technologies, telecommunications, internet, virtual life culture,

⁸ Communication: "*Towards Common Principles of Flexicurity*" ..., p. 21.

population aging process, and traditional family crisis. Abandoning the concept of the social state (responsibility of the state for social welfare of citizens) is in relation, to certain degree, to the fall of the communist regime in Europe, which was characterized by the absence of political and ownership freedom, but also by a visible degree of social security. Economic globalization is followed by the idea of neoliberalism in both the economic and social domain - flexible forms of employment, larger responsibility of the individual for his social security (for example, promoting the third pillar of pension insurance), etc.

Considering the normative frame within the international environment, certain complementarity is noticeable when introducing international (universal) standards and European-communitarian labor standards, which have in common the liberalization of the labor market, promoting flexible forms of employment. Within the EU in the last decade of the 20th century, the European collective agreements have been concluded by the European social partners on the matter of fixed-term contracts, part-time work, and 2002 tele-home work. These universal and communitarian working standards try to provide a proper protection of the constantly rising number of employees, which are engaged in atypical forms of work. Everything here mentioned is followed by the tendency of softening the consequences of dissolving an important element of the European social model - the standard form of work (open-ended employment contract, full time employment), which is, on the other hand, reflected in the tendency to create more and better jobs in the EU (Lisbon Strategy), as well as in the promotion of those elements of social policy which are generally accepted, but have euphemistic influence - lifelong learning, and active employment policy measures. It was probably no accident that the communitarian standards on flexible forms of employment were followed by the conclusion of a European Framework Collective Agreement on Job Related Stress in 2004.

Some critical remarks are given by the European Trade Union Confederation (October 2007), whose approach to flexicurity is very different from the Commission Communication. The ETUC finds that Communication on Flexicurity is seriously imbalanced in favor of the interests of business – business gets the flexibility to fire workers at a low cost, while obtaining the security of having at its disposal a work force, reducing the level of job protection.⁹ As a consequence, ETUC called upon European Council, European Parliament and Commission to rebalance flexicurity by making it more labor friendly. Modern labor law,

⁹ ETUC/EC177/JM/MHA/JD/RJ/TJ/RB-03.10.2007or.gb, pp. 7 – 8.

according to the ETUC, means making sure to end chains of fixed-term employment contracts, involuntary part-time jobs, and to reduce (eliminate) abuse of civil law contracts (sub-contracting), and to extend rights to transform precarious jobs into regular work.

Employability should thus be based on professional formation and rehabilitation (formation; new skills, additional jobs, sub-contracting; overtime work) – lifelong learning and quality of educational system. This is connected to Lisbon Strategy goals: better jobs, more paid/more skilled jobs. Employability asks for more decentralization of employment services – like Denmark's and Finland's experiences with regional employment services. Decentralization of employment services is more appropriate for detection and anticipation of social difficulties – demand for work; reconversion, formation, orientation; financial aid in the case of reorganization and modernization; advising on technical matters; more closer cooperation with social partners.

Considering lifelong learning (training and education) strategies is an integral part of comprehensive economic, fiscal, social and labor market policies and programs, not only for sustainable economic growth (in the global economy), employment creation and social progress, but also as contributing factors to personal development of human being (anthropological approach). According to the ILO Recommendation concerning Human Resources Development: Education, Training and Lifelong Learning (R195, 2004; Cross references: 142 Human Resources Development Convention, 1975, C122 Employment Policy, C140 Paid Education Leave)¹⁰, incorporated and elaborated in Communication of Common Principles on Flexicurity (2007), the key issue is not the fundamental importance of lifelong learning, but realization (and protection) of right to lifelong learning, having in mind the problem of access for training and lifelong learning opportunities due to limited financial opportunities to invest in human capital by employers (enterprises), and having in mind relatively limited investing by governments to enhance education and training at all levels.

The key issue addressed is the mere right to work as fundamental social human right and the concept of valid reason for termination of employment (R119, C158);¹¹ otherwise there is convergence to liberal concept of Employment at Will (USA). The question is does flexicurity, as the process rather than concept, has its limits, or is it about “*normes sans rivages*” – from Labour law back to Civil law. The limits of

¹⁰ L. Betten, *International Labour Law*, Kluwer, 1993, p. 351–379.

¹¹ G. Maes, *Social Human Rights and Protection Against Dismissal, General theory with an analysis of the right to work*, Antwerp, Intersentia, 2003.

flexicurity as the process in the context of globalization (of economy) should be globalization of fundamental social rights (ILO Declaration of fundamental principles and freedoms - needs to be enlarged – C158, etc.). In the framework of the Council of Europe, the limits of flexicurity should be Case law of European Committee for social rights on nine fundamental social rights – “hard-core provisions”.¹² Within the EU, the limits of flexicurity should be in fundamental rights of Charter of Nice (incorporated in Lisbon Treaty).

The question is whether the lifelong learning or adequate employment opportunities through high levels of employability, ensured by training and education, are overestimated as substitutes for no longer employment security based on rigid labor legislative provisions. Lifelong learning as the new basis for *de facto* security of employment on the internal and external labor market (adaptability, employability based on skills, know-how, innovative and other competences) should not abolish employment protection legislation (legitimate cause for dismissal on the initiative of employer, C158). Education and pre-employment training, development of competencies, training for decent work and social inclusion, ask for the responsibility of governments (particularly for unemployed; measures as incentives and assistance), the role of social partners (through human resources development policies), the adequate role of local authorities and communities (in implementing programs for people with special needs) (R195).

R195 concerning Human Resources Development, Education, Training and Lifelong Learning (2004), to mention again, was adopted in order to promote the interests of individuals (and their personal development of competencies and qualifications), enterprises, the economy and society as a whole, especially considering the challenge of full employment, social inclusion and social development, and sustained economic growth in the global economy, recognizing that education, training and lifelong learning are fundamental and integral parts of economic, fiscal, social and labor market policies and programs. R195 was adopted in order to renew (the Human Resources Development Convention, 1975, the Employment Policy /Supplementary Provisions/ Recommendation, 1984, the Paid Educational Leave Convention and Recommendation, 1974, the Tripartite Declaration of principles concerning Multinational Enterprises and Social policy) the commitment

¹² R. Harris, *The European Social Charter*, University Press of Virginia, 1984; L. Samuel, *Fundamental Social Rights – Case Law of the European Social Charter*, Council of Europe Publishing, Strasbourg, 2002; Akandji-Kombe, J-F. Leclerc, eds., *La Charte Sociale Européenne*, Bruxelles, 2001.

to lifelong learning: governments, by investing and creating the conditions to enhance education and training at all levels; enterprises by training their employees - adaptability of workforce; individuals, by making use of the education, training and lifelong learning opportunities - employability of workers - to secure and retain decent work, to progress within the enterprise and between jobs, and to cope with changing technology and labor market conditions. Lifelong learning is of the key importance to achieve the objective of (ILO, Member States) decent work for workers.

Member states should define, with the involvement of social partners, a national strategy for education and training, and establish framework for training policies at national, regional, local, sectoral and enterprise levels, to create an economic environment and incentives to encourage enterprises to invest in education and training, and to motivate all to participate in education and training programs. Also, to assist enterprises and employment agencies to match skill demand with supply, strengthen social dialogue and collective bargaining on training at all levels, to promote access to education, training and lifelong learning for youth, low-skilled people, people with disabilities, migrants, older workers, ethnic minority groups and socially excluded.

Members should establish and improve a coordinated education and training system within the concept of lifelong learning, taking into account the primary responsibility of government for education and pre/employment training and for training the unemployed, and recognizing the role of social partners in further training, in particular the vital role of employers in providing work experience opportunities.

Members are responsible for education and pre-employment training, they should encourage the use of new information and communication technology in learning and training, ensure that vocational education and training systems are developed to provide opportunities for the development of skills relevant to the labor market. Member states should promote the extension of workplace learning and training through the organization of on- and off-the-job training with public and private training providers, and make greater use of information and communication technology. Last, but not least, Members States should promote equal opportunity for career guidance and skill upgrading for all workers, and supportive policies to enable individuals to balance their work, family and lifelong learning interests. The framework for recognition and certification of skills should include a credible system of certification which will ensure that skills are portable

and recognized across sectors, industries, enterprises and educational institutions.

Research in human resources development, education, training and lifelong learning suggests that members should evaluate the impact of their education, training and lifelong learning policies on the progress made toward achieving broader human development goals, such as the creation of decent jobs and poverty eradication. One of the aims of the Communication on Flexicurity is to contribute to eradication of poverty in Europe, by way of professional integration of vulnerable groups of persons.¹³

Moreover, the OESC Employment Outlook 2006 (Boosting Jobs and Incomes) shows that employment protection legislation has no significant impact on the total employment rate, and the ILO has shown that there is a positive relationship between tenure and productivity. Cooperative methods of working arrangements, low-profile hierarchies and greater autonomy in their work (team-work) are important factors for increasing quality of goods, productivity and innovativeness, and consumers' needs. Without being accompanied by the growth-friendly macro-economic policies and by coordinated tax policies, the flexicurity policies can not work.

However, the key question cannot hide the euphemism of a new concept of globalism, the flexicurity, which tries to reconcile flexibility and security (employment and social security) - where the limitations of the labor market liberalization are, and whether the flexicurity concept is based on a clearly defined set of fundamental rights, as a limit to liberalization, or flexibility of the labor market. There is a need for critical assessment (judgment) of general principles of flexicurity in view of redefining rights to work, as the fundamental social human right. When defining the right to work, elements considered to be vital elements of this right were not only based on the freedom of work (abolition of forced labor), but on the equality of opportunity and treatment in employment, and an unjustified dismissal - concept of a valid reason for dismissal (set in the Convention of the ILO No 158¹⁴, which considerably acknowledges the achievements of the European social model). Unlike the European social model and the ILO Convention, which express the concept of a valid (justified) reason for termination of employment contract at the initiative of the employer

¹³ F. Vandamme, "Flexicurité": *Qui est concerné?*, *Révue du Marché commun et de l'Union européenne*, n. 511/2007, p. 482 - 485.

¹⁴ L. Betten, op. cit., p. 225 - 227; N. Valticos, *International Labour Law*, Kluwer, 1979, 168 - 170.

(capacity, conduct of workers, operational requirement of undertaking /establishment/ service), the American liberal concept is based on the principle *Employment at Will*¹⁵ which enables the employer to terminate the labor contract without stating the (valid) reason of dismissal, except for discriminating dismissals (race, color, gender, etc).¹⁶ The European social model classifies valid reason as "real and serious reason of dismissal" (fr. *cause réelle et sérieuse*) (rare exception is Belgian law¹⁷), which is dealt with by the Member States of the Council of Europe, as well as by specialized courts/tribunals for labor disputes. In this way the philosophy of flexicurity leads to the decomposition of the European social model, because it makes relative the traditional protective character of labor legislation, when considering the procedure and expenses (compensation for dismissal) for the termination of the employment contract for economic reasons, thus making the European social model closer to the American model of employment at will. Otherwise, flexicurity as the process could revert from the Labor law back to the Civil law.

2. Flexicurity: Freedom wit(out) Solidarity

The concept of flexicurity opens the question of the future of the European social model, which is an important element of the European social identity based on the values of solidarity and humanity (preserving competitiveness - economic growth and social progress and social cohesion). In the common principles of flexicurity, the solidarity, social justice, social progress, social cohesion, or "social Europe" are not mentioned. However, the EU financial instruments for Cohesion – the European Social Fund (for 2007 – 2013) can contribute to the budgetary aspects of flexicurity (lifelong learning programs).

According to the Opinion of the European Economic and Social Committee from July 2007, the concept of flexicurity leaves some room for the role of social dialogue and collective bargaining as instruments for regulating and reforming labor markets (external flexibility – layoffs, temporary work, fixed term contracts), particularly in internal flexibility dimension (e.g., working time flexibility), functional flexicurity (e.g.,

¹⁵ A. L. Goldman, *Labor Law and Industrial Relations in the United States of America*, Kluwer, 1984; R. A. Gorman, *Basic Text on Labor Law – Unionization and Collective Bargaining*, West Publ. Co, 1992; L. G. Joel III, *Every Employee's Guide to the Law*, New York, 1996; D. Q. Mills, *Labor Management Relations*, NY, 1989.

¹⁶ M. A. Player, *Federal Law of Employment Discrimination*, St. Paul, Mn, 1992; D. Q. Mills, *Labor Management Relations*, McGraw-Hill, 1989.

¹⁷ P. Humbelt, M. Rigaux, (sous la direction de), *Aperçu du droit du travail belge*, Bruxelles, 2004, p. 208 – 214.

multitasking and job rotation, job enrichment, having in mind, however, that functional flexibility may lead to more work pressure and stress). Internal flexibility can play a key role in advancing productivity, innovation and competitiveness, adaptability and security of both employers and employees. The EESC emphasizes that the role of the social partners has to be strengthened at national and European levels, as a key element of modernizing labor law and industrial relations at all levels, and that concept of flexicurity does not mean unilateral and illegitimate reduction of workers' rights. The social partners had a key role in the development of Danish-style flexicurity, both in decision-making and in implementation in areas such as training policy and labor-market structural reforms – e.g., mandatory notice periods to enable workers to prepare better for another job. In Sweden, sectoral collective agreements have set up “career transition” funds – e.g., notice with training, job search assistance, paid internships in other firms; in Spain, tri-partite agreement on how to limit the use of fixed term work contracts; German collective agreements allow for a limited degree of flexible organization of both working time and work.

Decentralized collective bargaining (at enterprise level) on flexible forms of employment – part time work, work for definite period, tele-home work, reconciliation of professional and family life; adaptation of wages and salaries (remunerations) depending on results and needs – temporary derogation *in peius* may be seen as the step forward, having in mind basic European labor standards given by: European Framework Collective Agreements on Part-Time Work; Work for Definite Period; Tele-Home Work; and their implementation by directives (first) and national collective agreements (afterwards).¹⁸

Still, knowing how the process of flexicurity affects Social Dialogue, European Social Dialogue, as well as Cross-Border Collective Action in Europe¹⁹ is of particular importance. Should we invent an additional word in the vocabulary of globalization: flexidialogue? Does the process of flexicurity lead to increasingly decentralized collective bargaining systems, with the characteristics of liberal model with company level of collective bargaining as the main level of negotiation? The existing trend of decentralization of collective bargaining in more centralized systems of collective bargaining in Nordic countries and in Germany, Austria, Belgium could affect the tradition of social model in these countries.

¹⁸ E. Franssen, *Legal Aspects of European Social Dialogue*, Intersentia, 2002.

¹⁹ F. Dorssemont, T. Jaspers, A. von Hoek, eds., *Cross-Border Collective Actions in Europe: A Legal Challenge*, Intersentia, 2007.

Flexicurity asks for more topics for collective agreement – including organization of work, better skills of workforce – lifelong learning; more flexible reorganization of enterprises according to the opportunities on market of goods and services; participation in decision making and results (profits); anticipation of the need for reorganization of enterprises and social dialogue as a consequence of reorganization (transfer, collective dismissal, insolvency) – EU directives and ILO standards; Derogation *in peius* vs. derogation *in melius*; Collective bargaining on non-standards work.

Europe without solidarity (employment security, social security and social welfare) and without preservation of social justice, humanity brought by developed labor law (by emancipating in relation to civil law, labor law may be seen as humanized civil law), whose basic presumption is a social dialogue (collective agreements), represents dissolution of traditional values of the European social model. That is why the EESC, in its Opinion on Flexicurity, stresses that Commission and the Member States should give more attention to intergeneration solidarity, gender equality, older workers and young people protection in the labor market in terms of flexicurity and security. Demographic changes conditioned by population aging and changing family structure (single parent families) and flexicurity debate must increase the role of the social partners in reconciling working, family and private life, better inclusion in social welfare systems and better support of institutions to combine work and non-work activities. In other words, the aging people, marriage and family crisis are becoming increasingly delicate issues in making the reconciliation of professional and family life (ILO, Convention 156).

The concept or process of flexicurity is about growing mobility and responsibility for individual social security, with a more active role of the private insurance funds – health, age-pension, invalidity, unemployment private insurance funds (and the growing economic role of private funds as institutional investors). Flexicurity process is also about growing role of local community in social security and social assistance; social housing; local social work in community services, and local taxes.

The philosophy of neoliberalism, or ideology of globalization may be questioned by arguing that, to a certain extent, there is no (automatic) relationship between the level of social spending and economic growth,²⁰ and thus the European Social model need not be dissolved in order to be economically competitive. This is confirmed by

²⁰ P.H. Lindert, *Growing Public: Social Spending and Economic Growth Since the Eighteenth Century*, Cambridge University Press, 2004, p. 92.

Scandinavian countries that managed to maintain the social model despite the challenges of globalization, population aging, and EU enlargement. The European social model is also exposed to potential challenges because of the enlargement of the EU, since most of the new members are from Central and Eastern Europe, or Southeastern Europe, being inspired during the process of transition mostly by the philosophy of neoliberalism (with an exception of Slovenia). This is also due to the pressure from outside agencies – the World Bank, the International Monetary Fund, the OECD, and the EU itself, in the process of transformation of national and institutional systems of ex-socialist countries (process of transition) to market economies. In these countries, reduction in social protection (the socialist state was no more) and social cohesion was sacrificed to facilitate the transformation into liberal market economy.²¹ In others words, these countries have moved from social security system without (political and economical) freedom to system of freedom (market economy, political pluralism) without social protection. It would be too harsh to say that new members are the “Trojan horse” for the European social model, or that the rapid enlargement of the EU leads to the creation of a new excuse (justification) for dissolving traditional achievements of the European social model, having in mind the pressure of outside agencies to adjust overnight to the market economy (“shock therapy”), to the neoliberal model, and to the complete (social) uncertainty.

The issue of the future of the European social model perhaps surpasses the issue of the European social model identity. Flexicurity as the Process “*sans rivages*” jeopardizes the future of European Social Model, i.e., the preservation of European Identity based on Solidarity and Humanity (and Competitiveness); preservation of traditional European values and principles from the end of XIX century (Bismarck model) and in the late 40-ies of XX century – Welfare State; Social State (Beveridge model included); later on, Social Europe – Proposal of EU Constitution – New State of Providence (L' Etat Providence) at the beginning of XXI century. Flexicurity may be the peril for the concept of fundamental human rights seeking to promote human dignity – universality and inseparability of fundamental rights of civil, political and social nature. Europe without traditional solidarity (social security and social assistance) and humanity (social dialogue as prerequisite for humanity) may lose its identity itself.

²¹ *Reconciling labour flexicurity with social cohesion – The experiences and specificities of central and Eastern Europe*, Council of Europe Publishing, *Trends in social cohesion*, No. 17, 2007; Introduction by G. Farrell and S. Sperber, p. 11- 19.

Flexicurity may lead somehow to "flexistress" - globalization of stresses. Internal and external mobility, as one of the key elements of flexicurity, could contribute to identify the problem of job related stress. One of European answers how to prevent, diminish or eliminate the stresses at work in changing global economy and knowledge based society was the European Framework Collective Agreement on Job-Related Stress (2004).

Furthermore, the future of the European social model is important for the preservation, implementation and protection of social human rights, and the future of accomplishing and protecting the totality of human rights due to their mutual relationships, based on the school of natural law and anthropological approach. Without implementing and protecting the fundamental social human rights, personal, even political rights, become formal (right to life, dignity, privacy, association, etc.).

The process of flexicurity, if not limited by fundamental social human rights, could lead to erosion of the European social model and the return to the program's feature of social rights, instead of nurturing the concept and nature of fundamental social human rights, as are the rights proclaimed and guaranteed in the Revised European Social Charter of the Council of Europe, as well as the Community Charter of Fundamental Rights - the Nice Charter (2000), which express the concept and the philosophy of "social Europe". The dissolution of the traditional European social model in conditions of globalization asks for a critical reexamination from a universal point (not only within European borders) of the fundamental social rights, as a barrier to the global triumph of economic and social globalism. This barrier is partly built by the ILO by proclaiming the Declaration on Fundamental Principles and Freedoms (1998), which contains eight conventions of the ILO: freedom of work - 29, 105; on equality of chances on conducts (prohibition of discrimination - 100 and 111); child protection - 138, 183; freedom of associating and group negotiating - 87, 98.²² Within the European boundaries, that barrier can be seen well because it contains, in the context of the Revised European Social Charter, nine ("hard-core" provisions) out of thirty one articles. In the EU, the Nice Charter on fundamental rights of citizens of the Union includes the set of social rights. The practice of the European Court of Human Rights is of even more importance, which, with its additional protocols, enables the protection from discrimination, when fulfilling social rights (although the

²² An open debate on other basic social human rights, such as the right to decent working condition, and the right to social security may also be needed; B. Lubarda, European labour law, (in serbian), Podgorica, 2004.

European Convention on Human Rights contains only two articles on social rights - Article 4 forbids forced labor /Van der Musselle case/; Article 11 proclaims freedom of /union/ association /James, Young, Webster and other cases/. The Protocol No. 12 (2000) to the Convention for the Protection of Human Rights and Fundamental Freedoms deals with collective enforcement of a general prohibition of discrimination: "The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" (Art. 1). For the European Social Model, of particular importance is the prohibition of discrimination or the enjoyment of any social right set forth by law (labor and social protection legislation). Of importance is also the elimination of (sexual) harassment and mobbing²³ (lat. *mobile vulgus*).

Naturally, on the European and universal level it is to be expected that a wider consensus on the number and contents of fundamental and social human rights will be reached, in order to set the limits on the global scale, when liberalization of the labor market is concerned, and to establish more clear standards of decent working conditions. The *causa* of the labor /employment/ contract is not only competent loyalty of an employee to employer; it also includes decent working conditions.

From the point of realization and protection of fundamental social rights, the future of European Social Model is more than the problem of identity of Europe – the future of European Social Model is the mere future of social human rights in their inseparable mutual interdependence, because without realization, implementation and protection of (fundamental) social rights, including Right to Work and Right to Social Security, number of civil and political rights become more formal (from right to life; right to dignity; right to privacy, etc.). The future of fundamental social rights is thus deeply interrelated, interwoven with the future of universality of legal civilization based on fundamental human rights – civil, political, social, cultural, etc. The question may be raised if the flexicurity, as "soft law", leads to the erosion of European Social model and backs away to programmatic character (nature) of social rights, rather than social rights as fundamental human rights, as "hard law" (hardcore provisions of Revised European Social Charter; Charter on fundamental rights of European Citizens – Charter of Nice, as a part of Lisbon Treaty; ILO Fundamental Rights and Principles Conventions).

²³ B. Rupprecht-Stroell, *Mobbing: no grazie!*, Milano, 2001.

* * *

The legal civilization remains somehow uncompleted without clear definition, implementation and protection of fundamental social human rights on a global (universal) scale (which creates greater chances for the European social model to survive). Non-divisibility of fundamental human rights, from the anthropological point of view, as well as from the point of view of the school of natural law – *Recta Ratio*, seeks to overcome the dualism of political and civil rights, on one hand, and social (cultural) rights, on the other hand. Freedom without other virtues – social justice, solidarity and humanity could perhaps lead to economic growth, but it remains a serious challenge to social progress and social cohesion. (Social) Justice is the criterion (measure) for legitimacy of institutions, the most valuable or first virtue of social institutions²⁴, prerequisite for sustainability (of growth) and social cohesion of human community – *Recta Ratio, naturae congruens*.²⁵

²⁴ John Rawls, *A Theory of Justice*, Harvard University Press, 1971; D. Miller, *Principles of Social Justice*, Harvard University Press, 1999.

²⁵ From the point of view of *Recta Ratio* as the source of natural law (Hugo Grotius), modern classification of law as “hard law”- legal imperativism (legal sanction) and “soft law” – norm of behavior (no legal sanction) seems less important than the topic of effectiveness of law, if the law meets the requirements of *Recta Ratio*, if *ars boni et aequi* (Ulpianus).

Reconciling labour flexibility with social cohesion is a major challenge for Europe.

Even though the work place has become significantly more flexible in the former socialist countries of central and eastern Europe, the ideas on "flexicurity" and strategies of reconciliation are usually only developed in the context of the western European welfare states. However, when considering the differences of the transformation process, it is clearly indispensable to go beyond a one-size-fits-all strategy. The realities of central and eastern Europe and their social institutional systems must be taken into account.

This volume contributes to filling this gap and to starting a pan-European reflection on the concepts and issues of labour flexibility and social cohesion.

It contributes to the understanding of the specificities of certain realities in central and eastern Europe, including Turkey, in order to conceive adequate strategies for conciliation.

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Reconciling labour flexibility with social cohesion – The experiences and specificities of central and eastern Europe

Trends in social cohesion, No. 17

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for years, and the support of the Belgian Federal Government – a special volume on reconciling labour flexibility with social cohesion in central and eastern Europe. This publication gives insights into specificities of central and eastern European countries with respect to labour flexibility and social cohesion and proposes ideas for solutions adapted to this context.

I hope this work will inspire policy makers on the European continent to look for development strategies that unite flexibility and security and in which social cohesion is a factor of competitiveness.

Alexander Vladychenko

*Director General of Social Cohesion
Council of Europe*

INTRODUCTION

When addressing the question of possible accommodations between labour flexibility and social cohesion as a challenge for Europe, the characteristic realities of central and eastern Europe need to be considered. This is due to the fact that in these regions flexibility and the transformations of the national social and institutional systems as a whole have materialised chiefly under pressure from outside agencies (the World Bank, the IMF, the European Union, the OECD), whereas in western Europe they are more "policy-led" (cf. J. Kochanowicz's contribution).

In fact the socialist economies caused chronic manpower shortages: overt unemployment was unknown, the employment rate was high, and wages did not reflect individual productivity but aimed at egalitarian incomes. With the radical transformations resulting from the transition to market economies, shortages vanished, taking job security with them. Yet, paradoxically, this is seldom mentioned in the debate on the future model for reconciling labour flexibility with social cohesion, and the available information is relatively sparse.¹

The contrasts with the processes of transformation at work in the countries of western Europe are such that it is time to dispense with the idea of a single strategy. Indeed, the proposed reconciliation absolutely must take East-West differences into account, and this volume sets out to open avenues for doing so. It must therefore be emphasised at the outset that in central and eastern Europe we encounter not one reality but different realities in different states, to match the disparity of the communist systems and the differing prior patterns of development. Now, as in the case of the western European social models, groups of countries with similar situations can be singled out: the states of the Community of Independent States (CIS), the Visegrad countries, the Baltic countries, the countries of South-Eastern Europe and the Balkan countries (except Slovenia). That is why this study presents typical examples: Poland, Estonia, Russian Federation, Bulgaria, Croatia and Turkey, which differs from the others namely because it has no communist past.

1. See, for example, Wallace, C. (2002) "A critical review of literature and discourses about flexibility", HWF Research Report No. 1.

Nearly all these countries in fact went through what Janos Kornai called – referring to Karl Polanyi – “the great transformation”² from a socialist system with a command economy to a market economy, incurring profound social changes reflected in the novel forms of work distribution.

This volume is thus arranged in two parts:

1. Broadening perspectives so as to address, in a pan-European context, the questions of concepts and issues surrounding labour flexibility and social cohesion;
2. Comprehending the specificities of certain realities in central and eastern Europe, including Turkey.

Labour flexibility, precariousness and social cohesion

From the rigidity of the communist system to complete uncertainty

Before 1990, companies in central and eastern Europe were shielded from the global market: production and distribution were centralised and concentrated on national markets, with the allocation of work highly regulated and unconnected to the level of productivity. When the Berlin Wall came down, this scheme vanished: a large number of the wage earners changed jobs within the years which followed. The opening up of national economies saw the excessive demand for manpower supplanted by the intensification of productivity. Technology became crucial to the survival of companies which formerly had little incentive to innovate. The extremely rigid framework gave way to a system in which nothing is assured in advance. Everything that overbearing authorities and bureaucracy had stiffened to rigidity then became malleable, risky and insecure through the influence of market forces, competition, and civil rights guaranteeing more freedom of movement. Moreover, the comparatively generous social guarantees could no longer be preserved: the socialist state was no more. The introduction of labour flexibility and a reduction in social protection were seen as inescapable in adapting to the market system. Kochanowicz recalls the extent of these transformations in his article, emphasising that the former

2. Title of his address as President of the International Economic Association (IEA) at the 14th IEA world conference in Marrakesh on 29 August 2005.

communist countries had to adjust overnight to the market economy, and not only that. Their shock therapy also consisted of a leap into a globalised capitalist world that has caused upheaval in the structures of social and economic organisation in western Europe as well.

Today, per capita incomes are still appreciably lower than in western Europe, the disparities are wider, poverty and exclusion are increasing and unemployment is a problem for all generations. Flexibility measured by the employment protection index (OECD) has risen in just a few years to near the level of the most flexible countries in the West and has even outstripped the flexibility of the old European Union of 15 members.

But even flexibility often takes different forms. In Russia and in the Community of Independent States, flexibility is neither quantitative nor functional, but affects wages. As explained in the contribution by Vladimir Gimpelson, this model, which thanks to its versatility served Russia well while managing the early years of the transition, induced poverty among the working population and was a hindrance in reallocating workers to new jobs and consequently in finding a sustainable path for growth.

Furthermore, the informal economy and illicit, non-contracted employment are also patterns of labour flexibility that do not fit into any regulatory framework – as well as giving an indication that the extent of flexibility is to be determined only by assessing the degree of law enforcement. As Raul Eamets contends in his article, the employment protection index in Estonia is the same as in western Europe, but the rotation of labour is far more significant in the former because the legislative framework is not necessarily applied.

Nor, in a context of low income, is there any visible advantage in “choosing” flexibility, when it means working less (part-time). People want to work as many hours as they can to boost personal income. Flexibility is perceived as one more threat which further erodes an already precarious situation. Flexibility is “employer-led” and for virtually all men and women the ideal job is permanent and full time.³

By comparison with western Europe, where flexibility can be “chosen” in some cases to fulfil individual aspirations and is linked to the “family-friendliness” of companies, this is not yet an issue in eastern Europe. So, in a situation where the state reduces the protection of the family, women

3. Wallace, C., op. cit.

pay the highest price for flexibility in many of these countries (cf. Vladimirova contribution).

The sense of insecurity is very widespread at present, as expressed by all our writers, together with future fears linked with employment in particular. The phenomenon is amplified by a past where this type of challenge was unknown. Men and women were indeed socially programmed for a different world, as Katya Vladimirova also points out.

Different concepts and perspectives

The contrasts with western Europe begin with the way flexibility is apprehended. In academic literature, the concept changes virtually from one country to another. As Sabine Urban points out in her contribution, the perceived meaning of words, and their interpretations, are likely to generate country-specific divergences in attitude and behaviour. She explains these differences with precision. For one thing, collectivisation left such traces that, fifteen years after the destruction of the Berlin Wall, flexibility and social cohesion do not mean the same as in the West. Besides, she recalls, the two Europes plainly have different perceptions of reality if, as Douglass North,⁴ we take all types of formal and informal rules together, cultural heritage and values included.

Katja Vladimirova identifies differences that make the debate about reconciling flexibility and social cohesion so difficult. Individual values have gained the upper hand, leaving little room for a concept that resembles the old collective norms. As she sees it, the new system founded on self-interest and confrontation cancels out solidarity beyond the immediate family circle. Moreover, the past, when people suffered in the name of collective values, is perceived today as a weight to be cast off in order to develop personal forms of self-fulfilment. New identities are founded precisely on the break with that past and on the internalisation of individual values. This partly explains why the most liberal economic stances and a blind confidence in self-regulation of markets are also found in these countries.

However, not everyone has embraced these values; many people were socialised differently, let us reiterate. Indeed, the central and east European societies find themselves divided virtually into two groups living under

different epistemological and axiological systems. The passiveness nurtured for decades, and the hampering of personal initiative, aggravate the risk of exclusion in a flexible market. For them, a world has collapsed. Lifelong work – as in the West – has been crucial in forming their identity. Nothing demonstrates this more clearly than the testimonies of those who used to work in the conglomerates. Although the ordinary workers only performed lowly tasks, they identified and defined themselves through their work. Perhaps even more than their western counterparts during the Fordian era, they felt part of a grand collective design: they did not see themselves as responsible for a simple task but as contributors to a project carried by all. Since the rewards were not expressed in material terms, as was the case for their colleagues in western Europe, they identified even more with these large complexes. The change that came over the world of work, and the advent of flexibility, took from them not only the stability of employment but also their professional identity and social role, which they have difficulty regaining by holding multiple jobs or opening micro-enterprises.

Labour flexibility, insecurity and social cohesion not only operate in different ways, they are seen differently. They take on another dimension than in western Europe: what is to be gained by reconciling them, and the ways to achieve this, are not the same.

The challenge of reconciling labour flexibility and social cohesion in central and eastern Europe

Specificities to be brought out and understood ...

What are the implications of reconciling labour flexibility and social cohesion in these contexts?

Considered in relation to the circumstances described above, reconciliation as such is found not to be an important political concern. Whereas notions like flexicurity are circulating in western Europe, it is much harder for them to gain a place in the political discussions of central and eastern Europe. As Kochanowicz demonstrates, it is difficult to address these issues and even to achieve a political consensus when societies are divided as to their perspective of things, and differing epistemological schemes operate side by side.

Broadly, what are the needs to be reconciled? These countries have all made enormous strides towards flexibility, as the indices show, but

4. See North, D.C. (1990) *Institutions, institutional change and economic performance*, Cambridge University Press, Cambridge, MA.

performance in terms of reduction of unemployment is significantly lower than in western Europe. Despite a higher growth rate, unemployment is apparently stagnating or even soaring again, particularly in Bulgaria and Poland, which seems to contradict expectations. So what should be done? Should even more labour flexibility be introduced?

Alena Nesporova and Sandrine Cazes show in their article that on the contrary, flexibility may have passed an ideal threshold in central and eastern Europe and that insecurity is the main factor amplifying the problems in the labour market. They observe counter-cyclical labour turnover in these countries as opposed to pro-cyclical job tenure. Indeed, the very widespread sense of insecurity prevents effective allocation of work, because in these circumstances employees dare not quit their jobs, which are thus highly prized even if not in line with their aspirations.

By means of their empirical research, the authors prove that a negative correlation between social protection and unemployment cannot be demonstrated for these countries. In this way, they reveal that demands for greater flexibility to combat persistent unemployment remain unconvincing. They conclude that the deregulation policies did not improve labour market performance and even had adverse effects in some cases.

Their contribution suggests that the choice of a path for combating the increase in joblessness, other than just flexibility, and less insecurity could improve economic performance. Even from an economic standpoint, it seems worthwhile to move from flexibility towards flexicurity and towards reconciliation with social cohesion. Social benefits would obviously be added to these economic ones.

The forms of flexibility and security actually need to be reviewed. Neither the flexibility registered by indices nor the protection enshrined in law necessarily serve to attain their goal. As the example of the Russian Federation plainly shows, wage flexibility generates poverty and exclusion. Furthermore, the protection laid down in labour laws does not guarantee security because it is simply not enforced.

Here, we encounter a problem that cuts across many countries: inconsistency between law and reality. As Eamets puts it, a cynical view would be that in many countries there is flexicurity with flexibility in practice and security on paper. We are now touching upon a topic that decisively alters the possibilities for conciliation: the informal economy. According to estimates, up to 25% of the economy in central and eastern Europe is informal, as much as 40% in a few countries. Unregulated jobs and working conditions

mean that typical patterns of informal employment develop: multiple jobs (only one of which is normally declared), "family" jobs or bogus employers and "envelope wages" with securities and premiums outside the official rules. Thus flexibility stands on "inofficial" ground in that it creates ever more glaring inequalities between those who manage to enter the system and those left without protection. As demonstrated in the contribution of the former director of the Croatia Employment Service, Sanja Crnković-Pozaić, the time-honoured debate about the balance between flexibility and security and the ideas of flexicurity may be totally unsuited to a lawless context. To speak of reconciling flexibility with social cohesion makes no sense unless the reality of the informal economy is embodied in the break-out strategies, otherwise even more inequality could result.

There is another structural problem for reconciliation. Cheap labour (with a good general education) and a supply surplus on the labour market do not incite companies to invest in their employees, as these qualifications can be purchased at any time. Investments in personal qualifications, thus employability, are nevertheless crucial for attaining a dynamic security founded on enhancement of the individual's capabilities and flexicurity. Without it, in concentrating on plenty of cheap labour, one pursues a strategy that affords no scope for development. This sort of strategy is structurally opposed to the "high road" of development based on qualification and productivity, which is conducive both to competitiveness and to social cohesion, and is therefore the very foundation for reconciliation, according to Katya Vladimirova. In addition, in this context of low income, fiscal limits to official intervention are observed, and this intervention is vital in producing the collective assets represented by training.

Finally, an often limited administrative capability is another obstacle to the implementation of a reconciliation strategy. Eamets describes this limit to the capability of public services and explains how it can mean the inability to use all the funds intended for these purposes, particularly from the European Union. Employment-related institutions and services must be strengthened to be able to contribute more effectively to efforts of reconciliation.

... and paths to pursue

Even if reconciliation is not yet an issue on the political agenda, and considering the present problems of cohesion, a social model also founded on mastery of flexibility nonetheless seems in many countries to be part of the dream of modernity.

Which strategy is the most suitable for reconciling flexibility and social cohesion? The answer that Eamets provides in his article is time and active employment policies. He stresses the important aspect that labour flexibility should be reconciled with social cohesion under a long-term strategy, whereas other fundamental, even existential, preoccupations of citizens and governments loom larger in political debates than problems of flexibility.

The conditions for reconciliation probably need more time to improve. However, since the problems are pinpointed and real enough, there is a consensus among the experts that efforts towards reconciliation should begin today. For many people in these countries, social cohesion is a noble cause but eclipsed by the need for economic development which they consider to be only achievable through a liberal policy of deregulation. However, it is not a viable option to concentrate single-mindedly on economic development and have to deal with its ill-effects at a later point.

Eamets points out that any process of reconciliation and progress towards social cohesion requires trust. Restoring trust among the citizens and making them aspire to their future is an essential task. It is a way of starting the virtuous circle that leads to social cohesion: trust in the other players makes it possible to overcome difficult situations together and bolsters confidence again. This confidence is something to aim for today, especially as institutions are in the midst of transformation. Thus it would be a missed opportunity if one did not use reconstruction to steer the institutional framework onto a course that will allow for more social cohesion tomorrow.

How can this reconciliation be apprehended more definitely?

The articles in this volume map out some interesting paths. As we have seen, given the considerable degree of flexibility, the issue to discuss is how to restore security and make flexibility safe. One must think of "security of wings" instead of "security of the shell", as some economists say, in other words a protected mobility.

The second requirement is a high-powered education system that allows for better learning of trades, creation of specific human capital and the possibility of lifelong qualification and re-qualification.

A crucial consideration for a strategy of reconciliation is its general applicability, namely outreach to the whole population, including everyone who is unprotected today on the illegal labour market. Better application of the rules of play should be targeted. To achieve this, it is indispensable to

take account of the need for flexibility, as shown today in the blatantly obvious evasion of the rules. In addition, the gap between the written and practised forms of regulations and rights must be closed. This includes the "unrealistic" rigidities dating back to the era of the command economies. Inevitably, the standards of the European Union must be approximated.

Still further steps will certainly have to be taken in a context of a very extensive informal economy, as Sanja Crnković-Pozaić points out. "Protected" flexibility and administrative facilitation should provide means of combating these illicit activities, which are fraught with extreme inequalities and threaten poverty and exclusion. She argues that only a degree of relaxation of the rules, making these non-official dealings superfluous, can enable the entire population to enjoy the right to work. This right must then be enforced energetically. As Ercan and Tansel emphasise in their contribution, progress can slowly and gradually be made towards the enhancement of workers' rights through a process of legalisation which breaks with a "culture of illegality". Conversely, in this rationale the state can and must come to the aid of employees with support in addition to the protection of labour.

For a successful strategy, an efficient state is indispensable. But, more than the traditional welfare state, it takes a welfare-oriented society in which all players contribute to the solution. Only a strategy of co-responsibility is conducive to creating this environment of trust, identified as essential. To establish a culture of partnership and mutual understanding, new areas of dialogue are indispensable.

In conclusion, the thoughts collected in this volume reflect the state of the discussions on these questions in the countries of central and eastern Europe. Through the compilation of these texts, the Council of Europe wishes to stimulate a debate on how to deal with the differences between the various realities. Only by acknowledging them can we build a shared future.

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GREEN PAPER

Modernising labour law to meet the challenges of the 21st century

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1. INTRODUCTION – THE PURPOSE OF THIS GREEN PAPER

The purpose of this Green Paper is to launch a public debate in the EU on how labour law can evolve to support the Lisbon Strategy's objective of achieving sustainable growth with more and better jobs. The modernization of labour law constitutes a key element for the success of the adaptability of workers and enterprises. This objective needs to be pursued in the light of the Community's objectives of full employment, labour productivity and social cohesion. It is in line with the calls by the European Council to mobilise all appropriate national and Community resources to promote a skilled, trained and adaptable workforce and labour markets responsive to the challenges stemming from the combined impact of globalisation and of the ageing of European societies. As the Commission's 2006 Annual Progress Report on Growth and Jobs emphasises: *"Increasing the responsiveness of European labour markets is crucial to promoting economic activity and high productivity"*¹.

European labour markets face the challenge of combining greater flexibility with the need to maximize security for all². The drive for flexibility in the labour market has given rise to increasingly diverse contractual forms of employment, which can differ significantly from the standard contractual model³ in terms of the degree of employment and income security and the relative stability of the associated working and living conditions.

In 2003 the report to the European Council from the European Employment Task Force, chaired by Wim Kok, observed that a two-tier labour market might emerge divided between permanently employed "insiders" and "outsiders"⁴, including those unemployed and detached from the labour market, as well as those precariously and informally employed. The latter occupy a grey area where basic employment or social protection rights may be significantly reduced, giving rise to a situation of uncertainty about future employment prospects and also affecting crucial choices in their private lives (e.g. securing accommodation, planning a family, etc). Recourse to alternative forms of employment could further increase in the absence of moves to adapt the standard employment contract to facilitate greater flexibility to both workers and enterprises alike. Accordingly, the Task Force urged Member States to assess, and where necessary alter, the level of flexibility provided in standard contracts in areas such as periods of notice, costs and procedures for individual or collective dismissal, or the definition of unfair dismissal⁵.

The Integrated Guidelines for Growth and Jobs⁶ highlight the need for the adaptation of employment legislation to promote flexibility combined with employment security and reduce labour market segmentation. Social dialogue also plays a key role in framing collective and/or firm level solutions enabling "insiders" as well as "outsiders" to make successful transitions

¹ "Time to move up a Gear" The European Commission's 2006 Annual Progress Report on Growth and Jobs, p. 6. Also Council and Commission Joint Employment Report 2005/2006, pp. 6, 12-13.

² *ibid.*

³ The research study "The Employment Status of Individuals in Non-Standard by Employment", by B.Burchill; S.Deakin; S.Honey, UK Department of Trade and Industry (1999), identifies non-standard forms of employment as "those forms of work which depart from the model of the "permanent" or indeterminate employment relationship constructed around a full-time, continuous work week".

⁴ Jobs, Jobs, Jobs: Creating more employment in Europe. Report of the Employment Taskforce, November 2003, p. 9.

⁵ *ibid.*, Chapter 2, p. 30.

⁶ 2005 Integrated Guidelines 2005-2008 (adopted on 12 July 2005) - OJ L 205, 6.8.2005, p. 21.

between different employment situations while also assisting businesses to respond more flexibly to the demands of an innovation-driven economy and to changes in the competitive landscape brought about by restructuring.

Other policy components of the "flexicurity" approach include life-long learning enabling people to keep pace with the new skill needs; active labour market policies encouraging unemployed or inactive people to have a new chance in the labour market; and more flexible social security rules catering for the needs of those switching between jobs or temporarily leaving the labour market.

This Green Paper looks at the role labour law might play in advancing a "flexicurity" agenda in support of a labour market which is fairer, more responsive and more inclusive, and which contributes to making Europe more competitive⁷. It seeks:

- To identify key challenges which have not yet yielded an adequate response and which reflect a clear deficit between the existing legal and contractual framework, on one hand, and the realities of the world of work on the other. The focus is mainly on the personal scope of labour law rather than on issues of collective labour law.
- To engage Member State governments, the social partners and other relevant stakeholders in an open debate about how labour law can assist in promoting flexibility combined with employment security, independently of the form of contract, thereby ultimately contributing to increase employment and to reduce unemployment.
- To stimulate discussion on how different types of contractual relations, together with employment rights applicable to all workers, could facilitate job creation and assist both workers and enterprises by easing labour market transitions, assisting life-long learning and fostering the creativity of the whole workforce.
- To contribute to the Better Regulation agenda by promoting the modernisation of labour law, taking into account the overall benefits and costs involved, so as to enable individual workers as well as businesses to grasp more clearly what are their rights and obligations. Consideration needs to be given to the problems faced especially by SMEs in dealing with the administrative costs imposed by both Community and national legislation.

An open public consultation will be conducted on this Green Paper over a four-month period⁸. Following the public consultation, the main policy issues and options identified in the responses by Member States, social partners and other stakeholders will be considered in a follow-up Commission Communication in 2007. This is to be seen in the context of the range of initiatives on the wider topic of flexicurity that the Commission is developing in collaboration with Member States. In particular, a Commission Communication on flexicurity will be presented in June 2007, which will set out to develop the arguments in favour of the

⁷ Labour law is not the only relevant factor in this context. The Integrated Guidelines for Growth and Jobs recognise that a review of the tax wedge may also be needed to facilitate job creation, especially for low wage employment. Shifting taxation from labour to consumption and/or pollution taxes can also make a significant contribution in this regard. This Green Paper does not address economic immigration, which is dealt with under the common immigration policy.

⁸ Contributions are invited using the electronic form which you can find on the European Commission site at the following address: http://europa.eu.int/yourvoice/consultations/index_en.htm.

"flexicurity" approach and to outline a set of common principles by the end of 2007 to help Member States steer the reform efforts.

2. LABOUR LAW IN THE EUROPEAN UNION – THE SITUATION TODAY

a. Developments in the Member States

The original purpose of labour law was to offset the inherent economic and social inequality within the employment relationship. From its origins, labour law has been concerned to establish employment status as the main factor around which entitlements would be developed. This traditional model reflects several key assumptions about employment status. It was assumed to involve i) permanent, full-time employment; ii) employment relationships regulated by labour law, with the contract of employment as the pivot; and iii) the presence of a single entity employer accountable for the obligations placed upon employers. It has to be recalled that national traditions are very different when it comes to the formulation and implementation of labour law and policy.

Rapid technological progress, increased competition stemming from globalisation, changing consumer demand and significant growth of the services sector have shown the need for increased flexibility. The emergence of just-in-time management, the shortening of the investment horizon for companies, the spread of information and communication technologies, the increasing occurrence of demand shifts, have led businesses to organise themselves on a more flexible basis. This is reflected in variations in work organisation, working hours, wages, and workforce size at different stages of the production cycle. These changes have created a demand for a wider variety of employment contracts, whether or not explicitly covered by EU and national legislation.

The traditional model of the employment relationship may not prove well-suited to all workers on regular permanent contracts facing the challenge of adapting to change and seizing the opportunities that globalisation offers. Overly protective terms and conditions can deter employers from hiring during economic upturns. Alternative models of contractual relations can enhance the capacity of enterprises to foster the creativity of their whole workforce for increased competitive advantage.

Since the early 1990s, reform of national employment protection legislation has focused on easing existing regulation to facilitate more contractual diversity⁹. Reforms tended to increase flexibility "on the margins", i.e. introducing more flexible forms of employment with lesser protection against dismissal to promote the entry of newcomers and disadvantaged job-seekers to the labour market and to allow those who wanted to have more choice over their employment. The outcome has given rise to increasingly segmented labour markets¹⁰.

Developments in social dialogue at national, industry and enterprise level, geared to introducing new forms of internal flexibility, have also demonstrated how workplace rules can be adapted to changing economic realities. The evolving relationship between law and collective agreements is reflected in the ways in which such agreements cover new issues (e.g. restructuring, competitiveness, access to training) and apply to new categories of

⁹ OECD Employment Outlook 2004: Chapter 2, "Employment Protection Regulation and Labour Market Performance".

¹⁰ Joint Employment Report, 2005/06.

workers (like agency workers). Collective agreements no longer play a merely auxiliary role in complementing working conditions already defined by law. They serve as important tools adjusting legal principles to specific economic situations and to the particular circumstances of specific sectors.

b. Action at the EU level

At the level of the EU, a range of legislative and political actions, along with a series of analytic studies, have been undertaken in the interest of establishing how new more flexible forms of work might be combined with minimum social rights for all workers.

The improvement of living and working conditions as regards fixed-term contracts, part-time working, temporary work and seasonal work was originally highlighted in the 1989 Social Charter and in the ensuing Social Charter Action Programme¹¹. A period of intensive debate about the appropriateness of Community-level initiatives relating to these employment relationships culminated in the Part Time Work¹² and Fixed Term Work¹³ Directives which gave binding effect to the EU social partners' framework agreements establishing the principle of equal treatment for part-time and fixed-term workers in relation to comparable full-time workers.

In 2000, the Commission launched a first-stage consultation of the social partners on modernising employment relations, which led to the adoption in 2002 of a framework agreement on telework¹⁴. In 2002, the Commission adopted a proposal for a directive on minimum standards for the employment of temporary agency workers¹⁵, on which the Council has not yet been able to agree a common position.

Detailed studies have been published of the evolution of labour law in the EU-15 in the period 1992–2003¹⁶. The results of these studies were presented at a conference "Labour Law in Europe: Steps towards 2010" which was organised by the Dutch Presidency in 2004, with the support of the Commission¹⁷. Further country studies are being undertaken to cover the development of labour law in the EU-25, and in Bulgaria and Romania.

Responsibility for safeguarding working conditions and improving the quality of work in the Member States primarily rests on national legislation and on the efficacy of enforcement and control measures at national level. At the EU level, the social *acquis* supports and complements the actions of the Member States in this sphere.

¹¹ European Commission, Social Charter Action Programme, November 1989.

¹² Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and ETUC.

¹³ Directive 1999/70/EC concerning the Framework Agreement on fixed-term work concluded by UNICE, CEEP and ETUC.

¹⁴ At the request by the social partners, the Commission initiated a study by Adalberto Perulli "Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects" (2002).

¹⁵ COM(2002) 149, 20.3.2002, which was presented after social partners attempted to reach agreement without success and later modified by COM(2002) 701, 28.11.2002.

¹⁶ The Evolution of Labour Law (1992-2003), vols I and II. A general report was prepared providing a comprehensive overview of the evolution of labour law in the EU-15.

¹⁷ See also Final Conclusions of Dutch Presidency conference, Leiden, 2004, http://internationalezaken.szw.nl/index.cfm?fuseaction=dsp_document&link_id=44922#3738600

The Commission also acts as a catalyst to support action by the Member States and the social partners to strengthen the Lisbon goals of growth and jobs through its support for a range of policy instruments including the EU Social Dialogue and financial measures such as the European Social Fund, Progress, and the proposed European Globalisation Adjustment Fund. Coordination of employment policies within the partnership for growth and jobs and the open method of co-ordination in the field of social inclusion policies also help to ensure full mobility for workers across Europe within the context of the Treaties. These combine concrete goals and policy objectives set at EU level, which are translated into national plans, the use of benchmarks and indicators to measure progress, exchange of experience and peer review so as to learn from good practice.

3. THE KEY POLICY CHALLENGE – A FLEXIBLE AND INCLUSIVE LABOUR MARKET

A proliferation of different contractual forms has emerged in the absence of a more comprehensive adaptation of labour law and collective agreements to rapidly changing developments in work organisation and society. By availing of non-standard contractual arrangements, businesses seek to remain competitive in the globalised economy by avoiding *inter alia* the cost of compliance with employment protection rules, notice periods and the costs of associated social security contributions. Administrative burdens associated with the employment of regular employees also have a significant influence on employment growth, particularly in small firms¹⁸. Non-standard as well as flexible standard contractual arrangements have enabled businesses to respond swiftly to changing consumer trends, evolving technologies and new opportunities for attracting and retaining a more diverse workforce through better job matching between demand and supply. Workers are also afforded greater choice particularly as regards arrangements for working time, increasing career opportunities, a better balance between family life, work and education as well as more individual responsibility.

Fixed term contracts, part-time contracts, on-call contracts, zero-hour contracts, contracts for workers hired through temporary employment agencies, freelance contracts, etc., have become an established feature of European labour markets. The share of total employment taken up by those engaged on working arrangements differing from the standard contractual model as well as those in self-employment has increased since 2001 from over 36% in 2001 to almost 40% of the EU-25 workforce in 2005¹⁹. Part-time employment, as a percentage of total employment, has increased from 13% of total employment to 18% in the last 15 years. It has accounted for a larger contribution (around 60%) to employment creation after 2000 than full time standard employment. Part-time working remains predominantly a feature of female employment – with nearly one-third of women in employment having a part-time job compared with only 7% of men. Fixed-term employment has increased as a percentage of total employment from 12% in 1998 to over 14% in 2005 in the EU-25. Unlike part-time work, fixed-term employment does not exhibit significant gender differences²⁰. Given the

¹⁸ Observatory of European SMEs No 7, Recruitment of employees: Administrative burdens on SMEs in Europe, 2002, p. 11.

¹⁹ Employment Guidelines (2005-08): Indicator for total employees in part-time and/or fixed-term contracts plus total self-employed as % of persons in employment based on EU Labour Force Survey, 2005, ESTAT.

²⁰ Employment in Europe, 2006, Statistical Annex. Part-time work contracts may be of indeterminate as well as temporary duration. The latest data on workers' perceptions of their working conditions in the European Foundation's Fourth European Working Conditions Survey reveals that 68% of part-time

increasing levels of participation in these forms of contracts, the level of flexibility provided under standard contracts may need to be examined to enhance their capacity to facilitate recruitment, retention and the scope for progression within the labour market.

Self-employment is also providing a means of coping with restructuring needs, reducing direct or indirect labour costs and managing resources more flexibly in response to unforeseen economic circumstances. It also reflects the business model of service-oriented business delivering completed projects to their customers. In many cases it reflects a free choice to work independently despite lower levels of social protection in exchange for more direct control over employment conditions and terms of remuneration. Self-employed workers in the EU-25 numbered over 31 million in 2005 or 15% of the total workforce²¹. Those who are self-employed on their own account and without employees constitute 10% of all workers in the EU-25. Although agriculture and retailing still hold the larger share of this category, it is a growing feature of the construction and personal services sectors associated with outsourcing, subcontracting and project based work.

However, there is evidence of some detrimental effects associated with the increasing diversity of working arrangements²². There is a risk that part of the workforce gets trapped in a succession of short-term, low quality jobs with inadequate social protection leaving them in a vulnerable position. Such jobs may however serve as a stepping-stone enabling people, often those with particular difficulties, to enter the workforce.

EU-15 data show that around 60% of those who had taken up non-standard contractual arrangements in 1997 had standard contracts in 2003. However, 16% of them were still found in the same situation and 20% of them had moved out of employment²³. There is also a strong gender dimension and intergenerational dimension to the risk of having a weaker position in the labour market, since women, older and also younger workers engaged on non-standard contracts have fewer chances to improve their position in the labour market²⁴. It has to be taken into account however that different Member States have very different rates of transition.

The recent Employment in Europe 2006 report²⁵ refers to findings that stringent employment protection legislation tends to reduce the dynamism of the labour market, worsening the prospects of women, youths and older workers. The report underlines that deregulation "at the margin", while keeping stringent rules for regular contracts largely intact, tends to favour the development of segmented labour markets with a negative impact on productivity. It also stresses that workers feel better protected by a support system in case of unemployment than by employment protection legislation. Well-designed unemployment benefit systems, coordinated with active labour market policies seem to perform better as an insurance against labour market risks.

workers are satisfied with their working schedule compared to 23% wishing to work more hours and 9% wishing to work less hours.

²¹ *ibid*, also Industrial Relations in Europe, 2004. Self-employment is particularly significant in Poland, Hungary, Lithuania, Latvia and Estonia among the new EU Member States, and also in the UK, Ireland, Portugal, and the Netherlands.

²² Precarious Employment in Europe: A comparative study of labour market related risks in flexible economies. ESOP Final Report. Directorate General for Research, 2004.

²³ Employment in Europe 2004, p. 15, and Chapter 4. It has to be recognized of course that not all non-standard contracts can be considered as being precarious.

²⁴ Employment in Europe, 2004, Chapter 4, p. 181.

²⁵ Employment in Europe, 2006, p. 81 et seq.

In the context of globalisation, ongoing restructuring and the move towards a knowledge-based economy, European labour markets need to be both more inclusive and more responsive to innovation and change. Potentially vulnerable workers need to have a ladder of opportunity so as to enable them to improve their mobility and achieve successful labour market transitions. Legal frameworks sustaining the standard employment relationship may not offer sufficient scope or the incentive to those on regular permanent contracts to explore opportunities for greater flexibility at work. If innovation and change are to be successfully managed, labour markets will need to address three main issues: flexibility, employment security and segmentation issues. The purpose of this Green Paper is to promote a debate about whether a more responsive regulatory framework is required to support the capacity of workers to anticipate and manage change regardless of whether they are engaged on indefinite contracts or non-standard temporary contracts.

Questions

1. What would you consider to be the priorities for a meaningful labour law reform agenda?
2. Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation? If yes, then how?
3. Do existing regulations, whether in the form of law and/or collective agreements, hinder or stimulate enterprises and employees seeking to avail of opportunities to increase productivity and adjust to the introduction of new technologies and changes linked to international competition? How can improvements be made in the quality of regulations affecting SMEs, while preserving their objectives?
4. How might recruitment under permanent and temporary contracts be facilitated, whether by law or collective agreement, so as to allow for more flexibility within the framework of these contracts while ensuring adequate standards of employment security and social protection at the same time?

4. MODERNISING LABOUR LAW – ISSUES FOR DEBATE

a. Employment transitions

Labour and social security laws in most Member States were designed to provide protection for dependent employees in particular jobs. They may not be sufficient to assist workers in making transitions from one status to another, whether in the case of involuntary discontinuities (e.g. dismissal and unemployment) or voluntary discontinuities (e.g. in the case of education and training leave, caring responsibilities, career breaks and parental leave). The problems of female workers who are disproportionately represented in new forms of work arrangements and who still face obstacles in seeking access to full rights and social benefits also need to be addressed.

Opportunities to enter, remain and make progress in the labour market vary considerably, with both employment protection legislation and the legal contractual framework at national level having a strong impact on job status transitions, especially as regards the position of the long-term unemployed and precariously employed "outsiders". Examples of labour law measures

supportive of employment transitions which have been developed through a process of social dialogue at national level include the Dutch Flexibility & Security Act 1999, the Austrian Severance Act (*Abfertigungsrecht*) 2002²⁶ and the June 2006 Spanish decree easing the conversion of temporary labour contracts into open-ended labour contracts with reduced dismissal costs²⁷. The Austrian reform provides an interesting example of a radical shift away from a system based on the traditional employment relationship between one worker and one firm to one based on a broader employee benefit provision fund operated at national level. The link was cut between being laid off by an employer and the payment of a once-off severance award. The new rules allow workers to leave when they find alternative employment rather than stay in a particular job for fear of losing the accompanying severance payment. The reform removed the threat to a firm's existence which could be posed by the sudden cost of redundancies, while the employer's contribution to the individual savings fund can be spread over time. From the employee's perspective, the new system reduces the cost of job mobility since workers no longer lose all of their entitlement to severance payments when taking a new job.

Adopting a lifecycle approach to work may require shifting from the concern to protect particular jobs to a framework of support for employment security including social support and active measures to assist workers during periods of transition. This is what Denmark achieved by combining "light" employment protection legislation, intensive active labour market measures, and substantial investment in training as well as high unemployment benefits with strong conditionality.

Questions

5. Would it be useful to consider a combination of more flexible employment protection legislation and well-designed assistance to the unemployed, both in the form of income compensation (i.e. passive labour market policies) and active labour market policies?
6. What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between different contractual forms for upward mobility over the course of a fully active working life?

b. Uncertainty with regard to the law

The emergence of diverse forms of non-standard work has made the boundaries between labour law and commercial law less clear. The traditional binary distinction between "employees" and the independent "self-employed" is no longer an adequate depiction of the economic and social reality of work. Disputes concerning the legal nature of the employment relationship can arise where that relationship has either been disguised or where a genuine difficulty arises in seeking to fit new and dynamic work arrangements within the traditional framework of the employment relationship.

Disguised employment occurs when a person who is an employee is classified as other than an employee so as to hide his or her true legal status and to avoid costs that may include taxes

²⁶ See commentary on these examples cited in Employment Task Force Report, pp. 33 and 35, also OECD Employment Outlook 2004, Chapter 2.

²⁷ See report in European Industrial Relations Observatory on-line of August 2006, <http://www.eiro.eurofound.eu.int/2006/05/articles/es0605019i.html>.

and social security contributions. This illegal practice can occur through the inappropriate use of civil or commercial arrangements.

Action at national level to combat the phenomenon of disguised employment, often developed in collaboration with the social partners, has ranged from the introduction of mandatory legal presumption rules²⁸ to improving enforcement mechanisms including targeted campaigns and special information and awareness initiatives²⁹. Unclear legal definition of the status of self-employment in national legal and administrative frameworks may result in persons, who believe themselves to be self-employed, subsequently finding themselves to be classified by social security agencies or tax institutions as a dependent employee. This can result in an obligation for the self-employed/employee and his main client/employer to pay additional social security contributions³⁰. The Commission has stressed that the problem of persons posing falsely as self-employed workers to circumvent national law³¹ should be dealt with primarily by Member States³².

The concept of '*economically dependent work*' covers situations which fall between the two established concepts of subordinate employment and independent self-employment. These workers do not have a contract of employment. They may not be covered by labour law since they occupy a "grey area" between labour law and commercial law. Although formally 'self-employed', they remain economically dependent on a single principal or client/employer for their source of income³³. This phenomenon should be clearly distinguished from the deliberate mis-classification of self-employment. Already some Member States have introduced legislative measures to safeguard the legal status of economically dependent and vulnerable self-employed workers³⁴.

²⁸ The Dutch Flexibility and Security Act, 1999, introduced a mandatory legal presumption whereby an employment contract exists when work has been carried out for another person in return for pay on a weekly basis, or for at least twenty hours per month during three consecutive months.

²⁹ As a consequence of recent social partnership agreements concluded in Ireland and Spain, the respective governments have agreed to increase the number of labour inspectors.

³⁰ Second Career: Overcoming the obstacles faced by dependent employees who want to become self-employed and/or start their own business. Enterprise Directorate General, European Commission, (2004). p. 8, 29-31.

³¹ Social partner organisations have observed that bogus "self-employed" work, fictitious service provision and extended sub-contracting chains have been used to circumvent post-enlargement transitional restrictions on access to some national labour markets. See Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty - COM(2006) 48, 8.2.2006.

³² Accordingly, the Commission welcomes the adoption in June 2006 of a Recommendation on the Employment Relationship at the 95th session of the International Labour Conference promoting the formulation and adoption by member states, in consultation with the social partners, of national policies for regularly reviewing the scope of their laws, and where necessary clarifying and adapting them, in order to guarantee effective protection for workers who perform work in the context of an employment relationship. This non-binding instrument takes a strategic approach, leaving the nature and extent of protection given to workers in an employment relationship to be defined by national law and practice.

³³ This does not mean that these workers are necessarily in a vulnerable position.

³⁴ Examples include the concept of "employee-like" workers corresponding to the civil law notion of "*parasubordination*" in Italy and Germany. In Germany amendments to the Social Code introduced in 1999 to cover the social security status of economically dependent workers were subsequently modified in 2002 (see *The Evolution of Labour Law*, Vol. 2 pp. 151-153). In Spain, a Self-Employed Workers' Statute is envisaged, to give effect to the agreement concluded on 26 September 2006 between the Spanish government and the main representatives of the self-employed, on the rights and benefits the self-employed, including economically dependent workers.

While these approaches have been somewhat tentative and partial, they reflect efforts on the part of legislators, the courts and the social partners to tackle problems in this complex area. The "targeted approach" adopted in the UK to establishing differing rights and responsibilities in employment law for "employees" and "workers" is an example of how categories of vulnerable workers involved in complex employment relationships have been given minimum rights without an extension of the full range of labour law entitlements associated with standard work contracts³⁵. Anti-discrimination rights, health and safety protection, guarantees of minimum wage as well as safeguards for collective bargaining rights, have been selectively extended to economically dependent workers in several Member States. Other rights, particularly those relating to notice and dismissal, tend to be restricted to regular employees having completed a prescribed period of continuous employment.

At Community level, the regulation of the working conditions of self-employed commercial agents illustrates how Internal Market rules can closely resemble aspects of labour law. In order to provide basic protection to independent commercial agents in dealing with their principals, Directive 86/653/EEC³⁶ laid down provisions concerning, *inter alia*, payment of remuneration; conditions for the conversion of fixed-term contracts into contracts of indefinite duration; as well as compensation in the event of damage suffered due to the termination of a contract.

It has been argued that minimum requirements be introduced into all personal work contracts for services undertaken by the economically dependent self-employed³⁷. While increasing certainty and transparency and ensuring a minimum level of protection of the self-employed, such requirements could, however, have the effect of limiting the scope of these contractual arrangements.

Questions

7. Is greater clarity needed in Member States' legal definitions of employment and self-employment to facilitate *bona fide* transitions from employment to self-employment and *vice versa*?
8. Is there a need for a "floor of rights" dealing with the working conditions of all workers regardless of the form of their work contract? What, in your view, would be the impact of such minimum requirements on job creation as well as on the protection of workers?

c. Three Way Relationships

The growing incidence of temporary agency work has led to changes in labour law in some Member States in order to establish the respective liabilities of the work provider and user enterprise for safeguarding workers' rights. The "three-way relationship" between a user undertaking, an employee and an agency, usually arises where a temporary agency worker is employed by the temporary work agency, and then hired out to perform work assignments at

³⁵ DTI Discussion Document on Employment Status, July 2002; also Success at Work: Protecting Vulnerable Workers, Supporting Good Employers, UK Department of Trade and Industry, March 2006.

³⁶ EEC Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.

³⁷ See especially Perulli, *op. cit.* Chapter 3.

the user firm by means of a commercial contract. The resulting 'dual employer' situation adds to the complexity of the employment relationship³⁸.

Temporary agency work is regulated in most Member States through a mix of legislation, collective labour agreements and self-regulation³⁹. The Commission's proposal for a Directive on Temporary Agency Workers seeks to establish the non-discrimination principle to ensure that agency workers are treated no less favourably than the 'regular' workers in a "user enterprise"⁴⁰.

Similar problems can arise where workers are involved in extended chains of sub-contracting. Several Member States have sought to address such problems by making principal contractors responsible for the obligations of their sub-contractors under a system of joint and several liability. Such a system encourages principal contractors to monitor compliance with employment legislation on the part of their commercial partners. However, it has been argued that such rules may serve to restrain sub-contracting by foreign companies and could therefore present an obstacle to the free provision of services in the Internal Market. In recent case law on the posting of workers such a system was considered to be an acceptable procedural means of safeguarding an entitlement to minimum rates of pay where this form of worker protection is necessary and proportional and in accord with the public interest⁴¹.

Questions

9. Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of sub-contractors? If not, do you see other ways to ensure adequate protection of workers in "three-way relationships"?

10. Is there a need to clarify the employment status of temporary agency workers?

d. Organisation of working time

The failure of the extraordinary EPSCO Council of 7 November 2006 to reach an agreement has highlighted how the provisions of Directive 2003/88/EC and the relevant ECJ jurisprudence⁴² remain particularly challenging for certain sectors such as health.

The Commission is now reviewing the situation in the light of the stalemate in the Council.

³⁸ Temporary Agency work in an enlarged European Union, European Foundation, 2006, p. 1.

³⁹ *ibid*

⁴⁰ Amended proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers - COM(2002) 701.

⁴¹ Provided that such a system is necessary and proportional, the European Court held that Article 5 of Directive 96/71/EC on posting of workers in the framework of the provision of services, interpreted in the light of Article 49 TEC, does not preclude the use of such a system as an appropriate measure in the event of failure to comply with the Directive. See Judgement of the ECJ of 12 October 2004 in Case C-60/03 Wolff and Müller [2004] ECR I-9553.

⁴² In particular judgments of the ECJ of 3 October 2000 in Case C-303/98 (SIMAP) ECR I-7963, of 9 October 2003 in Case C-151/02 (Jäger) ECR I-8389, and of 1 December 2005 in Case C-14/04 (Dellas) ECR I-10253.

Question

11. How could minimum requirements concerning the organization of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers' health and safety? What aspects of the organization of working time should be tackled as a matter of priority by the Community?

e. Mobility of workers

The consistent application of EU labour law can be put in question, particularly in the context of the transnational operation of businesses and services, through the variations in the definitions of worker used in different directives. This is of particular concern when it comes to the situation of frontier workers⁴³.

Outside of the specific context of freedom of movement of workers, most EU labour law legislation leaves the definition of 'worker' to the Member States. It has been argued that Member States should retain discretion in deciding the scope of the definitions of 'worker' used in different Directives. Continued reference to national rather than Community law could, however, affect worker protection especially where freedom of movement is at issue. Difficulties associated with the different definitions of worker have emerged particularly in connection with the implementation of directives on posting of workers and transfers of undertakings. Divergence in the scope of national definitions of 'employee' in such circumstances is difficult to reconcile with the Community's social policy aims of striking a balance between a flexibility and security for employees.

Question

12. How can the employment rights of workers operating in a transnational context, including in particular frontier workers, be assured throughout the Community? Do you see a need for more convergent definitions of 'worker' in EU Directives in the interests of ensuring that these workers can exercise their employment rights, regardless of the Member State where they work? Or do you believe that Member States should retain their discretion in this matter?

f. Enforcement issues and undeclared work

Enforcement mechanisms should be sufficient to ensure well functioning and adaptable labour markets, to prevent infringements of labour law at national level and to safeguard workers rights in the emerging European labour market⁴⁴. In this context, undeclared work appears as a particularly worrying and enduring feature of today's labour markets, often associated with cross-border labour movements. Being the main contributing factor to social dumping, it is responsible not only for the exploitation of workers but also for distortions to competition. In October 2003 the Council adopted a resolution calling on Member States to address this problem⁴⁵. Suggested measures included preventative measures and sanctions, as well as partnerships between social partners and the public authorities at national level to tackle

⁴³ See also EP Resolution A5-0338/2000 - OJ C 262, 18.9.2001, p. 148.

⁴⁴ See ILO Report V(1) The Employment Relationship (2005), par 65. See also problems highlighted in the Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty. See also Commission Communication COM(2006) 159 "Guidance on the posting of workers within the framework of the provision of services".

⁴⁵ Council Resolution on transforming undeclared work into regular employment - OJ C 260, 29.10.2003.

undeclared work. These measures are currently reflected in a mix of incentives for transformation of undeclared work into regular work; sanctions and penalties; better links with the tax system and benefits; and administrative or fiscal simplification.

The problem was identified by UNICE/UEAPME, CEEP, ETUC, as an integral part of the balance between flexibility and security, as topics for joint analysis in the EU Social Partners work programme for 2006-2008⁴⁶.

Labour Ministries and their services have a crucial role to play in monitoring the application of the law, collecting reliable data on labour market trends and changing work and employment patterns, and designing effective and dissuasive sanctions, to combat undeclared work and disguised employment relationships. In the case of mobile workers in road and maritime transport, the transnational and offshore nature of operations in these sectors makes enforcement a particularly challenging task⁴⁷.

There should be more effective cooperation at national level between different government enforcement agencies, such as labour inspectorates, social security administrations and tax authorities. Improvements in the resources and expertise of these law enforcement authorities, and in their cooperation with partners, can contribute to reductions in the incentives to undeclared work.

Strengthened administrative cooperation at the EU level may also assist the Member States in detecting and tackling abuse and evasion of labour rules so as to ensure compliance with Community law. Article 10 TEC establishes a general rule imposing mutual duties of genuine co-operation and assistance on the Member States and the Community Institutions and requiring that appropriate measures be taken to help achieve the aims of the Community. Illegal practices with an international dimension only serve to highlight the need for increased co-operation at the EU level to improve the strategies and inspection tools used in assessing working conditions and labour practices.

Questions

13. Do you think it is necessary to reinforce administrative co-operation between the relevant authorities to boost their effectiveness in enforcing Community labour law? Do you see a role for social partners in such cooperation?

14. Do you consider that further initiatives are needed at an EU level to support action by the Member States to combat undeclared work?

⁴⁶ Work Programme of the European Social Partners, 2006-2008, 23 March 2006.

⁴⁷ Road Transport Working Time Directive – Self-employed and Night Time Provisions, forthcoming research report for DG TREN.

Fundamental social rights

**Case law of
the European Social Charter**

Lenia Samuel

Second edition

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Article 1 – The right to work

General

44. (Ost. pravo na rad je pravo na ostvarenje najdovoljnije zaposlenosti u skladu sa svojim sposobnostima i potrebama (gov. i obli), kao i rad, radnja i radnja)

The right to work is the first right protected by the European Social Charter. As the Committee pointed out in the first supervision cycle, "It is of fundamental importance within the context of the Charter, for the effective exercise of several essential rights set forth in the Charter is inconceivable unless the right to work is guaranteed first" (Conclusions I, p. 13). Examples are the right to just conditions of work (Article 2), and the right to fair remuneration (Article 4).

The right to work cannot however mean what it appears to mean: that a state must guarantee a job to every person who desires one, which is evidently impossible to fulfil, as the availability of work depends on the situation of the labour market and on whether the skills of job-seekers correspond to the demands of the market. Accordingly, Article 1 does not aim to provide employment to all those in search of it: instead, it consists of four specific undertakings which will improve job opportunities. The Committee stated this clearly in its first Conclusions: *W*

"This Article aims to ensure the effective exercise of the right to work. Its four paragraphs deal with various aspects of employment policy. Moreover, Article 1 does not merely state a principle: it also specifies the means whereby the Contracting Parties must apply it:

- full employment;
- free choice of occupation;
- free employment agencies;
- vocational guidance training and rehabilitation" (Conclusions I, p. 13).

Paragraph 1 – Full employment *Obligation as to means (not as to results)*

Under the first paragraph of Article 1 of the Charter, the Contracting Parties undertake:

"to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment."

According to the case law of the Committee, the Contracting Parties must prove that they adhere to a coherent economic policy specifically aimed at

achieving the ultimate goal of this provision. In addition to proving the existence of appropriate employment policies, the Contracting Parties are expected to take measures in view of its implementation and to supply sufficient information to permit the Committee to evaluate its effects.

The Committee has stated that this policy should:

- concern situations of short, medium and long-term unemployment;
- aim at avoiding, combating or reducing regional imbalance;
- seek to maintain or improve the situation of all groups of workers within society, especially women, young people, the middle-aged and the elderly, and;
- cover all sectors of the economy, including agriculture (in Conclusions II, p. 179, for instance, the Committee asked the Government of Cyprus to provide information on the measures taken to meet with underemployment in agriculture).

The Committee "interpreted this provision as imposing an obligation as to means rather than an obligation as to results. It recognised that in order to decide whether a country is really fulfilling its obligations, it is necessary to adopt a dynamic standpoint, to assess the situation existing at a given moment, having regard to the continuous action pursued." (Conclusions I, p. 13).

Paragraph 1 of Article 1 has been characterised as a dynamic provision. Its dynamic nature is inherent in the fact that it provides for the progressive attainment of full employment. Commenting generally on provisions of a similar character, the Committee stated that: "These provisions impose an obligation to adopt over the years a course of conduct so as to achieve a development in a stated direction. This makes it incumbent on every government concerned to inform the Committee of such changes as have occurred between the date of the coming into force of the Charter (or that of the preceding report) and the date to which a given report refers. Consequently, a purely static description of a state of affairs at a given moment does not suffice. It is necessary to specify that developments are taking place so as to enable the Committee to assess the progress each country has made in the particular context" (Conclusions I, p. 9).

The Contracting Parties must take measures to improve upon the employment situation which existed at the beginning of the period of reference. Again, actual improvement is not asked for as this may often only be revealed in the long term; what is needed is proof of the adoption of measures contributing towards the attainment of full employment. This was made very clear in the third supervision cycle when the Committee stated that the "decline of unemployment alone is not a sufficient indication of efforts towards the achievement of full employment when, for example, unemployment still affects 5 % of the active population. On the other hand, a large increase in the rate of unemployment would not prevent the Committee from concluding that the Charter was being satisfied, as long as a substantial effort is made to improve the labour market situation" (Conclusions III, p. 3).

During the fourth cycle of supervision, covering the years 1972-73, it became patent that in order to deal with growing inflation or economic recession resulting from the oil shocks, the Contracting Parties had introduced a number of measures which had the effect of increasing unemployment in the short term, but which were eventually destined to reduce it. Considering the consistency of this action with the requirements of the first paragraph of Article 1, the Committee stressed that: "Measures to sustain employment should be taken, in pursuance of Article 1 para. 1, to offset the side-effects of action such as anti-inflation measures, made necessary by the current crisis, in order to avoid an excessive rise in unemployment", and that: "special measures should be taken to help those persons who are at a disadvantage in seeking work either because of regional imbalance or disparities based on sex or because of age, since older workers, like the young, run a greater risk of unemployment." (Conclusions IV, p. XIV).

Similarly, in the sixth supervision cycle, the Committee indicated that when the economic situation was such that the prospects for a substantial reduction of employment did not seem very high, Article 1 para. 1 required Contracting Parties to "intensify their efforts, as a priority objective, with a view to reducing unemployment especially among the groups mostly affected by it through the implementation of appropriate economic and social policies" (Conclusions VI, p. 12).

The Committee shows great concern for the unemployment of certain categories of workers asking for measures aimed at improving their situation: those over the age of forty-five, young workers (15 to 24 age group), the long-term unemployed (over one year), women, in respect of whom unemployment rates are higher and increase more rapidly than those for men, thus widening disparities, immigrants and ethnic minorities. Likewise it shows concern for the position of young aliens, nationals of other Contracting Parties to the Charter.

Thus in the fourteenth supervision cycle, part one, the Committee expressed concern that:

- in several Contracting Parties over half of those unemployed were unemployed for over a year (Belgium, Greece, Ireland, Italy, Portugal and Spain) a situation which entailed a risk of marginalisation and social exclusion for long-term unemployed, particularly as the workers most concerned were the least qualified and had the least experience (Conclusions XIV-1, p. 33);
- the unemployment rate of women was still higher than for men (Cyprus, Finland, Greece) (Conclusions XIV, pp. 147, 203 and 346), and
- the number of unemployed foreigners had risen considerably (Conclusions XIV-1, p. 65, Austria).

Assessment of compliance

In the first supervision cycle, the Committee stated that: "If a state at any time abandoned the objective of full employment in favour of an economic

system providing for a permanent pool of unemployed, it would be infringing the Social Charter" (Conclusions I. p. 14).

In the eighth supervision cycle, the Committee decided that it would not adopt conclusions under this paragraph, i.e. that it would no longer decide whether the situation in a Contracting Party is in conformity with the Charter or not. Instead, the Committee reviews the policies pursued and the measures taken with the aim of achieving full employment.

Several factors account for the absence of conclusions. As has already been suggested, the upward trends in unemployment, characteristic of many countries in the last years, do not necessarily denote failure of employment policies, but reflect economic crises; figures nonetheless could be taken to imply a lack of action towards full employment whereas facts demonstrate the opposite. Furthermore, the results of many measures against unemployment cannot be foreseen and may take effect long after their implementation; therefore decisions on their efficiency are impossible.

In the fourteenth supervision cycle the Committee observed that "in the present economic and social context in Europe, the assessment of national situations in respect of Article 1 paragraph 1 is not possible on the basis of unemployment indicators alone. Account must be taken of different parameters, such as trends in the nature of employment, the design of national labour market policies and the budgetary commitment to these policies" (Conclusions XIV-1, pp. 33-34).

To this end it requested all Contracting Parties to supply information on:

- the unemployment rates for vulnerable groups on the labour market: women, young people (fifteen to twenty-four age group), long-term unemployed (over a year) (as a proportion of total unemployment and average duration), immigrants/ethnic minorities;
- the measures taken to favour access to employment of these groups with data on rates of participation in measures and information, if available, on the employment effects of measures taken;
- the labour force participation rate and breakdown of employment, by sectors, sex, full time – part time and type of contract (permanent, fixed-term, etc.);
- the trend in total employment policy expenditure over the past five years, broken down by individual measures or programmes;
- the relative shares of "active" (job creation, training, etc.) and "passive" (financial compensation, etc.) measures in relation to total expenditure (ibidem).

Commenting in general on the unemployment situation during the reference period covered by that cycle (1995-96), the Committee observed that unemployment continued to persist everywhere in Europe, even though at differing levels. The number of unemployed in the Contracting Parties reached between 22-23 million. In some Contracting Parties, unemployment decreased significantly (Denmark, Finland, Netherlands, UK), whereas in

others it increased (Germany, France), reaching in one Contracting Party (Spain) the level of 22% to 23%.

It also noted that "almost all the Contracting Parties are engaged in active policy measures against unemployment which involve job creation measures, vocational guidance and training measures, incentives to geographical and professional mobility. Some countries had made efforts to transfer public expenditure from passive to active employment measures."

Although the amounts of public funds spent on employment policy do not necessarily reflect its effectiveness, the Committee was concerned to learn that despite high unemployment the proportion of GDP devoted to this policy is very slight in some Contracting Parties, and that in some cases it is being reduced where the unemployment situation has not shown any significant progress.

The Committee considers that the full application of the Charter and the observance of its provisions should both contribute to combating unemployment by ensuring a better regulation of the labour market and should alleviate the especially serious consequences of loss or lack of unemployment." (ibidem, pp. 32-33).

In the fifteenth supervision cycle part two, examining the situation of Slovakia the Committee, having noted that while the employment policy of this state was in keeping with full employment objectives, and while recalling that Article 1 para. 1 is in the essence an obligation as to means, rather than an obligation as to a result, nevertheless, found reason to emphasise that "the co-existence in the medium and longer term of high economic growth and persistent very high unemployment is not an acceptable situation under this provision of the Charter" (Addendum to Conclusions XV-2, pp. 131-133, first report).

Paragraph 2 – The right of the worker to earn his living in an occupation freely entered upon

Freedom (of labour) (i.e. bargaining)

Under this paragraph, the Contracting Parties undertake:

"to protect effectively the right of the worker¹ to earn his living in an occupation freely entered upon".

¹ Generally speaking, the term "worker" takes on the broadest possible meaning in the Charter and also includes women workers and the self-employed, except when the text of the Charter or a specific context impose a different interpretation (such as the appendix to Article 19 para. 6 for women workers, which concerns only the wife of a worker and thus excludes women workers; in respect of the self-employed, Article 4 para. 4 on notice of termination of employment can only apply to salaried employees; and Article 8 which is expressly aimed only at protecting employed women).

Appendix¹ to Article 1 para. 2

"This provision shall not be interpreted as prohibiting or authorising any union security clause or practice"

The Committee recognised in the first cycle of supervision that "this provision was closely bound up with two particularly important problems, viz:

- the prohibition of forced labour and
- the eradication of all forms of discrimination in employment" (Conclusions I, p. 15).

It can, therefore, be said that this provision requires Contracting States to provide protection - against forced labour and B against discrimination in employment practices.

A. Prohibition of forced labour

The guarantee against forced labour results from the phrase "freely entered upon" of the Article. In the third cycle of supervision, the Committee expressed the view that "the coercion of any worker to carry out work against his wishes, and without his freely expressed consent, is contrary to the Charter. The same applied to the coercion of any worker to carry out work he had previously freely agreed to do, but which he subsequently no longer wanted to carry out" (Conclusions III, p. 5).

The Committee regarded as constituting coercion within the latter meaning and, therefore, as incompatible with the Charter, legislation providing criminal penalties against merchant seamen failing to return to their ship or to carry out certain orders. However, recognising that the safety of the ship and above all the lives of those on board are factors of the greatest importance, the Committee, in the same Conclusions and again in the case of merchant seamen, clarified its concept of non-forced labour and held that "penal measures could, in appropriate circumstances, be justified when they applied in cases where the act giving rise to the charge endangered, or could endanger the safety of the ship or the life or health of those on board. The same was also true, in the Committee's view, of air crew" (Conclusions III,

¹ As a rule the Appendix to the Charter contains important interpretations to be given to some of the Articles as well as a definition of the scope of the Charter in terms of persons protected. The appendix to Article 1 para. 2 stipulates that it is neutral to union security clauses, which means that a closed shop arrangement whereby a worker must be a member of a trade union or a particular trade union is not discrimination which a Contracting Party must take steps to prevent. Thus, Article 1 para. 2 of the Charter, like Article 11 of the European Convention on Human rights and ILO Convention No. 87 (Freedom of Association and Protection of the Right to Organise), takes no stand on the legality of closed shops. However, this appendix only applies to Article 1 para. 2 and the Committee stated its opinion on closed shops under Article 5 (the right to organise), which it considers are against the freedom of organisation (see Article 5).

p. 5). The Committee implied that in such cases, restrictions could not go beyond the limitations of Article 31 (protection of national security and public health).

In the same cycle, the Committee held that the particular status of the armed forces could justify penal sanctions for breach of a voluntary engagement, without constituting a breach of the prohibition of forced labour. Many Contracting Parties were found to be in violation of the Charter in so far as provisions in their legislation imposed penal sanctions on seamen. Some of them consequently amended their legislation and brought it in line with the Charter, whilst others did not and are still found in violation. Arguments by these Contracting Parties that their legislation is no longer applied, have been rejected by the Committee which has constantly held that "the non application of national legislation containing elements which were in conflict with this principle of the Charter would not be considered sufficient for the purpose of ensuring the application of this provision on this point and that consequently such legislation would have to be amended" (Conclusions V, p. 6), or that "even if these provisions were no longer applied, their very existence was at variance with the requirements of the Charter" (see Conclusions XIII-3, p. 66).

In the fourteenth supervision cycle, part one, the Committee recalled that "their mere existence constitutes a breach of Article 1, paragraph 2. These provisions may be applied at any time and as long as they conserve full legal force their implementation cannot be ruled out. The argument of disuse is in fact another reason to proceed to their abrogation" (Conclusions XIV-1, p. 39).

In the fifteenth supervision cycle, part one, the Committee examined more closely a number of measures introduced by governments with a view to encouraging employment and curtailing expenditure on unemployment benefit. With a view to ascertaining if they infringed against the right guaranteed by this paragraph, the Committee inquired into the obligation imposed on job-seekers to accept suitable work, the conditions under which their unemployment benefit was suspended or whereby they were required to perform socially useful work and the criteria used in evaluating the job seeker's bona fide and the suitability of their reasons where they refused to take up a certain employment or training (see, for example, Conclusions XV-1, p. 140 Denmark, p. 357 Italy and United Kingdom p. 625-626).

¹ The situation was remedied in Germany by the Merchant Shipping Act of 29 October 1974, in Sweden by the Merchant Shipping Act of 18 May 1973, in Norway by an Act of 1975, in Cyprus by the Merchant Shipping Act No. 11 of 1976, in Iceland by an Act of 1990, in Spain by an Act of 1992, in the United Kingdom by an Order of 1994 and in Ireland by the Merchant Shipping Act 1998. A recommendation, No R ChS (95) 6, had previously been addressed to Ireland for the first part of the thirteenth cycle as the conclusion had been negative since the second supervision cycle.

Assessment of compliance

Even though the case law of the Committee concerning the prohibition of forced labour has mainly been established in relation to the merchant navy and the aviation sector, other cases have also been found incompatible with this prohibition, particularly those which go beyond the limitations of Article 31¹ of the Charter, such as criminal sanctions against requisitioned civil servants, excessive lengths of compulsory service in the armed forces and delays in the acceptance of refusals of resignation in certain public services.

a. Situations contrary to the prohibition of forced labour for breach of contract

The following countries have been found to infringe on the prohibition of forced labour within the meaning of Article 1, para. 2, on the ground that their legislation punishes by penal measures cases where a contract is merely broken or not honoured and where there is no likelihood of persons or property being endangered.

Belgium: the Disciplinary and Penal Code for the merchant navy and fishing fleet allows for criminal sanctions to be imposed in certain cases of breaches of labour discipline which do not endanger either the safety of the ship or the life and health of those on board (Conclusions XIII-4 p. 330, Conclusions XIV-1, p. 104 and Conclusions XV-1, pp. 71-72).

France:² Sections 39, para. 4 and 59, para. 1 of the Disciplinary and Penal Code of the Merchant Navy provide a possibility for penal sanctions against seamen in certain cases not involving the safety of the vessel or the life and health of those on board. The conclusion has been negative since the seventh cycle of supervision (see, in the last instance, Conclusions XV-1, p. 237).

Greece:² provisions exist for criminal sanctions against seamen in cases where neither the safety nor the lives or health of the persons on board are endangered (Articles 205, 207 para. 1, 208, 210 para. 1-222 of the Code of Public Maritime Law of 1973; Section 4 para. 1 of Act No. 3276/1944 on

1. Under Article 31 of the Charter, the only authorised restrictions or limitations to the rights and principles guaranteed by the Charter are those which "are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals".

2. For the twelfth supervision cycle the Committee of Ministers addressed a recommendation to Greece, No. R ChS (93) 1 (first part), France No. R ChS (94) 2, Italy No. R ChS (94) 4 and Spain No. R ChS (94) 5 (second part). Moreover, in the thirteenth supervision cycle (first part), the Committee of Ministers addressed recommendations to France, No. R ChS (95) 3 (second recommendation), Greece No. R ChS (95) 4 (second recommendation), Italy No. R ChS (95) 7 (second recommendation) and Spain No. R ChS (95) 9 (second recommendation) - the first recommendation related to criminal sanctions in the merchant navy and in the aeronautics sector; the second recommendation only concerned those in the aeronautics industry as the law which provided for criminal sanctions for seamen was abolished in 1992). The Committee of Ministers reiterated its recommendations to France, Greece and Italy for the third part of the thirteenth supervision cycle in Resolution ChS (97) 1.

collective bargaining in the Merchant Navy; Section 15 of Act No. 299/1936 on the settlement of collective disputes in the Navy). The conclusion has been negative since the tenth supervision cycle, see, in the last instance, Conclusions XV-1, pp. 294-295.

Italy:¹ Sections 1091-1094 of the Navigation Code prescribe penal sanctions for seamen and civil aviation staff who desert their posts or refuse to obey orders even if those defaults jeopardise neither the safety of the ship or aeroplane nor the life or health of persons on board. The conclusion has been negative since the fourth cycle of supervision (see, in the last instance, Conclusions XV-1, p. 356).

Portugal: Sections 132 and 133 of the Disciplinary and Criminal Code of the merchant navy provide sanctions against seamen who leave their work posts even when neither the safety of the vessel nor the lives or health of those on board are in danger (Conclusions XIV-1, p. 650 and Conclusions XV-1, p. 467).

Turkey: Article 1467 of the Commercial Code empowers the captain of a ship to use force to bring seamen back on board or with a view to ensuring the proper running of the vessel and the maintenance of discipline. The Committee recalled that any sanction involving compulsory labour should be limited to acts endangering the safety of the ship or the life or health of persons on board, and needed to be strictly defined. As Article 1467 of the Commercial Code did not meet this criteria, the Committee concluded that it was not in conformity with the Charter (Conclusions XIII-3, p. 238, Conclusions XIV-1, p. 762 and Conclusions XV-1, p. 592).

The United Kingdom: under Section 59 of the 1995 Merchant Shipping Act (previously Section 30(c) of the 1990 Merchant Shipping Act) penal sanctions can be imposed on seamen in cases where a work contract is merely broken or not honoured because of a general or partial strike of the crew and where there is no danger to persons or property.²

1. For the twelfth supervision cycle the Committee of Ministers addressed a recommendation to Greece, No. R ChS (93) 1 (first part), France No. R ChS (94) 2, Italy No. R ChS (94) 4 and Spain No. R ChS (94) 5 (second part).

Moreover, in the thirteenth supervision cycle (first part), the Committee of Ministers addressed recommendations to France, No. R ChS (95) 3 (second recommendation), Greece No. R ChS (95) 4 (second recommendation), Italy No. R ChS (95) 7 (second recommendation) and Spain No. R ChS (95) 9 (second recommendation) - the first recommendation related to criminal sanctions in the merchant navy and in the aeronautics sector; the second recommendation only concerned those in the aeronautics industry as the law which provided for criminal sanctions for seamen was abolished in 1992). The Committee of Ministers reiterated its recommendations to France, Greece and Italy for the third part of the thirteenth supervision cycle in Resolution ChS (97) 1.

2. Section 30(c) was the last of a series of provisions still in force (see Sections 28-29 and 31) which had been criticised by the Committee since the third cycle but which have in the meantime been repealed. For the third part of the thirteenth cycle the Committee of Ministers addressed a recommendation, No R ChS (97) 3 to the United Kingdom on this issue.

The Committee did not accept the claim of the government that this section did not violate the Charter as it applied only to a strike by the crew or part of the crew of a vessel whilst the vessel was at sea and that no prosecution was ever made under it. The Committee considered that not all strikes on board vessels at sea would endanger the safety of the ship or the life of those on board and that Section 30(c) was not in conformity with the Charter. The conclusion has been negative since the eighth supervision cycle (see, in the last instance, Conclusions XV-1, p. 626).

In the past Spain¹ was found not to comply as the Act of 24 December 1964 relating to airmen included provisions for criminal sanctions in the event of disciplinary offences, even in cases where neither the safety of the aeroplane nor the life or health of those on board were threatened (Conclusions XIII-3, pp. 74-75).

b. Situations contrary to the prohibition of forced labour on other grounds

The following are cases of non-compliance on other grounds:

Cyprus: Defence Regulations 79A and 79B empower the government to requisition employees and to ban strikes in cases non-consistent with the restrictions allowed under Article 31 (Conclusions XIII-3, pp. 59-60 Conclusions XIV-1, pp. 149-150 and, in the last instance, Conclusions XV-1, p. 114).

The arguments of the Government of Cyprus that these regulations were applied only where they were not in conflict with the constitutional provisions relating to forced labour and the right to strike, which contained similar restrictions as those of Article 31, and that the constitutional validity of an order issued under them could be challenged in the High Court, were not accepted by the Committee on the grounds that this supervision was carried out subsequently, that the regulations were still in force and that they provided for restrictions and limits which went beyond those provided for under Article 31 the Charter.

Denmark: Sections 198 and 199 of the Criminal Code prescribe criminal penalties for deliberate idleness or lack of means of subsistence for which the person concerned is responsible (Conclusions XIII-1, pp. 45-46 and, in the last instance, Conclusions XV-1, p. 138²).

Greece: under Section 64 of Decree No. 1400 of 1973 on compulsory army service, career officers having attended a number of training courses may not leave the army before completing a term of service of up to twenty-five years. The Committee considered that this duration exceeded all reasonable limits and was not justified by the specific nature of a military career and the high cost of training¹ and, on the basis of information supplied, not neces-

1. Taking account of recommendations No. R ChS (94) 5 and R ChS (95) 9, Spain remedied the situation by repealing Articles 29 and 49 of Act No. 209 of 24 Dec. 1964 (Conclusions XIV-1, p. 690).
2. The Committee noted in these Conclusions that these sections were repealed by Act No. 141 of 17 March 1999, outside the reference period.

sary for the protection of national security. The conclusion has been negative since the tenth supervision cycle (see, in the last instance, Conclusions XV-1, p. 294).

Ireland: excessive length of compulsory service for officers in the army. The conclusion was negative for the first time in the fourteenth cycle, first part (Conclusions XIV-1, p. 409). It was repeated in the next cycle (Addendum to Conclusions XV-1, pp. 18-19).

Italy: Act No. 146 of 1990 allows striking workers to be requisitioned in essential public services in circumstances which go beyond the limitations to rights and principles authorised by Article 31 of the Charter. The conclusion was negative for the first time in the fourteenth cycle, first part. It was reiterated in the next cycle (Conclusions XV-1, p. 356).

Under the above-mentioned act, strike action in essential services is subject to several conditions including a guarantee of operation of a minimum service. Essential services are defined in the Act.² Workers who fail to provide a minimum service as agreed shall be liable to disciplinary sanctions, or as provided by ordinance, an administrative fine. Workers have the right to appeal against sanctions, which must be imposed in accordance with a procedure laid down in Act No. 300 of 1970, to a conciliation and arbitration committee. Appeals against fines may be made to a Court in accordance with Act No. 689 of 1981.

"The Committee observes that the possibility of imposing sanctions on workers who fail to provide a minimum service remains, and it finds that the scope of essential public services as defined in Section 1 of the Act, i.e. the number and the nature of the services involved, goes beyond the limitations permitted by Article 31 of the Charter. It recalls that the non-application of national legislation containing elements which do not comply with the prohibition of forced labour is not sufficient for the purpose of ensuring the application of Article 1 para. 2 on this point and that consequently such legislation would have to be amended (Conclusions V, p. 6). For these reasons the Committee concludes that the situation in Italy in this respect does not comply with the Charter" (Conclusions XIV-1, pp. 452-453).

The Netherlands: under Section 6 of the 1945 Labour Relations (Special Powers) Extraordinary Decree, neither an employee nor an employer may voluntarily terminate a contract of employment without the permission of

1. The Committee of Ministers addressed a recommendation to Greece for the first part of the twelfth cycle, No. R ChS (93) 1, and for the first part of the thirteenth cycle, No. R ChS (95) 4 (second recommendation). The recommendation was renewed for the third part of the thirteenth supervision cycle in Resolution ChS (97) 1.
2. They include artistic and historical heritage; civil protection, the collection and disposal of domestic refuse; services relating to the protection of the freedom of movement, namely urban and other public transport networks, railways, air traffic and airports; services relating to social welfare and insurance, services relating to education, including nurseries and kindergartens, services relating to freedom of communication, i.e. postal and telecommunications services and public radio and television news services.

the director of the Regional Labour Office (Conclusions X-1, p. 37; in the last instance Addendum to Conclusions XV-1, p. 83¹).

Portugal was found not to comply on the ground that Section 385 of the Criminal Code (previously Section 436) provides for sanctions to be applied against civil servants who leave their posts with the intention of disrupting a public service.

The Committee, was not satisfied by the explanations of the government that this Section could never be applied in the case of a strike and that a strike, which is a collective right covering civil servants aiming at putting pressure on the employer to obtain a goal, could never enter into the scope of Section 385, which covered cases of individual civil servants abandoning their posts with the specific aim of disrupting a public service. The Committee considered that according to the wording of Section 385, it could be applied in circumstances going beyond those acceptable under Article 31 of the Charter. In response to the comment that Section 385 had so far never been applied, the Committee recalled its case law (Conclusions XIII-3, p. 66) according to which the non-application of national legislation does not suffice to demonstrate a state's compliance with this provision (Conclusions XIV-1, p. 649). The situation was remedied by an amendment to this Section under Legislative Decree No. 48/95 of 15 March 1995, which provides for the punishment of a civil servant who *unlawfully* abandons his post with the intention of disrupting a public service. This amendment narrows the scope of the provision and renders it inapplicable to strike situations, since the right to strike is protected by law and does not constitute *unlawful* behaviour.

Unlawfulness in this context may be objectively assessed, according to the report: in order for Section 385 to apply, the subjective element of intention must be proved (Conclusions XV-1, pp. 466-467).

The Committee's conclusion is deferred for Poland (Conclusions XV-1, pp. 113-114). The Committee deferred its conclusion in cycles thirteen, fourteen and fifteen for the following Contracting Parties:

Greece: Decree No. 17 of 1974 permits the mobilisation of the civilian population in any "unforeseen situation causing disruption of the country's economy and society". The Committee considered this expression too broad in its meaning, as it could result in compulsory labour, not admissible under Article 1 para. 2 in the light of Article 31 of the Charter. As the last report stated that the Ministry of National Defence had started a procedure of modification of the Decree, with a view to deleting provisions open to misinterpretation, the Committee sought clarification of the situation (Conclusions XIII-3, p. 62 and Conclusions XIV-1, p. 349). In the last supervision cycle, the Committee took note of the fact that the authorities intended to revise the legislation and expressed the hope that this would be done without delay (Conclusions XV-1, p. 294).

1. The infringing provision was repealed by the Flexibility and Security Act, which entered into force on 1 January 1999, i.e. outside the reference period (Addendum to Conclusions XV-1, p. 83).

Italy: Sections 328, 331-333 of the Criminal Code provide for prison sentences for civil servants and public service employees guilty of dereliction of duty. The Committee noted that Section 333 on the exercise of the right to strike in essential public services was repealed by Act No. 146 of 12 June 1990, and that according to the Italian report the provisions still in force were applied only where the conduct of the public servant jeopardised the fundamental interests of the community. The Committee asked to be informed of each application of the provisions, in order to determine whether the situation in practice was in conformity with Article 31 of the Charter (see Conclusions XIII-3, p. 68 and Conclusions XIV-1, p. 451). It repeated this request in the latest cycle (Conclusions XV-1, p. 356).

Turkey: the prohibition of forced labour is enshrined in Article 18 of the Constitution. Nevertheless, certain work is not considered to be "forced labour", including, inter alia, work necessitated as a civic obligation (Article 18 para. 2). According to the report, the wording was based on Article 4 para. 3 d) of the European Convention on Human Rights. Act No. 2935 of 25 October 1983 on States of Emergency, one of the laws implemented in application of Article 18 para. 2 of the Constitution, provides that during a state of emergency declared following natural disasters and epidemics, people aged between eighteen and sixty can be assigned to certain tasks. The Committee wished to know whether there were any other laws passed in application of Article 18 para. 2 of the Constitution and, if so, asked for details of their application in practice (Conclusions XIII-3, p. 238 and Conclusions XIV-1, p. 762, where the question was repeated as no answer was received). In the fifteenth cycle, the Committee noted that according to the Turkish report no new acts had been passed under Article 18 of the Constitution during the reference period (Conclusions XV-1, p. 592).

B. Elimination of all forms of discrimination in employment

According to the Committee, Article 1 para. 2 imposes an obligation upon Contracting Parties to eliminate all forms of discrimination in employment and, in this respect, paragraph 2 must be read in conjunction with the Preamble to the Charter, which provides that "the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin", giving the forms of discrimination that are prohibited.

It is recalled that as the Charter applies *ratione personae* only to nationals of Contracting Parties, it is only such nationals who must be protected from discrimination in employment for reasons of "national extraction".

Furthermore, paragraph 2 is completed by other relevant provisions of the Charter which directly ensure the right to non-discrimination by recognising the entitlement of men and women to equal pay for work of equal value (Article 4, para. 3).¹

1. The protection of equality between men and women was reinforced by the Additional Protocol to the Charter, adopted in 1988 and brought into force in 1992, Article 1 of which guarantees the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.

✓ Under Article 1 para. 2, employment is understood in its broadest sense, taken to include all categories of workers, all sectors of activity (public, private, professional and of the self-employed), and all forms of employment (including for the purpose of a private household and in firms not employing more than five persons- Conclusions IX-1, p. 25).

From the earliest supervision cycles, the Committee showed a particular interest in the application of the principle of non-discrimination to the admission of women in employment, making it clear that reports on this provision should provide "particulars on the admission of women to certain posts, notably in the civil service; it considered that the rights guaranteed by the Charter, especially in matters of non-discrimination against women, required not only that the states remove all legal obstacles to admission to certain types of employment but also that positive, practical steps be taken to create a situation which really ensured complete equality of treatment in this respect" (Conclusions I, p. 15).

✓ Ireland was found to be in breach of Article 1 para. 2 during the first three supervision cycles because female civil servants were obliged to resign on marriage and because married women were prohibited from entering the civil service.¹

Furthermore, in its first Conclusions the Committee ruled that, as regards the principle of non-discrimination, this paragraph contained an obligation to "provide appropriate education and training to ensure the full exercise of the right guaranteed therein"² (Conclusions I, p. 15).

In the eighth supervision cycle the Committee, welcoming the initiative of Austria to organise a very wide-ranging government campaign to foster public awareness of problems of equality of access to work based on action by numerous international organisations to abolish all discrimination and prejudice against women, observed that this initiative was in keeping with the aims of the Charter and its own concern "to ensure that the principle of non-discrimination between men and women is not only embodied in the positive law of each Contracting Party but is also applied in practice" (Conclusions VIII, p. 29).

In the same cycle, the Committee considered it appropriate to clarify that: "the obligation to protect effectively the right of the worker to earn his living in an occupation freely entered upon certainly does not confer upon any worker, whether in the public service or not, the right to employment of his choice regardless of his qualifications. Nevertheless, certain requirements are not admissible under the Charter such as those based on race, colour, sex, political opinion etc (see the Preamble). That is to say that the Charter does not prevent an employer from stipulating whatever qualifications he or she

1. The bar on married women was abolished in 1977 by the Civil Service (Employment of Married Women) Act 1973.
2. David Harris, in his book *The European Social Charter* (pp. 33-34) regards this ruling as important, because "the absence of discrimination in the employment of qualified or trained candidates is meaningless if there is discrimination in the provision of facilities to obtain the necessary qualifications for training".

may wish, provided that they do not take the form of requirements inadmissible by the Charter (account being taken of Article 31)" (Conclusions VIII, pp. 29-30).

Two points may be underlined concerning the *elimination of discrimination on grounds of sex*: on the one hand, the Contracting Parties to the Charter have made considerable efforts to establish the necessary legislation and structures to guarantee the principle of equality, particularly between women and men; on the other, the Committee's supervision does not only extend to the conformity of legislation or regulations with the requirements of the Charter but also to practical applications, and in this respect it must be realised that the *de facto* situation of equality between men and women is nowhere satisfactory, even where the law is sufficient.

Despite the fact that during the early supervision cycles emphasis seems to have been placed on discrimination in access to employment and on discrimination based on sex, it is clear, especially from questions put to the Contracting Parties in the later supervision cycles, (see below) that non-discrimination is also equally important in matters of promotion, training, working conditions and of dismissal on grounds other than sex, such as trade union membership, political opinion, religion, race and national minority.^{3/4}

Concerning *discrimination in employment other than that based upon sex*, the Committee has examined more closely one particular example of possible discrimination on grounds of political opinion: the duty of fidelity and loyalty to the Constitution, required in the Federal Republic of Germany, for candidates for employment (as well as for those already employed) in the public services. The Committee has never questioned the conformity of this requirement with Article 1 para. 2, but it has expressed doubt as to "whether it was really necessary for the legitimate aim of protecting the state and its constitutional order to extend the requirement of fidelity and loyalty to candidates for fairly routine and even menial jobs such as engine-drivers, postmen and gardeners" (Conclusions VII, p. 6).^{5/6} The Committee defined the limits of this condition with regard to the Charter "The close connection in certain cases between 'loyalty' or 'fidelity to the Constitution' and political behaviour (as the practical expression of political opinion) creates the confusion (in respect, particularly, of 'Berufsverbot') in this context. The existence of measures based neither on the nature of the service nor on essential elements connected with the qualification of the person concerned or on any overt act putting in doubt his loyalty or fidelity to the Constitution, would constitute a discrimination and would not be considered as being in conformity with Article 1, paragraph 2 of the Charter" (Conclusions VIII, p. 30). Having considered that "access to the civil service was not the subject of any exemption or reservation in respect of Article 1 para. 2: it was a form of access to work and was therefore covered by this article", the Committee "saw fit, without calling into question the constitutional principle of German law, to draw the government's attention to the fact that one of the main problems arising from the conditions for the application of the duty of loyalty to the Constitution by the federal authorities and the Länder authorities - whose practices in this respect differed, moreover-stemmed from the fact

that the conditions laid upon applications to and members of the civil service were standard, general ones, irrespective of the jobs in question".¹

Despite subsequent developments, the Committee once again adjourned its conclusion after its latest study of the situation (Conclusions XIII-2, pp. 230-231).

In the thirteenth supervision cycle, fourth part, the Committee noted that the German report "confirmed that the routine enquiries made to establish the loyalty of applicants for civil service jobs, which had been criticised by the Committee, had been abolished throughout Germany; applicants for civil service jobs were now simply required to sign a declaration of loyalty to the Basic Law after receiving information on the subject" and concluded that Germany complied with the Charter (Conclusions XIII-4, p. 331).

More generally, it may be observed that in the General introduction to Conclusions XI-2, p. 23, under the sub-heading "Equality of treatment", the Committee remarked that with the exception of one report, all the national reports examined in the eleventh supervision cycle dealt solely with discrimination between men and women. As a result, the Committee drew the attention of the Contracting Parties to the Preamble of the Charter and urged that "consequently reports relating to the elimination of all discrimination in employment (Article 1 para. 2) – which is one of the cornerstones of equality of treatment – ought not to be restricted to discrimination based on sex".

Thus, for example, the Committee asked:

- the United Kingdom to indicate whether the 1990 Employment Act, which, *inter alia*, makes it unlawful to refuse a person employment on the ground that he is a member of a trade union, provides protection against denial of employment on grounds of past trade union membership or on grounds of trade union activity (Conclusions XII-1 p. 60). It also asked the government to indicate any steps taken or planned to guarantee in practice complete and effective protection against anti-trade union discrimination based on trade union membership or activities (Conclusions XIII-1, p. 57);
- Spain for information on cases of discrimination "in working conditions affecting coloured workers and Muslim workers, as well as difficulties affecting workers belonging to the Gypsy minority" (Conclusions XII-2, p. 52 and Conclusions XIII-1, p. 54);
- Greece to comment on allegations of discrimination in access to employment against persons not belonging to the Greek Orthodox religion, especially in the education sector (Conclusions XIII-1, pp. 48-49);

1. In the same way, concerning the provision allowing political, religious or cultural bodies in Norway to enquire as to job applicants' political, religious or cultural opinions when the post to be filled was important to the aims of the organisations or institutions concerned, the Committee "wished to draw the Norwegian Government's attention to the dangers inherent in a wider application of this provision" (Conclusions XI-1, p. 45).

- Turkey for information on discrimination on grounds of political opinion, *inter alia* with respect to: Section 2 of Martial Law Act No. 1402, which imposes an obligation on the competent authorities to comply with any demand by martial law commanders for the transfer or dismissal of public servants whose services are considered dangerous from the standpoint of general security, law and order or public safety, or whose work is not considered necessary; a regulation on security investigation and archive research which affected public servants, magistrates and public prosecutors, university teachers and employees of state enterprises and banks, and which could have repercussions on employment, and on the Fight against Terrorism Act of 12 April 1991 which contains a very broad definition of terrorism and propaganda. The Committee also asked for information on discrimination in practice on the grounds of trade union membership or activities (Conclusions XIII-1, pp. 219-220).
- Malta for information on the activities of the Employment Commission set up to ensure that there was no discrimination on grounds of political opinion and on the measures taken in practice to combat forms of discrimination on grounds other than sex or political opinion (Conclusion XIII-2, p. 235).

The repetition of the questions on the elimination of discrimination other than that based on sex has progressively led most of the Contracting Parties to provide all or part of the information requested. In this respect, Conclusions XIII-3 are of particular interest, as they show both the efforts made by states, at least in their legislation, to combat discrimination of all kinds, particularly in the area of employment, and the difficulties encountered.

The importance given by the Committee to the practical application of legislative measures against discrimination is significant, and its purpose is to allow an assessment of their efficiency (see, for example, Conclusions XIII-3, p. 74).

In the fourteenth supervision cycle, the Committee expressed the view "that the protection against discrimination in employment afforded by the Charter means that there should be effective access to court" (see below, under "Assessment of compliance", the case of the United Kingdom in which the Committee held that to prohibit such access infringed the right to protection against discrimination in access to employment).

Commenting in general on the application of this provision by Contracting Parties, the Committee considered that most of them now have sufficiently protective legislation and regulations against discrimination. "The real difficulty encountered in complying with this provision does not arise from the legislative or statutory framework but in the effective practical application of the normative provisions" (Conclusions XIV-1, pp. 35-36).

Assessment of compliance

The only countries found not to comply are Greece and the United Kingdom. *Ann.*
 Greece: the application of quotas to the admission of women to the police *YU.*
 (school (20%) and officers' school (15%)) constitutes direct discrimination *W*
 against women in gaining access to police training.

The Committee observed that such a situation could nonetheless be justified by the application of Article 31 of the Charter. However, this was not the case in Greece as it found "nothing in the report to persuade it that such a restriction was 'necessary in a democratic society' for the protection of any of the interests listed in Article 31. The report simply states that the nature of the mission and the character of the Greek Police Force as an armed body as well as [...] the conditions of the exercise of the relevant activities is an adequate justification. The fact that the Greek police force bears arms cannot, in itself, justify restricting the number of women accepted for police training," (Conclusions XV-1, p. 293).

United Kingdom: the law provides that certificates issued in pursuance of Section 42 of the Fair Employment Act in Northern Ireland prohibit access to a court appeal, which infringes the right to protection against discrimination in access to employment on ground of religious faith or political opinion.

Section 42, sub-sections 1-2 of the Fair Employment Act in Northern Ireland provide that this provision shall not apply to an act done for the purpose of safeguarding national security or of protecting public safety or public order and that a certificate issued by the Secretary of State and certifying that an act specified therein was done for one of these purposes shall be conclusive evidence that it was done for that purpose.

The Committee noted that the conclusive nature of these certificates in effect precluded the Fair Employment Tribunal or any domestic court from making a decision as to whether the contested act, for example, denial of employment, was carried out for improper and unlawful discriminatory reasons or for purposes of safeguarding national security, public safety or public order. The Committee considered "that the protection against discrimination in employment afforded by the Charter means that there should be effective access to court, and while acknowledging that the limitation on access to court is prescribed by law and pursues the legitimate aim of furthering national security, it finds that precluding the Fair Employment Tribunal from considering the merits of a complainant's case, the complainant being a worker or a self-employed worker, represents a disproportionate response, which undermines the protection against discrimination in access to employment on the grounds of religious belief and political opinion and is thus in breach of Article 1 para. 2 of the Charter" (Conclusions XIV, pp. 792-793).

Previously, Portugal² was also found not to comply, since Section 2 of Legislative Decree No. 97/77 obliged firms with more than five employees to ensure that at least 90% of the workforce was Portuguese. Exceptions to this

1. The situation was remedied, outside the reference period, by amendments to the nature of these certificates as a consequence of the review of national security aspects agreed under the Good Friday Agreement in 1998. The new Fair Employment and Treatment (Northern Ireland) Order 1998 now recognises the right of appeal against a certificate and allows appeals to be made against certificates issued under the Sex Discrimination Order 1976 and the Race Relations Order of 1997.
2. The situation was remedied as the quota system on the recruitment of foreign workers was abolished by Act No. 20/98 of 12 May 1998 which provides for equal treatment for non-national workers (Conclusions XV-1, p. 466).

rule were only made where the public interest required it or where no Portuguese workers possessed the necessary technical skills.

As the law failed to exempt nationals of other Contracting Parties to the Charter lawfully resident or working regularly within Portugal from this discrimination, the Committee found the situation not compatible with para. 2 of Article 1 (Conclusions XIII-5, p. 154 and Conclusions XIV-1, pp. 648-649).

The Committee's conclusion is presently deferred for a third time in respect of Italy, the Netherlands Antilles and Turkey (see, in the last instance, Conclusions XV-1, p. 356, Addendum to Conclusions XV-1, p. 120 and Conclusions XV-1, pp. 589-592 respectively). It is also deferred for Poland (Addendum to Conclusions XV-1, pp. 138-140, first report), and Slovakia (Addendum to Conclusions XV-2, pp. 134-135, first report).

Paragraph 3 – Free employment services

Under this paragraph, the Contracting Parties undertake:

"to establish or maintain free employment services for all workers". (and employers!)

In the first cycle of supervision, "the Committee interpreted this provision as placing an obligation on each Contracting State not only to create or maintain such services throughout its national territory but also to ensure that they were properly operated and, where necessary, supervised, in collaboration with both sides of industry" (Conclusions I, p. 16), and it made clear that the "employment services" required were essentially services for the placement of workers in employment (Conclusions I, p. 167).

In the fourth cycle of supervision, the Committee stressed in a general comment that the term "free employment services" implied "the free provision of placement services for both worker and employer. This interpretation is borne out by the text of the paragraph under consideration and is moreover the obvious one if only to prevent an employer passing on any placement costs incurred by him to workers".

Applying this case law in the same supervision cycle, the Committee found that the United Kingdom did not comply with this provision of the Charter because, "employers were charged for the placement of some categories of workers, such as professional, administrative, managerial, executive technical and scientific staff, and this can under no circumstances be compatible with the provisions of the Charter, unless such staff have access to other public placement services which are free of charge for both employee and employer, and receive the same treatment from them as other categories of workers" (Conclusions IV, pp. 10-12).

In the fifth, sixth and seventh cycles of supervision, the Committee confirmed its negative conclusion for the United Kingdom, as no comparable services were available to employers free of charge (see also Conclusions XIII-3, p. 241, Turkey).

In the eighth cycle of supervision, the Committee elaborated further on the "principle that free employment services shall be maintained for all workers".

More specifically, the Committee explained that this principle: "(being meant in accordance with the very terms of the Charter, to ensure the effective exercise of the right to work) aims above all to match, to the greatest possible extent, supply and demand of manpower with a view to guaranteeing maximum opportunities to workers. Consequently, the principle of free services would be devoid of its meaning if it applied only to the demand of employment by workers and did not include the supply of jobs by employers." Being aware, however, of the fact that: "access to certain occupations of a high level of responsibility or of a highly technical nature entailed, beyond the meeting of supply and demand, additional selection and thorough assessment, calling for appropriate staff and methods", the Committee accepted "that such services, added to the search for and registration of supply and demand by a specialised service for the placement of professional executives, fell outside the scope of application of paragraph 3 of Article 1 of the Charter and could justify payment by the employer for the specific services thus rendered him. Such an interpretation, however, could only be acceptable within very specified limits designed to prevent any failure to comply with the Charter, that is to say:

- that services paid for, concern specifically selection or assessment, separate from the registration of supply and demand of manpower, which must remain free;
- that posts justifying recourse to such additional service should be limited in number and correspond to a high level of qualification and responsibility (higher professional executives and managerial staff)" (Conclusions VIII, pp. 36-37).

In the ninth supervision cycle, the United Kingdom was found to comply with this provision, as since 1983 employers could ask the public employment services (which were free of charge), instead of the special executive recruitment services, to recruit professional executives.

During the twelfth supervision cycle when examining the situation in Denmark, where a new Act of 20 December 1989 allowed the free exercise of private placement services and where the Minister of Labour had been authorised to issue rules concerning the payment by employers for certain specified forms of assistance provided by the Public Employment Service, the Committee summarised its case law on this provision, "to the effect, firstly, that the principle of free employment services applied to employers and workers alike, secondly, that the existence of fee-charging placement services was acceptable only if a free placement service were available in all sectors and thirdly, that access to certain occupations of a high level of responsibility could justify payment by the employer for specific services of selection and thorough assessment, but only subject to certain precise limitations" (Conclusions XII-1, p. 62 reconfirmed in Conclusions XIV-1, pp. 104-105, Belgium).

Reimbursement of costs incurred by the national employment agency was not considered inconsistent with this provision (see below under "Assessment of compliance").

1. Those indicated in Conclusions VIII: see above.

Another issue examined systematically by the Committee is whether nationals of other Contracting Parties have access to public employment services under the same conditions as nationals (see, for instance, Conclusions XIV-1, p. 72, Austria, p. 105, Belgium, p. 213, Finland, p. 250, France).

In the thirteenth supervision cycle the Committee, observing that many states were changing their placement structures and allowing private services to operate, checked if public - and therefore free - services continued to be available to all workers in all sectors (Conclusions XIII-1, pp. 62-65 in the cases of Italy, Greece and Sweden and Conclusions XIII-3, p. 79, Austria and Denmark, pp. 83-84 Italy, pp. 86-87 Norway and Spain, p. 88 Sweden, p. 239 Finland and pp. 240-242 Portugal and Turkey).

The Committee consistently asks Contracting Parties having accepted this paragraph to supply it with statistics on the age and sex of applicants and the persons for whom employment is found. It also insists on finding out whether employers' and workers' representatives participate in the operation and control of the employment services. On the latter point, see Conclusions XII-1, pp. 66-67, the United Kingdom, where the Committee, whilst ruling that the privatisation of the Professional and Executive Recruitment Agency (previously part of the public employment service) was not in itself contrary to the Charter, as long as recourse could be made to free employment services for the employment of professional and managerial staff. It remarked that workers did not seem to be asked to participate in the operation and control of the employment services and asked for information on this point (see also Conclusions XIII-3, p. 87 (Spain), p. 89 (the United Kingdom), p. 239 (Finland), p. 242 (Turkey) and Addendum to Conclusions XIII-3, p. 20 (Luxembourg)).

The situation of the labour market in the Contracting Parties and the changes having taken place or occurring in the area of recruitment services have led the Committee to reinforce its supervision of the efficiency of free employment services. It has always attached great importance to the correct running of these services and in view of this, has always sought to ascertain that they are located over the whole territory. In Conclusions XII, "the Committee asked all states to outline the geographical distribution of employment services, particularly placement services, over the entire national territory and the action taken to ensure proper conditions of access to such services for all interested persons, which it considered as an indispensable condition for the effective exercise of the rights guaranteed under Article 1 of the Charter" (Conclusions XII-1, p. 19 and XII-2, p. 18; see also Conclusions XIII-3, p. 82, Greece, p. 86, the Netherlands Antilles, p. 239, Finland and p. 240, Portugal).

An essential factor demonstrating the efficiency of recruitment services is their rate of placement; consequently, the Committee asks the Contracting Parties how many job applications are registered, or the number of applicants registered and the number of vacancies filled. Where private placement services exist, it asks the same questions for these structures. The Committee also endeavours to find out whether employers are obliged to notify public recruitment services of employment vacancies and if not by what means these

services are informed of vacancies, the proportion of placements made by the public services, which other structures exist for recruitment and the proportion of vacancies filled by each (on all these points, see Conclusions XIII-1, pp. 58-66, pp. 221-222, Conclusions XIII-2, pp. 235-238, Conclusions XIII-3, pp. 78-89 and pp. 238-242 and Addendum to Conclusions XIII-3, pp. 19-20).

In the General introduction to Conclusions XIV-1, the Committee summed up its findings from the examination of national reports and indicated what it regards indispensable for assessing the actual situation in member states.

✓ "The role and the specific responsibilities of the employment services differ across Contracting Parties, but at a general level their mandate is to contribute to a well functioning labour market by facilitating the matching of supply and demand for labour. While information, counselling and job-broking services are in most cases available to both employed and unemployed jobseekers as well as to employers, it is evident that the tasks pertaining specifically to the unemployed have assumed still more weight over the past two decades. In many Contracting Parties the employment services are responsible for the administration of unemployment benefit schemes, including the control of the availability for the labour market of benefit claimants, for the organisation of training and retraining measures, for the implementation of job creation schemes, etc., in addition to placement activities per se". Moreover, the Committee observed "that the trend towards liberalisation of employment services continued in several Contracting Parties during the reference period. In Austria, Finland, Germany, Malta and Spain legislative steps were taken to permit or facilitate the operation of private placement agencies. Only a few states now retain a public monopoly on employment services and in some of these consideration is currently being given to liberalising the market."

Despite the on-going liberalisation process, the public employment services remain the dominant providers of free services in all Contracting Parties. In order to verify that the requirements of Article 1, paragraph 3, are satisfied not only in legislation, but also in practice, the Committee has sought to determine the performance levels of the public agencies. The Committee is conscious of the methodological problems inherent in quantitative measurements of employment service results. Leaving aside the problems of statistical reliability¹ it is obvious that indicators such as the placement rate and the market share do not directly reflect the quality and the variety of services offered. The Committee nevertheless considers that these indicators are

1. The increasing use of self-service procedures, especially the so-called open job orders (vacancies) which are displayed openly in employment offices and which may lead to placements without active mediation and without formal registration reduces the value of the placement rate as an indicator of the role and importance of the employment services.

Quantifying the market share is fraught with difficulties. The relevant market for the employment services cannot be clearly identified, partly because reliable statistics on the total number of vacancies in the economy are not available in most countries, and partly because not every vacancy requires the mediation of a placement agency (and should therefore not be counted as belonging to the "market" proper).

indispensable for assessing the actual situation in states, which makes the more regrettable the lack of basic information in certain national reports on the number of placements made, vacancies notified and market shares.

On the other hand the Committee noted with interest the efforts made by some Contracting Parties (such as the Flemish Community in Belgium and France) to gauge the results of the employment services and the valuable information on different indicators used: number of interviews with job-seekers, contact visits to employers, staffing levels and others. The Committee also paid attention to the results of the private placement agencies. The development and growth of private agencies may be related – though this is not necessarily the case – to poor quality or insufficient coverage of freely available public services, whether in general or in specific sectors. The Committee found that on the whole, the role of private agencies is still quite limited in the Contracting Parties."

Finally, the Committee stressed once again the emphasis it puts on the need for the participation of the social partners in the organisation and operation of employment services. "It considers that organisations of workers and employers by their very nature possess a special knowledge of the supply and demand for labour and are ideally placed to identify the relevant service needs. The non-participation of the social partners would therefore render the provision of efficient placement services difficult in the least. While close tripartite co-operation on employment services seems to be the norm in most Contracting Parties, the Committee noted a few instances where tripartite structures apparently were either not existing or not functioning and it raised a number of questions in this regard" (Conclusions XV-I, pp. 40-41).

Assessment of compliance

During the latest examination of this provision, the Committee reached a negative conclusion in respect of Greece only. The results obtained by the public employment services were exceptionally poor, notably in respect of the number of jobseekers registered, the number of vacancies notified and the number of placements made (Conclusions XIV-1, pp. 350-351 and Conclusions XV-1, pp. 295-296).

The Committee had previously found Turkey as not complying on the ground that employers were charged a fee for the notification of vacancies. The Committee considered that the charging of a fee for such a fundamental operation of the employment services as the notification of vacancies could not be in conformity with the Charter (Conclusions XIV-I, pp. 762-763). However, the Committee did not insist on this criticism when it ascertained that the payments were not notification fees, but only reimbursement of costs incurred on behalf of the National Employment Agency (e.g. postal costs, transportation of candidates, etc.) and was informed of their amounts. It asked to be informed about the exact destination of these sums, the regularity of payment and whether they were compulsory (Conclusions XV-1, pp. 592-593).

The Committee's conclusion is deferred in respect of Belgium (first report – Conclusions XIII-2, pp. 235-236, Conclusions XIV-1, pp. 104-105 and

Conclusions XV-1, pp. 72-73), Malta (Conclusions XIV-1, p. 524 and Conclusions XV-1, p. 400), Slovakia (Addendum to Conclusions XV-2, p. 136, first report), Spain (Conclusions XV-1 p. 509) and Turkey (Conclusions XV-1, pp. 592-593).

to provide/promote
Paragraph 4 – Vocational guidance, training and rehabilitation (11.9, 10, 15)

Under this paragraph, the Contracting Parties undertake:

"to provide or promote appropriate vocational guidance, training and rehabilitation".

18.10. In the first supervision cycle, the Committee described the obligations deriving from this paragraph as identical to those imposed by Articles 9 (vocational guidance), 10 (vocational training) and 15 (vocational training, rehabilitation and social resettlement for disabled workers) of the Charter and ruled that states which had accepted these three articles were not required to include in their reports particulars concerning the application of paragraph 4 (Conclusions I, p. 16).

In the second supervision cycle, the Committee recalled its ruling and added that: "Nevertheless the Committee desired to make clear that while this was possible because of the identity, broadly speaking, of the areas covered by those articles and by Article 1, the converse was not implied, viz. that a State which complied with the last-mentioned provision had necessarily fulfilled all the obligations set out in Articles 9, 10 and 15 of the Charter." (Conclusions II, p. 6).

Article 1 para. 4 is a very general provision, whereas Articles 9, 10 and 15 contain precise undertakings in each of the areas covered. The question at issue is therefore whether cases of non-compliance with one or more of the obligations included in Articles 9, 10 and 15 necessarily constitute a violation of Article 1 para. 4. The case law of the Committee has developed around this issue.

Until the seventh cycle of supervision, the Committee's assessment of compliance with Article 1 para. 4 depended on its assessment of compliance with Articles 9, 10 and 15, a fact which it clearly stated: "The Committee had to conclude that this state does not comply entirely with paragraph 4 of Article 1 as it does not comply with paragraph 2 of Article 10", or "...with paragraph 1 of Article 10 and paragraph 1 of Article 15", or "The Committee, having come to the conclusion that this country was not in full compliance with the requirements of paragraphs 1-2 of Article 10 and in view of the close connection between paragraph 4 of Article 1 and Articles 9, 10 and 15, concluded that this country was still not entirely fulfilling its obligations under paragraph 4 of Article 1 of the Charter." (Conclusions VII, p. 11).

Since the eighth cycle of supervision, the Committee as a rule does not refer to its assessments given under Article 9, 10 and 15, but to the information

on these provisions given in the reports. Concerning the same states as above, it concluded in the following manner: "the Committee noted that vocational training was not being provided equally for all categories of the population and that, in particular, there was discrimination against foreigners. In these circumstances, the Committee had to conclude that Austria was not complying fully with the 'obligation to provide or promote appropriate vocational training'". Also: "the Committee reached the conclusion that vocational training is not adequately provided to certain young foreigners and that this state cannot be considered as fully complying with Article 1 para. 4 of the Charter"; "The Committee took note of the new vocational training programmes in the United Kingdom. It noticed nonetheless that the right to vocational training was not yet fully guaranteed, as certain forms of discrimination against foreign manpower existed in some sectors. The Committee had to conclude that this country does not fully comply with this provision" (Conclusions VIII, pp. 37-38).

In the twelfth supervision cycle the Committee made the following observation of a general character concerning the scope of Article 1 para. 4: "The purpose of Article 1 of the Charter being to ensure the effective exercise of the right to work, the Committee specified that in order to satisfy the requirements of Article 1, para. 4, a state must not only have institutions providing vocational guidance, training and rehabilitation, but must also ensure access to the institutions for all those interested, including foreigners, nationals of the states parties to the Charter, and the disabled" (Conclusions XII-1, p. 67 and Conclusions XII-2, p. 57). *12th cycle*

Since then, whenever a negative conclusion is reached under Article 9, 10 or 15 on one of the two grounds mentioned in the above observation (i.e. adequacy of services and equality of access), the conclusion is also negative under Article 1 para. 4. On the contrary, when the conclusion under Articles 9, 10 or 15 is negative on another ground, the conclusion under Article 1 para. 4 is not necessarily negative. *Access*

Assessment of compliance

Taking into account the scope of Article 1 para. 4 as defined above and information supplied under Articles 9, 10 or 15, as appropriate, the Committee has concluded that the following countries are not complying with the Charter:

Austria: equality of treatment between Austrian nationals and nationals of other Contracting Parties to the Charter is not guaranteed with regard to access to apprenticeships (Conclusions XIII-3, p. 90 and Conclusions XIV-2, p. 75);

✓ **Belgium:** a length of residence requirement is imposed on nationals of certain Contracting Parties who apply to participate in vocational training or employment schemes for persons with disabilities (Conclusions XIII-4, p. 335 and Conclusions XIV-2, p. 109).

Turkey:¹ due to the poor geographical distribution of existing institutions, which in the Committee's view manifestly do not ensure satisfactory access for all those concerned, particularly disabled persons, to vocational guidance, training and rehabilitation (Conclusions XIII-1, pp. 222-224; Conclusions XIII-3, p. 243 and Conclusions XIV-2, pp. 739-740).

In the thirteenth cycle, part three, Greece, Luxembourg and Malta were also found not to comply with this provision, but in the fourteenth cycle, part two, the Committee deferred its decision in respect of them pending clarification of certain questions raised (Conclusions XIV-2, p. 327, Greece, p. 463, Luxembourg and p. 499 Malta). It is worth noting that in the case of Greece, the Committee noted that Section 11, para. 4 of the Act No 2224/1994 guaranteed equal treatment between Greeks and nationals of other Contracting Parties not members of the European Union in access "to professional orientation, professional training and education" offered by the Manpower Employment Organisation (OAED). However, it deferred its conclusion pending receipt of the answers to the outstanding questions remaining under Articles 9, 10 and 15 (Conclusions XIV-2, p. 327).

Other countries in respect of which the Committee's conclusion is deferred, mainly pending receipt of information concerning equal access of nationals of other Contracting Parties to vocational guidance, training and rehabilitation are: Denmark (Conclusions XIV-2, p. 182), Finland (ibidem, p. 213), Iceland (ibidem, pp. 361-362), Ireland (ibidem, p. 383) the Netherlands Antilles (ibidem, pp. 531-532), and Portugal (ibidem, p. 627).

1. Turkey has accepted Articles 9 and 10 but not Article 15.

Article 2 – The right to just conditions of work

General

*Hours of work
public holidays
weekly rest day*
"This article covers matters (hours of work, rest, holidays, etc.) which were among the original concerns of the labour movement and among the early standards established by international labour law" (Conclusions I, p. 17). It consists of five paragraphs which correspond to five types of measure which must be undertaken by Contracting Parties in order to provide the worker with the best conditions in which to carry out his work.

These measures are:

- a reasonable duration of work;
- paid public holidays;
- specific arrangements for workers engaged in dangerous or unhealthy occupations;
- a weekly rest day.

The whole of Article 2 is subject to the conditions set down by Article 33 of the Charter, which means that the obligations arising from it are fulfilled by a Contracting Party provided that the great majority of the workers concerned (i.e. 80 %) enjoy the protection stipulated under legislation, collective agreements or otherwise. In view of this it is necessary for the Committee to have sufficient information for each paragraph to determine the proportion of persons covered.

Paragraph 1 – Reasonable working hours

(should rest etc. - break)
Under this paragraph, the Contracting Parties undertake:

"to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit".

The aim of Article 2, para. 1 is to protect workers health and safety - hence their lives - without neglecting more general interests, particularly economic ones (Third report on certain provisions of the Charter which have not been accepted, p. 11; in the last instance, Conclusions XIV-2, p. 32).

a. The first question which arises is *how to provide for* reasonable working hours. The answer was given by the Committee in its first Conclusions, when

In the case of Slovakia, the Committee examined the first report of this country and requested information on financial support for non-governmental social service providers as well as concrete examples of the participation of individuals and organisations, including voluntary organisations, in the establishment and maintenance of social services (Addendum to Conclusions XV-2, pp. 216-217).

Dojzato
20 159

Article 15 – The right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement

From assistance policies to prof. rel. and rehab. & soc. resettlement
Prof. rel. - work in it & rehab. it!
General

The purpose of Article 15 was explained by the Committee in the first supervision cycle as follows:

W "For a long time aid to the handicapped was classed together with aid to the aged; since the second world war aid to handicapped persons has developed on separate lines, under the influence of Anglo-Saxon legislation. Traditional assistance policies are now out of date and in legislation the emphasis regarding this category of persons has shifted to vocational training and rehabilitation, the reintegration within society. The overriding purpose is that such persons shall be enabled to work and be independent. The Charter reflects this trend and after referring to handicapped persons in Articles 9 and 10, raises the right of physically or mentally disabled persons to training, vocational rehabilitation and social resettlement to the level of a separate social right. Such a right is inconceivable in the absence of means for bringing it into effect, and the Charter therefore incorporates some of the provisions already contained in relevant ILO recommendations¹. Under Article 15, the Contracting Parties undertake to guarantee to disabled persons:

- training facilities, including, where necessary, specialised institutions (paragraph 1);
- that their placing shall be promoted by means of specialised services, sheltered employment and measures to encourage employers to admit physically or mentally disabled persons to employment (paragraph 2)" (Conclusions I, p. 72).

Commenting on Article 15, in the General introduction to Conclusions XIV-2, the Committee stressed that its two subjects, vocational training on the one hand and placement and employment on the other, covered respectively by paragraphs 1-2, "are inextricably linked and both show that occupational integration is an essential element of social integration." (Conclusions XIV-2, pp. 62 and 63).

1. Vocational Training (Adults) Recommendation, 1950, No. 88 and Vocational Rehabilitation (Disabled) Recommendation, 1955, No. 99.

The EU Charter of Fundamental Rights—Towards a European Social Constitution?

I INTRODUCTION

EUROPE'S 'ECONOMIC CONSTITUTION'¹ has been painstakingly constructed over a 50-year period. Economic freedoms and market integration form its predominant rationale. Until recently employment and social policies have been advanced as a function of the economic integration process rather than an independent aspiration. The significance of the Social Policy Agenda² lies with the fact that it subverts the liberal economic paradigm by positing employment and social policies based on the 'quality of work' as intrinsic elements of the efficient process of market functioning. Nonetheless, at its core, the EU still lacks a *social constitution*. Indeed, what is often portrayed as Europe's 'social deficit'³ will persist so long as the notion of EU citizenship is located within the domain of economic freedoms rather than social values such as solidarity and participation. The high level proclamation of the EU Charter of Fundamental Rights⁴ marks a symbolic attempt to place indivisible rights—civil,

¹ See M Streit and W Mussler, 'The Economic Constitution of the European Community: From "Rome" to "Maastricht"' (1995) 1 *European Law Journal* 5; C Joerges, 'European Economic Law, the Nation-State and the Maastricht Treaty' in R Dehousse (ed) *Europe After Maastricht: An Ever Closer Union?* (Law Books in Europe, Munich, 1994) 29–62; N Walker, 'European Constitutionalism and European Integration' [1996] *Public Law* 266; and M Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart, Oxford, 1998).

² COM(2000) 379, approved at the Nice European Council, 7/9 Dec 2000, Presidency Conclusions, Annex I. Discussed in ch 11.

³ See M Poiares Maduro, 'Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU' in P Alston (ed) *The EU and Human Rights* (OUP, Oxford, 1999) 449–72; and P Davies, 'Market Integration and Social Policy in the Court of Justice' (1995) 24 *Industrial Law Journal* 49.

⁴ The Charter was issued as a 'solemn proclamation' by the European Parliament, the Council and the Commission on 7 Dec 2000. For the full text, see OJ 2000, C364/1. For essential explanatory documentation, see the Charter website at: <http://europa.eu.int/comm/justice_home/unit/charte/index_en.html>.

political, economic and social—at the centre of the EU's enterprise and, despite its non-binding status, may yet act as a portent for the emergence of a European social constitution based on a foundation of shared social values.

In this final chapter we will explore the potential of the Charter as a tool for constitutionalising fundamental social values within the EU legal order. In the first part the origins of the Charter will be traced before proceeding to consider several inter-related questions in the remaining sections. What is the substance of the fundamental social rights, freedoms and principles that form the Charter's 'common values'?⁵ What is its legal scope? Finally, in the light of the 'post-Nice agenda'⁶ of constitutional reflection,⁷ to what extent does the Charter offer a new framework for the development of justiciable social rights and recognition of basic social entitlements for European citizens?

II THE ORIGINS OF THE CHARTER

The lineage of the social elements of the Charter can be traced back to the Tindemans Report of 1975⁸ and an attempt in the 1980s by the Economic and Social Committee to draw up a catalogue of 'inalienable basic social rights' derived from the Treaties and international law. Significantly, the Committee's aim was to remind the Community institutions and the Member States of *existing* social rights and not to draw up a separate 'Social Charter'.⁹ Nevertheless, the Commission proceeded with its own proposal for a *Community Social Charter* that, although adopted only as a non-binding 'solemn declaration' by a majority of Member States,¹⁰ has been a catalyst for legislative and programmatic action at Community and national levels.¹¹ The Social Charter seeks to persuade Member States to guarantee fundamental social rights for 'workers' but as we discussed in Chapter 4, all references to social citizenship were deleted from the final text. Europe's 'social identity' was—and indeed remains—highly contested¹² and the time

was not yet ripe for a broad inclusive vision of social citizenship within a European integration project that lacked a human rights foundation. However, in the wake of the post-Maastricht 'legitimacy crisis', issues of citizenship, social solidarity and fundamental rights were swiftly brought to the fore.

The immediate process leading to the Charter stemmed from the March 1996 report of an ad hoc *Comité des Sages*.¹³ Significantly, the authors of the report sought to end the tradition schism¹⁴ between civil and political rights, on the one hand, and economic and social rights, on the other, by proposing a 'bill of rights' encompassing *indivisible* civic and social rights to be incorporated into the Amsterdam Treaty. The objective was to render the embryonic concept of EU citizenship meaningful in the eyes of the people of Europe. In the event, the revised EC Treaty left the limited EU citizenship provisions unchanged and contained only a small nod in the direction of social rights. Article 136 [ex 117] EC proclaims that the Community and the Member States shall have in mind *fundamental social rights*, such as those set out in the ESC and the Community Social Charter, when pursuing their social policy objectives. In itself, however, this generalised commitment does not form a basis for establishing justiciable social rights.

In the aftermath of the Amsterdam Treaty the Commission sought to rekindle the flame ignited by the *Comité*. The Social Affairs Directorate appointed a group of legal experts who published a report on affirming fundamental rights in the European Union.¹⁵ The experts called for recognition of both economic and social rights contained in the ECHR, the ESC and ILO conventions, and concluded that all rights should be set out in a single text to be inserted into the Treaties.¹⁶ The timing of the experts' report was propitious. 1998 marked the fiftieth anniversary of the Universal Declaration of Human Rights¹⁷ an event heralded by a range of activities,¹⁸ including a separate Commission report calling for, inter alia, the establishment of a centre for monitoring human rights based on the model of the Racism Monitoring Centre.¹⁹ Moreover, the adoption of the Revised

⁵ First recital of the preamble.

⁶ See especially, J Shaw, 'The Treaty of Nice: Legal and Constitutional Implications' (2001) 7 *European Public Law* 195 at 211–13.

⁷ See K Lenaerts and E De Smijter, 'A "Bill of Rights" for the European Union' (2001) 38 *Common Market Law Review* 273 at 299.

⁸ COM(75) 481.

⁹ Doc CES 270/89.

¹⁰ At the Strasbourg European Council, Dec 1989. The text of the Charter is reproduced in *Social Europe* 1/90, pp 46–50.

¹¹ By early 2001, there were 43 references to the Social Charter in Community legislation. See further, L Betten, 'The EU Charter on Fundamental Rights: a Trojan Horse or a Mouse?' (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 151 at 158.

¹² See M Poiarses Maduro, 'Europe's Social Self: "The Sickness Unto Death"' in J Shaw (ed) *Social Law and Policy in an Evolving European Union* (Hart, Oxford, 2000) 325–49 at 326.

¹³ *For a Europe of Civic and Social Rights* (European Communities, Luxembourg, 1996).

¹⁴ See M Gijzen, 'The Charter: A Milestone for Social Protection in Europe?' (2001) 8 *Maastricht Journal* 33 at 35.

¹⁵ *Affirming Fundamental Rights in the European Union Time to Act* (European Commission, Brussels, 1999). Available at: http://europa.eu.int/comm/justice_home/unit/charte/index_en.html.

¹⁶ *Ibid* p 17.

¹⁷ GA Res 217A (III) 10 Dec 1948.

¹⁸ See G de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26 *European Law Review* 126.

¹⁹ *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000* (EUI, Florence, 2000). For an adapted version, see P Alston and J Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights' in Alston, n 3 above, 3–66.

ESC in 1996,²⁰ and the launch of the ILO's Declaration on Fundamental Principles and Rights at Work in 1998,²¹ increased the visibility of fundamental social rights on the international stage. At Cologne, in June 1999, the European Council finally accepted responsibility to act by declaring that:²²

Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy. The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice. *There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens.*

Once again the Union was deploying the language of rights for the twin purposes of legitimation and integration.²³ The European Council added substance to its rhetoric by referring both to the ECHR and the common constitutional traditions of the Member States, and also to the citizens' 'guarantee' of economic and social rights in Article 136 [ex 117] EC derived from the Community Social Charter and the ESC.²⁴ This declaration was significant not only because of the expressed desire to deepen the culture of fundamental rights in the EU, but also as a bold attempt to place classic civil liberties and core social rights on an equal footing. However, from the outset, there was an underlying ambiguity behind the whole exercise. The idea of the Charter was seen as an alternative to Community accession to the ECHR²⁵ or incorporation of the ESC.²⁶ Moreover, in a barely concealed compromise, the European Council indicated that, when the Charter was eventually adopted, it would be in the form of a non-binding political declaration and it 'will then have be considered whether and, if so, how the

²⁰ The Revised ESC entered into force in July 1999. For discussion, see N Casey, 'The European Social Charter and Revised European Social Charter' in C Costello (ed) *Fundamental Social Rights: Current Legal Protection and the Challenge of the EU Charter of Fundamental Rights* (Irish Centre for European Law, Dublin, 2001) 55–75.

²¹ Available at: <www.ilo.org>. For discussion, see J Bellace, 'The ILO Declaration of Fundamental Principles and Rights at Work' (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 269.

²² Presidency Conclusions, 3–4 June 1999, Annex IV, para 1. Emphasis added.

²³ For a prescient analysis, see G de Búrca, 'The Language of Rights and European Integration' in J Shaw and G More, *New Legal Dynamics of European Union* (Clarendon Press, Oxford, 1995) 29–54 at 39–43.

²⁴ Cologne Presidency Conclusions, para 2.

²⁵ In *Opinion 2/94* [1996] ECR I-1759, the Court ruled, on the basis of the principle of conferred powers in the first paragraph of Art 5 [ex 3b] EC, that the Community had no competence to accede to the ECHR, as human rights were not included among the Community's objectives in Art 2 EC. For discussion, see *The Human Rights Opinion of the ECJ and its Constitutional Implications* (CELS Occasional Paper No 1, Cambridge, 1996); G Gaja, 'Opinion 2/94, Accession by the Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms' (1996) 33 *Common Market Law Review* 973; and L Betten and N Grief, *EU Law and Human Rights* (Longman, Harlow, 1998) pp 111–23.

²⁶ For discussion of this option, see ch 4.

Charter should be integrated into the treaties'.²⁷ Hence, on the one hand, the European Council wished to keep alive the pretence of a legally binding Charter as a token gesture to the minority of Member States that might support such a move,²⁸ while, on the other hand, the driving purpose behind the initiative was to offer a visible declaration of the EU's existing commitments directed, as de Búrca observes, not at lawyers or politicians but the ordinary citizen to 'help to secure a degree of popular legitimacy for a political entity which continues to be contested and questioned'.²⁹

In order to furnish the Charter with legitimacy, the European Council constituted a novel EU 'body' composed of representatives of the Governments, the Commission, the European Parliament and national parliaments.³⁰ The body, which renamed itself the 'Convention', was established outside the Treaties and signified a new form of constitution building in Europe.³¹ The Convention consulted widely and set up working parties. Representatives of the Court of Justice and the European Court of Human Rights sat as observers and a wide variety of expert groups were invited to submit their opinions. The Convention established a powerful inner core group, the grandiloquently titled 'Praesidium', to work through the detailed text and produce drafts. The idea was to have the widest possible exchange of views and maximum transparency. Indeed the Convention's inclusiveness was intended to mark a fresh approach, running counter to the exclusiveness and opacity of the traditional IGC process, which was running in parallel.³² As a decision-making body, however, the Convention was criticised for lacking a formal mechanism for the participation of 'civil society' in its work, except through hearings and the involvement of parliamentary representatives.³³ Nevertheless it represented an open, inherently flexible and more inclusive forum for constitutional development in the EU.

While the structure and working methods of the Convention were innovative, its work was hampered by a fundamental difference of perception among the participants that reflected the contradictions and ambiguities of the whole project.³⁴ According to Lord Goldsmith, the UK Government's

²⁷ Cologne Presidency Conclusions, para 4.

²⁸ As an indication, in *Opinion 2/94*, the compatibility of accession to the ECHR was broadly supported by eight Member States (Austria, Belgium, Denmark, Finland, Germany, Greece, Italy and Sweden) and opposed by five (France, Ireland, Portugal, Spain and the UK).

²⁹ See de Búrca (2001, *European Law Review*) n 18 above at 130.

³⁰ The formal representation was: Member State governments (15); European Commission (1); European Parliament (16); national parliaments (30). Therefore parliamentary representatives were in a clear majority with 46 out of a total of 62 seats. For the details, see the Tampere European Council Presidency Conclusions, 15–16 Oct 1999, Annex.

³¹ See de Búrca (2001, *European Law Review*) n 18 above at 126.

³² *Ibid* at 132.

³³ See T Eicke, 'European Charter of Fundamental Rights—Unique Opportunity or Unwelcome Distraction' [2000] *European Human Rights Law Review* 280 at 281.

³⁴ See de Búrca (2001, *European Law Review*) n 18 above at 128.

representative, the discussions were 'not about minting new rights, but rather an exercise in increasing the visibility of existing rights'.³⁵ Many NGOs sought to use the Convention as a platform to argue for new rights not yet firmly established at international level and were, not surprisingly, disappointed.³⁶ Moreover, shortly after the first draft of the Charter was published in July 2000,³⁷ it became abundantly clear that the final text would be issued in the form of a non-binding political declaration and the question of legal force would be deferred to a later date.³⁸ In order to breathe fresh life into the process, and unite the disparate members of the Convention around a common objective, the President, Roman Herzog,³⁹ successfully recommended that the Charter should be drafted 'as if' it had 'mandatory legal force'.⁴⁰ The Convention wished to send a clear signal to the outside world that the European Union must not be any less bound to its citizens than are the Member States under their own constitutional laws'.⁴¹ This led to a period of intensive negotiations before publication of the final text in October 2000.⁴² In a remarkably smooth process the Charter was endorsed at political level at a meeting of Union leaders in Biarritz⁴³ before its adoption at Nice on 7 December 2000.

The publication of the Charter as a 'solemn proclamation' of the European Parliament, the Council and the Commission was intended to send a message of unity of purpose as a prelude to a decisive act of constitution building at the Nice IGC in preparation for the enlargement of the Union to include the countries of central and eastern Europe, the Baltic region and the eastern Mediterranean.⁴⁴ In the event any feelings of optimism associated with the proclamation of the Charter were swiftly dispelled

³⁵ See Lord Goldsmith, 'A Charter of Rights, Freedoms and Principles' (2001) 38 *Common Market Law Review* 1201 at 1207.

³⁶ *Ibid.*

³⁷ CHARTE 4422/00, CONVENT 45. An online version can be found at: <<http://www.eurofound.ie/2000/08/Features/eu0008268f.html>>.

³⁸ Both the Commission and the European Parliament advocated the case for the Charter to become legally binding. See COM(2000) 644, para 11, and European Parliament resolutions A5-0064/2000, especially points 7(a) (f) and (g) and B5-767/2000. See also, Economic and Social Committee Resolution 105/2000 and Committee of the Regions Resolution 140/2000.

³⁹ Formerly President of Germany.

⁴⁰ See COM(2000) 559 final, para 3.

⁴¹ Doc CHARTE 4105/00.

⁴² CHARTE 4487/00, CONVENT 50. For the text with explanatory notes produced by the Praesidium, see CHARTE 4473/00, CONVENT 49. Regrettably the version in the Official Journal does not include the explanatory note even though it is indispensable. See further, D Curtin and R van Ooik, 'The Sting is Always in the Tail: The Personal Scope of Application of the EU Charter of Fundamental Rights' (2001) 8 *Maastricht Journal* 102 at 103.

⁴³ 13/14 Oct 2000. This was not a formal European Council meeting. A summary of the proceedings can be found at: <<http://www.presidente-europe.fr/pfue/static/acces5.htm>>.

⁴⁴ Following the decision at the Helsinki European Council of Dec 1999 to pursue negotiations with an additional six countries, making a total of 13 possible entrants between 2005 and 2015 including: Czech Republic, Hungary, Poland, Romania, Bulgaria, Slovakia, Slovenia, Estonia, Latvia, Lithuania, Cyprus and Malta. Negotiations with Turkey are on hold.

by four days of 'bad-tempered squabbling'⁴⁵ on the French Riviera. The draft Treaty of Nice⁴⁶ that emerged is primarily concerned with adapting the institutional design of the Union.⁴⁷ The main changes concern the representation of the Member States in the composition and appointment of the institutions and their operational efficiency in a Europe of 20 or more countries.⁴⁸ For the time being, however, the Treaty and the whole process of enlargement is on hold following a negative vote in the Irish referendum of 7 June 2001. In the meantime, attention has been focused on a declaration annexed to the draft Treaty, which calls for a 'deeper and wider debate' on the future of the Union involving wide-ranging discussions with all interested parties including civil society.⁴⁹ This process should address, inter alia, the status of the Charter along with other 'post-Nice' issues such as a more precise delimitation of powers between the EU and the Member States, simplification of the Treaties and a review of the role of national parliaments in the 'European architecture'.

Following the launch of a Declaration on the Future of the European Union at the Laeken European Council of December 2001,⁵⁰ a Convention on the Future of the European Union has been established closely modelled on the Convention formed to draft the Charter. The new Convention, chaired by the former French President, Valéry Giscard d'Estaing, is due to draw up recommendations on a possible 'Constitution of the European Union' in time for a decision to be taken at a further IGC to be held in 2004. In the meantime the Convention's discussions will be in the public domain and organisations representing civil society will receive regular information through a network called the Forum.⁵¹ This means that any decision to incorporate the Charter in a new 'basic treaty', or to accede to the ECHR,⁵² will have to be considered as part of a broader constitutional package.⁵³

III THE CHARTER'S SOCIAL RIGHTS AND PRINCIPLES—TEXT AND STRUCTURE

The EU Charter of Fundamental Rights is divided up into three discrete parts: a preamble; the main body consisting of 50 enumerated 'rights,

⁴⁵ See Shaw, n 6 above at 195.

⁴⁶ OJ 2000, C80/1. The Treaty was formally adopted on 26 Feb 2001.

⁴⁷ See K St C Bradley, 'Institutional Design in the Treaty of Nice' (2001) 38 *Common Market Law Review* 1095.

⁴⁸ *Ibid* at 1097.

⁴⁹ Declaration No 23 annexed to the Final Act of the Conference.

⁵⁰ Issued on 15 Dec 2001. Available at: <<http://europe.eu.int/futurum>>.

⁵¹ See A Arnall, 'Editorial: From Opinion 2/94 to the Future of Europe' (2002) 27 *European Law Review* 1 at 2.

⁵² Laeken Declaration, Part II.

⁵³ See B de Witte, 'The Legal Status of the Charter: Vital Question or Non-Issue?' (2001) 8 *Maastricht Journal* 81 at 88.

freedoms and principles'⁵⁴ set out in six chapters; and a final chapter of 'horizontal' provisions that define its legal scope and the level of protection that it offers.

As with the Social Charter, the preamble serves as a point of reference for the value orientation⁵⁵ of the document and the aspirations of its signatories. From the outset the authors sought to legitimate the whole enterprise by proclaiming that the 'peoples of Europe' wish to 'share a peaceful future based on common values'.⁵⁶ Moreover, just as fundamental rights are regarded as indispensable for legitimacy,⁵⁷ the process of European integration—or 'ever closer union'⁵⁸—is dependent upon the furtherance of these shared values. In other words, should the Charter be integrated into the Treaties, its core values, or what Fitzpatrick describes as the apex of the EU pyramid,⁵⁹ would be based, for the first time, on fundamental rights. Next, the central aspirations are presented thus:⁶⁰

Conscious of its spiritual and moral heritage, the Union is founded on the *indivisible, universal* values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

This highly nuanced paragraph contains three interlinked strands, each of which offers a tantalising glimpse of the *potential* of the Charter if not the *actualité*. First, the values espoused in the Charter are declared to be indivisible, an ambition that is underlined by references to both civil and political rights—'human dignity, freedom and equality'—and social rights—'solidarity'. Within the EU's conception of fundamental rights, the inclusion of solidarity among the Charter's common values has the effect of elevating social rights to the level of human rights⁶¹ and is perhaps the most important achievement of the Charter in its present form as a political declaration. The EU institutions, not least the Courts, will be bound to take note of the central position that social values now occupy when carrying out their obligations. Therefore, the Charter's social values are capable of having a mainstreaming effect⁶² for new legislation and programmatic

⁵⁴ Seventh recital of the preamble.

⁵⁵ See M. Weiss, 'The Politics of the EU Charter of Fundamental Rights' in B. Hepple (ed) *Social and Labour Rights in a Global Context* (CUP, Cambridge, 2002, forthcoming).

⁵⁶ First recital.

⁵⁷ See A. von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *Common Market Law Review* 1307 at 1307.

⁵⁸ First recital.

⁵⁹ See B. Fitzpatrick, 'Converse Pyramids and the EU Social Constitution' in Shaw, n 12, above, 303–24.

⁶⁰ Second recital. Emphasis added.

⁶¹ See Gijzen, n 14 above at 42.

⁶² *Ibid.*

action, and also serve as a basis for judicial interpretation of EU law within the scope of application of the Treaties. Secondly, the Charter's values are presented as universal. Most of the enumerated rights are guaranteed to 'everyone' or 'every worker'.⁶³ Where this is the case, the logic of the principle of universalism suggests that the reach of the Charter must extend to third-country nationals who are seeking to rely on social rights falling within the scope of EU law.⁶⁴ Thirdly, the Charter fills a void, identified previously by O'Leary,⁶⁵ by making an explicit link between fundamental rights and EU citizenship. Although the citizenship provisions in the Charter merely restate the *acquis*,⁶⁶ the inclusion of solidarity, along with civil and political rights, offers the prospect of an emerging social conception of citizenship which fits more closely with Marshall's classic definition of citizenship as 'full membership of a community'.⁶⁷

The remaining recitals reflect the compromises reached by the Convention in the light of the Cologne mandate and what was likely to be acceptable to the Member States. First, reference is made to respect for the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States.⁶⁸ In the area of social policy, where the Community defers to 'diverse forms of national practices',⁶⁹ this statement provides a pretext for imposing conditions on the exercise of rights and the recognition of principles. Hence, several of the provisions concerning employment law and social security rights are conditional upon 'national laws and practices'.⁷⁰ Secondly, the delicate balance between 'new' rights and making existing rights more visible is reflected by a recital that refers to the need to strengthen the protection of fundamental rights 'in the light of changes in society, social progress and scientific and technological development'.⁷¹ The Charter is presented as a 'living instrument' that the Courts can interpret teleologically rather than the regressive creation that Weiler feared.⁷² Thirdly, the

⁶³ See C. Costello, 'The Legal Status and Legal Effect of the Charter of Fundamental Rights of the European Union' in Costello, n 20 above, 127–50 at 144.

⁶⁴ See Gijzen, n 14 above at 38; and Lenaerts and De Smijter, n 7 above at 278.

⁶⁵ See generally, S. O'Leary, 'The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law' (1995) 32 *Common Market Law Review* 519.

⁶⁶ See N. Reich, 'Union Citizenship—Metaphor or Source of Rights?' (2001) 7 *European Law Journal* 4 at 6.

⁶⁷ See T. Marshall, *Citizenship and Social Class and Other Essays* (CUP, Cambridge, 1950). For further discussion, see Reich, *ibid.*

⁶⁸ Third recital.

⁶⁹ Art 136 [ex 117] EC.

⁷⁰ Art 27 (workers right to information and consultation within the undertaking); Art 28 (right of collective bargaining and action); Art 30 (protection in the event of unjustified dismissal); Art 34 (social security and social assistance); Art 35 (health care); Art 36 (access to services of general economic interest).

⁷¹ Fourth recital.

⁷² See J. Weiler, 'Editorial: Does the European Union Truly Need a Charter of Rights?' (2000) 6 *European Law Journal* 95 at 96; cf Eicke, n 33 above at 286.

Charter 'reaffirms' rights derived from the common constitutional traditions of the Member States, the Treaties and international law—including the two 'Social Charters'—but preserves the 'powers and tasks of the Community and the Union' in accordance with the principle of subsidiarity.⁷³ In this way the Charter recognises a wide range of sources of fundamental rights without transferring any competences from the national to the Union level. Fourthly, the enjoyment of the rights in the Charter entails unspecified 'responsibilities and duties' with regard to other persons, the 'human community' and future generations.⁷⁴

Finally, the preamble refers to the 50 'vertical' provisions that follow as 'rights, freedoms and principles'.⁷⁵ This phrase suggests a distinction between specific enforceable rights and general unenforceable principles.⁷⁶ Goldsmith explains that this formulation was arrived at after a 'long and difficult' debate.⁷⁷ As the UK Government representative he argued assiduously, and with some success, for the inclusion of what he describes as a 'new concept' that the economic and social rights in the Charter are mere 'principles' that will only be realised as exercisable rights 'to the extent that they are implemented by national law or, in those areas where there is such competence, by Community law'.⁷⁸ In essence, Goldsmith argues that economic and social rights are different and, by implication, inferior to civil and political rights because they are 'usually not justiciable' and are recognised and given effect to in different ways in the Member States who have primary competence in most of these areas.⁷⁹ Goldsmith's contention strikes at the heart of the notion of indivisibility of rights. It is based on an assumption that economic and social rights, such as those contained in the ESC,⁸⁰ or the UN International Covenant on Economic, Social and Cultural Rights⁸¹ are less important because they are not subject to judicial oversight. In fact, both the Council of Europe⁸² and the UN⁸³ have introduced

⁷³ Fifth recital.

⁷⁴ Sixth recital.

⁷⁵ Seventh recital.

⁷⁶ See A Heringa and L Verhey, 'The EU Charter: Text and Structure' (2001) 8 *Maastricht Journal* 11 at 14.

⁷⁷ Goldsmith, n 35 above at 1212.

⁷⁸ *Ibid* at 1213.

⁷⁹ *Ibid* at 1212.

⁸⁰ For a summary of the social rights contained in the ESC and Revised ESC, see ch 4, pp 112–3.

⁸¹ 999 UNTS No 3. See also, the UN International Covenant on Civil and Political Rights, 999 UNTS No 171. Both Covenants were adopted in 1966.

⁸² Following the 1991 Amending Protocol of the ESC, a more effective European Committee of Social Rights has replaced the Committee of Independent Experts. See further, Casey, n 20 above; and T Novitz, 'Remedies for Violation of Social Rights within the Council of Europe' in C Kilpatrick, T Novitz and P Skidmore (eds) *The Future of Remedies in Europe* (Hart, Oxford, 2000) 231–51.

⁸³ The UN Committee on Economic, Social and Cultural Rights. See further, M Craven, 'A View from Elsewhere: Social Rights, the International Covenant and the EU Charter of Fundamental Rights' in Costello, n 20 above, 77–93 at 87.

increasingly sophisticated supervisory committees that have developed an impressive body of legal assessments on the interpretation of these instruments. Further, Member States retain primary competence in many of the areas included among the civil and political rights in the Charter but this does not prevent them from being recognised as fundamental rights. Goldsmith's distinctive conception of 'rights' and 'principles' is not referred to in the explanatory text issued by the Praesidium. Moreover, he was not entirely successful. Eventually, after lengthy negotiations, the Chapter on 'Solidarity' emerged as a mix of clear individual rights, guiding principles that the EU recognises and respects, and pure objectives.⁸⁴ As we shall see, this compromise creates particular difficulties of interpretation and leaves a question mark over the status of social rights within the Charter's construct of fundamental rights.

The Charter's substantive rights are set out in six chapters headed: Dignity; Freedoms; Equality; Solidarity; Citizen's Rights and Justice. The rights and principles of most relevance to EU employment and social law are found mainly, but not exclusively, in the chapter on Solidarity. In this section the main provisions will be presented, and briefly developed, before analysis, in the next section, of their legal scope and effectiveness as determined by the horizontal clauses in Articles 51–54.

Included within chapter I on Dignity we can find rights to human dignity,⁸⁵ to the integrity of the person,⁸⁶ and the prohibition of slavery and forced labour.⁸⁷ Article 1 declares that: 'Human dignity is inviolable. It must be respected and protected'. The dignity of the human person occupies the pole position because it is not only a fundamental right in itself but constitutes the real basis of each of the substantive fundamental rights laid down in the Charter.⁸⁸ Therefore, consistent with the Court's interpretation of fundamental rights in *P v S*,⁸⁹ human dignity is an integral part of the principle of non-discrimination, which is contained in Article 21. Furthermore, Article 31(2) grants workers the right to working conditions that respect their 'health, safety and dignity'. The source of this provision is.

⁸⁴ See B Hepple, 'The EU Charter of Fundamental Rights' (2001) 30 *Industrial Law Journal* 225 at 228.

⁸⁵ This is drawn from the preamble of the 1948 Universal Declaration of Fundamental Rights where it is declared that: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. It follows that the Charter must not be used to harm the dignity of another person and that the dignity of the human person is part of the substance of the rights laid down in the Charter (see CHARTE 4473/00, CONVENT 49, p 3).

⁸⁶ Art 3.

⁸⁷ Art 5.

⁸⁸ See the explanatory note, CHARTE 4473/00, CONVENT 49, p 3.

⁸⁹ See Case C-13/94, *P v S and Cornwall CC* [1996] ECR I-2143, para 22, where the Court held that: 'To tolerate [discrimination against transsexuals] would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard'.

Article 26 of the Revised ESC, which refers to the obligation on the parties to promote awareness, information and prevention of sexual harassment in relation to work and the need to take appropriate measures to protect workers from such conduct.⁹⁰ This provides a platform for advancing legislation and programmatic action under Articles 13 and 141(3) [ex 119] EC.⁹¹

Furthermore, Article 5(2) on the prohibition of forced or compulsory labour, although explicitly derived from Article 4(2) ECHR,⁹² owes its origins to the long-established principle that 'labour is not a commodity'.⁹³ Hence, Article 5(2) reinforces the Court's finding in *Katsikas*⁹⁴ that, under the Acquired Rights Directive,⁹⁵ an employee cannot be compelled to continue in an employment relationship with an employer because such an obligation 'would jeopardise the fundamental rights of the employee who must be free to choose his employer and cannot be obliged to work for an employer that he has not freely chosen'.⁹⁶

[Chapter II on Freedoms] contains the following provisions, inter alia, drawn, for the most part, directly from the ECHR:

- right to liberty and security (Article 6);⁹⁷
- respect for private and family life (Article 7);⁹⁸
- protection of personal data (Article 8);⁹⁹
- right to marry and found a family (Article 9);¹⁰⁰
- freedom of thought, conscience and religion (Article 10);¹⁰¹
- freedom of expression and information (Article 11);¹⁰²
- freedom of assembly and association (Article 12);¹⁰³

⁹⁰ See the explanatory note, CHARTE 4473/00, CONVENT 49, p 29.

⁹¹ Stemming also from Commission Recommendation 92/131/EEC on the protection of the dignity of men and women at work, OJ 1992, L49/1. See now, Art 2(3) of the Race Equality Dir, 2000/43/EC, OJ 2000, L180/22; Art 2(3) of the Framework Employment Dir, 2000/78/EC, OJ 2000, L303/16; and the Commission's revised proposal to amend Dir 76/207/EC on equal treatment between men and women, COM(2001) 321, draft Art 1a. Discussed in ch 9.

⁹² See the explanatory note, CHARTE 4473/00, CONVENT 49, p 7.

⁹³ See further, P O'Higgins, 'Labour is not a Commodity'—An Irish Contribution to International Labour Law' (1997) 26 *Industrial Law Journal* 225.

⁹⁴ Cases C-132/91 and C-138-139/91, *Katsikas v Konstantinidis* [1992] ECR I-6577.

⁹⁵ Dir 77/187/EEC, OJ 1977, L61/26.

⁹⁶ Paras 31-2. See B Hepple, 'Social Values and European Law' [1995] *Current Legal Problems* 39 at 52-4.

⁹⁷ Conveys the same meaning and scope as Art 5 ECHR.

⁹⁸ Corresponds to the rights contained in Art 8 ECHR.

⁹⁹ Derived from Art 286 [ex 213b] EC and Dir 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data, OJ 1995, L281/31. See also, Art 8 ECHR and Council of Europe Convention of 28 Jan 1981 for the Protection of Individuals with regard to the Automatic Processing of Personal Data, ratified by all EU Member States.

¹⁰⁰ This is broader than Art 12 ECHR, which refers only to 'men and women of marriageable age'.

¹⁰¹ Corresponds to Art 9 ECHR.

¹⁰² Follows Art 10 ECHR.

¹⁰³ Based on Art 11 ECHR.

—right to education (Article 14);¹⁰⁴

—freedom to choose an occupation and engage in work (Article 15);¹⁰⁵

—freedom to conduct a business (Article 16).¹⁰⁶

Article 52(3), discussed below, provides that where the rights laid down in the Charter correspond with those in the ECHR 'the meaning and scope of those rights shall be the same'. In respect of the right to freedom of assembly and association in Article 12, for example, this has been interpreted by the Strasbourg Court in the context of Article 11 ECHR, as including both the right to join and not to join a trade union—a 'negative right of association'.¹⁰⁷

Article 15(3) contains the only express reference to nationals of third-countries 'who are authorised to work in the territories of the Member States and are entitled to working conditions equivalent to those of citizens of the Union'. Viewed in isolation, this provision conveys a broad conception of citizenship as a 'common bond transcending nationality'.¹⁰⁸ However, neither the citizenship provisions in the EC Treaty, which are tied to nationality of a Member State,¹⁰⁹ nor the requirement for unanimity for legislative measures in respect of the working conditions of third-country nationals,¹¹⁰ are affected, a situation that would remain unchanged even if the Charter were to become legally binding.¹¹¹

[Chapter III on Equality] enumerates the following rights:

- equality before the law (Article 20);¹¹²
- non-discrimination (Article 21);¹¹³
- cultural, religious and linguistic diversity (Article 22);¹¹⁴

¹⁰⁴ Derived from the common constitutional traditions of the Member States and Art 2 of the Protocol to the ECHR. The right to education also includes vocational and continuing training—Art 10 ESC and point 15 of the Social Charter. Art 14(2) states that this right 'includes the possibility to receive free compulsory education'. According to the explanatory note, CHARTE 4473/00, CONVENT 49, p 16, this does not require all establishments that provide education to be free of charge. Nor does it exclude certain specific forms of education having to be paid for, if the State takes measures to grant financial compensation.

¹⁰⁵ Drawn from Art 1(2) ESC and the case law of the Court of Justice—eg Case 44/79, *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

¹⁰⁶ Based on case law; eg Case 4/73, *Nold v Commission* [1974] ECR 491.

¹⁰⁷ *Sigurjonsson v Iceland* [1993] Series A no 264; *Young, James & Webster* [1981] Series A no 44. See also, Art 5 ESC, Art 22 of the International Covenant on Civil and Political Rights; Art 8 of the International Covenant on Economic, Social and Cultural Rights; and ILO Convention Nos 87 and 98.

¹⁰⁸ See AG Jacobs in Case 274/96, *Bickel & Franz* [1998] ECR I-7637, at paras 23-4 of his opinion. See further, Reich, n 66 above at 10-13.

¹⁰⁹ Art 17(1) [ex 8] EC.

¹¹⁰ Under Art 137(3) EC.

¹¹¹ See Reich, n 66 above at 23.

¹¹² This is a basic tenet of national constitutions. Also recognised by the Court of Justice: eg Case 283/83, *Racke v Hauptzollamt Mainz* [1984] ECR 3791.

¹¹³ Based on Art 12 [ex 6] EC and Art 13 EC. Further sources are Art 14 ECHR and Art 11 of the Convention on Human Rights and Biomedicine.

¹¹⁴ Derived from Art 6 [ex F] TEU and Art 151 [ex 128] EC, the provisions on culture.

- equality between men and women (Article 23);
- rights of the child (Article 24);¹¹⁵
- rights of the elderly (Article 25);¹¹⁶
- integration of persons with disabilities (Article 26).¹¹⁷

Article 21(1) lays down a general right to non-discrimination as follows:¹¹⁸

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Article 22(2) replicates the prohibition of discrimination on grounds of nationality contained in Article 12 [ex 6] EC. By contrast, the grounds of discrimination emphasised above are in addition to those referred to in the exhaustive list in Article 13 EC,¹¹⁹ although the words 'racial or ethnic origin' in that provision may imply discrimination based on colour, genetic features and membership of a national minority.¹²⁰ There is a danger that the inclusion of additional classifications of discrimination may further accentuate the hierarchical essentialist model of EU equalities law and raise unrealistic expectations of programmatic and legislative action in areas that fall outside the competence of the Community. Conversely, the reference to discrimination on the grounds of social origin, which had been specifically excluded during the drafting stage of Article 13 EC, amounts to a political recognition of disadvantage arising from multiple or cumulative discrimination in society.¹²¹

Article 23 on equality between men and women states that:¹²²

Equality between men and women *must be ensured in all areas*, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

¹¹⁵ Based on the New York Convention on the Rights of the Child of 20 Nov 1989, ratified by all EU Member States.

¹¹⁶ Drawn from Art 23 of the Revised ESC. See also points 24–25 of the Social Charter. This article did not appear in the original draft.

¹¹⁷ Based on Art 15 ESC and point 26 of the Social Charter.

¹¹⁸ Emphasis added.

¹¹⁹ Art 13 EC provides that: 'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred upon it by the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

¹²⁰ The Race Equality Dir, 2000/43/EC, OJ 2000, L180/22, contains no specific definition of the term 'racial or ethnic origin' although it is made clear in recital 6 that the EU rejects theories that attempt to determine the existence of separate human races and the use of the term 'racial origin' does not imply acceptance of such theories.

¹²¹ See ch 9 for discussion of these concepts.

¹²² Emphasis added.

On the face of it the right to equality between the sexes appears to be no more than a concise version of Article 141 [ex 119] EC. Article 23 does, however, shift the emphasis from formal to substantive equality by declaring that equality between men and women 'must be ensured'. In the light of Article 23, there is potential for the Court to reconsider its case law in this area, in particular the need for a comparator in sex discrimination cases,¹²³ on the basis that the absence of a comparator should not be allowed to undermine the fundamental rights guarantee. The second paragraph of Article 23 contains the essence of Article 141(4) EC but, as part of the Charter, it is indicative of not just a right to equal opportunities but also of meaningful participation in society.¹²⁴ Further, by contrast with Article 21, where the prohibition of discrimination is expressed negatively, Article 23 amounts to a positive commitment to the principle of equality and serves to reinforce the Court's approach in recent cases such as *Badeck*,¹²⁵ *Gerster*¹²⁶ and *Schröder*.¹²⁷ Nevertheless, while Article 23 holds the potential for a more positive approach it will, at the same time, have to be reconciled with the clear wording of the equality directives.

Moreover, by stressing the application of the equality principle 'in all areas', Article 23 is consistent both with the general obligation to promote gender equality in Articles 2 and 3(2) EC and the practice of mainstreaming and specific actions targeted at increasing the participation of women. In addition, it provides a platform for advancing the alternative paradigm of imposing positive duties on states, public bodies and employers to promote equality in their respective spheres.¹²⁸

Chapter IV on Solidarity comprises employment rights, social entitlements and other miscellaneous rights to, inter alia, access to a free placement service,¹²⁹ health care,¹³⁰ and a 'high level' of environmental and consumer protection.¹³¹ Employment rights and social entitlements include:

- information and consultation within the undertaking (Article 27);
- collective bargaining and action (Article 28);
- protection in the event of unjustified dismissal (Article 30);

¹²³ For a recent example, see Case C-218/98, *Abdoulaye v Renault* [1999] ECR I-5723.

¹²⁴ See Weiss, n 55 above.

¹²⁵ Case C-158/97, *Badeck and others v Hessischer Ministerpräsident* [2000] ECR I-1875.

¹²⁶ Case C-1/95, *Gerster v Freistaat Bayern* [1997] ECR I-5253.

¹²⁷ Case C-50/96, *Deutsche Telekom AG v Schröder* [2000] ECR I-743. See ch 10 for a full discussion of this case law.

¹²⁸ See S Fredman, 'Equality: A New Generation?' (2001) 30 *Industrial Law Journal* 145 at 163–64.

¹²⁹ Art 29—based on Art 1(3) ESC and point 13 of the Social Charter. This is no more than a right for job seekers to receive information about employment vacancies and, as such, can also be implied from Art 15(1) on the 'right to engage in work and to pursue a freely chosen or accepted occupation'. See further, Weiss, n 55 above.

¹³⁰ Art 35—derived from Art 12 ESC and point 10 of the Social Charter.

¹³¹ Arts 37 and 38.

- fair and just working conditions (Article 31);
- prohibition of child labour and protection of young people at work (Article 32);
- family and professional life (Article 33);
- social security and social assistance (Article 34).

It is immediately apparent that the chapter on Solidarity does not provide a comprehensive catalogue of fundamental social rights. The drafting Convention appears to have taken a rather cursory view of the ESC and the Social Charter despite the explicit reference to the 'visibility' of these instruments in the Cologne mandate. For example, the right to work,¹³² the right to a fair remuneration¹³³ and the right to housing are among provisions in the ESC or Revised ESC that are not included in the negotiated text of the Charter.¹³⁴ In his insightful analysis of the workings of the Convention, Goldsmith justifies this vanishing act on the grounds that 'social and economic rights are usually not justiciable in the same way as other rights'.¹³⁵ It is undoubtedly the case that certain social rights, such as the right to social assistance or housing, concern positive social entitlements provided by governments but that does not mean that they are inherently non-justiciable.¹³⁶ Goldsmith rather lamely suggests that it would be difficult to provide for a right to an adequate level of housing in a legal text¹³⁷ but this does not absolve the EU and the Member States from responsibility to formulate policies and programmes in a manner consistent with international guidance.¹³⁸

The distinction between 'rights' and 'principles' in the solidarity provisions is far from clear. For example, Article 27 states that workers or their representatives at the appropriate levels are 'guaranteed' the right to information and consultation within the undertaking in good time 'in the cases and under the conditions provided for by Community law and national laws and practices'.¹³⁹ The precise legal effect of these conditions will be considered in the next section, with particular reference to Article 28 on the right of collective bargaining and action,¹⁴⁰ and Article 30 on protection in the event of unjustified dismissal,¹⁴¹ where the same rider is attached.

¹³² Now Art 1 ESC.

¹³³ Art 4 ESC and point 5 of the Social Charter.

¹³⁴ Art 31 of the Revised ESC.

¹³⁵ Goldsmith, n 35 above at 1212.

¹³⁶ See Craven, n 83 above at 87.

¹³⁷ Goldsmith, n 35 above at 1212.

¹³⁸ Craven, n 83 above at 89. Craven refers to the General Comment of the UN Committee on Economic, Social and Cultural Rights on the Right to Adequate Housing which encompasses more than simply a 'roof over one's head' and includes matters such as security of tenure, availability of services, affordability, habitability, accessibility, location and cultural adequacy—General Comment No 4 (1991) UN Doc E/1992/23, annex III, paras 7–8.

¹³⁹ Art 27 is consistent with Art 21 of the Revised ESC and points 17–18 of the Social Charter. It also incorporates the notion of social dialogue contained in Arts 138 and 139 [ex 118b] EC.

¹⁴⁰ Based on Art 6 ESC and points 12–14 of the Social Charter.

¹⁴¹ Draws on Art 24 of the Revised ESC.

For now it is important to note that several of the provisions in the Solidarity Chapter are not expressed as freestanding 'rights'.

Directive 2002/14 on establishing a general framework for informing and consulting employees in the European Community¹⁴² can be seen as an attempt to secure this objective through Community law while, as Article 27 indicates, allowing for national diversity. In effect, Article 27 reaffirms the existing obligation on the Community to act in this area but it does not resolve the issue of what level is appropriate and under what conditions the guarantee will operate.¹⁴³ Furthermore, the Charter makes no reference to the right of workers, contained in the Revised ESC,¹⁴⁴ to take part in the determination and improvement of the working conditions and working environment. The absence of any reference to workers' participation is a striking indication of the failure of the Charter to fully address the issue of inequality in the employment relationship.¹⁴⁵

Article 27 is a good example of a 'right' that is derived primarily from Community law. Articles 31, 32¹⁴⁶ and 33(2)¹⁴⁷ also fall into this category. For example, Article 31(1), providing that 'every worker' has the right to working conditions which respect his or her 'health, safety and dignity', is derived mainly from the Framework Directive on Safety and Health at Work.¹⁴⁸ It should be noted, however, that the term 'working conditions', drawn from Article 140 [ex 118] EC, is used rather than the much wider 'working environment' found in Article 137(1) [ex 118a] EC.¹⁴⁹ Article 31(2), which grants 'every worker' the right to limitation of maximum working hours, to daily and weekly rest and an annual period of paid leave, is based on the Working Time Directive.¹⁵⁰ While the exclusion of certain sectors and activities from that Directive is now being addressed,¹⁵¹ the law, even after the implementation of a series of supplementary sectoral directives,¹⁵² will still not contain an unfettered right to any of the proclaimed rights apart from a minimum of four weeks paid annual leave. The main area of contention is likely to concern Article 18(b)(i) of the Working Time

¹⁴² Dir 2002/14/EC, OJ 2002, L80/29.

¹⁴³ See Hepple (2001, *Industrial Law Journal*) n 84 above at 228–29.

¹⁴⁴ Art 22 of the Revised ESC.

¹⁴⁵ See the case made by Hepple (1995, *Current Legal Problems*) n 96 above at 52.

¹⁴⁶ Art 32 is based on Dir 94/33/EC on the protection of young people at work, OJ 1994, L216/12. See also, Art 7 ESC and points 20–23 of the Social Charter.

¹⁴⁷ Art 33(2) contains the basic rights set out in the Pregnancy and Maternity Dir, 92/85/EEC, OJ 1992, L348/1; and the Parental Leave Dir, 96/34/EC, OJ 1996, L145/4. See also Art 8 ESC and Art 27 of the Revised ESC. Art 33(1) provides for a more general family right, based on the right in Art 16 ESC to 'legal, economic and social protection'.

¹⁴⁸ Dir 89/391/EEC, OJ 1989, L183/1. Other sources include Art 3 ESC, Art 26 of the Revised ESC and point 19 of the Social Charter.

¹⁴⁹ See further, Case C-84/94, *United Kingdom v Council* [1996] ECR I-5755.

¹⁵⁰ Dir 93/104/EC, OJ 1993, L307/18. See also, Art 2 ESC and point 8 of the Social Charter.

¹⁵¹ See Dir 2000/34/EC, OJ 2000, L195/41.

¹⁵² Dir 99/63/EC, OJ 1999, L167/33 and Dir 99/95/EC, OJ 2000, L14/29 (both concerning seafarers) and Dir 2000/79/EC, OJ 2000, L302/57 ('mobile' airline staff).

Directive which allows Member States discretion to provide for an individual 'opt-out' from the maximum working week provisions where workers agree to an employer's request to perform such work. In the UK, where this 'opt-out' is available, it has been widely suggested that, in practice, many workers have little option but to agree to such requests. It is difficult to see how this clause can be reconciled with Article 31.

Under Article 34(1) the Union 'recognises and respects' a range of entitlements to social security benefits and social services.¹⁵³ Article 34(3) applies the same language to the right to social and housing assistance 'so as to ensure a decent existence for all those who lack sufficient resources' in order to combat social exclusion and poverty.¹⁵⁴ The purpose of this Article is to reaffirm the European model of social protection while also respecting the competence of the Member States in these areas. This is consistent with the principle of subsidiarity and helps us to distinguish between general principles and the pursuit of specific policies.¹⁵⁵ Therefore, although Article 34 may have only a limited practical impact, it provides some political ballast for the preservation of welfare states in Europe based on the notion of social rights as positive entitlements.

Finally, before we turn to the legal scope and effectiveness of these provisions, it is important to note that Chapter VI on Justice includes a number of rights concerned with access to justice including: the right to an effective remedy,¹⁵⁶ a fair trial,¹⁵⁷ the presumption of innocence and the right of defence.¹⁵⁸

IV THE LEGAL SCOPE OF THE CHARTER

Chapter VII, Articles 51–54, contains general provisions that are intended to define the legal scope of the Charter and the level of protection it offers,

¹⁵³ Based on Arts 137(3) and 140 [ex 118] EC, Art 12 ESC and point 10 of the Social Charter. Art 34(1) refers to social entitlements 'in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices'.

¹⁵⁴ This paragraph draws on Arts 30–31 of the Revised ESC and point 10 of the Social Charter.

¹⁵⁵ On this point, see the explanation by Hepple (1995, *Current Legal Problems*) n 96 above at 50.

¹⁵⁶ Art 47, first paragraph, derived from Art 13 ECHR and buttressed by more extensive protection provided by the Court of Justice guaranteeing an effective remedy: Case 222/84, *Johnston v Chief Constable of the RUC* [1986] ECR 1651; Case 222/86, *UNECTEF v Heylens* [1987] ECR 4097; and Case C-97/91, *Borelli v Commission* [1992] ECR I-6313.

¹⁵⁷ Art 47, second and third paragraphs. Included within this provision is a right to legal aid for those who 'lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'. In *Airey* [1979] Series A vol 32/11, the European Court of Human Rights held that provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy.

¹⁵⁸ Art 48—corresponding with Art 6(2) and (3) ECHR.

on the assumption that it may become a binding document in due course.¹⁵⁹ Therefore, in order to determine both the effectiveness of the Charter as a soft law instrument and its potential legal scope in the future if it is incorporated into the Treaties, it is necessary to explore these provisions in depth.

Article 51 outlines the scope of the Charter. Under Article 51(1) the provisions in the Charter are addressed to the 'institutions and bodies' of the Union 'with due regard to the principle of subsidiarity' and to the Member States 'only when they are implementing Union law'. In accordance with their respective powers they shall 'respect the rights, observe the principles and promote the application' of the Charter. Therefore, on the one hand, the purpose of the Charter is to enhance the legitimacy of the EU by ensuring that it complies with internationally recognised standards of fundamental rights in all of its activities, without granting the Union a specific competence to accede to the ECHR or ESC. The national government representatives were clearly determined to block the notion of an independent EU human rights policy, as advocated by Alston and Weiler.¹⁶¹ Hence, the reference to subsidiarity, which is intended to prevent the Charter having a centralising effect.¹⁶²

The Member States, on the other hand, are regarded as individually bound by the obligations in the Charter under international law.¹⁶³ In fact this is not strictly the case as many Member States have not signed up to, for example, the Revised ESC, or all relevant ILO Conventions. However, the adoption of the Charter as a high level inter-institutional political declaration, and the unique manner of its drafting, strengthens its legitimacy and creates an expectation of conformity with the individual fundamental rights that it enumerates without creating a strict legal obligation on the Member States.¹⁶⁴ Further, a clear message is being sent to applicant states that the Charter now provides the reference point for the assessment of the fundamental rights criteria required for EU accession.¹⁶⁵

¹⁵⁹ See Costello, n 63 above at 128.

¹⁶⁰ According to the explanatory note, this would include all institutions listed in Art 7 [ex 4] EC and bodies set up by the Treaties or secondary legislation. See CHARTE 4473/00, CONVENT 49, p 46. For discussion, see Curtin and van Ooik, n 42 above at 104–8.

¹⁶¹ See n 19 above. For a powerful critique, see von Bogdandy, n 57 above.

¹⁶² See von Bogdandy, *ibid* at 1316.

¹⁶³ A point that is reinforced by Art 6(1) [ex F(1)] TEU, which refers to Member States' observance of common principles including 'liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'.

¹⁶⁴ See especially, J Kenner, 'EC Labour Law: the Softly, Softly Approach' (1995) 11 *International Journal of Comparative Labour Law and Industrial Relations* 307; and F Snyder, *Soft Law and Institutional Practice in the European Community*, EUI Working Paper LAW No 93/5 (EUI, Florence, 1993).

¹⁶⁵ In this respect the Charter is to be read in conjunction with Art 7 TEU whereby a Member State found to have been guilty of 'a serious and persistent breach' of fundamental rights and other principles listed in Art 6(1) [ex F(1)] TEU can have certain of their EU rights suspended. Under the draft Treaty of Nice, Art 7 TEU will be strengthened to allow action to

Nevertheless, unlike the Social Charter, the Charter of Fundamental Rights is not directly addressed to the Member States except in so far as when they are 'implementing Union law'. An earlier draft had used the formulation that Member States would be bound by the Charter only when acting 'within the scope of Community law',¹⁶⁶ a statement that is consistent with the case law of the Court.¹⁶⁷ Rather confusingly, the Convention's explanatory note suggests that Member States will be bound 'when they act in the context of Community law'.¹⁶⁸ Viewed in isolation, Article 51(1) would appear to be a restriction on the Court's powers of interpretation and application of fundamental rights.¹⁶⁹ However, Article 53 states that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights 'in their field of application' by Union law. According to the explanatory text this is intended to maintain the level of protection currently afforded.¹⁷⁰ This would appear to leave the Court free to apply the rights in the Charter 'horizontally' in preliminary references involving private parties, consistent with its case law on sex equality¹⁷¹ and non-discrimination on grounds of nationality,¹⁷² binding employers and entities which regulate employment.¹⁷³

be taken against a Member State where there is a 'clear risk of a serious breach' by that State. The Council may address 'appropriate recommendations' to the State in question, acting by a four-fifths majority and after obtaining the assent of the European Parliament, on a reasoned proposal by one-third of Member States, by the European Parliament or by the Commission. The 'purely procedural stipulations' in Art 7 TEU, which include a procedure for the Member State under review to be heard and for an independent report to be submitted to the Council, will be subject to review by the Court under Art 46 [ex L] TEU. These changes are intended to give the EU power to act where there is a potential violation of human rights principles and have been introduced as a direct response to the events in Austria where, following the electoral success of the far-right 'Freedom Party' in Oct 1999, the EU found itself unable to act decisively.

¹⁶⁶ CHARTRE 4360/00.

¹⁶⁷ See Cases C-60 and 61/84, *Cinéthèque v Fédération Nationale des Cinémas Français* [1985] ECR 2605, para 25; Case C-12/86, *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, para 28; and Case C-260/89, *ERT v Pliroforissis & Kouvelas* [1991] ECR I-2925, para 42, where the Court held that 'it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights'.

¹⁶⁸ See CHARTRE 4473/00, CONVENT 49, p 46. See further, L Besselink, 'The Member States, the National Constitutions and the Scope of the Charter' (2001) 8 *Maastricht Journal* 68 at 76.

¹⁶⁹ See de Búrca (2001, *European Law Review*) n 18 above at 137.

¹⁷⁰ See CHARTRE 4473/00, CONVENT 49, p 50.

¹⁷¹ See Case 43/75, *Defrenne v Sabena II* [1976] ECR 455.

¹⁷² See Case C-281/98, *Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139.

¹⁷³ See Costello, n 63 above at 144.

The Court has ruled that Member States may be held liable for legislative or administrative decisions in 'all situations which fall within the scope *ratione materiae* of Community law'.¹⁷⁴ For example, the Court has ruled that actions of Member States in areas such as education,¹⁷⁵ vocational training,¹⁷⁶ public transport,¹⁷⁷ and health,¹⁷⁸ may fall within the scope of Community law if they are incompatible with, or a restraint upon, the exercise of *market rights*, such as the free movement rules. In this respect it is important to note that the Race Equality Directive will prohibit discrimination on the grounds of 'racial or ethnic origin' in a wide range of fields including, inter alia, social protection, social security, social advantages, education and healthcare.¹⁷⁹ The new Directive will present a fresh challenge for the Court when ruling on the policy choices of Member States in areas of national competence. Moreover, the Charter's emphasis on 'indivisible values of human dignity, freedom, equality and solidarity'¹⁸⁰ adds weight to Póiares Maduro's suggestion that the Court should 'elevate the assessment of reasonableness of public intervention in the market from market integration rules to the realm of classical social and economic fundamental rights'.¹⁸¹

The main thrust of Article 51(1) must be understood in the context of Article 6(2) [ex F(2)] TEU which places a duty on the Union to respect fundamental rights derived both from the ECHR and the constitutional traditions common to the Member States. This means that there is a positive obligation on the Commission when proposing legislation, and the European Parliament and Council when performing their legislative roles, to take full account of the Charter. While this obligation does not carry binding force in itself, the Charter adds meaning and legal certainty to the responsibility of the Community and the Member States in Article 136 [ex 117] EC to have in mind fundamental social rights when pursuing their objectives under the Social Chapter. According to the Commission, the Charter 'will produce all its effects, legal and others, whatever its nature'.¹⁸² In performing their judicial roles, the Court of Justice and the Court of First Instance will be obliged to have cognisance of the rights in the Charter. In particular, the Courts will have to re-evaluate their narrow approach to

¹⁷⁴ Case C-85/96, *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691, para 63. For discussion, see Póiares Maduro in Alston, n 3 above at 456-7.

¹⁷⁵ For example, see Case 152/82, *Forcheri v Belgian State* [1983] ECR 2323.

¹⁷⁶ See Case 293/83, *Grauer v City of Liège* [1985] ECR 593; and Case 24/86, *Blazot v University of Liège* [1988] ECR 379.

¹⁷⁷ See Case 32/75, *Christini v SNCF* [1975] ECR 1085.

¹⁷⁸ See Case C-158/96, *Kohl v Union des caisses de maladie* [1998] ECR I-1931; and Case C-120/95, *Decker v Caisse de maladie des employés privés* [1998] ECR I-1831.

¹⁷⁹ Art 3(1) of Dir 2000/43/EC, OJ 2000, L180/22. See ch 9 for discussion.

¹⁸⁰ Second recital of the preamble.

¹⁸¹ See Póiares Maduro in Alston, n 3 above at 464.

¹⁸² COM(2000) 644, para 10.

the locus standi rules for non-privileged applicants in judicial review proceedings¹⁸³ to ensure compliance with the access to justice provisions in the Charter.¹⁸⁴

When carrying out their legislative functions, it will be difficult for the EU institutions to ignore the Charter.¹⁸⁵ For example, the Commission's draft directive on working conditions for temporary workers,¹⁸⁶ which is based on Article 137(1) EC, 'is designed to ensure full compliance' with Article 31 of the Charter that proclaims the right of *every worker* to fair and just working conditions.¹⁸⁷ Moreover, the proposal also refers to the Social Charter,¹⁸⁸ emphasising that it has continuing relevance and a quite distinctive function because, unlike the Charter of Fundamental Rights, it places particular responsibility on the Member States to guarantee the fundamental social rights that it enumerates.¹⁸⁹ Hence, the recent Directive on establishing a general framework for informing and consulting employees,¹⁹⁰ which applies to undertakings with more than fifty employees even if they are based in only one Member State, demonstrates that the Social Charter still retains potency as a catalyst for social legislation and is not wholly superseded by the new Charter.¹⁹¹

While Article 51(1) opens up possibilities for utilising the Charter, Article 51(2) limits its scope as follows:

This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

The purpose of this clause is to prevent the Charter being used as a 'Trojan horse' to expand social policy even if it enters into legal force.¹⁹² For example, although the Charter 'recognises and respects' the entitlement to social security and social assistance,¹⁹³ this right is purely symbolic, or at

¹⁸³ With the exception of the privileged institutional applicants, Art 230 [ex 173] EC restricts standing for judicial review proceedings thus: 'Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'. For analysis of the Court's approach, see A. Arnall, *The European Union and its Court of Justice* (OUP, Oxford, 1999) pp 40–9.

¹⁸⁴ Arts 47–50.

¹⁸⁵ COM(2000) 644, para 10.

¹⁸⁶ COM(2002) 149.

¹⁸⁷ Draft first recital of the preamble.

¹⁸⁸ Draft second recital of the preamble, which refers to the achievement of harmonisation of the living and working conditions of temporary workers in accordance with point 7 of the Social Charter.

¹⁸⁹ Point 27 of the Social Charter.

¹⁹⁰ Dir 2002/14/EC, OJ 2002, L80/29. This Directive is also based on Art 137(1) EC.

¹⁹¹ But see Hepple (2001, *Industrial Law Journal*) n 84 above at 230.

¹⁹² The fear expressed by the Confederation of British Industry is that the Charter will be 'a "Trojan horse" imposing social policy through the back door'—*The Times*, 1 June 2000. See Betten, n 11 above at 151.

¹⁹³ Art 34(1).

least adds nothing to existing Community rules concerning free movement and non-discrimination. Further, the limitation in Article 51(2) is reinforced by Article 52(2), concerning the scope of guaranteed rights, which declares that rights recognised by the Charter, which are based on the Treaties, 'shall be exercised under the conditions and within the limits defined by the Treaties'. In order to illustrate the effect of these limitations of scope let us consider two possible scenarios.

The first scenario concerns Article 30, which recognises the right of *every worker* to protection against unjustified dismissal, in accordance with Community law and 'national laws and practices'. According to Goldsmith,¹⁹⁴ the UK had to 'fight very hard' to include this formulation in the final draft. From his perspective, economic and social 'rights' are mere 'principles' that will only be realised as exercisable rights 'to the extent that they are implemented by national law or, in those areas where there is such competence, by Community law'.¹⁹⁵ Goldsmith was acutely aware that the UK's national legislation on unfair dismissal, which excludes workers in the first year of their employment contract, was under threat.¹⁹⁶ Article 137(3) EC provides a legal base for Community legislation to provide protection against dismissal but only subject to a requirement of unanimity in the Council. Thus, although Article 51(1) makes it an imperative for the Commission to bring forward a proposal in this area, the effect of Article 30, read in conjunction with Article 51(2), is that, even if the Charter becomes legally binding, it only creates a moral obligation on the Council to act. In turn, the UK would be entitled to veto such a proposal in its entirety or seek to secure an amendment that would exclude the most vulnerable workers from the 'right' to protection against unjustified dismissal.

Article 28, concerning the right of collective bargaining and action provides us with another interesting scenario. Workers and employers, or their respective organisations have, in addition to the right to negotiate and conclude collective agreements at the appropriate level, the right 'in cases of conflicts of interest, to take collective action to defend their interests, including strike action'. As with Article 30, this right applies only in accordance with Community law and national law and practices. Let us suppose that the Commission wishes to propose a directive to harmonise the law on the right to strike.¹⁹⁷ Immediately this would conflict with the exclusion of the right to strike from the scope of Community legislative action under Article 137(6) EC. The effect of Article 52(2) is, according to the explanatory

¹⁹⁴ Goldsmith, n 35 above at 1213.

¹⁹⁵ *Ibid.*

¹⁹⁶ See Betten, n 11 above at 163.

¹⁹⁷ For advocacy of action in this area, see P Germanotta and T Novitz, 'Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action' (2002) 18 *International Journal of Comparative Labour Law and Industrial Relations* 67.

note,¹⁹⁸ to preserve the status quo because the Charter does not alter the system of rights and conditions conferred by the Treaties and Community legislation. Further, Article 51(2) may inhibit the Community from exercising its powers in this respect, making it difficult to justify legislation based on another ground such as common market approximation under Article 94 [ex 100] EC.¹⁹⁹ This inconsistency undermines both the visibility of the Charter and its effectiveness. Member States, such as the UK, who have domestic legislation that does not comply with ILO Convention No 87 or Article 6(4) ESC, from which the right in Article 28 is derived, are under no compulsion to act. As Weiss²⁰⁰ observes, the Community is obliged by the Charter to promote a right in an area where it has no power to harmonise laws, which might lead one to suggest that Article 28 is nugatory in effect.

Article 51(1) will also oblige the Court of Justice and the Court of First Instance, within their respective jurisdictions, to take account of the Charter when carrying out their duties of interpretation under Article 220 [ex 164] EC.²⁰¹ This opens up a number of possibilities but also carries with it certain dangers. The Court has developed the concept that 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice'.²⁰² Fundamental rights have been utilised incrementally to perform an important gap-filling function, enabling the Court to assert the supremacy of Community law 'within the framework and structure of the Treaties'.²⁰³ As de Witte²⁰⁴ observes, by using unwritten principles 'instead of, or in addition to, rights expressly contained in the constitution, supreme courts enlarge their scope for creative law-making'. For Weiler²⁰⁵ the ability of the Court to draw from the legal system of each Member State 'as an organic and living laboratory of human rights protection' is one of the Community's truly original features. Indeed in cases

such as *Rutili*,²⁰⁶ *Johnston*,²⁰⁷ *Wachauf*²⁰⁸ and *P v S*,²⁰⁹ the Court has been able to identify Community provisions as specific manifestations of more general principles enshrined in the ECHR and national constitutions²¹⁰ and therefore reflective of common values.²¹¹ The Court has resolved that the Community cannot accept measures that are incompatible with the observance of fundamental rights thus recognised and guaranteed,²¹² but it has no power to examine the compatibility with fundamental rights of national rules that do not fall within the scope of Community law.²¹³ Therefore, fundamental rights as developed by the Court have provided a source of inspiration for the interpretation and application of Community law amounting to an 'unwritten charter of rights'.²¹⁴

Weiler fears that the adoption of the Charter 'runs the risk of inducing a more inward looking jurisprudence and chilling the constitutional dialogue'.²¹⁵ Where, for example, rights in the Charter are derived from the case law of the Court this may inhibit further innovation and induce a 'freezing effect'.²¹⁶ Equally, the explanatory note may unduly influence the Court even though it has 'no legal value' and is simply intended to clarify the provisions of the Charter.²¹⁷ For example, in *D and Sweden v Council*,²¹⁸ the issue at stake concerned recognition by the Council of a same-sex

²⁰⁶ Case 36/75, *Rutili v Minister for the Interior* [1975] ECR 1219, para 32. See P Craig and G de Búrca, *EU Law—Text, Cases and Materials*, 2nd edn (OUP, Oxford, 1998) pp 303–5.

²⁰⁷ Case 222/84, *Johnston v Chief Constable of the RUC* [1986] ECR 1651, para 18.

²⁰⁸ Case 5/88, *Wachauf v Germany* [1989] ECR 2609, para 19.

²⁰⁹ Case C-13/94, *P v S & Cornwall CC* [1996] ECR I-2143, para 18.

²¹⁰ See Case 44/79, *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, paras 14–16.

²¹¹ See Craig and de Búrca, n 206 above p 305.

²¹² See Case C-260/89, *ERT v Pliroforissis & Kouvelas* [1991] ECR I-2925, para 41. For a more wide ranging statement, see the opinion of AG Jacobs in Case C-168/91, *Konstantinidis v Stadt Altensteig, Standesamt, & Landratsamt Calw, Ordnungsamt* [1993] ECR I-1191. The AG advised that an EU national is entitled to assume that, wherever he goes in the EU 'he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say "civis europeus sum" and to invoke that status in order to oppose any violation of his fundamental rights' (para 46).

²¹³ For examples of the application of this rule, see Case C-299/95, *Kremzow v Austria* [1997] ECR I-2629; Case C-309/96, *Annibaldi v Sindaco del Comune di Guidonia & Presidente Regione Lazio* [1997] ECR I-7493; and Case C-249/96, *Grant v South-West Trains* [1998] ECR I-621. Discussed by de Witte, n 203 above at 870–74. For a lively debate, see J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 *Common Market Law Review* 669; and J Weiler and N Lockhart, 'Taking Rights Seriously' Seriously: The European Court and its Fundamental Rights Jurisprudence' (1995) 32 *Common Market Law Review* 59.

²¹⁴ See Craig and de Búrca, n 206 above, p 296.

²¹⁵ Weiler (2000, *European Law Journal*) n 72 above at 96.

²¹⁶ See de Witte, (2001, *Maastricht Journal*) n 53 above at 85. De Witte gives the example of Art 41 on the right to good administration.

²¹⁷ CHARTE 4473/00, CONVENT 49, p 1. On this point, see Costello, n 63 above at 132.

²¹⁸ Cases C-122/99P and C-125/99P [2001] ECR I-4139, at para 97 of the opinion. Noted by E Ellis (2002) 39 *Common Market Law Review* 151.

¹⁹⁸ CHARTE 4473/00, CONVENT 49, p 48.

¹⁹⁹ On the basis that this would prevent distortions of competition and help to establish the 'common market' in accordance with Art 2 EC. Utilisation of Art 94 EC in this regard would be possible notwithstanding the limited scope of the narrower 'internal market' concept in Art 14 [ex 7a] EC and its distinct legal base for approximation measures in Art 95 [ex 100a] EC. See ch 3 for discussion of this issue in the context of the Court's judgment in Case C-376/98, *Germany v European Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419.

²⁰⁰ See Weiss, n 55 above.

²⁰¹ This is based on the revised text of Art 220 [ex 164] EC in the draft Treaty of Nice. If ratified, the new Treaty will expand the jurisdiction of the Court of First Instance. See OJ 2000, C80/1. See further Shaw, n 6 above, at 203–8.

²⁰² See Case 11/70, *Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle Getreide* [1970] ECR 1125, para 4.

²⁰³ *Ibid.* See B de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in Alston, n 3 above, 859–97 at 863.

²⁰⁴ *Ibid.* at 865.

²⁰⁵ See Weiler (2000, *European Law Journal*) n 72 above at 96.

partnership that was legally recognised in Sweden. In his opinion, AG Mischo considered the term 'spouse' in the Community's Staff Regulations in the context of Article 9 of the Charter on the right to marry and found a family. The AG referred directly to the explanatory note, which states that Article 9 'neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex'.²¹⁹ In the light of this advice he recommended that the Court should follow its earlier case law restricting the meaning of 'spouse' to marital relationships between couples of the opposite sex.²²⁰ In its judgment the Court followed this advice without making direct reference to the Charter.

Although *D* might suggest that, to the extent that the Charter is a point of reference for the Court, it will merely 'consecrate the status quo',²²¹ the case is perhaps best explained as a classic example of judicial restraint in a situation where, as in *Grant*,²²² new Community legislation had been introduced²²³ or was imminent in an area of acute national sensitivity.²²⁴

Article 28 of the Charter, recognising the right of collective bargaining and action may present the Court with an opportunity to interpret and apply the Charter more creatively, but it also reveals new dilemmas. We have discussed the opinion of AG Jacobs and the judgment of the Court in the pre-Charter case of *Albany International*²²⁵ in a range of contexts, but the Charter now casts a fresh light on the tension between collective labour law and competition law. In his extensive opinion, the AG relied primarily on the case law of the European Court of Human Rights based on Article 11 ECHR concerning freedom of association, the essence of which is replicated in Article 12 of the Charter. The AG was satisfied that, on the basis of the case law of the Strasbourg Court, the ECHR did not establish a general right to bargain collectively, and, while he accepted that the right was recognised by Article 6 ESC and other international instruments upon which the Member States had collaborated,²²⁶ he concluded that there was insufficient convergence of national legal orders and international legal instruments on the recognition of a specific fundamental right to bargain

collectively.²²⁷ The Court did not address the international instruments in its judgment although it too ultimately concluded that collective agreements per se fell outside the competition rules in Article 81 [ex 85] EC.

While the AG's approach is comprehensive, his analysis underplays the status and autonomy of the ESC and, most importantly, the authority of the legal experts on the European Committee of Social Rights (ECSR) that oversees its operation.²²⁸ Once again it reveals a bias in favour of 'first generation' civil and political rights over 'second generation' economic and social rights. There is, however, a serious underlying problem. The ECSR is not a court, even if it is quasi-judicial in nature, and therefore, as Fitzpatrick notes,²²⁹ in dealing with the ECHR, the Court of Justice is in a mode of 'judges speaking to judges', whereas it tends to perceive other bodies as non-judicial and discounts their expertise.²³⁰ The ECSR is gradually maturing as an expert body that produces a regular, coherent overview of the ESC and the Revised ESC,²³¹ whereas the Strasbourg Court is concerned only with the interplay between the ESC/Revised ESC and the ECHR when interpreting and applying the rights protected by the latter.

The emergence of a Charter based on a core concept of indivisible rights would suggest that the Court is now impelled, in cases concerning the interpretation of provisions derived from the ESC/Revised ESC, to consider the legal assessments of the ECSR. This would provide a foundation for the Court to affirm collective bargaining rights, as set out in Article 28, when ruling on a matter within the scope of Community law.²³² However, Article 52(3) may dissuade the Court from acting boldly. Under that provision, where rights correspond with those guaranteed by the ECHR 'the meaning and scope of those rights shall be the same as those laid down by the said convention'. According to the explanatory note this is intended to ensure consistency between the ECHR and the Charter as determined both by the

²²⁷ Para 160. The AG concludes, in para 161, that the right to collective bargaining is sufficiently protected by the general principle of freedom of contract.

²²⁸ The ECSR consists of nine experts assisted by an observer from the ILO. Under the Amending Protocol of 1991 its functions are to examine the national reports and make a legal assessment of the states' observance of their legal obligations. For further discussion, see Casey, n 20 above at 56; and Novitz, n 82 above who notes, at 250, attempts by the Parliamentary Assembly of the Council of Europe to establish either a 'parallel European Court of Social Rights' or the absorption of the ESC within the ECHR 'in order to create the basis for strict legal observance': *Recommendation No 1354 on the Future of the European Social Charter* (1998) para 18.

²²⁹ See B Fitzpatrick, 'European Union Law and the Council of Europe Conventions' in Costello, n 20 above, 95-108 at 101.

²³⁰ *Ibid.* For example, in Case C-249/96, *Grant v South-West Trains* [1998] ECR I-621, the Court was not prepared to draw on the interpretation of the International Covenant on Civil and Political Rights by the UN Human Rights Committee, also a quasi-judicial body.

²³¹ *Ibid.* at 101. Until all Member States of the Council of Europe endorse the Revised ESC the two texts will operate in tandem.

²³² See Costello, n 63 above at 137.

²¹⁹ CHARTE 4473/00, CONVENT 49, p 12.

²²⁰ See Case 59/85, *Netherlands v Reed* [1986] ECR 1283.

²²¹ Weiler (2000, *European Law Journal*) n 72 above at 96.

²²² Case C-249/96, *Grant v South-West Trains* [1998] ECR I-621. See pp 435-42.

²²³ An amendment to the Staff Regulations had been introduced but was not yet in force at the material time: Council Reg 781/98/EC, OJ 1998, L113/4. See Ellis, n 218 above at 151.

²²⁴ However, recital 22 of the preamble of the Framework Employment Dir, 2000/78/EC, OJ 2000, L303/16, which prohibits sexual orientation discrimination in employment, states that the Directive is 'without prejudice' to national laws on marital status and benefits dependent thereon.

²²⁵ Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

²²⁶ ILO Convention Nos 87 and 98; Art 22 of the International Covenant on Civil and Political Rights; and Art 8 of the International Covenant on Economic, Social and Cultural Rights.

text of the ECHR and the case law of the European Court of Human Rights.²³³ The Court of Justice is extremely sensitive about its relationship with its colleagues in Strasbourg, and this feeling of sensitivity has been heightened and reciprocated following the negotiation and adoption of the Charter. In a future case the Court may be inclined to follow the European Court of Human Rights' restrictive interpretation of Article 6 ESC in the context of Article 11 ECHR, for the purposes of judicial consistency and coherence, rather than adhering to the autonomous but only quasi-judicial findings of the ECSR. Significantly, there is no mention of the ECSR in Article 52(3), while the only direct reference to the ESC is in the preamble. The final sentence of Article 52(3) allows Union laws to lay down more extensive protection than the ECHR. This would allow the Court leeway to make direct reference to higher standards laid down in the Charter as 'Union law' if the Charter enters into legal force.

Article 52(3) is also likely to lead the Court to follow the jurisprudence of the Strasbourg Court and review its established case law. This possibility was open to the Court in *D*.²³⁴ AG Mischo, basing his interpretation on the Court's judgment in *Grant*, was not prepared to make a like-for-like comparison between the situations of same-sex and opposite-sex couples. The AG reached this conclusion notwithstanding bolder steps taken in Strasbourg, where the European Court of Human Rights has now held that sexual orientation discrimination is a violation of the right to respect for private life guaranteed by Article 8 ECHR.²³⁵ Further, neither the AG nor the Court referred to the right to non-discrimination in Article 21 of the Charter, which prohibits sexual orientation discrimination on the basis of Article 13 EC and also the general non-discrimination clause in Article 14 ECHR which has been broadly interpreted by the European Court of Human Rights.²³⁶ The AG and the Court were undoubtedly influenced by the fact that only three out of 15 Member States recognised same-sex partnerships at the material time. However, by September 2001 that figure had increased to five with legislation pending in several other countries.²³⁷ This may allow the Court to review its case law on the basis of the 'common constitutional traditions of the Member States' without having to concede that its earlier formulation is clearly at odds with Article 52(3).

Article 53 provides a minimum standards guarantee of the 'level of protection' offered by the Charter:

²³³ CHARTE 4473/00, CONVENT 49, p 48.

²³⁴ Cases C-122/99P and 125/99P [2001] ECR I-4139.

²³⁵ Appl Nos 33985/96 and 33986/96, *Smith and Grady v United Kingdom* [2000] 29 EHRR 493. In *D* the Court found, at para 59, that Art 8 ECHR was not affected by the Staff Regulations because the refusal to grant the allowance did not affect D's civil status.

²³⁶ Appl No 33290/96, *da Silva Mouta v Portugal* [2001] 31 EHRR 47.

²³⁷ See Ellis, n 218 above at 152. For comprehensive analysis, see R Wintemute and M Andenas, *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart, Oxford, 2001).

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by Member States' constitutions.

The purpose of Article 53 is to 'maintain the level of protection currently afforded within their respective scope by Union law, national law and international law'.²³⁸ Consistent with the notion of 'non-retrogression' inherent within Article 137(5) [ex 118a(3)] EC, Article 53 is designed to prevent the Charter being interpreted and applied in such a way as to reduce or level down the protection of rights within the EU and national legal orders. Moreover, if the Charter becomes legally binding, it is intended that it will guarantee the minimum standard or 'floor' of fundamental rights protection that it enunciates, but it should not be seen as a ceiling. For example, existing laws may provide a higher standard of protection, or the Charter may act as a spur for the elaboration or expansion of the rights that it contains. Although some concern has been expressed that Article 53 may replace or weaken Member States' provisions concerning fundamental rights,²³⁹ and may even threaten the supremacy of Community law, it is better understood as a political safeguard against the diminution of the enjoyment of rights based on other rules.²⁴⁰

Finally, Article 54 contains a prohibition against 'any right to engage in any activity or to perform any act' aimed at the 'destruction' of any of the rights and freedoms or their 'limitation' to a greater extent than is provided for in the Charter. This is intended to be a straightforward transposition of a corresponding provision in the ECHR.²⁴¹ In the context of the Charter, however, the broad span of enumerated rights, many of which are 'polycentric', in the sense that they involve competing interests that may have to be evaluated against each other,²⁴² may cause particular difficulties. For example, to what extent is the exercise of the right to strike under Article 28 an activity aimed at the destruction or greater limitation of an employer's freedom under Article 16 to conduct a business in accordance with Community law and national laws and practices? Article 52(1) is intended to help resolve this conundrum.²⁴³ Under that provision such limitations are subject to the proportionality principle and will only be permitted if they

²³⁸ See the explanatory note, CHARTE 4473/00, CONVENT 49, p 50.

²³⁹ See the concern expressed by the European Parliament's representatives at the Convention, CHARTE 4199/00, CONTRIB 80, point 12 and considerations F and R of the preamble. Discussed by J Bering Lisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' (2001) 38 *Common Market Law Review* 1171 at 1173.

²⁴⁰ *Ibid* at 1194.

²⁴¹ Art 17 ECHR. See the explanatory note, CHARTE 4473/00, CONVENT 49, p 51.

²⁴² See Craven, n 83 above at 87.

²⁴³ See the explanatory note, CHARTE 4473/00, CONVENT 49, p 19.

are necessary and genuinely meet objectives of general interest recognised by the Union 'or they need to protect the rights and freedoms of others'. However, as Article 28 contains an identical limitation to that contained in Article 16 such arguments are somewhat circular.

Whilst Articles 51–54 have been drafted on the basis that the Charter will eventually enter into legal force, they also help us to determine its effects as a high-level soft law proclamation. According to the Commission, 'the Charter will become *mandatory* through the Court's interpretation of it as belonging to the general principles of law'.²⁴⁴ Such an interpretation is certainly consistent with Articles 51 and 53. To date, however, the Court has exercised extreme caution when the Charter has been raised in pleadings. Indeed the solitary reference to the Charter in a judgment has been in a competition case concerning the procedural fairness of the Commission's rules for dealing with complaints.²⁴⁵ When giving judgment the Court of First Instance applied the Charter to affirm the rights of the individual to both good administration²⁴⁶ and an effective remedy.²⁴⁷ The Court's AGs have been less reticent, issuing several opinions where the primary role of the Charter as a tool for interpreting and affirming established rights and making them 'visible' has been emphasised.

For example, in *BECTU*²⁴⁸ the Court was asked to consider the validity of a trade union challenge to a UK law that denied employees the right to accrue paid annual leave until after the first 13 weeks of their employment. Was this rule compatible with the right of 'every worker' to paid leave under Article 7(1) of the Working Time Directive?²⁴⁹ The trade union argued that many employees in the entertainment sector were unable to exercise their right to paid leave because they were employed for periods of less than 13 weeks at a time. The UK pointed to the fact that Article 7(1) of the Directive operates 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice'. This formulation, which is strikingly similar to the rider added to several of the provisions in the Solidarity Chapter, is not contained in Article 31(2) of the Charter, which simply refers to the right of 'every worker ... to an annual period of paid leave'. In his opinion AG Tizzano drew on the Charter thus:²⁵⁰

Admittedly ... the Charter ... has not been recognised as having genuine legislative scope in the strict sense. In other words, formally, it is not in itself binding. However

²⁴⁴ COM(2000) 644, para 10.

²⁴⁵ Case T-54/99, *max.mobil Telekommunikation Service GmbH v Commission* [2002] ECR II (nir) judgment of 30 Jan 2002.

²⁴⁶ Art 41(1).

²⁴⁷ Art 47.

²⁴⁸ Case C-173/99, *R v Secretary of State for Trade and Industry, ex parte BECTU* [2001] ECR I-4881. For the background and facts of the case, see ch 5.

²⁴⁹ Dir 93/104/EC, OJ 1993, L307/18.

²⁵⁰ Opinion, paras 27–8. Emphasis added.

... the fact remains that it includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments ...

I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored: in particular we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for those involved—Member States, institutions, natural and legal persons—in the Community context. Accordingly, I consider that the Charter provides us with the *most reliable and definitive confirmation* of the fact that the right to paid annual leave constitutes a fundamental right.

In the light of the wording in the Charter, and by reference to other international instruments,²⁵¹ the AG advised that the right to paid leave is located among workers' fundamental rights. It follows that the right to paid leave in the Directive is 'an automatic and unconditional right granted to every worker'.²⁵² The reference in the Directive to national laws and practices concerning the conditions for entitlement means that, although Member States have some latitude in defining the arrangements for the enjoyment of paid leave, it does not permit national rules that negate that right²⁵³ or affect its scope.²⁵⁴ In its judgment the Court agreed with the AG's interpretation of the Directive but did not refer to the Charter. Therefore, although the clear wording in the Charter affirmed the right to paid leave and helped to guide the AG and, by implication, the Court, it was not regarded as an essential point of reference.

While *BECTU* provides a glimpse of the interpretative potential of the Charter, its limitations have been revealed in *Bowden*,²⁵⁵ where the Court was asked to consider the scope of the Working Time Directive in a case involving 'non-mobile' workers in the transport sector who were excluded from its provisions.²⁵⁶ Neither the AG nor the Court referred to the Charter even though the legislative exclusion denied the workers in question the right to paid annual leave that had been deemed 'automatic and unconditional' by the same AG in *BECTU*. The explanation for this is twofold. First, the Court was acting in deference to the Community legislature that had recently adopted a Directive that would extend the scope of the Directive to cover 'non-mobile' transport workers.²⁵⁷ Secondly, notwithstanding the unconditional wording of Article 31(2), the general provision in Article 52(2) effectively precludes the Court from applying the Charter in these circumstances because it can only be 'exercised under the conditions and

²⁵¹ Para 23. The AG referred to Art 24 of the Universal Declaration of Human Rights; Art 2(3) ESC; and Art 7(d) of the UN Charter on Economic, Social and Cultural Rights.

²⁵² Paras 29–30.

²⁵³ Paras 34–5.

²⁵⁴ Paras 39–45.

²⁵⁵ Case C-133/00, *Bowden and others v Tuffnells Parcels Express Ltd* [2001] ECR I-7031.

²⁵⁶ Art 1(3) of Dir 93/104.

²⁵⁷ Dir 2000/34/EC, OJ 2000, L195/41.

within the limits' defined by the Treaties. The same logic would apply even if the Charter were legally binding.

Nevertheless, even in its present form, the Charter will have to be taken into account for, as AG Léger observed in *Hautala*:²⁵⁸

... aside from any considerations about its legislative scope, the nature of the rights set down in the Charter of Fundamental Rights precludes it from being regarded as merely a list of purely moral principles without any consequences... The Charter has undeniably placed the rights which form its subject-matter at the highest levels of values common to the Member States...

As the solemnity of its form and the procedure which led to its adoption would give one to assume, the Charter was intended to constitute a privileged instrument for identifying fundamental rights. It is a source of guidance as to the true nature of the Community rules of positive law.

Moreover, as AG Mischo noted in his opinion in *Booker Aquaculture*, the Charter:²⁵⁹

... constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order.

These observations highlight the importance of the Charter and its unique place in the hierarchy of Community soft law. As de Witte²⁶⁰ observes, the 'natural temptation' of lawyers is to dismiss the Charter as a mere political declaration and give unquestioned preference to a legally binding document. Such a temptation must be firmly resisted for several reasons. First, unlike the Social Charter, the Charter of Fundamental Rights is both an inter-institutional declaration and has the unanimous endorsement of the Member States. In addition, it has the cachet of legitimacy bestowed by a drafting Convention dominated by parliamentarians intended to engage with civil society and, above all, to be taken seriously.²⁶¹ Secondly, the Charter serves to affirm and 'crystallise'²⁶² the content of the catalogue of fundamental rights referred to in, inter alia, Article 6 [ex F] TEU and Article 136 [ex 117] EC. Therefore, it places an interpretative obligation on the Court—that will be strengthened if the Charter enters into legal force—to affirm, within the scope of EU law, the existence of justiciable social rights that may have, hitherto, had an uncertain legal footing. Hence, the Charter forms part of the *acquis*, even though it is not binding in itself,

²⁵⁸ Case C-353/99P, *Council v Hautala* [2001] ECR (nir) paras 80–3 of the AG's opinion delivered on 10 July 2001.

²⁵⁹ Cases C-20/00 and 64/00, *Booker Aquaculture Ltd & Hydro Seafood GSP Ltd v The Scottish Ministers* [2002] ECR (nir) para 126 of the AG's opinion delivered on 20 Sept 2001.

²⁶⁰ De Witte (2001, *Maastricht Journal*) n 53 above at 83.

²⁶¹ See de Búrca (2001, *European Law Review*) n 18 above at 132.

²⁶² For the application of this concept, see O Kahn-Freund, 'The European Social Charter' in F Jacobs (ed) *European Law and the Individual* (North-Holland, Amsterdam, 1976) 181–211 at 197–98.

because it clarifies and designates those fundamental rights that constitute the essence of the 'common constitutional traditions' of the Member States.²⁶³ Thirdly, it places a responsibility on each of the EU institutions and the Member States, acting within their respective competences, to develop a fundamental rights culture within the Union.²⁶⁴ Fourthly, it provides a point of reference for individuals who wish to rely on the values proclaimed in the Charter to support the exercise of their existing Community law rights.

V CONCLUSION

From the preceding analysis it is clear that the EU Charter of Fundamental Rights, whatever its ultimate legal status, has many flaws. The Solidarity Chapter offers a highly selective and incomplete list of fundamental social rights that distinguishes between enforceable rights, many of which are conditional, and recognition of vague principles.²⁶⁵ The 'peoples of Europe' are offered tantalising glimpses of 'rights' that are, at once, visible but unattainable. For the EU institutions, the Charter creates an obligation to promote each of the enumerated rights but denies them the capacity to extend their powers or tasks to secure its objectives. At the level of the individual, the Charter neither directly affects workers' and/or citizens' social rights, nor does it guarantee basic social entitlements. Member States will remain free to pursue independent human rights policies and can pick and choose their international obligations. Fundamental rights hover over the Union's activities but their final resting place in the EU constitutional settlement has yet to be determined.

Despite these limitations, the Charter has the potential to add a new dimension to the 'post-Nice' process of 'constitutionalising' the Union. Firstly, although the results to date have been inconclusive, the Charter may yet 'add value' to the protection of fundamental rights by the Court. For the first time at Union level a wide range of economic and social rights have been defined as both indivisible and justiciable.²⁶⁶ The Court's approach to applying fundamental rights has been highly selective.²⁶⁷ With the exception of the principles of equality and non-discrimination, social rights have, hitherto, been perceived as less 'fundamental'²⁶⁸ and have assumed a secondary position in the Court's catalogue of judicial protection.²⁶⁹ Only on

²⁶³ See Lenaerts and De Smijter, n 7 above at 299.

²⁶⁴ See Shaw, n 6 above at 199.

²⁶⁵ See 'Editorial Comments: The EU Charter of Fundamental Rights still under discussion' (2001) 38 *Common Market Law Review* 1 at 3.

²⁶⁶ See Betten, n 11 above at 156.

²⁶⁷ See G de Búrca, 'The Role of Equality in European Law' in A Dashwood and S O'Leary (eds) *The Principle of Equal Treatment in E.C. Law* (Sweet & Maxwell, London, 1997) 13–34.

²⁶⁸ See de Búrca in Shaw and More, n 23 above at 51.

²⁶⁹ See Poiares Maduro in Shaw, n 12 above at 338.

Social Human Rights and Protection against Dismissal

General theory with an analysis of the right to work.

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1. This contribution seeks to clarify the general theory concerning social human rights. Social human rights are often underestimated and regarded as less fundamental than civil and political rights. However, social human rights are more than positive obligations for the government, more than aims to achieve progressively with a content which is rather variable and relative. There is also another approach which focuses attention on genuine human dignity existing not only in possibilities and growth but also in need and sorrow. Human rights bestow on people the fullest dignity. This contribution counters classic theory on social rights and focuses attention on the intrinsic safeguarding nature of social human rights. Human dignity is protected by human rights and those rights simultaneously have classic and social aspects.

2. The second part of this contribution focuses on the right to work, which is one of the social human rights and analyses its international provisions. This international approach makes less relevant an examination of the protection of social human rights in the Belgian Constitution (art. 23). The general theory of the first part will be applied to the right to work thus becoming more concrete and clear. The right to work is a crossroad where the liberty of employer and employee meet the duty of the State. Such dialogue is the starting point for more humanity.

1. Social human rights

3. The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the United Nations General Assembly in 1966, together with the International Covenant on Civil and Political Rights. The initial idea was to draft one covenant in line with the Universal Declaration on Human Rights of 1948, containing both civil and political rights, and economic, social and cultural rights¹.

1.1. Definition

4. In the past, civil rights (i.e. rights and freedoms of all human beings) were embodied in the Constitution and the rule of law of modern states. These rights are said to be 'fundamental' human rights: regulatory principles which restrict and guide state power, and the touchstone for the legitimacy of the Legislature and the Executive. To an extent they are the fruit of a classic liberal tradition where fundamental rights are determined as *immunities*. In a liberal interpretation they are described as *Abwehrrechte*: they issue a prohibition of State interference in a very broadly defined individual private sphere². They are radical and essential conditions enabling people to live with dignity and develop in society³.

¹ G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, no. 60; G. MAES, 'Afdwingbaarheid van sociale grondrechten', in *De grondrechtelijke onderbouw van het collectief arbeidsrecht*, Mechelen, Kluwer, 2005, 37-39; G. MAES, 'Justiciability of Social and Economic Rights', in W. VANDENHOLE (ed.), *An Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Leuven, Institute for Human Rights, 2002, 55 et seq.

² G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, no. 3; G. MAES, 'Justiciability of Social and Economic Rights', in W. VANDENHOLE (ed.), *An Optional Protocol to the*

5. This rather socialist tradition has pursued the ethical logic of the civil liberties. The right to life – the most fundamental of human rights – means guaranteeing not only the people's necessary safety but also protecting them against arbitrary arrest or punishment. This right is meaningless unless it is interpreted in a socialising manner. It encompasses the right to basic food and the possibility to earn one's living through work. In this tradition, fundamental rights are not only immunities, but also *claims*: claims on material and social conditions in order to realise real freedom⁴.

1.2. Social rights vs. civil rights

6. It was argued at the time of drafting and subsequently often repeated that the two sets of rights were of a different nature and therefore needed different controlling instruments. Civil and political rights were considered to be 'absolute' and 'immediate', whereas economic, social and cultural rights were held to be programmatic; to be realised gradually, and therefore not a real matter of rights. Some authors argue that fundamental social rights are not really rights, but aspirations, aims of policy, elements to be achieved progressively⁵.

7. This approach starts from a very deeply-rooted consideration and is totally incorrect and misleading⁶. Some scholars still accept this theory and promote it overzealously⁷. The

International Covenant on Economic, Social and Cultural Rights, Leuven, Institute for Human Rights, 2002, 55 et seq.

⁴Inter alia: G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, no. 60; G. MAES, 'Afdwingbaarheid van sociale grondrechten', in *De grondrechtelijke onderbouw van het collectief arbeidsrecht*, Mechelen, Kluwer, 2005, 35; K. RIMANQUE, 'Nationale bescherming van grondrechten', *T.B.P.*, 1981, 33; K. RIMANQUE en P. PEETERS, 'De toepasselijkheid van grondrechten in de betrekkingen tussen private personen – algemene probleemstelling', in K. RIMANQUE (ed.), *De toepasselijkheid van de grondrechten in private verhoudingen*, Antwerp, Kluwer, 1982, 3-10; K. RIMANQUE, B. PEETERS en L. VERMEIRE, *De toepassing van het E.V.R.M. in de praktijk*, Antwerp, Kluwer, 1987, p. 3, no. 4; M.C. BURKENS, 'Werkgelegenheid en Grondwet', in M.C. BURKENS, W. DRIEHUIS en J. VAN DEN DOEL, *Werkgelegenheid: recht of beleid?*, Alphen aan de Rijn 1979, 32 et seq.; E.A. ALKEMA, 'Advocaat en mensenrechten, vuistregels en vooruitzichten', *Advocatenblad* 1981, 297 et seq.; P.W.C. AKKERMANS (red.), *De grondwet – Een artikelsgewijs commentaar*, Zwolle Tjeenk Willink, 1987, 13; P. MARTENS, 'Encore la dignité humaine: réflexions d'un juge sur la promotion par les juges d'une norm suspecte', *Les droits de l'homme au seuil du troisième millénaire. Mélanges en hommage à Pierre Lambert*, Brussels, Bruylant, 2000, 561-579; W. RAUWS, 'Niet de ver-van-mijn-bed-show: sociale grondrechten en de praktijk', in *Sociaal recht: niets dan uitdagingen*, Ghent, Mys en Breesch, 1996, (794), 798, no. 1503

⁴ G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, no. 4

⁵ Inter alia: P. ORIANNE, 'Mythe ou réalité des droits économiques, sociaux et culturels', *Présence du droit public et des droits de l'homme – Mélanges offerts à Jacques Velu*, Brussels, Bruylant, 1992, III, 1871; F. SUDRE, *Droit international et européen des droits de l'homme*, PUF, 1989, 134; A. EIDE, 'Economic, social and cultural rights as human rights', in A. EIDE, C. KRAUSE en A. ROSAS (eds.), *Economic, social and cultural rights: a textbook*, Dordrecht, Martinus Nijhoff, 1995, 21-40

⁶ G. MAES, 'Afdwingbaarheid van sociale grondrechten', in *De grondrechtelijke onderbouw van het collectief arbeidsrecht*, Mechelen, Kluwer, 2005, 38-39; A. EIDE, C. KRAUSE en A. ROSAS (eds.), *Economic, social and cultural rights: a textbook*, Dordrecht, Martinus Nijhoff, 1995 (with contributions of A. Eide, A. Rosas and M. Scheinin); K. DRZEWICKI, C. KRAUSE and A. ROSAS, *Social rights as human rights. A European Challenge*, 1994 (with contributions of K. Drzewicki, A. Rosas, T. Jasudowicz, V.P. Viljanen)

⁷ O.m.: M. BOSSUYT, 'La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels', *H.R.J.* 1975, 783 et seq.; M. BOSSUYT, *L'interdiction de la discrimination dans le droit international des droits de l'homme*, 1976, 173-217; C. STARCK, 'La jurisprudence de la Cour constitutionnelle fédérale concernant les droits fondamentaux', *Revue du droit public et de la science politique au France et à l'Etranger*, 1988, (1263) 1276-1287; J. BRUGGINK, 'Wat zijn 'mensenrechten'?', in L. HEYDE, J. LEYTEN, TH. MERTENS en B.P. VERMEULEN (red.), *Begrensde vrijheid. Opstellen over mensenrechten aangeboden aan Prof. dr. D.F. Scheltens, bij zijn afscheid als hoogleraar aan de Katholieke Universiteit Nijmegen*, Zwolle, Tjeenk Willink, 1989, (87) 89; See also: G.J.H. VAN HOOFF, 'The legal nature of Economic, Social and Cultural Rights: a rebuttal of some traditional views', in P. ALSTON en K. TOMASEVSKI (ed.), *The right to food*, Nijmegen, Martinus Nijhoff, 1984, (97) 102 et seq.

Special Reporter of the UN Sub-Commission on the Promotion and Protection of Human Rights urges us to recognise the universality and juridical correctness of this theory⁸. The political and dogmatic premises of this way of thinking are clear, and ignore evolutions in law and society. From the beginning, this approach starts from the notion that respect for civil and political rights requires only abstention and no financial supplies or legislation whereas respect of social human rights needs a plethora of legislation and expensive policy thus making judicial control impossible and even undesirable in light of the primacy of the elected legislator. In reality, even the realisation of civil rights requires active policy by the legislator and the administration, and costs the earth⁹.

8. The judiciary has interpreted civil and political rights in such a way as to safeguard also aspects of social human rights. In other cases, restrictions on civil and political rights are accepted in order to respect and promote social human rights. In my doctoral thesis I argue that human rights seek to promote human dignity; some have a civil and political nature, and others a social nature. Both dimensions are intertwined *ex rerum natura*¹⁰.

9. In the following paragraphs I shall examine some of the most surprising arguments against the legal nature of social human rights.

1.3. Legal nature of social human rights

a. Social rights are not human rights

10. A first group of authors argue that social human rights are not *human* rights: only civil and political rights are real human rights, based on the right to life, freedom and property, because the individual holds a central position in these classic rights. In contrast, social human rights are judged to be merely policy guidelines or aspirations, but not legal rights for individuals¹¹.

Covenants containing fundamental social rights are legally binding material or instruments, in the same way that documents containing civil and political rights are legally binding. Human dignity, a matrix human right for each and every person, is protected and preserved by civil and political rights, but also –and even more in reality– by social human rights¹².

b. Social rights are moral rights

11. A second opinion stresses that social human rights are *moral*, not legal rights because they are not justiciable in international law. However, their lack of justiciability is rooted in political reasons, not international law¹³.

⁸ Non-discrimination as enshrined in article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights. Preliminary Report submitted by the Special Rapporteur Marc Bossuyt, 16 June 2005, E/CN.4/Sub.2/2005/19

⁹ G. MAES, 'Afdwingbaarheid van sociale grondrechten', in *De grondrechtelijke onderbouw van het collectief arbeidsrecht*, Mechelen, Kluwer, 2005, 38-39; G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, 179-252

¹⁰ G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003

¹¹ E. VIERDAG, 'The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights', *Netherlands Yearbook of International Law*, 1978, 69-105; C. KORTMANN, *De Grondwetsherzieningen van 1983 en 1987*, Deventer, 1987, 113; Zie ook voor de relativering: G.J.H. VAN HOOFF, 'The legal nature of Economic, Social and Cultural Rights: a rebuttal of some traditional views', in P. ALSTON en K. TOMASEVSKI (ed.), *The right to food*, Nijmegen, Martinus Nijhoff, 1984, (97) 98 et seq.

¹² G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, nrs. 955-958

¹³ M. BOSSUYT, 'La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels', *H.R.J.* 1975, 783 et seq.; M. BOSSUYT, *L'interdiction de la discrimination dans le droit international des droits de l'homme*, 1976, 173-217; C. STARCK, 'La jurisprudence de la Cour constitutionnelle fédérale

Their opinion stresses the importance and desirability of protecting social human rights, but overestimates the fear of legal control by the courts. Even restrained control by a judge in social human rights affairs could undermine the position of the elected legislator and lead to judicial activism. This stress on moral rights normally leads to an inconvenient situation where violations of social human rights are not sanctioned at all. Human rights not only derive their quality of human rights from their justiciability; their inherent acceptance by the people is a very important safeguard. Whilst the absence of remedies may weaken the real enjoyment of rights, it does not deprive them of their quality as rights¹⁴.

c. Social rights are relative rights

12. Fundamental social rights are often described as *relative* rights with a variable content. Their realisation requires positive action by the legislator and administration, and the activation of considerable fiscal resources. Their implementation costs much more than the realisation of civil and political rights which only requires abstention. The latter entails only negative obligations; they have an invariable content and are thus absolute and fundamental¹⁵. In reality, civil and political rights also require positive action. The full realisation of civil and political rights is heavily dependent on both the availability of resources and development of the necessary societal structures¹⁶. This is a logical consequence of the real nature of human rights and the link with the realisation of real humanity and human dignity. Human rights protection is so important that it is a major responsibility for States; a result of the tacit and implied convention binding the people and the State. In a social welfare state the State's responsibilities are not fulfilled when the State abstains from intervention; social and economic growth implies evolution also in the interpretation of human rights protection¹⁷.

d. Social rights are vague

concernant les droits fondamentaux', *Revue du droit public et de la science politique au France et à l'Etranger*, 1988, (1263) 1276-1287; J. BRUGGINK, 'Wat zijn 'mensenrechten'?', in L. HEYDE, J. LEYTEN, TH. MERTENS-en B.P. VERMEULEN (red.), *Begrensde vrijheid. Opstellen over mensenrechten aangeboden aan Prof. dr. D.F. Scheltens, bij zijn afscheid als hoogleraar aan de Katholieke Universiteit Nijmegen*, Zwolle, Tjeenk Willink, 1989, (87) 89; Zie ook ter relativisering: G.J.H. VAN HOOFF, 'The legal nature of Economic, Social and Cultural Rights: a rebuttal of some traditional views', in P. ALSTON en K. TOMASEVSKI (ed.), *The right to food*, Nijmegen, Martinus Nijhoff, 1984, (97) 102 et seq.

¹⁴ M. ADAMS, 'De stok achter de deur!? Over sancties, preventieve rechtshandhaving en een responsieve rechtscultuur', *R.W.* 2001-02, 1589 et seq.; H.J.L.M. VAN DE LUYTGAARDEN, *The relational-theory in human rights law – Contemporary reflections on the difference between social and civil human rights*, Utrecht, RUU, 1991, 4-5; D. MEEUWISSEN, *Recht en vrijheid. Inleiding in de rechtsfilosofie*, Utrecht, Het spectrum, 1982, 198; J. DEFOORT, *Wet en geweld- Over recht en gerechtigheid*, Kapellen, Pelckmans, 1994, o.m. p. 135 et seq.; L. PETTITI (Les droits de l'homme dans le monde): *en matière des droits de l'homme, il y a un seul critère d'application sérieux, c'est celui de l'effectivité de prévention et de protection. Tout le reste est littérature diplomatique, aadémisme comparatiste, proclamation d'autosatisfaction, culte des apparences de l'Etat de droit*'.

¹⁵ M. BOSSUYT, 'La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels', *H.R.J.* 1975, 783 et seq.; M. BOSSUYT, *L'interdiction de la discrimination dans le droit international des droits de l'homme*, 1976, 173-217

¹⁶ G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, 177-252

¹⁷ F. SUDRE, 'Les 'obligations positives' dans la jurisprudence européenne des droits de l'homme', *Rev. Trim. D.H.* 1995, 364 et seq.; F. SUDRE, 'Obligations positives et effet horizontal des dispositions de la convention', F. SUDRE (ed.), *L'interprétation de la Convention européenne des droits de l'homme*, Brussel, Nemesis, 1998, 134; C.J. FORDER, 'Positieve verplichtingen in het kader van het Europees Verdrag tot bescherming van de Rechten van de mens en de fundamentele vrijheden', *NJCM-bulletin* 1992, 611-637; C.J. STAAL, *De vaststelling van de reikwijdte van de Rechten van de Mens*, Nijmegen, Ars Aequi libri, 1995, 287-303; R. LAWSON, 'Positieve verplichtingen onder het EVRM: opkomst en ondergang van de 'fair balance'-test', *NJCM-bulletin* 1995, (558) 562

13. It is argued that fundamental human rights are vague standards containing only vague obligations for states. Political influence and decision-making have to elaborate the concept of fundamental rights. This leaves a considerable margin of appreciation for the State and would make the role of the courts too complex or even impossible.

This argument lacks intellectual honesty. Scholars and different organs of international organisations such as the Committee on Economic, Social and Cultural Rights or the Committee of Experts under the European Social Charter have made considerable efforts to clarify the content and obligations of fundamental social rights. By using those rights in a court, the courts will further clarify and describe their substance. It seems a vicious circle: they are vague so that they cannot be used in a court, but they are also vague because they are not used in a court.

e. Universality and interdependence

In 1948, there was consensus in the Universal Declaration of Human Rights on the indivisibility and interdependence of all human rights. This indivisibility and interdependence was also confirmed by the World Conference on Human Rights in Vienna¹⁸ (1993) and Teheran¹⁹ (1968). These Conferences renewed the international community's commitment to the promotion and protection of human rights. The meetings forged "a new vision for global action for human rights into the next century".

The Vienna Declaration and Program of Action mark the culmination of a long process of review and debate over the current status of human rights machinery in the world. It also marks the beginning of renewed effort to strengthen and implement the body of human rights instruments that have been painstakingly constructed on the foundation of the Universal Declaration of Human Rights since 1948.

14. The Committee on Economic, Social and Cultural Rights pointed out that *the international community as a whole continues to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights*²⁰. This is a given in the rule of law that may not be weakened²¹.

1.4. Justiciability vs. enforceability

a. Justiciability

15. As a result of doubts about the real nature of these rights, scholars and politicians often stress that they are not justiciable. Whilst recognising the legal status of social human rights

¹⁸ 13 October 1993, A/CONF.157/24

¹⁹ 13 May 1968

²⁰ UN doc. E/1993/22 at 83, par. 5

²¹ *Tweede rapport van de Staatscommissie van advies inzake de Grondwet en de Kieswet*, 's Gravenhage 1969, 29-30; F. SUDRE, 'Les 'obligations positives' dans la jurisprudence européenne des droits de l'homme', *R.T.D.H.* 1995, 363-384; D. SPIELMANN, 'Obligations positives et effet horizontal des dispositions de la Convention', in F. SUDRE (ed.), *L'interprétation de la Convention européenne des droits de l'homme*, Brussel, Nemesis, 1998, 133-174; R. LAWSON, 'Positieve verplichtingen onder het EVRM: opkomst en ondergang van de 'fair balance' test', *N.J.C.M.* 1995, 558-573, 727-750; J. VAN SCHOKKENBROEK, *Toetsing aan de vrijheidsrechten van het Europees Verdrag tot bescherming van de rechten van de mens*, Zwolle, Tjeenk Willink, 1996.

they deny enforceability: i.e. the promotional obligations arising from such rights cannot be justiciable. Social human rights are therefore political rights and cannot be applied by courts of law. This approach starts – as stated above – from the very assumption that the realisation of social human rights is expensive and requires state intervention, whereas the realisation of civil and political rights requires only state abstention²². It concerns human rights of the second generation, where second means less important in the hierarchy of norms.

16. Justiciability is a right's amenability to be subjected to the scrutiny of a court of law or another judicial or quasi-judicial entity²³. Justiciability is a fluid concept, depending on the interpretation of the right concerned by a court or supervisory body. The key element in this definition is the rather formal aspect of the controlling body due to the theoretical concept of 'separation of powers' where the judiciary is independent of other powers. The judiciary makes decisions which are considered to be law and those decisions have to be enforced.

17. In a rather 'natural' understanding of justiciability, the courts' play a key role²⁴ by recognising the law and enforcing respect for the rules²⁵. It is important to agree about the real nature of law. The courts' sanctions are important, but not the only reason for accepting the obligatory force of a rule. Obligatory force is a logical consequence of the promulgation of rules of law by a competent organ (national or international) and the acceptance of the signatory party. A sense of standards is by far the most important element for justiciability²⁶.

b. Enforceability

²² R. HIGGINS, 'International law and the avoidance, containment and resolution of disputes – General Course on Public International Law', *Recueil des Cours – Académie de droit international* 1991, V, (9) 140; F. SUDRE, *Droit international et européen des droits de l'homme*, PUF, 1989, 134: *Les droits économiques, sociaux et culturels en tant que catégorie distincte de la proclamation internationale des droits de l'homme, appartiennent au domaine des principes souhaitables: ils font partie de la nébuleuse des droits de l'homme mais ne s'inscrivent pas dans le champ du droit.*; W. RAUWS, 'Niet de ver-van-mijn-bed-show: sociale grondrechten en de praktijk', in *Sociaal recht: niets dan uitdagingen*, Gent, Mys en Breesch, 1996, 794, no. 1497

²³ K. ARAMBULO, *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights. Theoretical and procedural aspects*, Antwerp, Intersentia, 1999

²⁴ F. RIGAUX, 'Droit international et droits de l'homme', *J.T.* 1988, 700, no. 20: *die dit wijdt aan de programmatorische aard van deze rechten.*; P. LAMBERT, 'La mise en oeuvre juridictionnelle des droits économiques, sociaux et culturels', in R. ERGEC (ed.), *Les droits économiques, sociaux et culturels dans la Constitution*, Brussel, Bruylant, 1995, (107) 115 no. 5; P. ORIANNE, 'De la juridicité des droits économiques et sociaux reconnus dans les Déclarations internationales', *Annales de droit de Louvain*, 1974, (147) 148

²⁵ H.J.L.M. VAN DE LUYTGAARDEN, *The relational-theory in human rights law – Contemporary reflections on the difference between social and civil human rights*, Utrecht, RUU, 1991, 4-5; J. RIVERO, 'Déclarations parallèles et nouveaux droits de l'homme', *R.T.D.H.* 1990, 324; A. JACQUEMIN, 'Droit économique et droits économiques', in *Vers une protection efficace des droits économiques et sociaux*, Leuven, 1973, 137; K. ARAMBULO, *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: theoretical and cultural aspects*, Antwerp, Intersentia, 1999, 55; G. MAES, 'Justiciability of social and economic rights', in W. VANDENHOLE (ed.), *An optional protocol to the international Covenant on Economic, social and cultural rights*, Leuven, Institute for Human Rights, 2002, 55, 56

²⁶ H.J. LEENEN, *Sociale grondrechten en gezondheidszorg*, Hilversum 1966, 172-173; K. RIMANQUE, 'Kanttekeningen over grondrechten in België en in de wereld', in M. STORME (ed.), *Recht en macht*, Brussel, Paleis der Academiën, 1990, 54; J. BRUGGINK, 'Wat zijn 'mensenrechten'?', in L. HEYDE, J. LEYTEN, TH. MERTENS en B.P. VERMEULEN (red.), *Begrensde vrijheid. Opstellen over mensenrechten aangeboden aan Prof. dr. D.F. Scheltens, bij zijn afscheid als hoogleraar aan de Katholieke Universiteit Nijmegen*, Zwolle, Tjeenk Willink, 1989, (87) 88

²⁶ G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, no. 62-72; G. MAES, 'Afdwingbaarheid van sociale grondrechten', in *De grondrechtelijke onderbouw van het collectief arbeidsrecht*, Mechelen, Kluwer, 2005, 42-44; D.H.M. MEUWISSEN, 'Enkele overwegingen met betrekking tot de mensenrechten', in L. HEYDE, J. LEYTEN, TH. MERTENS en B.P. VERMEULEN (red.), *Begrensde vrijheid. Opstellen over mensenrechten aangeboden aan Prof. dr. D.F. Scheltens, bij zijn afscheid als hoogleraar aan de Katholieke Universiteit Nijmegen*, Zwolle, Tjeenk Willink, 1989, (157) 161

18. Enforceability is implementation and execution by way of a (quasi) judicial decision. Lack of justiciability does not automatically mean that the individual has no protection under the law. Enforceability means that an authority (national or international) receives complaints about the violations of a protected right, and provides redress by cancelling or rectifying the violation, awarding compensation for damage, or both.

Enforceability also has to be interpreted as a means of enforcing and implementing rules of international law other than through courts of law. In my opinion this is the key difference between enforceability and justiciability. The Committee on Economic, Social and Cultural Rights stated that *'the right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. (...) Whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.'*²⁷

19. Enforceability includes also a (political) supervisory system. The right to an effective remedy need not be interpreted as always requiring a judicial remedy. The process of transforming more or less general standards to standards which are more manageable and contain more precise obligations of states is primarily a task for 'political' organs, where examination of the States' respect of precisely formulated commitments could be more legal²⁸.

20. Supervisory (reporting) procedures are by their very nature somewhat more 'political', in that their main focus is the development of states, while complaint procedures are more (or should be) strictly legal. The Committee on Economic, Social and Cultural Rights has set out the objectives of reporting procedures *'to ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures and practices in an effort to ensure the fullest possible conformity with the Covenant'*²⁹.

21. An important element is also the obligation of all State parties to an international human rights convention to insist that other State parties respect the human rights obligations they have undertaken. This is the result of the obligation of good faith in international law: the application of the rule *'pacta sunt servanda'*. States are (---at a first level---) bound vis-à-vis each other and without an active part for the citizen. Furthermore, States are engaged collectively to respect those rights. It is a formal engagement in the international community; changes to governments or political systems have no impact on them.

2. Fundamental social right: the Right to work

22. The right to work is an important social human right. Everyone has the right to work and theoretically also the right not to work. A second element, clearly distinct from liberty, is the right to work: both are inextricably linked. Workers are not objects; they are also subjects in the employer-employee relationship. As a result of the employer's authority, the employee's right to work will collapse. The core of the right to work is the dignity of every human being. Employees are entitled to special protection when earning their daily bread. Scholars often argue that the right to work is the most programmatic of all social human

²⁷ Committee on Economic, Social and Cultural Rights – General Comment 9 – The domestic application of the Covenant, E/CN.12/1998/24, CESCR, no. 9

²⁸ E.g.: G. MAES, 'Collectief klachtenrecht bij het Europees Sociaal Handvest – Overzicht van Rechtspraak 1998-2002', T.S.R. 2005, 3-40

²⁹ Committee of Economic, Social and Cultural Rights, General Comment 1, paragraph 2 (E/1989/22, E/C.12/1989/5)

rights. By analysing the most important international provisions concerning the right to work and General Comment No. 18, it will become clear that a correct approach to the right to work is reasonable, just and correct. The dignity of human beings and the universality of human rights protection focus attention on progressive respect, recognition and realisation of the right to work.

2.1. Article 23 of the Universal Declaration on Human Rights

23. One of the fundamental social rights is the right to work. In the Universal Declaration on Human Rights Article 23 says:

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

24. In the ILO's Declaration of Philadelphia of 1944, the international community already recognised that labour is not a commodity. Work is part of everyone's daily life and crucial to a person's dignity, well-being and development as a human being. The Declaration recognises also the obligation for the States to achieve full employment. Workers should enjoy their employment because it enables them to develop their skills and talents and contribute to common well-being. Economic development should include the creation of jobs and working conditions where people can work in freedom, safety and dignity. In short, economic development is not undertaken only for profit but also to improve the lives of human beings. Good working conditions imply also good protection in the case of dismissal: a reasonable period before dismissal becomes effective, scrutiny of the reasons, etc.

2.2. Article 6 of the International Covenant on Economic, Social and Cultural Rights

25. This fundamental social right to work is also a part of the International Covenant on Economic, Social and Cultural Rights. Article 6 ICESCR says:

1. The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realisation of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

a. Principle – General Comment No. 18

26. According to General Comment No. 18 of the Committee on Economic, Social and Cultural Rights³⁰, the right to work is both an individual right and a collective right (No. 6). It encompasses not only self-employment but also work under a contract of employment. The Committee stresses that the right to work cannot be understood as an absolute and unconditional right to obtain employment. Article 6 emphasises the State's obligations rather

³⁰ The right to work. Article 6 of the International Covenant on Economic, Social and Cultural Rights. General Comment No. 18, 24 November 2005, E/C.12/2005

than the individual right to work. The text of Article 6 clearly proclaims the right of access to a system of protection guaranteeing to each worker access to employment, as well as the right not to be unfairly deprived of employment.

27. The Committee refers to the importance of *decent* work. This means work which respects the fundamental rights of the human person (especially physical and mental integrity) as well as recognition of decent and safe working conditions and honest remuneration which provides an income level allowing workers to earn a living for themselves and their families. These obligations are also covered and elaborated in Article 7 of the Covenant.

28. The Committee asks for requisite governmental measures to reduce the amount of workers in the informal sectors of the economy. This is a result of high unemployment and a lack of secure employment. Workers in the informal economy lack social protection. States have the duty to take legislative and other measures, ensuring greater respect for labour legislation and ensuring the enjoyment of all the rights of workers. The right to work is more than a vehicle for survival. As Marx so aptly said: work is more than a means of production and may not alienate the worker from himself. That is the rather baleful natural consequence of contemporary labour market conditions and the macro-economic situation of business and society as a whole. Workers have no choice and are obliged to sell their labour; due to this power imbalance they have to sell their own identity and personality. Workers do not own the means of production and have to sell their manual labour to earn a living. Competition on the labour market is also hard and leads to exclusion and exploitation. Their price is a vector of their availability. This is a function of physical, intellectual, social and cultural elements. Work's inherent nature is to give people the means to achieve human dignity and develop more completely. Lawfulness, validity of grounds and circumstances of dismissal are very important in this respect. The perverse treadmill cannot be stopped or adjusted without labour law regulations and especially social human rights.

29. The Committee describes the core duties for the State parties vis-à-vis the conventional right to work in three interdependent but essential elements. The implementation is a duty for the State parties. First of all, the *availability* of work obliges State parties to set up specialised services to assist and support individuals to enable them to identify and find available employment. Secondly, *accessibility* means that the labour market must be open to everyone under the jurisdiction of States parties. This means no discrimination in access to or maintenance of employment; physical accessibility for persons with disabilities; and the right to seek, obtain and impart information on the means of gaining access to employment. Thirdly, *acceptability and quality* stresses the importance of just and favourable conditions of work, especially safe working conditions, the right to form trade unions and the right of the worker to freely chosen and accepted work (No. 12).

b. Obligation to respect, to protect and to fulfil

30. It is important to understand that those international standards oblige the State to undertake action. This is also emphasised in General Comment No. 18. General comments are declarations prepared by the Committee for Economic, Social and Cultural rights interpreting provisions of the Covenant and defining the core obligations of those rights. The principal obligation concerning the right to work is to ensure the progressive realisation of the exercise of this right. State parties must adopt as soon as possible measures aiming at achieving full employment (Nos. 19-28).

31. The first and most important element is *the obligation to respect*. The State has to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use the material resources available to that individual in

a way she or he finds best to satisfy basic needs. The State must at this very first level respect the freedom of the individuals to take the necessary actions and use the necessary resources, alone or in association with others. General Comment No. 18 highlights the immediate obligation to guarantee that the right to work will be exercised without discrimination of any kind, with due regard to prisoners and detainees, members of minorities, women and young persons. The right to work contains also the immediate obligation to take steps to the full realisation of Article 6. These steps must be deliberate, concrete and targeted towards the full realisation of the right to work (Nos. 23-24).

32. In this regard, it is interesting to mention and analyse a decision of the Belgian Constitutional Court on the difference in procedure for dismissing blue and white-collar workers. The former enjoy far less protection than the latter; the period for dismissal is shorter and motives are less stringent. The *ratio legis* was that it would be easier for blue-collar workers to find paid employment because their work is not intellectual and demand on the labour market is more visible³¹, whereas employees performing more intellectual work need better protection with longer periods of notice and a stronger scrutiny of the reasons. Whilst this difference in treatment continues to exist at the beginning of the 20th century, its relevancy has disappeared (B.6.2.1.)³². However, the Constitutional Court did not qualify it as discrimination because it took into account the historical reasons for this evolution. New measures drawing on this difference are now discriminatory, whereas existing measures are *becoming* discriminatory. The State has the duty to abolish this difference and renew protection against dismissal for all.

33. On a second level the State has *the obligation to protect*. It requires the State to take the necessary measures to prevent other individuals or groups from violating the integrity, freedom of action, or other individual human rights, including infringement of his material resources. This includes State protection of freedom of action and the use of resources against other subjects. General Comment No. 18 underlines the prohibition of retrogressive measures, also in relation to the right to work (No. 25). If any deliberately retrogressive measures are taken, States parties have the burden of proving that they have been introduced after consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the States parties' maximum available resources. The rule must be that a retrogressive measure is not in accordance with the duties of the State parties; there is an obligation to recognise the standstill that is inherent in the protection of social rights. Only important economic or social development may justify those retrogressive measures. It is an important element for the judiciary to safeguard these principles and to take appropriate sanctions when the State party violates the obligation of standstill (see No. 35).

34. The right to protect encompasses also the obligation for the State to protect the worker when specific measures are taken in order to increase the flexibility of labour markets. Flexibility often undermines the labour relation's stability or reduces the worker's social protection. This is a challenge for the future and a focus of attention. There has to be a reasonable and proportional balance between the necessities of business, and the (fair) protection of the workers. The worker's dependence should not be too great; there has to be real interdependence between business and workers.

35. The third obligation concerns *the obligation to fulfil*. The State has to take the measures necessary to ensure for all persons under its jurisdiction opportunities to obtain satisfaction of the needs, recognised in human rights instruments, which cannot be secured by

³¹ *Parl.St.*, Kamer, 1977-1978, no. 293/4, p. 4

³² Court of Arbitration, no. 56/93, 8 July 1993, *B.S.* 27 August 1993

personal efforts. This implies also that the State party should adopt appropriate legislative, administrative, budgetary, judicial and other measures to ensure its full realisation. This includes an employment policy with a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment. State parties have to increase the resources allocated to reducing the unemployment rate, especially amongst women, disadvantaged persons and the marginalised. Also a system of compensation for loss of employment has to be established by the States.

c. Progressivity

36. Article 6 ICESCR also gives the opportunity to focus attention on the inherent progressivity of social human rights. The obligation of Article 2 ICESCR is clear and urges states *to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures*. This is an obligation of conduct. The obligation of conduct requires action reasonably calculated to realise the enjoyment of a particular right (No. 7). The obligation of conduct is different from the obligation of result which allows for a broad margin of appreciation for States in achieving the result. The result concerned is decisive, not the way it is achieved. The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard (No. 7). The obligation to take steps is not without reason, and must be taken immediately. The State parties have the obligation to give attention to the further realisation of social human rights; juridical control concerns the reasonability of the steps taken in order to achieve fuller protection of social human rights, or lack thereof. The judiciary can only control marginally the state's decision: the criterion for control is the reasonability of the steps that should be taken.

37. Intertwined with the progressivity of social human rights (and of all human rights), the theory of the core obligations and the principle of standstill allows a specific and very concrete development of social human rights protection. These two principles form the bottom line of human rights protection without hampering progressivity.

d. Principle of standstill

i. Principle

Standstill guarantees the effective realisation of normative texts which only or mainly protect the objective that has to be achieved, not the way it should be achieved. It is the State's duty to take no measures (whether legislative, governmental, or judicial) which conflict with the protected aim or diminish the elaborated protection by implementing social human rights³³. The Belgian Constitutional Court defines this principle *Cette obligation leur interdit d'adopter des mesures qui marqueraient un recul significatif du droit garanti (...), mais elle ne les prive pas du pouvoir d'apprécier de quelle manière ce droit sera le plus adéquatement assuré*.³⁴ This principle follows from the good faith of the state authorities. The fundamental rights embedded in the Constitution or International Covenants urge the

³³ A. ALEN, *Handboek van het Belgisch Staatsrecht*, Antwerp, Kluwer, 1995, no. 66; J. VANDE LANOTTE en G. GOEDERTIER, *Overzicht van het publiek recht*, Brugge, Die Keure, 1997, nr. 708; S. WYCKAERT, 'Het 'standstilleffect' in de milieurechtspraak van de Raad van State', *A.J.T* 1999-00, (413), 415, no. 9

³⁴ Court of Arbitration, no. 169/2002, 27 november 2002, B.6.6.

State to respect and implement them. Without this principle the State can remove the protection already achieved and undermine the position of the people without sanctions or juridical control³⁵. The content, conditions and stipulations of this theory have been elaborated on different occasions and will not be mentioned here³⁶. Only the link with the principle of progressivity will be examined.

ii. Protection of progressiveness

38. The principle of standstill protects the *progressiveness* of human rights protection and especially social human rights protection in a very specific way. It does not urge the State authorities to take immediate additional steps and to upgrade the standard of human rights protection, but prohibits and prevents the reduction of existing protection and implicitly promotes progressivity. The level of protection is riveted to the fundamental principle and the State authorities are not authorised to rollback protection without violating the principle of standstill³⁷.

39. At the same time the principle of standstill protects not only against retrogressive measures but also urges **positive steps** to be taken. I have already shown that the concept of standstill also means that in light of the evolution of society, the period of time that has elapsed, economic growth and social devaluation, the principle of standstill can also be violated when the State authorities refrain from further steps and fail to take appropriate measures. Evolutions in society lead to a devaluation of existing protection. In this context standstill means reduction and thus rollback of protection. The obligation of standstill urges states to go further to safeguard the level of protection.

iii. A relative approach

40. The principle of standstill is by no means **absolute**³⁸. Without reflecting on the motive's urgency, not every restriction or reduction, however small, violates the principle. The imminent risk of such a theory should be that the legislator and the administration will be paralysed with fright and refuse to take further steps in the realisation of social human rights. Paradoxically, human dignity will be mortgaged by the severe and unrealistic control of human rights protection. The fear that every step in protection will impede every retrogressive measure whatever the motive, is realistic and should be avoided. A sound relative approach to standstill recognises that there may be motives and circumstances allowing and forcing certain protective measures to be changed thus diminishing human rights protection. The disadvantage of such a relative approach is the erosion of the essential and thorough guarantee of standstill. The relativity of this principle can degenerate into a go-as-you-please ticket. In

³⁵ E. BREMS, 'De nieuwe grondrechten in de Belgische Grondwet en hun verhouding tot het internationale, inzonderheid het Europees Recht', *T.B.P.* 1995, (619) 632 ; J. VERHOEVEN, noot onder R.v.St. Corveleyn, 7 oktober 1968, *J.T.* 1969, 634

³⁶ G. MAES, 'Het standstillbeginsel in verdragsbepalingen en in art. 23 G.W.: progressieve (sociale) grondrechtenbescherming', *R.W.* 2005-06, 1081-1094; G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, no. 220-281; G. MAES, 'Afdwingbaarheid van sociale grondrechten', in *De grondrechtelijke onderbouw van het collectief arbeidsrecht*, Mechelen, Kluwer, 2005, 50-55

³⁷ J. JACQMAIN, 'Droit au travail, droit du travail', R. ERGEC (ed.), *Les droits économiques, sociaux et culturels dans la Constitution*, Brussel, Bruylant, 1995, 181; J. CLEMENT en M. VAN DE PUTTE, 'De in de Grondwet uitdrukkelijk genoemde economische, sociale en culturele rechten', *Jaarboek Mensenrechten* 1994, 158

³⁸ E. BREMS, 'De nieuwe grondrechten in de Belgische grondwet en hun verhouding tot het Internationale, inzonderheid het Europese Recht', *T.B.P.* 1996, 632; S. WYCKAERT, 'Het 'standstilleffect' in de milieurechtspraak van de Raad van State', *A.J.T.* 1999, 415

Belgium, the highest courts³⁹⁴⁰ have opted for a relative approach and accept (the existence of) imperative motives or pressing need (*des raisons impérieuses*) which do not only justify a divergence of the principle of standstill, but also make it unavoidable. It concerns the inflation-proof level of financial contributions and social benefits and also the possibility for the government to provide for an equivalent alternative and compensation taking into account the evolution of society and the passage of time⁴¹.

Comment: weglaten NEEN

iv. Horizontal applications

41. The principle of standstill has to be complied with by the State authorities: legislator, government and judiciary. It does not commit individuals and employers; they can act without violating this principle. But in light of the State's concern to achieve the highest level of employment, court decisions must be influenced by the profound conviction that individuals and companies also have a duty to assume their responsibilities. Human rights protection is an obligation for everyone, everywhere and all the time. Horizontal relations are also influenced by the requirements of human rights. No judge will allow an individual to harm another, especially not in his fundamental rights. Similarly, an employer cannot exercise his right to dismissal without legal limitations or violate the employee's right to work. On the contrary, when the judiciary appreciates such behaviour, State responsibility in light of the principle of standstill can be violated. This is the main consequence of the obligation to protect. Although an employee does not have a personal right to standstill, a total lack of control and attention for the motives of dismissal can violate the principle. A constitutional and socially-corrected state cannot accept unreasonable and arbitrary dismissal; arbitrariness always violates fundamental rights. Although horizontal protection by social human rights does not follow directly from social human rights provisions, it is a natural consequence of the State's obligation to protect those rights and the correlative principle of standstill.

e. Core Obligations

i. Principle

42. In this regard it also seems appropriate to focus attention on the confirmation of the theory of **core obligations** (*noyau dur*). In General Comment No. 3 the Committee confirms that State parties have a core obligation to ensure the satisfaction of minimum essential levels of each of the rights covered by the Covenant. This is a very important theory and provides immediate protection on the basis of the article of the Covenant. The theory of core obligations is a twin of the principle of standstill. Like the principle of standstill, the theory of core obligations leads to the conclusion that social human rights do not lack any justiciability; on the contrary, they are real human rights. It determines the minimum scale of judicial power embodied in social human right provisions. Core obligations are those *parts of a right which cannot be breached and which must be respected and maintained, whatever the specific conditions of a country*⁴².

ii. Core obligation of Article 6 as interpreted by General Comment No. 18

³⁹ Council of State, 29 April 1999, *A.J.T.* 1999-00, (424), 427 et seq. with note by S. WYCKAERT (consideration 5.1.4.3)

⁴⁰ Court of Arbitration, no. 169/2002, 27 November 2002

⁴¹ G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, no. 261-277

⁴² K. ARAMBULO, *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects*, Antwerp, Intersentia, 131 et seq.

43. The Committee determines the core obligation laid down in Article 6 as the obligation to ensure non-discrimination and equal protection of employment. Discrimination in the field of employment comprises a broad cluster of violations affecting all stages of life, from basic education to retirement, and can have a considerable impact on the work situation of individuals and groups.

iii. Criticism on the given interpretation and an alternative interpretation

44. The core obligation of Article 6 ICESCR as interpreted by the Committee is very narrow and does not widen protection for the worker. There are many international provisions protecting people against discrimination: Article 26 ICCPR protects everyone's legal equality and prohibits any discrimination on whatever ground. This article also concerns the labour market. The given content of the core obligation of the right to work does not demonstrate determination to define the right to work as a real and effective right for the worker in his horizontal relationship between employer and employee. This legal relationship is based on the employer's authority. The employee risks being the weakest pole in the relationship and has to undergo employer decisions, justified by the social-economic situation and the freedom of trading and commerce. Dismissal is a real instrument in this relationship's balance of power and offers protection to both employer and employee. The employee has the right to end the labour relationship otherwise this would lead to a system of forced labour. Everyone has the right and duty to earn a living by decent work which is freely chosen or accepted. In turn they also have an obligation to work. On the other hand, an employer always has the right to dismiss his employees because he owns the means of production, delivers the capital for production and endures business risks. In return he has the power to organise the process of production and take decisions about the content and extent of the employees' labour relation. This is a power relationship which has to be counterbalanced *ex rerum natura* and the imperative demands embedded in the right to human dignity. This is the main task for labour law. Social human rights and especially the right to work, can provide guidelines for countering this imbalance. The employer's unlimited possibility of ending the labour relationship without a reasonable argument, based on reality and facts must be restricted because of the importance of the right to work for the humanity of the worker and his family and his self-realisation. Article 4 of ILO Convention No. 158 restricts the possibility to terminate employment on the employer's initiative by demanding '*a valid reason (...) connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service*'.

45. The reasoning that the right to work is a right for everyone and not only for those who are in a labour relationship is correct⁴³. The consequence of this reasoning is of concern only to the obligations of the State parties. Although Article 6 clearly does not prohibit dismissal, the obligation to respect the right to work leads inevitably to conclude that the economic and social policy of a State must recognise the right to work and that the State must elaborate an effective policy promoting and protecting economic growth with respect for the workers. It must give consideration to the protection of working people by securing adapted procedures for information and consultation. In severe economic situations dismissal is a reality. The Committee on Economic, Social and Cultural Rights correctly emphasised that this cannot serve as an excuse for the lack of measures for the weakest people in society: '*... even in times of severe resources constraints whether caused by a process of adjustment, of economic*

⁴³ Inter alia: K. SALOMEZ, *De rechtspositie van de ontslagmacht naar Belgisch Arbeidsrecht*, Bruges, Die Keure, 2004, 313-315

*recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes*⁴⁴. At that point the obligations for the State party arise.

46. Although the right to work places an important burden on the State, it does not mean that individuals, especially employers, are totally free to do as they please. The provisions of the Constitution and international declarations are important. Even more important is the interpretation of those provisions *in a living society*. The text of a provision can not restrict its interpretation. The interpretation will enable to understand and implement the provisions in the present-day society and tending to reach a higher level of humanity. The lack of courage so typical of political organs of control (such as the ICESCR and the ESC) and the pragmatism governing high courts does not restrict the potentiality of those provisions. The principles normally used by the European Court of Human Rights can enlighten the coming evolution: the interpretation in light of present day conditions in order to achieve a real and effective protection⁴⁵. Human rights protection has to be concrete and improve the situation of those with whom it is concerned, otherwise it is a dangerous myth, weakening legal reality and undermining the principle of the indivisibility of human rights. The past cannot be the decisive criterion for interpretation and action. Human rights protection speaks of progressivism, not conservatism and fear. The argument that the recognition of an individual right to work can be used to reduce freedom of collective action is intellectually not correct. Freedom of collective action is not a correlative of the right to work, but of the freedom to work⁴⁶. The right to work can only have real meaning –and that is the real core obligation of this right– when the judiciary has the opportunity to scrutinise employers' decisions in light of this right. The judiciary should allow a great margin of appreciation for employers, and at the same time should it reform decisions which are clearly exaggerated and unreasonable. In this way genuine legal protection on the basis of this article will be developed. This kind of horizontal protection by social human rights does not follow directly from the human rights provisions, but is realised by the State liability for violation of human rights. When the judiciary fails to give appropriate protection on the basis of social human rights to individuals in their horizontal relationship, the state's responsibility for respecting human rights is engaged and violated.

47. The content of this core obligation as described by the Committee allows too much freedom for States and has down-graded the value of human rights protection. In this regard, it is very important to interpret and implement the right to work in the light of ILO Convention No. 158, and regarding the elements offered by Article 24 of the Revised Social Charter.

2.3. The Revised Social Charter

48. In the Revised European Social Charter Article 1 of part II says:
With a view to ensuring the effective exercise of the right to work, the Parties undertake:
1. to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;

⁴⁴ General Comment No. 3, paragraph 2.

⁴⁵ EHRM 18 december 1986, Johnston t. V.K., Serie A, no. 112, § 53

⁴⁶ F. DORSEMONT, "Het recht op de vrije keuze van beroepsarbeid" in artikel 23 van de Grondwet: een ultieme erkenning van de vrijheid van arbeid?, *R.W.* 1994-95, 865 et seq.

2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
3. to establish or maintain free employment services for all workers;
4. to provide or promote appropriate vocational guidance, training and rehabilitation.

49. In the same text Article 24 refers to protection in the case of termination of employment:

With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:

- a. the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;
- b. the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.

To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body.

50. The right to work is the first right guaranteed by this Charter. It is also a very important right in the convention as a whole. The Committee declared: '*... l'exercice effectif de plusieurs droits essentiels énoncés par la Charte ne peut se concevoir sans la garantie préalable du droit du travail*⁴⁷'. In this regard we can focus on the just conditions of work, especially also the right to safe and healthy working conditions.

51. The right to work does not mean that the State has the obligation to guarantee to each person the right to a paid job. Generally speaking, jobs are intertwined with the economic situation of a country, but also with the capacities of the persons seeking work and the needs of the labour market. Article 1 ICESCR does not oblige the State to create jobs paid by the government. This article contains four important and concrete obligations to ameliorate the situation of the labour market and promote employment. In the first conclusions the Committee of Independent Experts stipulates: '*Cet article vise à assurer l'exercice effectif du droit au travail et traite en quatre paragraphes de divers aspects d'une politique de l'emploi. L'article 1^{er} de la Charte ne se borne d'ailleurs pas à en énoncer le principe ; il précise aussi l'aide de quels moyens les Etats contractants doivent le mettre en œuvre.*

A cet effet, l'article 1^{er} indique les quatre moyens suivants :

- *plein emploi ;*
- *liberté d'accès au travail*
- *services gratuits de l'emploi ;*
- *mesures d'orientations, de formation et de réadaptation*⁴⁸

52. The economic and social policy of a State must strive to realise the aim of this article. Article 1(1) of the Charter requires States to pursue a policy of full employment. This means on the one hand, that States must adopt and follow economic policy which is conducive to creating and preserving jobs and on the other hand must take adequate measures to assist those who become unemployed in finding and/or qualifying for a job. Article 1(1) is an obligation with regard to means of conduct rather than results and failure to achieve full employment does not pose a problem of compliance. However, it follows that the efforts made by states must be adequate in light of the economic situation and the level of unemployment.

53. This policy includes also attention for labour situations, for measures promoting labour, for information about labour, the labour situation and the problems of working people. The Committee of Independent Experts qualifies this article as an obligation of conduct rather

⁴⁷ Conclusions I, p. 13

⁴⁸ Conclusions I, p. 13

than an obligation of result. Examination of this obligation of conduct is dynamic and a function of the situation of society and the economy at a given time. Effectiveness on its own is not decisive; it is the effort that counts.

54. The aim is full employment. The State has the duty to take measures promoting and tending to reach full employment. The State informs the Committee on the evolution of the labour market and instruments (legal, administrative and others) that support the policy of full employment, having regard also for the evolution between the date of entry into force of the Convention and the situation today. This is a repercussion the never ending duty of progressivity. But the Committee understands also that whilst some measures might be intrinsic, they have no results owing to a country's economic situation.

55. The Committee's assessment rests on a number of economic and social indicators which are particularly linked to the results achieved by States in providing assistance to the unemployed and transforming economic growth into employment⁴⁹. First of all, the Committee examines a wide range of indicators relating to the national economic situation, to patterns of employment (e.g. the employment rate, part-time and fixed-term employment) as well as to unemployment where special attention is paid to vulnerable groups such as youth, the long-term unemployed, ethnic minorities and the disabled. In light of this information, it then proceeds to examine the policy pursued, relying both on evidence of legal or declaratory commitment to full employment as well as on statistical indicators of actual state effort such as the scope of the employment measures implemented (e.g. number of participants as a proportion of all unemployed, average duration of unemployment spells before being offered participation in a measure), and the amount of resources devoted to the various measures. Also examined is the output side of employment policy, notably the effects of different active measures (training, guidance, subsidised jobs, etc.) in terms of creating lasting employment.

56. Belgium signed the Revised Social Charter on 3 May 1996, and ratified it on 2 March 2004. It entered into force for Belgium on 1 May 2004. In accordance with Part III, Article A, paragraph 2 of the Charter, Belgium is bound by most of the articles of Part II of the Charter, but Article 24 is not mentioned in this list nor is it binding and obligatory for Belgium. The controlling institutions cannot consider and discuss compliance with this provision.

⁴⁹ Digest of the Case Law of the ECSR – March 2005

2.4. International Labour Organisation

a. Termination of Employment Recommendation, 1963

57. The International Labour Organisation has also established international labour standards; they are first and foremost about the development of people as human beings. It has a system of international labour standards, with international conventions and recommendations negotiated by representatives of governments, employers and workers. Those international labour standards are legal instruments; they are either conventions which are legally binding international contracts that may be ratified by member states or recommendations which serve as non-binding guidelines. In 1963, the ILO adopted the Termination of Employment Recommendation (R.119). This recommendation stipulates that the termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment of service. The recommendation contains also a list of non-valid reasons for termination of employment, such as union membership, race, colour etc. There is also attention for a reasonable period of notice of the termination, or compensation. In addition, the worker has the right to a reasonable amount of time off without loss in pay in order to seek other employment. Important is also that when a reduction of the work force is contemplated, consultation with workers' representatives should take place as early as possible.

b. Termination of Employment Convention 1982

58. In 1982, the ILO adopted the Termination of Employment Convention (C158). Most elements from the Recommendation became part of this Convention. Belgium is not a party to this Convention and has not ratified it. Consequently, it has failed to safeguard the rights of working people and promote humanity in a real and substantial way. This is a blemish on any social welfare state sincere about social human rights protection.

59. Firstly, there is emphasis on the valid reason for such termination, connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service (art. 4). This is a fundamental element in the human rights protection of the worker and directly concerns his humanity. It counterbalances the power relation between employer and employee. Violation of this principle does not result in an obligation for the employer to keep the employee in work; the employee is not guaranteed a job. The emphasis lies on financial compensation rather than genuine reintegration in the workplace. Article of the Convention states that if the validation is unjustified, the reinstatement of the worker can be ordered or proposed, but the supervisory organ (according to national law) is also empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.

60. The Convention enumerates reasons which are not valid for dismissal: (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours; (b) seeking office as, or acting or having acted in the capacity of, a workers' representative; (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; (e)

absence from work during maternity leave (art. 5). Temporary absence from work because of illness or injury shall not constitute a valid reason for termination (art. 6).

61. The Convention gives the worker the opportunity to defend himself; he cannot be dismissed for reasons related to his conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity (art. 7). A reasonable period of notice is also required or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period (art. 11). The Convention describes also a procedure of appeal against termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator (art. 8). The examination concerns either the reasons given for the termination and the other circumstances relating to the case (art. 9). There are special rules for the burden of proof: the worker does not have to bear the burden alone. A valid reason has to be given by the employer. When analysing dismissal based on reasons relating to the operational requirements of the undertaking, establishment or service, it is important for the impartial body to establish whether the dismissal is effective for this reason. The procedure, extent and consequences of this analysis have to be elaborated by the national authorities. There is very little interest in this regard

62. A very important element is the duty for the employer to inform and consult the workers' representatives when the terminations are for reasons of an economic, technological, structural or similar nature (art. 13). The obligation to provide information in good time to the workers' representatives concerns the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out. The employer must give the workers' representatives the opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures, to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment. The national authorities have the obligation to elaborate rules for the information and consultation procedure.

63. The situation of the labour market and the position of working people tend to concentrate power in the hands of the employer, giving him power to decide, use and abuse. In this light procedures of information, consultation and bargaining are very important because they strengthen workers by unifying their interests and rights. The employer's freedom and power are reduced and curtail the unlimited exercise of a strong power relationship. Subordination ends and makes room for dialogue. In such situations dialogue is both a very powerful and important right and tool. Fundamental Social Rights Charters contain this right to dialogue thus counterbalancing the employer's power and promoting in a specific, albeit restricted, way the right to work. Promoting the right to work implies improving the right to dialogue and the right to information and consultation of workers.

Conclusion

64. Social human rights protection seems to be the ugly duckling of human rights protection. The Cold War era caused this dichotomy between civil and political rights on the one hand, and social human rights on the other hand. Assumptions are widespread and intellectual and scholarly honesty are lacking. Respect for the rule of law, reality and the evolution of society and jurisprudence force us to recognise the importance of protecting and implementing social human rights. The judiciary can at least marginally examine the State's conduct and in a derived way the conduct of civilians and companies. The theory of core

obligations and the principle of standstill are prominent means for achieving a fuller promotion of humanity.

65. A key position in social rights protection is reserved for the right to work. Although international recognition of this principle is a reality, its judicial significance is limited. The interpretation given by the UN Committee on Economic, Social and Cultural Rights to this right is inadequate and disappointing. Common sense and judiciousness cry out for a wider interpretation without violating freedom of trading and business, but recognizing effectively the real value of human capacity for work. Arbitrariness and abuse must be stamped out. Everything of value is defenceless, so the law has a duty to protect.

the consultations and negotiations with the social partners. It is hard to see how *Article 138 EC* could be amended to give the European Parliament a formal role in the decision-making process.

Finally, the use of a social dialogue is emerging in the various 'Processes' taking place at the intergovernmental level, lending some legitimacy to crucial decisions on the future direction of EU policy. Voruba⁷⁵ and others have criticised this kind of use of the social dialogue as the legal introduction of 'Euro-corporatism' which brings with it a trend towards specific selectivity as regards choice of topics which can, and will, be handled in a Euro-corporatist fashion on the European stage. This in turn gives preferential treatment to work and production-related topics, to the disadvantage of 'citizen' or 'social' topics.⁷⁶

⁷⁵ Voruba, G., 'Social Policy for Tomorrow's Euro-Corporatist Stage' (1985) 24 *Journal of European Social Policy* 182.

⁷⁶ The concern with citizenship rights focusing upon work-oriented matters is explored in a number of critiques of the citizenship model adopted in Community law: see, *inter alia*, Schulte, B., 'Juridical Instruments of the European Union and the European Communities' in Beck, W. *et al.* (eds) *The Social Quality of Europe* (The Hague, Kluwer, 1997); Shaw, J., 'The Many Pasts and Futures of Citizenship' (1997) 22 *European Law Review* 554; Moebius, I. and Szyssczak, E., 'Of Raising Pigs and Children' (1998) *Yearbook of European Law* 125.

CHAPTER 3

The free movement of labour

A national of one of the Member States may move around the Community in order to work in a number of ways. He or she might be a frontier worker; for example, a Swedish waiter might cross over to Copenhagen from Malmö every day to work in a Copenhagen bar and return home each evening. A person may move to another Member State as a 'posted worker' either to complete a particular contract or to work for a temporary period in the employment of the employer abroad. Alternatively, a person may decide to emigrate temporarily or permanently to another Member State. He or she may work as an employee (or under an employment relationship) or as a self-employed person, perhaps interrupting his/her working life on either a voluntary or involuntary basis and also settling there on retirement. All these situations are covered by EC labour law.

The free movement of persons is a fundamental aspect of the Internal Market. It also has relevance for EC labour law. The right to free movement is one of the rights attached to Citizenship of the Union and is a fundamental right in Community law.¹ Community law provides for the idea of equal treatment or non-discrimination² of migrant workers (who hold the nationality of one of the Member States) with the treatment of host-state nationals.³ This has contributed to the formation of a European social citizenship.⁴ The Court of Justice has enhanced the concept of non-

¹ It is recognised as such in the Community Charter of Fundamental Rights of Workers 1989, *Article 18 EC* and in the ECJ case law. For a powerful discussion of human rights/citizenship rights, see the Opinion of Advocate General Jacobs in Case C-168/91 *Konstantinidis* [1993] ECR I-1191.

² See Hilson, C., 'Discrimination in Community Free Movement Law' (1999) 24 *European Law Review* 445.

³ See Case C-369/90 *Micheletti and Others v Delegación del Gobierno en Cantabria* [1992] ECR I-4239; Case C-238/98 *Hoeksman v Ministre de l'emploi et de la Solidarité*, pending.

⁴ Ball, C., 'The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community's Legal Order' (1996) 37 *Harvard International Law Journal* 314.

discriminatory barriers to free movement in the *Bosman* case.⁵ This could have an impact upon a number of national employment practices which may deter or prevent a person moving between the Member States in order to engage in paid work.⁶

3.1 Free movement of labour as a fundamental tenet of the Internal Market

Building upon the success of the free movement of labour provisions of the Benelux Union, the original Treaty of Rome 1957 created the right to free movement of workers in Article 48 EC (now Article 39 EC)⁷, the free movement of services in Article 59 EC (now Article 49 EC) and the freedom of establishment in Article 52 EC (now Article 43 EC).

There has been a tendency to create flexibility in the Member States' labour markets by a process of what Collins has described as the vertical disintegration of the firm.⁸ This has been achieved by creating or encouraging more self-employment as well as 'atypical' working arrangements in the form of out-sourcing, temporary, part-time, and home-work. One reason for these new forms of working relationships is to reduce labour costs for employers – and thus to transfer some of the risks of non-employment or under-employment on to workers. The 1980s saw a growth in the service sector, not only in professional services but also in education, healthcare, personal services as well as a number of new forms of services, particularly in what Esping-Andersen calls the 'fun and food' sector.⁹ The Treaty of Rome 1957 addressed the issue of self-employment from the very limited and classic angle of securing the freedom to operate in other Member States without suffering from discrimination on the ground of nationality. Until 1987, this area of law was underdeveloped. Professional

⁵ Case C-415/93 [1995] ECR I-4705.

⁶ The Citizenship provisions may also apply when a person is out of the paid labour market in another Member State: see Case C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691. Cf. Case C-275/96 *Anne Kuusijarvi v Riksforsäkringsverket* [1998] ECR I-3419.

⁷ Ancillary measures were also introduced to develop a genuine employment market in Council Regulation 1612/68/EEC (Part II) to exchange information on job vacancies within the Member States, with the idea being to give 'Community preference' where there were work shortages. See also Council Regulation 2434/92 of 27 July 1992 amending Part II of Regulation (EEC) No. 1612/68, OJ 1992 L 245/1, and Commission Decision 93/569/EEC of 22 October 1993 on the implementing of Council Regulation (EEC) No. 1612/68 freedom of movement for workers within the Community, as regards, in particular, a network entitled EURES, OJ 1993 L 274/32.

⁸ Collins, H., 'Independent Contractors and the Challenge of Vertical Disintegration for Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353.

⁹ Esping-Andersen, G. *The Three Worlds of Welfare Capitalism* (Princeton University Press, Princeton, 1990).

qualifications and regulatory rules were the two principal barriers to full liberalisation of the professions, but the Commission's approach of sectoral harmonisation was slow and piecemeal. As the Internal Market programme developed, so did a renewed interest in addressing liberalisation for the self-employed, particularly service providers.¹⁰

The rights to free movement were organised around the exercise of an economic activity and by so doing created rights to 'market citizenship'.¹¹ There is now a divorce from linking the right of free movement to the exercise of an economic activity, firstly by allowing a right of residence in another Member State where a person is retired,¹² or a student¹³ or has sufficient funds to be economically independent;¹⁴ secondly, by creating a right to free movement as one of the rights of citizenship of the Union to be found in the new Article 18 EC (ex Article 8a EC).

The provisions on the free movement of persons extend to nationals of the EEA states and to members of the migrant's family, even if they are third country nationals (TCNs). TCNs are covered by the free movement provisions of international agreements if they can show they are economically active or a member of a migrant worker's family.¹⁵ The rights to citizenship of the Union are only granted to EU nationals.

Article 42 EC (ex Article 51 EC) allows for the continuity of social security protection when a person moves between Member States. Three principles underpin the way the continuity of social security protection is approached. The first is the principle of co-ordination.¹⁶ EC law does not seek to harmonise or create a supranational system of social security law but instead seeks to co-ordinate the various divergent Member States' systems. The second principle is that of aggregation. For the purposes of acquiring, retaining and calculating social security benefits, there is an

¹⁰ The Commission has revealed that employment in the services sector accounts for only 39.2% of working age population in the EU, while it accounted for 54.2% in the USA: European Commission Press Release on the 1999 Employment Guidelines, 14 October 1998.

¹¹ See Everson, M., 'The Legacy of the Market Citizen' in Shaw, J. and More, G. (eds) *New Legal Dynamics of European Union* (Clarendon Press, Oxford, 1995).

¹² Council Directive 90/365/EEC, OJ 1990 L 180/28.

¹³ Council Directive 93/96/EEC, OJ 1993 L 317/59.

¹⁴ Council Directive 90/364/EEC, OJ 1990 L 180/26.

¹⁵ Peers, S., 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union' (1996) 33 *Common Market Law Review* 7.

¹⁶ The Court has not provided a definition of co-ordination. The Member States are free to determine the rules of national social security systems, to decide who is to be insured, benefits to be granted and the principles upon which these benefits are to be based. Such rules must meet the criteria of non-discrimination on the grounds of sex as laid down in Community law discussed in Chapter 4. See White, R., *EC Social Security Law* (Longman, Harlow, 1999).

aggregation of all periods under the laws of the Member States where the person resides. The final principle is that of exportability. This speaks for itself. A person may export the benefits acquired under the laws of the Member States to the Member State where he/she is resident. The principal Regulation, 1408/71/EEC, implementing these principles has been amended several times. It is felt that the Regulation is outdated. It fails to address newer forms of social security and the wave of privatisation of social security risks across Europe. Its rules are inordinately complex and often inconsistent.¹⁷ Another problem is that TCNs are excluded from its scope¹⁸ unless they fall within the definition of the claimant's family in Article 2(1) of Regulation 1408/71.¹⁹ The Commission is currently undertaking a review of the Regulation with a view to replacing it.²⁰

Even with this array of provisions, the number of EC nationals who take advantage of the free movement provisions is still extremely small.²¹ The Commission has argued that *Article 14 EC* establishing the Internal Market concept in which the free movement of persons is a fundamental tenet, has direct effect.²² The Commission set up a working group under the chairmanship of Simone Weil to investigate the barriers to the full realisation of the free movement of persons in the EU.²³ In the Commission's Social Action Programme 1998-2000,²⁴ the Commission states that removing the remaining obstacles to the free movement of workers and improving labour market flexibility is a key employment objective of the EU. An Action Plan for free movement of workers has been drawn up.²⁵ One of the first proposals to emanate from the working group was for a Directive on safeguarding the supplementary pension rights of employed and self-employed persons moving within the EU.²⁶

¹⁷ See Council Recommendation 92/442/EC on the convergence of social policy objectives, OJ 1992 L 245/49, and Council Recommendation 92/441/EC on common criteria concerning sufficient resources and social assistance, OJ 1992 L 245/46.

¹⁸ Case 94/84 *Office National de l'Emploi v Jozsef Deak* [1985] ECR 1873. Cf. Case C-277/94 *Z Taflan-Met* [1996] ECR I-4085.

¹⁹ Case C-308/93 *Cabanis-Issarte* [1996] ECR I-2097; Case C-126/95 *Hallouzi-Choho v Bestuur van de Sociale Verzekeringsbank* [1996] ECR I-4807.

²⁰ See COM (97) 561 final (extension to TCNs); COM (97) 378 final (miscellaneous) amended by COM (97) 158 final.

²¹ On the gender dimension see Ackers, L. *Shifting Spaces: Women, Citizenship and Migration Within the European Union* (Polity Press, Bristol, 1998).

²² SEC (92) 877 final. Cf. Case C-378/97 *Wijsenbeek*, judgment of 21 September 1999.

²³ The Weil Report is at <http://europa.eu.int/comm/dg15/en/people/hlp/summ/htm>

²⁴ COM (1998) 259 final.

²⁵ COM (97) 128.

²⁶ Now Council Directive 98/49/EC; OJ 1998 L 209/46.

3.2 The complex legal base of the right to free movement

The gradual expansion of the right to free movement under Community law has resulted in a multiplicity of legal bases under which the right can be exercised. In the Commission's First Report on Citizenship,²⁷ it was announced that a new unitary legal text would be forthcoming which would codify the Court's case law on the free movement of persons and residence. Yet, no amendments to the legal base of the economic/Citizenship rights to free movement were made at Amsterdam. From 1 May 1999, the elimination of border controls will take place within the framework of *Article 62 EC*. Until there is harmonisation of measures concerning the crossing of external frontiers, Member States retain the right to check the identity and nationality of persons entering their territory.²⁸ In the Commission's XVIth Report on Monitoring the Application of Community Law,²⁹ the Commission reiterates an earlier view that more information is needed to allow citizens of the EU to exercise their rights to free movement, as well as to training and information for those involved in the exercise of free movement.³⁰

The broadest right to free movement is contained in *Article 18 EC* (ex *Article 8a EC*) which states:

Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

The Court has declined to rule upon whether *Article 18 EC* creates direct effect. *Article 18(2) EC* envisages further implementing legislation which would seem to deny direct effect. Another issue is whether *Article 18 EC* improves upon the economic rights to free movement since it does not contain any limitations. Questions remain as to whether the Member States' ability to control who enters and remains within their territory under the economic rights to free movement should be read across into *Article 18 EC*. A number of cases have come before the Court where the issue of the scope of *Article 18 EC* has arisen. In *Skanavi*³¹ the Court ruled that *Article 18 EC* is a residual right and not the basis or starting point for an analysis of the constitutional nature of the right to free movement

²⁷ COM (93) 702 final, 5. The plethora of legal bases may account for the Member States' poor record of transposition of Directives in this field. See *XVIth Report on Monitoring the Application of Community Law* COM (1999) 301 final.

²⁸ Case C-378/97 *Florus Ariel Wijsenbeek*, judgment of 21 September 1999.

²⁹ COM (1999) 301 final.

³⁰ COM (1998) 403 final.

³¹ Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929.

under EC law. Two Advocates General³² have argued for an expansive interpretation of *Article 18 EC*, but the Court until recently has been cautious and refused to address the significance of *Article 18 EC* directly. The Court gave hints of a limited role for *Article 18 EC* in the *Uecker and Jacquet* case.³³ This was a case of reverse discrimination where the Court ruled that Community Law had no application. The Court stated that:

... it must be noted that citizenship of the Union, established by *Article 8* [now *Article 17*] of the EC Treaty, is not intended to extend the scope of *rationae materiae* of the Treaty also to internal situations, which have no link with Community law.³⁴

In a later ruling the Court has provided more positive guidance on the scope of *Article 18 EC*. In *Martínez Sala*³⁵ a Spanish woman lived and worked in Germany for a number of years but gave up paid work on the birth of a child. After 1984 her residence permit was not renewed but she received documentation that an extension of her residence permit had been applied for. In 1993 she applied for a child-rearing allowance but this was denied by the German authorities who argued that she was not eligible for the allowance on the ground that she was not in possession of a residence permit. *Martínez Sala* argued that the German law contravened *Article 6 EC* (now *Article 12*) which sets out the principle of non-discrimination on the grounds of nationality. She argued that the child-raising allowance fell within the scope of Community law where the non-discrimination principle applied. In order to bring herself within the scope of Community law, *Martínez Sala* was obliged to prove that she had a right of residence in Germany and/or she was a person covered by the free movement of persons provisions. The Court ruled that *Martínez Sala* did have a right of residence in Germany although she had been refused a residence permit. It was not necessary, therefore, to examine whether *Article 18 EC* created a new right to reside in the territory of the Member State concerned. But at paragraph 61 the Court states:

As a national of a Member State lawfully residing in the territory of another Member State, the appellant in the main proceedings comes within the scope of *ratione personae* of the provisions of the Treaty on European Citizenship.

³² See Advocate General La Pergola in Joined Cases C-4/95 and C-5/95 *Stober and Pereira v Bundesanstalt für Arbeit* [1997] ECR I-511; Advocate General Ruiz-Jarabo in Case C-65 and 111/95 *R v Secretary of State for the Home Department, ex parte Shingara* [1997] ECR I-3343.

³³ Joined Cases C-64/96 and C-65/96 *Land Nordrhein-Westfalen v Uecker and Jacquet v Land Nordrhein* [1997] ECR I-3171.

³⁴ *Ibid.* at para 23.

³⁵ Case C-85/96. *Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

The Court then went on to rule that as a 'citizen of the European Union' lawfully resident in a host Member State, *Martínez Sala* could rely on *Article 12 EC*³⁶ in all situations which fall within the scope of Community law, including the situation where a Member State delays or refuses to grant a benefit to a national of another Member State who is not in possession of certain documents where such benefits are available to its own nationals without necessitating similar documentation.³⁷

The main limitations on the use of *Article 18 EC* as the generic right to free movement in the Community are the fact that it is an individual right; it gives no rights to family migration where the family members are TCNs. Secondly, the right crystallises around the right to be a national of a Member State which is left in the hands of the Member States to determine. The Court has made some inroads into this sovereign right by ruling that the Member States must *exercise* their nationality laws in conformity with Community law.³⁸

Given that *Article 18 EC* provides a generic right to free movement of persons, it seems an anachronism that the economic rights to free movement have been retained. The Court has begun to apply some of the general principles of market integration found in the other economic freedoms to the area of the free movement of persons, for example principles of mutual recognition³⁹ and the tackling of non-discriminatory barriers to market integration.⁴⁰ The Court has also stated that Member States cannot raise their own internal classifications of a person's status to deny the principle of free movement to a Community national.⁴¹ Yet, there are still fine distinctions in Community law, particularly as to whether a person is providing a temporary service in another Member State or is permanently established there.⁴²

³⁶ See also Case C-274/96 *Horst Otto Bickel, Ulrich Franz* [1998] ECR I-7637 for the Court's expansive use of citizenship right ideas attached to the non-discrimination principle.

³⁷ Cf. Case C-275/96 *Anne Kuusjarvi v Riksforsäkringsverket* [1998] ECR I-3419.

³⁸ Case 21/74 *Airola v Commission* [1975] ECR 221; Case C-369/90 *Micheletti and Others v Delegación del Gobierno en Cantabria* [1992] ECR I-4265.

³⁹ See for example, Case C-129/92 *Kraus* [1993] ECR I-1663. L. Daniele describes this as a 'global approach': 'Non-discriminatory Restrictions to the Free Movement of Persons' 22 *European Law Review* 191 (1997).

⁴⁰ Case C-415/93 *Union Royal Belge des Sociétés de Football Association ASBL v Bosman* [1995] ECR I-4921.

⁴¹ Case C-363/89 *Roux v Belgium State* [1991] ECR I-273.

⁴² See Case C-55/94 *Gebhard* [1995] ECR I-4165 where the Court states that the three sets of provisions relating to workers, services and establishment are mutually exclusive. The provisions of the chapter in the Treaty relating to services are subordinate to those on establishment in so far as *Article 59(1) EC* (now *Article 49 EC*) assumes that the provider and the recipient of the service are 'established' in two different Member States and *Article 60(1) EC* (now *Article 50 EC*) specifies that the provisions relating to services apply only if the provisions relating to establishment do not apply.

3.3 Workers and the self-employed

Article 39 EC grants the right of free movement to workers who have the nationality of one of the Member States and who have crossed an internal frontier in order to take up an offer of employment.⁴³ *Article 39 EC* may also apply to economic activities outside the EU where aspects of the employment relationship are governed by the law of one of the Member States.⁴⁴

Article 39 EC has vertical⁴⁵ and, to some extent, horizontal⁴⁶ direct effect. The issue of horizontal direct effect of *Article 39 EC* has yet to be fully explored. Cases to date have focused upon regulatory bodies which perform functions very similar to state institutions. A different situation arose in the *Bosman* case.⁴⁷ Here a Belgian footballer brought an action against his employer, the football club, as well as the national body which implemented the European regulatory rules governing football. His complaint was that the European regulatory regime governing the transfer of football players between European football clubs was a barrier to free movement, even though it was not discriminatory. The Court agreed, and at paragraph 94 the Court states that the provisions of the Treaty relating to freedom of movement of persons are intended to facilitate all kinds of occupational activities throughout the Community and preclude measures which might put Community citizens at a disadvantage when they wish to pursue economic activities in other Member States.⁴⁸

The *Bosman* case has far-reaching consequences, extending the reach of Community law into national labour law and practices which may act as barriers or deterrents to the right of free movement of persons. One area stems from the lack of tax harmonisation between the Member States. The Community has been slow in harmonising the direct and indirect taxation schemes of the Member States.⁴⁹ This is because there is a diversity

⁴³ The Treaty Articles are supplemented by a raft of secondary measures to facilitate free movement: Council Directive 64/221/EEC; Council Directive 68/360/EEC; Council Regulation 1612/68/EEC; Commission Regulation 1251/70/EEC; Council Directive 90/365/EEC.

⁴⁴ Case C-214/94 *Boukhalifa v Bundesrepublik Deutschland* [1996] ECR I-2253.

⁴⁵ Case 167/73 *Commission v France* [1974] ECR 359; Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337.

⁴⁶ Case 36/74 *Walrave and Koch v AUCI* [1974] ECR 1405; Case 13/76 *Donà v Mantero* [1976] ECR 1333.

⁴⁷ Case C-415/93 [1995] ECR I-4921.

⁴⁸ Cf. the Opinion of Advocate General Alber of 22 June 1999 in Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine v Fédération Royale des Sociétés de Basket-ball and Ligue Belge-Belgische Liga*.

⁴⁹ See Williams, D. *EC Tax Law* (Longman, Harlow, 1998). As a consequence of the lack of harmonisation, workers seek to rely on *Article 39 EC* and Regulation 1612/68. See, for example, Case C-18/95 *F.C. Terhoeve v Inspecteur van de Balastingdienst/Ondernemingen Buitenland* [1999] ECR I-345.

between the taxation structures of the Member States and also because tax and national insurances systems have different structures fulfilling different fiscal goals within the Member States. Yet, these differences may result not only in discrimination against migrant workers but also may be a disincentive for a migrant worker to move.

3.4 Workers

The Court has given a liberal interpretation to the concept of a 'worker' under *Article 39 EC*. Stating that the concept of a 'worker' must be a Community law concept,⁵⁰ the Court has provided a flexible definition stating that the work must be 'effective and genuine'.⁵¹ Job seekers are allowed a period of three months in the host state to look for work when they are unemployed.⁵² A person may also be classified as a worker after having left the paid labour market where, for example, he/she takes up a vocational training course. If a person can still be classified as a 'worker' in such circumstances, he/she can take advantage of the principle of non-discrimination found in *Article 7* of Regulation 1612/68/EEC and *Article 12 EC* and claim the same treatment in terms of fees/grants payable for such vocational training courses. This opens up the free movement principle to possible abuse: a person could move to a Member State and work for a short period and then claim a host of social/tax benefits on the same footing as host state nationals.⁵³ To limit this potential abuse, the Court has ruled that where a person is *involuntarily* unemployed and legitimately resident in the host state, he may still rely upon the non-discrimination principle contained in Community law, but where a worker *voluntarily* gives up work in order to undertake further training in the host state, there

⁵⁰ Case 75/63 *Unger v Bestuur* [1964] ECR 1977.

⁵¹ Case C-337/97 *C.P.M. Meusen*, judgment of 8 June 1999; Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035. Cf. Case 344/87 *Bettray v Staatssecretaris van Justitie* [1989] ECR 1621 where work – paid at market rates – on a Dutch rehabilitation scheme was not regarded as effective and genuine since the participants were not selected on their basis to perform certain activities. Arguably, this case is restricted to its own facts since in Case C-197 *Mehmet Birden v Stadtgemeinde Bremen* [1998] ECR I-7747 the Court has ruled that '... [the *Bettray*] conclusion does not follow the general trend of the case-law ... [and] can be explained only by the particular characteristics of that case...', para 31. *Article 39 EC* may also be relied upon by an employer: Case C-350/96 *Clean Car Autoservice GmbH v Landeshauptmann von Wien* [1998] ECR I-2521.

⁵² Case C-292/89 *Antonissen v Secretary of State for Home Affairs* [1991] ECR I-745; Case C-344/95 *Commission v Belgium* [1997] ECR I-1035.

⁵³ Cf. Case C-85/96 *Martinez Salu* [1998] ECR I-2691 where the Court ruled: 'Once the employment relationship has ended, the person concerned as a rule loses his status of worker, although that status may produce certain effects after the relationship has ended' (para 32).

must be some link between the further studies and the previous employment.⁵⁴

Article 39(4) EC exempts the public service from the free movement of workers provisions on the ground that such work is often sensitive and can therefore be reserved to nationals of the host state. Despite the Court's ruling that because this is a derogation from a fundamental principle of Community law and must, therefore, be interpreted restrictively,⁵⁵ there is evidence that discrimination occurs in a number of public-service posts and also in the public sector of many of the Member States. Even with the tide of privatisation across the EU, the public sector comprises around 25% of employment in the EU.⁵⁶ To counteract this discrimination, the Commission adopted an Action Plan to eliminate restrictions on the grounds of nationality to public-service/sector posts and has begun a series of infringement actions against Member States which have persisted with direct and indirect discriminatory provisions.⁵⁷ In *Commission v Greece*⁵⁸ the Court found Greece guilty of a Treaty infringement by failing to take into account time served in the civil service of another Member State. Infringement proceedings are pending against Luxembourg and Spain concerning nationality criteria applied to posts in the civil service.⁵⁹ A number of preliminary rulings have also been made; for example, in *Kalliope Schoning-Kougebetopoulou v Freie und Hansestadt Hamburg*⁶⁰ a clause in a German collective agreement was held to be null and void by virtue of Article 7(4) of Regulation 1612/68. The clause did not take into account previous periods of comparable employment in the public service of another Member State in calculating promotion opportunity. The Court ruled that the clause was contrary to Article 39 EC (ex Article 48 EC) and Article 7(1) of Regulation 1612/68/EEC.

In addition to allowing a migrant worker the right to bring his/her family

to the host state the Community, anxious to avoid the concept of 'guest workers', has made provision for the integration of the migrant and his/her family into the social, cultural and educational fabric of the host state.⁶¹ These ideas are set out in Regulation 1612/68/EEC.⁶² Article 10 provides for extensive rights of family migration together with educational and employment opportunities (contained in Articles 11 and 12) for the spouse and dependent children of the migrant worker.⁶³ Article 7(2) of Regulation 1612/68/EEC grants the migrant worker the same tax and social advantages as national workers. The term 'social advantages' has been given a wide interpretation by the Court⁶⁴ to include educational grants and access to vocational training courses for the children⁶⁵ and spouses,⁶⁶ death grants⁶⁷ and child-rearing allowances.⁶⁸ The Court declined to rule on whether a permanent right to remain in the host state for a TCN spouse is a social advantage.⁶⁹

Article 8 of Regulation 1612/68/EEC grants equality of treatment to migrant workers in relation to membership of trade unions and the exercise of trade union rights.⁷⁰ Article 9 entitles the migrant worker to enjoy all the rights and benefits accorded to national workers, including house ownership. In *Commission v Greece*⁷¹ a restriction on foreigners' rights to

⁵⁴ Case 39/86 *Lair v University of Hanover* [1988] ECR 3161. Cf. Case 197/86 *Brown v Secretary of State for Scotland* [1988] ECR 3205.

⁵⁵ Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153; Case 225/85 *Commission v Italy* [1987] ECR 2625.

⁵⁶ See Freedland, M. and Sciarra, S. (eds) *Public Services and Citizenship in European Law* (Clarendon Press, Oxford, 1998).

⁵⁷ Even after the Commission's Action Programme, designed to clarify the concept of public service in EC law (OJ C 1988 72/2), a series of Article 226 EC (ex Article 169 EC) infringement proceedings has followed: Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207; Case C-173/94 *Commission v Belgium* [1996] ECR I-3265; Case C-290/94 *Commission v Greece* [1996] ECR I-3285. Luxembourg has not complied with the Court's ruling and the Commission has commenced a further Article 228 EC (ex Article 171 EC) action.

⁵⁸ Case 187/96 *Commission v Greece* [1998] ECR I-1095.

⁵⁹ A reasoned opinion has been sent to Spain.

⁶⁰ Case C-15/96 [1998] ECR I-47; Case C-187/96 *Commission v Greece* [1996] ECR I-3207.

⁶¹ Cf. the position of TCNs in Joined Cases 281/85, 283-85 and 287/85 *Germany and Others v Commission* [1988] ECR I-3203. See Peers, S., 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union' (1996) 33 *Common Market Law Review* 7.

⁶² JO 1968 L257/2, but a number of problems continue; see, for example, Case C-85/98 *Commission v Greece*, pending. The Commission has initiated infringement proceedings against Greece for demanding a higher fee for the issue of residence permits to members of a migrant's family who are TCNs than the fee charged to EU nationals.

⁶³ Cf. Case 316/85 *Centre Public d'aide sociale de Courcelles v Lebon* [1987] ECR 281 with Case C-85/96 *Martínez Sala* [1998] ECR I-2691.

⁶⁴ Case 207/78 *Ministère Public v Even* [1979] ECR 2019. Peers, S., "'Social Advantages' and Discrimination in Employment: Case Law Confirmed and Clarified" (1997) 22 *European Law Review* 157; Allen, QC, R., 'Equal Treatment, Social Advantages and Obstacles: In Search of Coherence in Freedom and Dignity' in Guild, E. (ed.) *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union* (Kluwer, The Hague, 1999).

⁶⁵ Case C-308/89 *Di Leo v Land of Berlin* [1990] ECR I-5185.

⁶⁶ Case 152/82 *Forcheri v Belgian State* [1983] ECR 2323.

⁶⁷ Case C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-33.

⁶⁸ Case C-85/96 *Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

⁶⁹ Case C-356/98 *Arben Kaba v Secretary of State For The Home Department*, Opinion of Advocate General La Pergola of 30 September 1999; judgment of 11 April 2000.

⁷⁰ Case C-213/90 *Association de Soutien aux Travailleurs Immigrés v Chambres des Employés Privés* [1991] ECR I-3507; Case C-118/92 *Commission v Luxembourg* [1994] ECR I-1891. See Evans, A., 'Development of European Community Law Regarding the Trade Union Rights and Related Rights of Migrant Workers' (1979) 26 *International and Comparative Law Quarterly* 354.

⁷¹ Case C-213/90 [1991] ECR I-74.

own property in Greece was found to be incompatible with the free movement provisions.

By far the greatest litigation has concerned education rights in relation to migrant workers and their families. Article 7(2) grants equality of treatment in the provision of tax and social advantages to migrant workers. Article 7(3) allows a migrant worker to have equality of access to training in vocational schools and retraining centres. Cases have emerged where a person has worked for a short period of time as a worker in another Member State and then attempted to apply for access to a vocational training/education course claiming the same benefits as host state nationals in the form of reduced fees for maintenance grants. Students now have a right of residence in the host state under Council Directive 93/96/EEC,⁷² but they must be financially independent. The Court has accepted that as long as the work is effective and genuine, a person employed for as little as ten weeks⁷³ or on an intermittent 'on call' contract⁷⁴ may take advantage of Article 7(3) of Regulation 1612/68/EEC. The Court has qualified this right in that where a person voluntarily gives up work to undertake a vocational training course a maintenance grant would only be available where there is a link between the future studies and the previous work.⁷⁵ This qualification prevents abuse of the free movement principle – a person could easily move to a Member State, work for a short period and then claim advantageous education rights in a Member State. It also prevents migrant workers from 'upskilling' and acquiring new skills in order to adapt to economic and labour market change.

3.5 'Posting' of workers

Because of the disparities in labour costs across the Internal Market, there are incentives to 'forum shop' and draw up labour contracts in Member States with the least onerous labour laws. The liberalisation of the free movement of services and procurement has also created incentives to tender for work in other Member States using personnel posted to another Member State in order to fulfil such contracts. In two cases,⁷⁶ the Court

⁷² OJ L 1993 317/59.

⁷³ Case C-3/90 *Bernini v Minister for Education and Science* [1990] ECR I-1071.

⁷⁴ Case C-315/94 *Raulin* [1996] ECR I-1417.

⁷⁵ Case 39/86 *Lair* [1988] ECR 3161, para 37.

⁷⁶ Case C-113/89 *Rush Portuguesa v Office National d'Immigration* [1990] ECR I-1417; Case C-43/93 *Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803. Any measures which the host state takes to regulate a posted workforce must be proportionate and necessary. The Court will look to see if the sending Member State (the state where the service provider is established) has similar regulations and requirements: Case 279/80 *Criminal Proceedings Against Webb* [1981] ECR 3305; Case C-272/95 *Guiot and*

has ruled that under the free movement of services principles contained in Article 49 EC a service provider may use its own workforce even where the workforce is composed of TCNs. In *Rush Portuguesa* a Portuguese company won a tender to build a railway in France. At this time there was freedom to provide services for Portuguese nationals but a long transitional period was in force for the free movement of labour. French law gave the defendants a monopoly over the engagement of foreign workers. The Court ruled that the right to provide services in another Member State involved the right of an undertaking to take its own workforce.⁷⁷ The Court sought to avoid social dumping by stating that the host state could still insist on the application of its labour laws to the posted workforce. Otherwise, since there are differences in the labour and social laws of the Member States, there is an incentive for business enterprises to establish themselves in Member States with low labour costs.⁷⁸ The Court has facilitated the free movement of services by not creating 'double costs' for an employer. An employer is not obliged to pay social security contributions for employees in the host state if they are already paid in the state of establishment.⁷⁹

There is now a Directive on the Posting of Workers, based upon Article 47(2) EC (ex Article 57(2) EC) and Article 55 EC (ex Article 66 EC).⁸⁰ Further Directives are proposed on the posting of TCN workers.⁸¹ The Directive is a derogation from the Rome Convention 1980⁸² which allows for party autonomy as the main rule in all contractual matters.⁸³ However, in individual employment contracts, an employee is protected by the mandatory rules of the law which would govern the individual employment contract in the absence of a choice of law by the parties.⁸⁴ This is the law of the country in which the employee habitually carries out his work or the law of the country in which the place of business through which he

Climatec [1996] ECR I-1905. See Onslow-Cole, J., 'The Right of Establishment and Provision of Services: Community Employers and Third Country Nationals' in Guild, E. (ed.) *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union* (Kluwer, The Hague, 1999).

⁷⁷ Case C-113/89 [1990] ECR I-1417; Case C-43/93 *Vander Elst v OMI* [1994] ECR I-3803 where the workforce included Moroccan nationals.

⁷⁸ Joined Cases C-369/96 and C-376/96 *Jean Claude Arblade, Arblade & Fils SARL and Bernard Leloup, Serge Leloup, Sofrage SARL*, judgment of 23 November 1999.

⁷⁹ Case C-272/94 *SA Criminal Proceedings Against Guiot and Climatec SA* [1996] ECR I-1905.

⁸⁰ Council Directive 96/71/EC, OJ 1997 L 18/1. See Davies, P., 'Posted Workers: Single Market or Protection of National Law Labour Systems?' (1997) 34 *Common Market Law Review* 571.

⁸¹ COM(1999) 3-final.

⁸² Convention on the Law Applicable to Contractual Obligations, OJ 1980 L 266/1.

⁸³ Article 3.

⁸⁴ Article 6.

was engaged is situated.⁸⁵ Council Directive 96/71/EC makes a 'hard core' of protective rules in the host country mandatory for the provider of the services. This 'hard core' of employment protection rules comprises maximum work periods and minimum rest periods; minimum paid annual holidays; minimum rates of pay (including overtime rates);⁸⁶ the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; health, safety and hygiene at work; protective measures with regard to terms and conditions of employment of pregnant women or women who have recently given birth, and of children and of young people; equality of treatment between men and women; and other provisions of non-discrimination.

The Directive applies to undertakings established in a Member State which, in the framework of the transnational provision of services under *Article 47 EC* (ex *Article 57 EC*), posts workers to the territory of another Member State to the extent that one of the following transnational elements is triggered:

workers are posted to the territory of another Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting

or

workers are posted to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting

or

being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

In the case of initial assembly and/or first installation of goods, where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking, the Directive does not apply if the period of posting does not exceed eight days, except in relation to temporary employment undertakings.

⁸⁵ Article 6(2).

⁸⁶ But not supplementary occupational retirement pension schemes.

The Directive must also be considered in the light of ILO Convention, Labour Clauses (Public Contracts Convention), No. 94 of 1949.⁸⁷ This Convention requires public contracts to include clauses which ensure certain clauses are observed relating to wages and allowances, hours of work and other conditions of labour which are not less favourable than those established for work in the local area where the public contract is to be carried out (Article 2). The Convention does not establish a set of minimum standards but aims to ensure that workers are not exploited or displaced in public-contract tendering procedures.

3.6 Free movement of services

Articles 49–55 EC (ex *Articles 59–66 EC*) provide for the freedom to supply services in another Member State. The Court has extended this to the right to freedom to receive services.⁸⁸ 'Services' are defined in the Treaty as 'those normally provided for remuneration' in so far as they do not fall under the other provisions of the Treaty relating to goods, persons, services and capital. They include specifically activities of an industrial character, of a commercial character, of craftsmen and the professions. The Court has brought services relating to tourism, medical care and education within the scope of the free movement provisions.

Service providers – and receivers – have rights of entry into the host state and a right of residence coincidental with the period in which the service is provided. The principle of non-discrimination applies to the service provider and receiver. In order to enhance the free movement of services, the Court has applied the principles of 'home-state control' and 'mutual recognition' developed from *Cassis de Dijon*⁸⁹ in the area of free movement of goods to services. If a person has to qualify twice, once in the home state and again in the host state (which may be more than one Member State) in order to supply a service, this may take time and increase costs and make the service uncompetitive. There are several sectoral Directives applying to different professions, and the Community has also

⁸⁷ Eight Member States have ratified this Convention: Belgium, Denmark, Finland, France, Italy, The Netherlands, Spain, Austria. The UK ratified it in 1950 but denounced it under the Thatcher government in 1982. See Nielsen, H., 'Public Procurement and International Labour Standards' (1995) 4 *Public Procurement Law Review* 94; Krüger, K. *et al.*, *European Public Contracts in a Labour Law Perspective* (DJØF Publishing, Copenhagen, 1998).

⁸⁸ Case 186/87 *Cowan v Trésor Public* [1989] ECR 195; Cases 286/82, 26/83 *Luisi and Carbonne v Ministero del Tesoro* [1984] ECR 377. See also Case C-120/95 *Decker v Caisse de Maladie des employés privés* [1998] ECR I-1831 and Case C-158/96 *Kohl v Union des caisses de maladie* [1998] ECR I-1931.

⁸⁹ Case 120/78 *Rewe-Zentrale v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

enacted general 'mutual recognition' Directives in the field of Community⁹⁰ higher education qualifications.⁹¹

In *UNETEF v Heylens*⁹² the Court ruled that, in the absence of Community harmonisation, the Member States are entitled to stipulate the knowledge and training required for a particular post or profession. However, where employment was dependent upon possession of a diploma, Community law required the Member States to make judicial review available against a decision of the Member State's authorities in order to challenge the refusal to recognise the equivalence of the diploma. The Court has also ruled that the direct effect of *Article 43 EC* (ex *Article 52 EC*) may be used to facilitate the free movement of persons. The Member States owe a duty under *Article 10 EC* (ex *Article 5 EC*) to co-operate in the recognition of such educational qualifications by supplying the necessary information.⁹³ There are difficulties where a national of one of the Member States has obtained qualifications or experience outside of the EU. While such qualifications may be recognised by one Member State, that process of recognition cannot be imposed upon other Member States.⁹⁴

Similarly there are barriers and increased costs where a person is subject to two sets of regulations. The Court has ruled that where a person is regulated in the home state, the host state may not impose its own regulations upon the service provider unless these are justified and proportionate and not covered by the home-state regulation. In areas such as the insurance sector, the EU has moved faster and adopted the concept of a 'single licence' which allows the holder to practise anywhere in the EU. A number of cases are pending before the Court concerning the incorrect transposition of mutual recognition Directives as well as discriminatory rules relating to freedom to provide tourist services.⁹⁵

⁹⁰ C-154/93 *Tawil-Albertini v Ministre des Affaires Sociales* [1994] ECR I-451; Case C-319/92 *Haim v Kassenzahnärztliche Vereinigung Nordrhein* [1994] ECR I-425; (note Case C-424/97 *Haim II* pending where Haim is seeking damages from the German state in respect of restrictions placed on his career by the refusal to authorise him to practise in the German social security system, Opinion of Advocate General Mischo 19 May 1999); Case C-238/98 *Hugo Fernando Hocsmán v Ministre de l'emploi et de la solidarité*, Opinion of Advocate General Jacobs, 16 September 1999.

⁹¹ Council Directive 89/48/EEC OJ 1989 L 19/16; Council Directive 92/5/EEC OJ L 1992 L209/25; Directive 1999/42/EC of the European Parliament and of the Council of 7 June 1999 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications OJ 1999 L201/77.

⁹² Case 222/86 [1987] ECR 4097.

⁹³ C-340/89 *Vlassopoulou v Ministerium für Justiz, Bundes und Europaangelegenheiten Baden-Württemberg* [1991] ECR 295; Case C-104/91 *Colegio Oficial de Agentes de la Propiedad Inmobiliaria v Aguirre Borrell and Others* [1992] ECR I-3003.

⁹⁴ See the cases cited in n. 90 *supra*.

⁹⁵ See, for example, Case C-375/92 *Commission v Spain* [1994] ECR I-923.

3.7 Freedom of establishment

Article 43 EC (ex *Article 52(1) EC*) prohibits restrictions on the freedom of establishment. The principle of non-discrimination applies and Directive 73/148/EEC provides for rights of entry and residence in the host state. The Court has not gone as far as applying home-state control to freedom of establishment. Freedom of establishment connotes a permanent association with a Member State. It would thus be easy to move around in the Member States and evade regulation.⁹⁶

3.8 Reverse discrimination

The Court has refused to extend the substantive rights relating to free movement, particularly the principle of non-discrimination, to situations which are considered to be purely internal to a Member State, that is, where there is no Community element. This issue represents the interface between Community competence to create an Internal Market and the role of EC labour law in the Internal Market. Cases have arisen under the free movement of workers⁹⁷ and the freedom of establishment and services provisions.⁹⁸ Where there is a Community element, then the free movement rules may apply, especially where the actions of the home state (including the action of public bodies or other binding rules, such as collective agreements⁹⁹) may be a deterrent to exercising the right to free movement. In *Knoors v Secretary of State for Home Affairs*¹⁰⁰ a Dutch plumber had worked in Belgium for a number of years and then wished to return to The Netherlands to practise his trade. The Dutch authorities argued that Knoors did not have the necessary qualifications to practise as a plumber in The Netherlands. There was, however, a Community Directive (64/427/EEC) which allowed for the mutual recognition of qualifications and experience, which Knoors satisfied. The Court ruled that, given the lengthy qualifying periods (the minimum amount of time was six years), there was little possibility of the abuse of the Directive (the Dutch were afraid workers would go

⁹⁶ See Case 81/87 *HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483. Cf. Case C-212/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen*, judgment of 9 March 1999.

⁹⁷ Case 180/83 *Moser* [1994] ECR 2539; Joined Cases 35/82 and 36/82 *Morson and Jbanjan v Netherlands* [1982] ECR 3723; Joined Cases C-64/96 and C-65/96 *Land Nordrhein-Westfalen v Uecker and Jacquet* [1997] ECR I-171.

⁹⁸ Case C-61/89 *Criminal Proceedings Against Bouchacha* [1990] ECR I-355; Case C-238/98 *Hocsmán*, pending, Opinion of 16 September 1999.

⁹⁹ Case C-234/97 *Bobadilla v Museo Nacional del Prado, Comité de Nacional del Prado, Comité de Empresa del Museo Nacional del Prado, Ministerio Fiscal*, judgment of 8 July 1999.

¹⁰⁰ Case 115/78 [1979] ECR 399.

abroad to evade the requirements of Dutch law) but Dutch nationals might be deterred from pursuing their trade in another Member State if they could not return home and continue to use their skills in the home state. Where a Member State has knowledge that the migrant worker has not been in another Member State acquiring the alleged skills and experience, it can refuse mutual recognition of the alleged experience or skills.¹⁰¹

In *Surinder Singh*¹⁰² an Indian national married to a British national had accompanied his spouse to Germany where the couple had worked. On return to the United Kingdom, the marriage broke down and the British immigration authorities issued a deportation notice against the Indian spouse. The marriage had not been formally dissolved. The Indian spouse invoked the protection of Community law. The Court had ruled in *Diatla*¹⁰³ that it may be necessary for spouses to live apart in order for a spouse to work in the host state. The Court accepted that the free movement provisions had been triggered and that a potential migrant might be deterred from moving to another Member State if his or her conditions of entry and residence – and those of the family – to the home state were not equivalent to those he/she would enjoy in the host state. The Court recognised that the Community rules could be abused and ruled that where such abuse was evident a person could not claim the protection of Community law. This is a major limitation upon the right to free movement since a migrant worker may bring his or her third-country-national family members into the EU by triggering the free movement provisions. The Council has adopted a Resolution on the combating of marriages of convenience.¹⁰⁴ There is concern that the free movement provisions, as they impinge upon TCNs, may infringe basic human rights and they may have a gendered effect upon family life.¹⁰⁵ This is shown in *Kadiman*¹⁰⁶ where a spouse of a Turkish worker lost the right to stay in Germany because she was not living with her husband who had been violent and deceptive towards her.

¹⁰¹ Case 130/88 *Van de Bijl v Staatssecretaris van Economische Zaken* [1989] ECR 3039.

¹⁰² Case C-370/90 [1992] ECR I-4265.

¹⁰³ Case 267/83 *Diatla v Land of Berlin* [1986] ECR 567.

¹⁰⁴ OJ 1997 C 382/1. The Commission's earlier attempt to protect widows and deserted spouses by an amendment to Article 11 of Regulation 1612/68/EEC to allow rights to continue after the death of the migrant worker or on dissolution of marriage has not been taken up. Regulation 1251/70/EEC (OJ Sp. Ed 1970 L 142/24) gives the migrant and his/her family a right to remain only on retirement or permanent incapacity to work.

¹⁰⁵ See Blake, QC, N., 'Family Life in Community Law: The Limits of Freedom and Dignity' and Hantrais, L., 'What is a Family or Family Life in the European Union?' in Guild, E. (ed.) *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union* (Kluwer, The Hague, 1999).

¹⁰⁶ Case C-351/95 [1997] ECR I-2133.

3.9 Limitations on the free movement of labour

All three provisions relating to the free movement of persons contain provisos or limitations on the right to free movement. In relation to workers, *Article 39(3) EC* (ex *Article 48(3) EC*) provides that a Member State may limit the right to free movement for workers on the grounds of public health, public security and public policy.

Limitations on the right to residence are also found in the three residence Directives.¹⁰⁷ There is no proviso/limitation written into *Article 18 EC* (ex *Article 8a EC*) and it is questionable as to whether the limitations found in the economic rights to free movement should be read into *Article 18 EC* (ex *Article 8a EC*).

Council Directive 64/221/EEC¹⁰⁸ gives definitions on how the proviso should be applied by the Member States. Article 4(1) of Council Directive 64/221/EEC provides that the public health proviso may be invoked only to refuse entry to the Member State or to refuse the issue of a first residence permit and only if the applicant has one of the diseases listed in Annex A to the Directive.¹⁰⁹ This list has not been revised since 1964 and there are problems in handling new illnesses, such as Aids.¹¹⁰ In List B of the Annex the health risks of drug addiction, profound mental disturbance, manifest conditions of psychotic disturbance with agitation, delirium, hallucinations or confusion may be used to raise the public policy/public security proviso. Member States must respect fundamental human rights when applying Treaty derogations, and the derogations must be interpreted in accordance with the EC law principle of proportionality.¹¹¹ The provisos relating to public policy and public security have tended to be conflated in their application, with the emergence of a generic concept of 'public policy'.¹¹² In *Van Duyn v Home Office*¹¹³ the Court ruled that provisions of the Directive could create direct effect. In this case the issue was one of vertical direct effect against a Member State. In *Bosman*¹¹⁴ the issue of whether *Article*

¹⁰⁷ Council Directives 90/364/EEC, 90/365/EEC, 93/96/EC, *supra* nn. 12, 13, 14.

¹⁰⁸ OJ 1964 L 56/850.

¹⁰⁹ These are TB, syphilis, diseases subject to quarantine as listed in the International Health Regulation No. 2 of the WHO of 25 May 1951 and other infectious, contagious parasitic diseases if they are subject to provisions to protect nationals of the host state. Note that Aids/HIV positive infection is not included in this list.

¹¹⁰ Pais Macedo van Overbeek, J., 'Aids/HIV Infection and the Free Movement of Workers within the European Economic Community' (1990) 27 *Common Market Law Review* 791.

¹¹¹ Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219; S. Hall, 'The ECHR and the Public Policy Exceptions to the Free Movement of Workers Under the EEC Treaty' (1991) 16 *European Law Review* 466.

¹¹² See Peeters, S., 'National Security and European Law' (1996) 16 *Yearbook of European Law* 363.

¹¹³ Case 41/74 [1974] ECR 1337.

¹¹⁴ Case C-415/93 [1995] ECR I-4705.

39(3) EC (ex Article 48(3) EC) could deny horizontal direct effect was discussed by the Court but was not found to be an obstacle.

In *Van Duyn* the Court ruled that the concept of public policy found in Article 39 (3) EC (ex 48(3) EC) and Directive 64/221/EEC was a concept of Community law. Furthermore, because it was a derogation from a fundamental right, it should be interpreted restrictively. The Court went further in *Rutili*¹¹⁵ by ruling that a Member State cannot restrict the right to free movement unless the presence of the individual in the territory of the host state constitutes a 'genuine and sufficiently serious threat to public policy'. Any restrictions on the right to free movement must be interpreted in accordance with the principle of proportionality and the Court also invoked Articles 8–11, ECHR 1950 as guidance for applying the Community law proviso. In *Bouchereau*¹¹⁶ the Court tightened up the room for manoeuvre by the Member States even more by ruling that the concept of public policy must always presuppose a genuine and serious threat affecting one of the fundamental interests of society.

Article 3(1) of Council Directive 64/22/EEC provides that any measures taken on the grounds of public policy or public security must be based exclusively on the personal conduct of the individual concerned, and Article 3(2) provides that previous criminal convictions do not in themselves constitute grounds for invoking the proviso. In *Van Duyn*¹¹⁷ the Court was asked whether membership of an organisation can be regarded as 'personal conduct' within the meaning of Article 3(1). The Court ruled that past association with an organisation cannot be considered as 'personal conduct', whereas present association, as a voluntary act, represented an identification with the aims of the association and could be regarded as 'personal conduct'.

In *Adoui and Cornuaille v Belgian State*¹¹⁸ the Court ruled that a Member State could not deny residence to non-nationals for committing acts (in this instance, prostitution) which were not the subject of repressive (or other genuine/effective measures) for host-state nationals. The Court also ruled that a Member State may not take general or repressive measures to discourage anti-social behaviour of migrants.¹¹⁹ Each case must be considered individually to assess the threat to public policy.

More recently, an Italian tourist was able to rely upon the free movement provisions to challenge a Greek law which provided for expulsion from its

¹¹⁵ Case 36/75 [1975] ECR 1219.

¹¹⁶ Case 30/77 *R v Bouchereau* [1977] ECR 1999.

¹¹⁷ Case 41/74 [1974] ECR 1337.

¹¹⁸ Joined Cases 115 and 116/81 [1982] ECR 1665.

¹¹⁹ See also Case 6/74 *Bonsignore v Oberstadtdirektor of the City of Cologne* [1975] ECR 297.

territory for life of any person found guilty of drug offences.¹²⁰ The Court found that the law did not take any account of the personal conduct of the offender or the danger which the offender posed to Greek society for the requirements of the public policy proviso.

3.10 Remedies

Community law provides a set of remedies derived from the general principles of Community law and Articles 5–9 of Council Directive 64/221/EEC. In *Rutili*¹²¹ the Court ruled that an authority of a Member State making an immigration decision must give a migrant a precise and comprehensive statement of the grounds of the decision to allow the migrant to take effective steps to prepare his/her defence. A migrant cannot be deported until appeal processes have been exhausted, except where there is an emergency situation where the migrant's presence would pose a threat to public security. The Directive also secures the review of immigration decisions either by a court of law or a 'competent authority'.

The main procedural controls are set out in Articles 8 and 9 of the Directive. Article 8 provides that the migrant shall have the same rights of judicial review concerning any measure taken under Article 39(3) EC (ex Article 48(3) EC) as are available to nationals of that state in respect of acts of the administration. Since Member States cannot expel their own nationals, the comparison should be made with general rights of judicial review.¹²²

The role of the competent authority is discussed in *Gallagher*.¹²³ Here an exclusion order was made against an Irish national who worked in England. Gallagher chose to leave England voluntarily but asked for an interview with a person nominated by the Home Secretary. An interview took place in the British Embassy in Dublin but the interviewer did not reveal his identity or give any information on the grounds of exclusion. After reconsidering Gallagher's case, the Home Secretary did not alter his initial decision. Gallagher argued that the procedure adopted was contrary to Article 9. The Court ruled that the competent authority can be appointed by the same administrative authority as takes the decision ordering expulsion, provided that the competent authority can perform its

¹²⁰ Case C-348/96 *Donatella Calfa* [1999] ECR I-11.

¹²¹ Case 30/77 [1977] ECR 1999.

¹²² Joined Cases C-65/95 and C-111/95 *R v Secretary of State for the Home Department, ex parte Shingara and Radom* [1997] ECR I-3343. See also Case C-357/98 *R v Nana Koadu Yiadom, ex parte Secretary of State for the Home Department*, pending, Opinion of 30 March 2000.

¹²³ Case C-175/94 *R v Secretary of State for the Home Department, ex parte Gallagher* [1995] ECR I-4253.

duties in absolute independence and is not subject to any control by the authority empowered to take the measures provided for in the Directive.

Article 7 of the Directive states that a person must be notified officially of any decision to refuse the issue or renewal of a residence permit or expulsion from the territory of a Member State. A period of time must elapse between the notification and expulsion, except in cases of urgency; the period shall not be less than 15 days for persons who do not have a residence permit and not less than one month in other cases. By virtue of Article 6, the migrant must be informed of the grounds upon which the decision was made unless this is contrary to the interests of state security. The notification must be made in such a way as to enable the person concerned to comprehend the content and effect of the decision.¹²⁴

3.11 Third-country nationals

In the early years of the Common Market, many of the Member States relied upon immigrant labour from outside the EU either to shore up expanding economies with labour shortages¹²⁵ or to fill jobs which indigenous workers no longer were prepared to undertake.¹²⁶ Germany was at the forefront of establishing a 'guest worker' system whereby non-EC workers, particularly Turks and Yugoslavs, were allowed entry to work in a Member State but were not allowed the right to bring their families with them, to stay within the host state after they had ceased their economic activity or to move freely to other Member States to look for work. Other Member States, particularly France and Italy, even turned a blind eye to illegal migration. TCNs thus had neither the right of free circulation within the Common Market nor derived any social, political, economic or citizenship rights from Community law. In fact, at the Community level, a special regime was deliberately created whereby nationals of the Member States should receive priority over TCNs in the labour market of other Member States.¹²⁷ TCNs were left to be regulated by each Member State. The Community began to show an interest in the regulation of TCNs when the recession began to bite in the 1970s.¹²⁸ There was some early discussion as

¹²⁴ Joined Cases 115 and 116/81 *Adoui v Belgian State and City of Liège and Cornuaille v Belgian State* [1982] ECR 1665.

¹²⁵ Claude-Valentin, M., 'Entre économie et politique: le "clandestin", une figure sociale à géométrie variable' (1988) 47 *Pouvoirs* 75; Collinson, S. *Europe and International Migration* (Pinter, London, 1993).

¹²⁶ Castles, S. and Kosack, G. *Immigrant Workers and Class Structure in Western Europe* (OUP/Institute for Race Relations, Oxford, 1973).

¹²⁷ Article 43 of Regulation 15/61 JO 1961 1073. See the discussion by Advocate General Mancini in Joined Cases 281, 283-5 and 287/85 *Germany and Others v Commission* [1988] ECR I-3203.

¹²⁸ See the first social action programme, OJ 1976 C-277/2.

to whether Article 6 EC (now *Article 12 EC*) which forbids discrimination on the ground of nationality could be applied to TCNs since, on a literal reading of the Article, it is not confined to EC nationality,¹²⁹ but the Court has confined its application to EC nationals since the more specific provisions of the Treaty, such as *Article 39(2) EC* (ex *Article 48(2) EC*), and the secondary legislation refer only to nationals of the Member States.

Gradually a number of discrete groups of non-EC nationals have acquired rights to enter and work in the EU through agreements made between the EU and third states.¹³⁰ EEA citizens, for example, have rights to enter and work in the EU almost on the same terms as EU nationals but they do not enjoy the rights to citizenship of the Union since *Article 18 EC* reserves this right to nationals of the Member States. The Community has developed a number of agreements under *Article 300 EC* (ex *Article 228 EC*), the most extensive being the Association Agreement with Turkey and the Co-operation Agreements with Algeria and Morocco.¹³¹ The Court has ruled that some of the provisions of these international agreements are capable of direct effect.¹³²

Two recent rulings have far-reaching consequences. First, in *Tetik v Land of Berlin*¹³³ the Court interpreted Article 6 of Decision 1/80 of the EEC/Turkey Association Agreement in parallel with the provisions of *Article 39 EC* (ex *Article 48 EC*) allowing a Turkish worker to remain in a Member State for a reasonable period to look for work after being legally employed in the Member State for at least four years. The second ruling is that of *Sürül*.¹³⁴ This was a preliminary ruling concerning the principle of non-discrimination on the grounds of nationality set out in Article 3(1) of Decision 3/80. In a number of cases concerning the Algerian and Moroccan Co-operation Agreements, the Court had ruled that the principle of

¹²⁹ Böhning, W. *The Migration of Workers in Britain and the EC* (OUP/Institute for Race Relations, Oxford, 1972). See the discussion in Szyszczak, E., 'Race Discrimination: The Limits of Market Equality?' in Hepple, B. and Szyszczak, E. (eds) *Discrimination: The Limits of Law* (Mansell, London, 1992).

¹³⁰ Peers, S., 'Towards Equality: Actual or Potential Rights of Third-Country Nationals' (1997) 33 *Common Market Law Review* 7; Cremona, M., 'Citizens of Third Countries: Movement and Employment of Migrant Workers Within the European Union' (1995/2) *Legal Issues of European Integration* 87; Hedemann-Robinson, M., 'Third-Country Nationals, European Union Citizenship and Free Movement of Persons: A Time For Bridges Rather Than Divisions' (1996) 16 *Yearbook of European Law* 321.

¹³¹ See Eicke, T., 'The Third-Country Agreements: The Right to Work and Reside in the First Generation Agreements' in Guild, E. (ed.) *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union* (Kluwer, The Hague, 1999).

¹³² Case C-192/89 *Sevince v Staatssecretaris van Justitie* [1990] ECR I-3461; Case C-58/93 *Yousfi v Belgian State* [1994] ECR I-1353.

¹³³ Case C-171/95 *Tetik v Land of Berlin* [1997] ECR I-329.

¹³⁴ Case C-262/96 *Sema Sürül v Bundesanstalt für Arbeit*, judgment of 4 May 1999. See Peers, S., 'Social Security For Turkish Nationals' (1999) 24 *European Law Review* 627.

equality applied notwithstanding the fact that a particular provision had not been implemented by the Co-operation Council. The Court agreed with the Commission that the:

'... rule of equal treatment lays down a precise obligation of result and, by its nature, can be relied on by an individual before a national court as a basis for requesting it to disapply the discriminatory provisions of a member State under which the grant of a right is subject to a condition not imposed upon nationals.'¹³⁵

The Court applied the same principle in *Sürül*, although it imposed a temporal application upon its ruling.

TCNs may also achieve immigration rights to enter and work in another Member State when they are legally resident in one of the Member States and their employer takes them as part of a labour force to fulfil a service contract under the free movement of services provisions of *Article 49 EC*. This happened in *Vander Elst*.¹³⁶

3.11.1 The emergence of a legal regime to regulate third-country nationals

Conservative estimates suggest the number of TCNs legally resident in the EU is more than ten million.¹³⁷ Recent years have seen a greater interest in creating EC/EU competence to create a secure external frontier to control the flow of the TCNs into the EU and also to recognise some Community-law rights to allow TCNs free movement within the EU.¹³⁸ Although the SEA 1987 kept TCN immigration issues outside of the scope of Community competence, it signifies a turning point of the Member States working more closely at an intergovernmental level to co-ordinate immigration and refugee policy.¹³⁹

A smaller group of Member States entered into the Schengen Agreement in 1985 and this created a 'fast-track' internal market for free movement of persons, divorced from the exercise of economic activities. At Maastricht the intergovernmental pillar of Justice and Home Affairs dealt with immigration issues of TCNs.¹⁴⁰ Most of the activity, while taking

¹³⁵ Para 63.

¹³⁶ *Supra* n.76.

¹³⁷ Communication on Immigration and Asylum Policies, COM (94) 23, Annex I, 22.

¹³⁸ There were earlier attempts to harmonise and combat illegal immigration, see the Social Action Programme, OJ 1976 C 277/2; Evans, A., 'Third-Country Nationals and the Treaty on European Union' (1994) 5 *European Journal of International Law* 199.

¹³⁹ See Chalmers, D., and Szyzszak, E. *European Law Two. Towards a European Polity?* (Ashgate, Aldershot, 1998), Chapter 3.

¹⁴⁰ Article K.I, TEU.

place in secret without democratic or judicial control,¹⁴¹ has been in the form of Resolutions and Recommendations. For example, there has been a Resolution on the admission of TCNs to a Member State for employment.¹⁴² The Resolution suggests that a TCN should be admitted only if it can be shown that the vacancy cannot be filled by an EC national. Prior authorisation for the employment must be given before the TCN enters the territory of the Member State. In a Resolution concerning the admission of TCNs for the purpose of pursuing activities as self-employed persons, Member States are only to admit TCNs if it can be shown that the activity is of economic benefit to the Member State concerned.¹⁴³ In a Resolution¹⁴⁴ on the admission of TCNs for study purposes, the Member States urge that in principle the right to reside should only be given for the purpose of study and a student should not be allowed to seek employment following study. Recommendations on illegal immigration¹⁴⁵ and Joint Actions on exchanges of information,¹⁴⁶ travel facilities for TCN school pupils resident in the EU,¹⁴⁷ transit visas,¹⁴⁸ uniform format for residence permits¹⁴⁹ and burden sharing of displaced persons¹⁵⁰ have also been passed, but the Member States appear unwilling to be bound by even soft law in this area.

At Maastricht, visa policy was brought within the remit of EC policy.¹⁵¹ A Regulation on a common format for visas¹⁵² was enacted as well as a Regulation to determine the third states whose nationals must be in possession of a visa when crossing the external frontiers of the Member States.¹⁵³

¹⁴¹ See Meyring, B., 'Intergovernmentalism and Supranationality: Two Stereotypes for a Complex Reality' (1997) 22 *European Law Review* 221. For earlier discussions on Schengen, see Schutte, J., 'Schengen: Its Meaning for the Free Movement of Persons in Europe' (1991) 28 *Common Market Law Review* 549; O'Keeffe, D., 'The Schengen Convention: A Suitable Model for European Integration?' (1992) 12 *Yearbook of European Law* 185; Curtin, D. and Meijers, H., 'The Principle of Open Government in Schengen and the European Union: Democratic Regression?' (1995) 32 *Common Market Law Review* 391.

¹⁴² OJ 1996 C 274/3.

¹⁴³ OJ 1996 C 274/7.

¹⁴⁴ OJ 1996 C 274/10.

¹⁴⁵ OJ 1996 C 5/1.

¹⁴⁶ Decision 97/420/JHA, OJ 1997 L 178/6.

¹⁴⁷ Decision 94/795/JHA, OJ 1994 L 327/1.

¹⁴⁸ Decision 96/197/JHA, OJ 1996 L 63/8.

¹⁴⁹ Decision 97/111/JHA, OJ 1997 L 7/1.

¹⁵⁰ Decision 96/198/JHA, OJ 1996 L 63/10.

¹⁵¹ Article 100c(1), EC.

¹⁵² Regulation 1683/95/EC, OJ 1995 L 164/1.

¹⁵³ Regulation 2317/95/EC, OJ 1995 L 234/1. This Regulation was declared illegal by the Court in Case C-392/95 *Parliament v Council* [1997] ECR I-3213 as the Council failed to consult the Parliament after introducing substantial alterations to the Regulation. As a result, a second Regulation had to be issued: Regulation 574/99 OJ 1997 C 180/18. The new Regulation reproduces the same text ignoring the position of the European Parliament.

The Commission has attempted to link TCN policy in with the completion of the Internal Market.¹⁵⁴ In 1995 it proposed the lifting of family members' visa requirements, a new Directive abolishing internal frontier checks on any individuals and a Directive on the travel rights of TCNs.¹⁵⁵ Until the Treaty of Amsterdam, however, the Member States were reluctant to expand EC competence.¹⁵⁶ Title IIIa of the Treaty of Amsterdam transfers immigration, asylum, external borders and judicial co-operation in civil matters into EC competence.¹⁵⁷

A new category of 'denizens' has been created as a result of the failure of the EU and the Member States to accord full-blown citizenship rights to TCNs legally resident in the EU. The failure on the immigration rights front has now been tackled at the EU level by the use of a race discrimination action plan¹⁵⁸ to ameliorate the yawning gap created by the treatment of EU nationals and non-EU nationals under the free movement of persons programme.

¹⁵⁴ See Communication on Immigration and Asylum Policies COM (94) 23; White Paper on European Social Policy COM (94) 333.

¹⁵⁵ COM (95) 346, 347, 348.

¹⁵⁶ See Peers, S., 'The Visa Regulation: Free Movement Blocked Indefinitely' (1996) 21 *European Law Review* 150; Geddes, A., 'Immigrant and Ethnic Minorities and the EU's Democratic Deficit' (1995) 33 *Journal of Common Market Studies* 197; Hedmann-Robinson, M., 'Third-Country Nationals, European Union Citizenship and Free Movement of Persons: a Time for Bridges rather than Divisions' (1996) 16 *Yearbook of European Law* 321; Peers, S., 'Building Fortress Europe: The Development of EU Migration Law' (1999) 35 *Common Market Law Review* 1235. See also the essays in the section 'An Area of Freedom, Security and Justice' in O'Keefe, D. and Twomey, P. (eds) *Legal Issues of the Amsterdam Treaty* (Hart, Oxford, 1999).

¹⁵⁷ See Action Plan of the Commission and the Council on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, OJ 1998 C 19/1; *The Commission's Work Programme for 2000*, COM (2000) 155 final.

¹⁵⁸ COM (98) 183 final. See the discussion in Chapters 1 and 4.

CHAPTER 4

The equal treatment between women and men programme

The Treaty of Amsterdam provides the European Union with the first example of a relatively complete sex equality framework at the Community level—at least on paper.¹ The Court of Justice has elevated the principle of equal treatment between the sexes into one of the general principles of Community law.² This principle finds concrete application in a number of legal bases in the EC Treaty. The amended *Article 2 EC* adds the words 'equality between men and women' to the tasks of the Community. *Article 13 EC* provides a legal base to 'take appropriate action to combat discrimination' based on, *inter alia*, 'sex or sexual orientation'.³ The new *Article 137 EC* allows the Council to act by qualified majority vote, using under *Article 138 EC* either the social partners or the co-decision procedure with the Parliament, to adopt measures relating to 'equality between men and women with regard to labour market opportunities and treatment at work'. *Article 141 EC* consolidates the Court's previous case law in the field of equal pay while *Article 141(3) EC* also provides a new legal base to develop legislation. Equal opportunities for men and women is the subject of the fourth pillar of the new Employment Guidelines adopted under the fast-tracked Employment Chapter of the Treaty of Amsterdam. *Article 129 EC* expressly states that the while measures may be taken to encourage co-operation between the Member States, such measures shall not include harmonisation of the laws and regulations of the Member States. From 1999 the concept of equal opportunities for men and women has been

¹ A vigorous analysis of this area of law can be found in Ellis, E. *EC Sex Equality Law* (Clarendon Press, Oxford, 1998).

² See Docksey, C., 'The Principle of Equality Between Women and Men as a Fundamental Right Under Community Law' (1991) 2 *Industrial Law Journal* 258; More, G., 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?' in Craig, P. and de Búrca, G. (eds) *The Evolution of EU Law* (OUP, Oxford, 1999).

³ Other areas of competence are racial or ethnic origin, religion or belief and age.

mainstreamed through the other three pillars. In the Commission's Recommendations to the Member States on the implementation of the National Action Programmes, the Commission notes that very few Member States have addressed the question of mainstreaming in their employment policies.⁴

4.1 Equal pay

The original Treaty of Rome 1957 contained an equal pay for equal work clause in Article 119 EC (now amended, *Article 141 EC*). This was introduced for competition reasons at the insistence of France. France was the Member State with the most advanced equal pay laws and was afraid the other Member States might undercut French industry by exploiting female labour.⁵ Given the reasons for Article 119 EC, it is rather strange that, until recently,⁶ the Member States were unconcerned about the similar function played by third-country nationals in the EU labour markets. Despite its inclusion in the Treaty, the Member States ignored the obligations towards equal pay and even passed a Resolution in 1961 postponing the full implementation of Article 119 EC.⁷

The Court side-stepped the question of the application of Article 119 EC in two employment cases by determining the question of sex discrimination according to the general principles of Community law.⁸ Life was brought to Article 119 EC by a series of test cases commenced in the Belgian courts by an airline hostess who was compelled to retire at the age of 40, whereas male cabin crew employees could work until the normal retirement age and thereby receive full pension rights. The first case⁹ was unsuccessful since the Court ruled that a retirement pension established within the framework of a social security scheme laid down by legislation

⁴ Commission Recommendation for Council Recommendations on the Implementation of Member States' Employment Policies, COM (99) 441.

⁵ See Forman, J., 'The Equal Pay Principle Under Community Law: A Commentary on Article 119 EEC' (1982) 1 *Legal Issues of European Integration* 17; Szyszczak, E., 'Pay Inequalities and Equal Value Claims' (1985) 48 *Modern Law Review* 139; Barnard, C., 'The Economic Objectives of Article 119' in Hervey, T. and O'Keeffe, D. (eds) *Sex Equality Law in the European Union* (Wiley, Chichester, 1996). Cf. Hoskyns, C. *Integrating Gender* (Verso, London, 1996).

⁶ In November 1999 the Commission presented the first proposal for a Directive addressing racial discrimination in the Community.

⁷ Bulletin of the EC, Nos. 1, 7-9 (1962). In Case 43/75 *Defrenne v Sabena* (No. 2) [1976] ECR 455 the ECJ ruled that the Member States could not alter a binding Treaty obligation by means of a Resolution.

⁸ Case 20/71 *Sabbatini v European Parliament* [1972] ECR 345; Case 32/71 *Chollet v European Commission* [1972] ECR 363.

⁹ Case 80/70 *Defrenne v Belgian State* [1971] ECR 445.

4.1 Equal pay

did not fall within Article 119 EC, but fell within the old Article 117 EC, which did not create individual rights enforceable in the national courts.

4.1.1 The enduring significance of the second *Defrenne* case

The second *Defrenne*¹⁰ case is one of the most significant and well-known cases in Community law. Earlier, in 1972, the heads of state or government had attempted to make the Common Market more palatable to the people of Europe by declaring that vigorous action in the social field was as important as the economic priorities of the process of European integration.¹¹ This provided the signal for the Court to take an ambitious approach, although part of its ruling in the second *Defrenne* judgment is hedged with caution and ambiguity. The Court ruled that Article 119 EC had both horizontal and vertical direct effect. As a result, the ensuing years have witnessed a dynamic between the national courts and the Court of Justice whereby men¹² and women have brought equal pay claims raising issues on the scope and substance of the equal pay principle and also procedural¹³ and remedial issues.¹⁴

Because of the economic disruption which might ensue with women and men bringing back pay claims to 1 January 1958, the Court took the unusual step of giving a prospective ruling, stating that only applicants who had lodged equal pay claims before the date of the ruling on 8 April 1976 could rely upon Article 119 EC for periods of service before that date. The effects of this date are still being felt today. In *Magorrian*¹⁵ the Court ruled that an English limitation period which only allowed for the back-dating of equal pay claims for a period of two years prior to the claim was invalid and that periods of service completed since 8 April 1976 must be taken into account when calculating entitlement to additional pension benefits. More recently, Advocate General Léger has given an Opinion

¹⁰ Case 43/75 *Defrenne v Sabena* (No. 2) [1976] ECR 455.

¹¹ EC Bulletin 10/1972, para 6, p. 19.

¹² See Case C-218/98 *Oumar Dabo v Abdoulaye and Others v Régie Nationale des Usines Renault SA*, judgment of 16 September 1999 where the ECJ ruled that special treatment of women on maternity leave may be justified to compensate for disadvantages suffered by women as a result of being away from work.

¹³ Attention has been focused by the Commission on the application of the equal treatment principle at the national level: McCrudden, C., 'The Effectiveness of European Equality Law: National Mechanisms for Enforcing Gender Equality Law in the Light of European Requirements' (1993) 13 *Oxford Journal of Legal Studies*, 320; Blum, J. et al., *The Utilization of Sex Equality Litigation in the Member States of the European Community*, Brussels, Commission of the EC, VI/782/96-EN, 1995.

¹⁴ Szyszczak, E., 'Remedies in Sex Discrimination Cases' in Lonbay, J. and Biondi, A. (eds) *Remedies for Breach of EC Law* (Wiley, Chichester, 1997).

¹⁵ Case C-246/96 *Magorrian and Cunningham v Eastern Health and Social Services Board, Department of Health and Social Services* [1997] ECR I-7153.

European Labour Law

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I Zay. Dredh:

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 shabake - 4 vel. shabake; v.p. shabake hq. hq. shabake u + shabake - v.s.

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II Cijam

III Acquis communautaire (social) shabake hq. hq. shabake u + shabake - v.s.

IV Dijam shabake hq. hq. shabake u + shabake - v.s.

Ods pr NOR.

On hq. hq. shabake u + shabake - v.s.

they are already 21 years of age or older and are no longer dependants of their parents. Accordingly, to make the application of Article 12 subject to an age-limit or to the status of dependent child would conflict not only with the letter of that provision, but also with its spirit.

1. COJ, 27 September 1988, *Commission v. Belgium*, No. 42/87, IELL, Case Law, No. 129.
2. COJ, 17 Sept. 1987, *Steven Mulcom Brown v. Secretary of State for Scotland*, No. 197/86.
3. COJ, 27 September 1988, *Belgium v. R. Humbel and M.T. Edel*, No. 263/86, IELL, Case Law, No. 130.
4. COJ, 15 March 1989, *G.B.C. Echternach and A. Moritz v. Dutch Minister of Education and Sciences*, Joined Case Nos. 389-390/87, IELL, Case Law, No. 133.
5. COJ, 4 May 1995, *Landesamt für Ausbildungsförderung Nordrhein-Westfalen v. Lubor Gaal*, C-7/94, Jur., 1995, 1031.

III. Exceptions

A. Employment in the Public Sector

281. Pursuant to Article 48, §4 of the EC Treaty, the provisions of free movement for workers do not apply to employment in the public sector. This provision has given cause to a great deal of controversy. The Court is, for evident reasons, of the opinion that the term 'employment in the public sector' requires uniform interpretation and application throughout the Community. It should indeed be recalled, as the Court has constantly emphasised in its case-law, that recourse to the provisions of the domestic legal system to restrict the scope of the provisions of Community law would have the effect of impairing the unity and efficacy of that law and consequently cannot be accepted.¹ Moreover, it must be borne in mind that, as a derogation from the fundamental principle that workers in the Community should enjoy freedom of movement and not suffer discrimination, Article 48, §4 must be construed in such a way that it limits its scope to what is strictly necessary for safeguarding the interests which that provision allows the Member States to protect.² The Court comes to the conclusion that 'employment in the public sector' must be understood as meaning those posts which involve direct or indirect participation in the exercise of powers conferred by public law in the discharge of functions whose purpose is to safeguard the general interests of the State or of other public authorities. In order to carry out these functions, a special relationship of allegiance to the State on the part of persons occupying them and the reciprocity of rights and duties which form the foundation of the bond of nationality is needed.³ Thus the Court retains the content of the function and not the legal qualification of the employment relationship as a criterion:

'in the absence of any distinction in the provision Article 48, §4, it is of no interest whether a worker is engaged as a blue-collar worker (*ouvrier*), a white-collar worker (*employé*) or an official (*fonctionnaire*) or even whether the terms on which he is employed come under public or private law.'

Finally, it should be indicated that Article 48, §4 only relates to the access to public employment. It cannot justify discriminatory measures with regard to remuneration

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or other conditions of employment once they have been admitted to the public sector.⁴

1. COJ, 17 December 1980, *Commission v. Belgium*, No. 149/79, IELL, Case Law, No. 39.
2. *Lawrie-Blum Case*, *op. cit.*
3. *Idem.*
4. *Sotgiu Case*, *op. cit.*

282. The following jobs are not considered to be public functions: post office workers;¹ trainee locomotive drivers, loaders, plate-layers, shunters and signaller with the national railways and unskilled workers with the local railways as well as posts for hospital nurses, children's nurses, night-watch men, plumbers, carpenters, electricians, garden hands, architects and supervisors with a municipality;² permanent employment as a nurse in a public hospital;³ a trainee teacher;⁴ a researcher; a foreign-language teacher at a university⁵ and a secondary school teacher.⁶ The same goes for posts in the public sectors of research, teaching, health, transport, ports and telecommunications, and in the water, gas and electricity distribution services.⁸ On the other hand, duties of managing or advising the State on scientific questions could be described as employment in the public sector within the meaning of Article 48, §4.⁹ Finally, one should note that a Member State may reserve the promotion to certain public functions that involve participation in the exercise of power to its own nationals.¹⁰

Article 90(1) of the EC Treaty, in conjunction with Articles 30, 48 and 86, precludes rules of a Member State which confer on an undertaking established in that State the exclusive right to organise dock work and requires it for that purpose to have recourse to a dock-work company whose workforce is composed exclusively of nationals.¹¹

1. *Sotgiu Case*, *op. cit.*
2. *Commission v. Belgium*, No. 149/79.
3. COJ, 3 June 1986, *Commission v. France*, No. 307/84, IELL, Case Law, No. 95.
4. *Lawrie-Blum Case*, *op. cit.*
5. COJ, 16 June 1987, *Commission v. Italy*, No. 225/85, IELL, Case Law, No. 104.
6. COJ, 30 May 1989, *P. Allué and C.M. Coonan v. Università degli Studi di Venezia*, No. 33/88, IELL, Case Law, No. 136.
7. 27 November 1991, *A. Bleis v. Ministère de l'Éducation Nationale*, No. C-4/91, IELL, Case Law, No. 177.
8. COJ, 2 July 1996, *Commission v. Luxemburg*, Case C-473/93, not yet published; see also COJ 2 July 1996, *Commission v. Belgium* (distribution of water, gas and electricity), Case C-173/94; 2 July 1996, *Commission v. Hellas*, Case C-290/94, not yet published.
9. *Commission v. Italy*, No. 225/85.
10. *Commission v. Belgium*, No. 149/79.
11. COJ, 10 December 1991, *Merci Convenzionali Porto di Genova v. Siderurgica Gabrielli SpA*, No. C-179/90, IELL, Case Law, No. 178.

B. Public Policy, Security and Public Health

283. Pursuant to Article 48, §3 of the EC Treaty, free movement for workers entails the right

- a. to accept offers of employment actually made;
- b. to move freely within the territory of Member States for this purpose;
- c. to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
- d. to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

These rights are however subject to limitations justified on grounds of public policy, public security or public health. These limitations were more precisely defined in Directive No. 64/221 of 25 February 1964,¹ which aims at protecting the nationals of other Member States against possible abuse of these limitations regarding the free movement of workers.

1. Directive on the coordination of special measures concerning the movement and residence of foreign nationals that are justified on the grounds of public policy, public security or public health, O.J., No. L 56, 4 April 1964.

284. Taken as a whole, these limitations, placed on the powers of Member States in respect of the control of aliens, are a specific manifestation of the more general principle enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and ratified by all the Member States, and in Article 2 of Protocol No. 4 of the same Convention, signed in Strasbourg on 16 September 1963. These provide in identical terms that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above quoted Articles other than such as are necessary for the protection of those interests in a democratic society.¹ There are moreover procedural safeguards:

'any person enjoying the protection of the provisions of Directive No. 64/221 must be entitled to a double safeguard comprising notification to him of the grounds on which any restrictive measure has been adopted in his case and the availability of a right of appeal.'²

1. COJ, 28 October 1975, *Roland Rutilly v. Minister for the Interior*, No. 36/75, IELL, Case Law, No. 19.
2. *Idem*.

1. Scope of Application

285. Directive No. 64/221 applies, *ratione personae*, to any national of a Member State who resides in or travels to another Member State, either in order to pursue an activity as an employed or self-employed person, or as a recipient of services (Art. 1, §1), e.g., tourists. The directive applies also to the spouse and the members of the family, who enjoy freedom of movement (Art. 1, §2).

Ratione materiae, the directive relates to all measures concerning the entry into their territory the issue and renewal of residence permits, or exclusion from their

territory, taken by Member States on grounds of public policy, public security or public health. Such grounds cannot be invoked to service economic grounds (Art. 2).

The expression 'subject to limitations justified on the grounds of public policy' concerns not only the legislative provisions which each Member State has adopted to limit freedom of movement and residence for nationals of other Member States within its territory but also concerns individual decisions taken in application of such legislative provisions.¹ Prohibition on residence may be imposed only in respect of the whole of the national territory; in the case of partial prohibitions on residence, limited to certain areas of the territory; persons covered by Community law must, under Article 6 of the EC Treaty, be treated on equal footing with the nationals of the Member States concerned.²

1. *Rutilly Case*, *op. cit.*
2. *Idem*.

2. Grounds of Public Policy or Security

286. It should be emphasised that the concept of public policy, in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community. Nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another country and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the EC Treaty.¹ In any event, the concept of 'public policy' presupposes the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.²

1. COJ, 4 December 1974, *Y. van Duyn v. Home Office*, No. 41/74, IELL, Case Law, No. 13; 27 October 1977, *Regina v. P. Boucherau*, No. 30/77, IELL, Case Law, No. 28.
2. 'It follows that a Member State, for reasons of public policy can, where it seems necessary, refuse a national of another Member State the benefit of the freedom of movement for workers in a case where such a national proposes to take up a particular offer of employment even though the Member State does not place a similar restriction upon its own nationals. It is a principle of international law, which the EC Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own national the right of residence' (*Van Duyn Case*, *op. cit.*). See also: *Regina Case*, *op. cit.*

287. Measures taken on grounds of public policy or of public security must be based exclusively on the personal conduct of the individual concerned (Art. 3, §1).¹ This provision of the directive confers on individuals the rights that are enforceable by them in the national courts of a Member State and which the national courts must protect.²

Article 3 of Directive No. 64/221 imposes on Member States the duty to base their decision on the individual circumstances of any person under the protection of Community law and not on general considerations.³

The association with a body or an organisation involving participation in its activities, as well as the identification with its aims and its designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct.⁴

1. The term 'measures' in Article 2 relates only to provisions laid down by law, regulations or administrative action, to the exclusion of the action of the judiciary. The term 'measures' in Article 3 includes the action of a court which is required by the law to recommend in certain cases the deportation of a national of a another Member State (*op. cit.*).
2. *Van Duyn Case, op. cit.*
3. *Rutilly Case, op. cit.*
4. *Van Duyn Case, op. cit.*

288. Previous criminal convictions do not in themselves constitute grounds for taking measures to limit the free movement for workers and their dependents (Art. 3, §2). These convictions are relevant only insofar as the circumstances which gave rise to them are evidence of personal conduct constituting a present threat to the requirements of public policy.¹ The directive therefore prevents the deportation of a national of a Member State who is unlawfully in possession of arms and who causes the death of his brother by negligence, if such a deportation is ordered for the purpose of deterring other aliens, that is, if it is based on reasons of a general preventive nature.² The mere failure by a national of a Member State to comply with the formalities concerning entry, movement and residence of aliens is not of such a nature as to constitute in itself conduct threatening public policy and public security and cannot therefore by itself justify a measure ordering expulsion or temporary imprisonment for that purpose.³ Likewise, a Member State may not, by virtue of the reservation relating to public policy, expel a national of another Member State from its territory or refuse him access to its territory by reason of conduct which, when attributable to the former State's own nationals, does not give rise to repressive measures or other genuine and effective measures intended to combat such conduct.⁴

Expiry of the identity card or passport used by the person concerned to enter the host country and to obtain a residence permit does not justify expulsion from the country (Art. 3, §3). The State that issued the identity card or passport must allow the holder of such document to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute (Art. 3, §4).

1. *Regina Case, op. cit.*
2. COJ, 26 February 1975, *C.A. Bonsignore v. Oberstadtdirektor Köln*, No. 67/74, IELL, *Case Law*, No. 17.
3. COJ, 8 April 1976, *J.N. Royer*, No. 48/75, IELL, *Case Law*, No. 23.
4. COJ, 18 May 1982, *Rezgua Adoui v. Belgian State and City of Liège; Dominique Cornuaille v. Belgian State*, Joined Cases Nos. 115 and 116/81. The case related to prostitution in Belgium.

3. Public Health

289. The only diseases or disabilities justifying refusal of entry into a territory or refusal to issue a first residence permit are those listed in the annex to the directive

(Art. 4, §1). Diseases or disabilities occurring after a first residence permit has been issued do not justify refusal to renew the residence permit or expulsion from the territory (Art. 4, §2).

4. Procedural Safeguards

290. A decision to grant or refuse a first residence permit must be taken as soon as possible and in any event not later than six months from the date of application for the permit. The person concerned is allowed to remain temporarily in the territory pending a decision. The host country may, if necessary, request the Member State of origin of the applicant and other Member States to provide information concerning any previous police record. Such enquiries cannot be made as a matter of routine. The Member State consulted must give its reply within two months (Art. 4, §5). In the case of expulsion, a reapplication for a residence permit may be lodged after a reasonable period has elapsed. Such an application must be examined by the appropriate administrative authority in the host State, which must take into account, in particular, the arguments put forward in order to establish that there has been a material change in the circumstances justifying the first expulsion measure.¹

1. *Adoui Case, op. cit.*

291. An important safeguard is self-evidently the fact that one knows the reasons for limiting the right of free movement. These reasons must be made known unless this is contrary to the interests of the security of the State involved (Art. 6). It is clear from the purpose of the directive that the notification of the grounds must be sufficiently detailed and precise to enable the person concerned to defend his interests. It is sufficient in any event that the notification be made in such a way as to enable the person concerned to comprehend the content and the effect thereof.¹ The person concerned must be officially notified of any decision to refuse the issue or renewal of a residence permit or to expel him from the territory. The period allowed for leaving the country must be stated in this notification. Except in cases of urgency, this period may not be less than fifteen days if the person concerned has not yet been granted a residence permit and not less than one month in all other cases (Art. 7).

1. *Adoui Case, op. cit.*

292. Against decisions limiting the freedom of movement, the same legal remedies as those open to nationals of the host State must be made available (Art. 8). In this connection, it should be emphasised that Article 9 is complementary to Article 8. Article 9 imposes obligations on Member States which may be relied upon by the persons concerned before national courts. Article 9 provides that where there is no right of appeal to a court of law, or where such an appeal may only be in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, a decision cannot, except in cases of urgency, be taken by the administrative authority until an opinion has been obtained from a competent authority of the host country. The directive leaves a margin of discretion to Member

States for defining 'the competent' authority. Any public authority independent of the administrative authority, which is so constituted that the person concerned enjoys the right of representation and of defence to it, as the domestic law of that country provides for, may be considered as such an authority.¹ These conditions may not be less favourable to the person concerned than those applicable to proceedings before other national authorities of the same type.² The directive does not require the authority to be a court or to be composed of members of the judiciary.³ Any decision refusing the issue of a first residence permit or ordering the expulsion of the person concerned before the issue of the permit must, where that person so requests, be referred for consideration to the authority whose prior opinion is required. The person concerned is then entitled to submit his defence in person, except where this would be contrary to the interests of national security (Art. 9, §2). A decision ordering expulsion cannot be executed, except in cases of urgency that have been properly justified, against a person protected by Community law until the party concerned has been able to exhaust the remedies guaranteed by Articles 8 and 9 of Directive No. 64/221.⁴ However, it cannot be inferred from that provision that the person concerned is entitled to remain on the territory of the State concerned throughout the proceedings initiated by him. Such an interpretation, which would unilaterally enable the person to suspend the measure affecting him by lodging an application, is incompatible with the objective of the directive. This objective is to reconcile the requirements of public policy, public security and public health with the guarantees that must be provided for the persons affected by such measures as long as the person concerned is able to obtain a fair hearing and to present his defence in full.⁵

Finally, it should be pointed out that Directive No. 64/221 also applies to workers with the right to be employed in the territory of a Member State after having been employed in that State,⁶ to students,⁷ to employees and self-employed persons who have ceased their occupational activity⁸ and in the case of right of residence in general.⁹

1. COJ, 22 May 1980, *Regina v. Secretary of State for Home Affairs ex parte M. Santillo*, No. 131/79, IELL, Case Law, No. 37.

2. *Adoui Case*, *op. cit.*

3. *Idem.*

4. *Royer Case*, *op. cit.*

5. COJ, 5 March 1980, *Josette Pescastaing v. Belgian State*, No. 98/79, IELL, Case Law, No. 34.

6. Directive of 18 May 1972, No. 72/194, O.J., 26 May 1972, No. L 121/26.

7. Directive of 29 October 1993, No. 93/96, *op. cit.*

8. Directive of 28 June 1990, No. 90/365, O.J., 13 July 1990, No. L 180/28.

9. Directive of 28 June 1990, No. 90/364, O.J., 13 July 1990, No. L 180/26.

§3. PROMOTION

I. Employment Services

293. Free movement for workers in a single market demands the development of a direct cooperation between the central and regional employment services. This cooperation was established by Regulation No. 1612/68 of 15 October 1968 regarding the clearing of vacancies and applications for employment and the resulting placement of workers in employment along with the exchange of information and

the making of studies of employment and unemployment with the view to securing freedom of movement for workers within the Community (Arts. 13-14). The specialist service of each Member State shall regularly send to the specialist services of the other Member States and to the European Co-ordination Office:

- details of vacancies which could be filled by nationals of other Member States;
- details of vacancies addressed to non-Member States;
- details of applications for employment by those who have formally expressed a wish to work in another Member State;
- information, region and by branch of activity, on applicants who have declared themselves actually willing to accept employment in another country.

The specialist service of each Member State shall forward this information to the appropriate employment services and agencies as soon as possible.

The details of vacancies and applications will be circulated according to a uniform system to be established by the European Coordination Office in collaboration with the Technical Committee.

If necessary, the European Coordination Office may adapt this system in collaboration with the Technical Committee (Art. 15).

Any vacancy communicated to the employment services of a Member State shall be notified to and processed by the competent employment services of the other Member State concerned.

Such services shall forward to the services of the first Member State the details of suitable applications.

The applications for employment shall be responded to by the relevant services of the Member States within a reasonable period, not exceeding one month.

The employment services shall grant workers who are nationals of the Member States the same priority as the relevant measures grant to nationals *vis-à-vis* workers from non-Member States.¹

1. Amended by Regulation 2434/92 of 27 July 1992.

294. The regulation also contains measures for controlling the balance of the labour market. On the basis of a report from the Commission, drawn up from the information supplied by the Member States, the latter and the Commission shall at least once a year analyse jointly the results of Community arrangements regarding vacancies and applications.¹

The Commission and the Member States will also examine the possibilities of giving priority to nationals of Member States when filing employment vacancies in order to achieve a balance between vacancies and applications for employment within the Community (Art. 19.2).

Regulation No. 1612/68 established a European Coordination Office with the task of promoting vacancy clearance at Community level (Art. 21), as well as an Advisory Committee responsible for studies and advice (Arts. 24-31) and a Technical Committee charged with the mission to assist the Commission (Arts. 32-37).

1. As amended by Council Regulation (EEC) No. 2434/92 of 27 July 1992 amending Part II of Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community, O.J., 26 August 1992, No. L 245.

II. Vocational Training

295. The Commission has the task of promoting close cooperation between Member States regarding basic and advanced vocational training (Art. 118, EEC Treaty). Article 128 of the EC Treaty was replaced by Article 127 introduced by the Maastricht Treaty (1991).

Article 127, underlining the principle of subsidiarity, reads as follows:

- '1. The Community shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.
2. Community action shall aim to:
 - facilitate adaptation to industrial changes, in particular through vocational training and retraining;
 - improve initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour market;
 - facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people;
 - stimulate cooperation on training between educational or training establishments and firms;
 - develop exchanges of information and experience on issues common to the training systems of the Member States.
3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of vocational training.'

To implement these goals, the European Centre for the Development of Vocational Training was established in 1975. Mention should be made of Article 50 of the EC Treaty which provides for the exchange of young workers between Member States within the framework of a joint programme, as well as of Council Recommendation of 30 June 1993 on access to continuing vocational training.¹

¹ O.J., 23 July 1993, No. 181, 37.

296. By a decision of 2 April 1963, the Council laid down the general principles for implementing a common vocational training policy (No. 63/266).¹ These general principles must enable every person to receive adequate training with due regard to freedom of choice of occupation, place of training and place of work. The common vocational training policy should enable every person to acquire the technical knowledge and skills necessary to pursue a given occupation and to reach the highest possible level of training, whilst encouraging, particularly in regard to young persons, intellectual and physical advancement, civic education and physical development. The general guidelines laid down by the Council in 1971 state that:

'in view of the constantly changing needs of the economy, the aim of vocational training should be to offer the opportunity of basic and advanced training and

a continuity of in-service training designed, from a general and vocational point of view, to enable the individual to develop his personality and to take up a career.'

This led the Court to rule in the *Gravier* Case:

'that any form of education which prepares for a qualification of a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment, is vocational training whatever the age and the level of training of the pupils or students, even if the training programme includes an element of general education.'²

¹ O.J. No. 63, 20 April 1963, 1338/63.

² COJ, 13 February 1985, *Françoise Gravier v. City of Liège*, No. 293/83, IELL, Case Law, No. 71.

297. With regard to the issue whether university studies prepare for a qualification for a particular profession, trade or employment or provide the necessary training and skills for these, it must be emphasised that this is the case not only where the final academic examination directly provides the required qualification for a particular profession, trade or employment, but also insofar as the studies in question provide specific training and skills, even if no legislative or administrative provisions make acquisition of that knowledge a prerequisite for that purpose. In general, therefore, university studies fulfil these criteria. The only exceptions are certain courses of study which, because of their particular nature, are intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation.¹

¹ COJ, 2 February 1988, *Vincent Blaizot v. Université de Liège*, No. 24/86, IELL, Case Law, No. 118.

298. The meaning of the term 'vocational training' is somewhat restricted by Article 57 of the EC Treaty. This article relates to the directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications. Consequently, these directives, even when they relate to vocational training, are not covered by Article 127 of the EC Treaty.¹

¹ COJ, 30 May 1989, *Commission v. Council*, No. 242/87, IELL, Case Law, No. 135 bis, Jur. 1989, 1925.

299. In the above-mentioned *Gravier* Case,¹ the Court was of the opinion that the common vocational policy referred to in Article 127 of the Treaty is gradually being established and that it constitutes an indispensable element of the free movement of persons. Access to vocational training is in particular likely to promote free movement of persons throughout the Community by enabling them to obtain a qualification in the Member State where they intend to work and to complete their training and develop their particular talents in the Member State whose vocational training programmes include the special subject desired. It follows from all the foregoing that the conditions of access to vocational training fall within the scope

of the Treaty and that the imposition on students who are nationals of other Member States of a charge, a registration fee or the so-called 'minerval' as a condition of access to vocational training, where the same fee is not imposed on students who are nationals of the host Member State, constitutes discrimination on grounds of nationality contrary to Article 6 of the Treaty.

Article 6 of the Treaty therefore applies to financial aid granted by a Member State to its own nationals in order to allow them to follow a course of vocational training in so far as that aid is intended to cover the costs of access to the courses.

A national of a Member State who has been admitted to a course of vocational training in another Member State derives from Community law a right of residence in the second Member State for the purpose of following that course and for the duration thereof. That right may be exercised regardless of whether the host Member State has issued a residence permit. The right of residence in question may nevertheless be made subject to certain conditions to which the prohibition of discrimination with regard to access to vocational training does not apply.²

1. *Gravier Case*, *op. cit.*; see also COJ, 3 May 1994, *Commission v. Belgium*, No. C-47/93, *Jur.*, 1994, 1593.
2. COJ, 26 February 1992, *V.J.M. Raulin v. Netherlands Ministry of Education and Science*, No. C-357/89, *IELL, Case Law*, No. 184.

300. Whilst it is true that the conditions for access to vocational training, including university studies in general, fall within the scope of the Treaty for the purposes of Article 6 thereof, assistance given by a Member State to its nationals when they undertake such studies nevertheless fall outside the Treaty, at the present stage of development of Community law, except to the extent to which such assistance is intended to cover registration and other fees, in particular tuition fees, charged for access to education.¹

Article 6 of the EC Treaty, the Court furthermore states, precludes a Member State from requiring a student who is a national of another Member State and who enjoys, under Community law, a right of residence in the host Member State, to possess a residence permit in order to be entitled to benefit under the system of funding study costs.²

1. COJ, 21 June 1988, *Sylvie Lair v. Universität Hannover*, No. 39/86, *IELL, Case Law*, No. 124.
2. COJ, 26 February 1992, *V.J.M. Raulin v. Netherlands Ministry of Education and Science*, No. C-357/89, *IELL, Case Law*, No. 184.

III. Recognition of Qualifications and Diplomas

301. It is self-evident that, given the ever-increasing education of Europeans and advanced training, there can only be full-fledged free movement for workers once diplomas obtained in one Member State are valid in the other Member States.¹ With this aim in view, the Council adopted a number of directives concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications (Art. 57, EC Treaty). Notwithstanding the fact that Article 57 relates to self-employed persons only, one must ascertain that some of those directives, such as

those concerning medical doctors, pharmacists and others, contain a clause making those directives also applicable to the workers and their dependents as stated in Directive No. 1612/68.

1. However, Article 48 of the EC Treaty does not preclude a Member State from prohibiting one of its own nationals who holds an academic title acquired through postgraduate studies and awarded in another Member State from using that title in its territory without obtaining administrative authorisation for that purpose. The authorisation procedure must be intended solely to verify whether the academic title acquired through postgraduate studies was duly awarded, must be easily accessible and is not subject to the payment of excessive administrative charges. Furthermore, the decision that is taken must be open to judicial review, the person concerned must be able to ascertain the grounds for that decision and the penalties prescribed for non-observance of the authorisation procedure may not be disproportionate to the seriousness of the offense. See: COJ, 31 March 1993, *Dieter Kraus v. Land Baden Württemberg*, No. C-19/92, not yet published.

302. It soon became clear, however, that it is impossible to make individual directives for each profession, a training programme of its own included, and that more general measures are indicated. Such a general measure is Council Decision No. 85/368 of 16 July 1985 on the comparability of vocational training qualifications between the Member States of the European Community.¹ The Commission establishes this comparability in close cooperation with the Member States and the organisations of workers and employers at Community level. To that end:

- the relevant occupations or groups of occupations are selected on a proposal from the Member States or the competent employer or worker organisations at Community level;
- mutually agreed job descriptions for the occupations are drawn up;
- the vocational training qualifications recognised in the various Member States are matched with the job descriptions.

Finally, tables incorporating information are established on the level of vocational training, the vocational titles and the corresponding vocational training qualifications, the organisations and institutions responsible for dispensing vocational training and the organisations competent to issue or to validate diplomas, certificates or other documents certifying that vocational training has been acquired (Art. 3).

1. O.J., 31 July 1985, No. L 199/29.

303. Of capital importance is Directive No. 89/48 of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration.¹ This directive applies to any national of a Member State wishing to pursue a regulated profession in a host Member State in a self-employed capacity or as an employed person (Art. 2, §1). In a nutshell, the directive provides that the holder of a diploma of a post-secondary course of at least three years' duration can take up or pursue that profession in any Member State. The same applies if the applicant has pursued the profession in question full-time for two years during the previous ten years in another Member State which does not regulate that profession (Arts. 1 and 3).

Notwithstanding this, the host Member State may under certain conditions require the applicant to provide evidence of professional experience or to complete an adaptation period not exceeding three years or to take an aptitude test (Art. 4). The host State may allow the applicant to undergo there, on the basis of equivalence, that part of his professional education and training that is required and which he has not undergone in his Member State of origin (Art. 5). The directive contains further rules concerning the eventual proof of good character, whether the applicants have been declared bankrupt or not as well as concerning the suspension or prohibition of the pursuit of the profession (Art. 6); it also regulates the use of professional titles of the host State corresponding to that profession (Art. 7). Finally, attention must be drawn to the *Heylens* Case in which the Court ruled that:

'where in a Member State access to an occupation [in this case football trainer] as an employed person is dependent upon the possession of a national certificate or a foreign diploma recognised as equivalent, the principle of free movement of workers laid down in Article 48 of the EC Treaty requires that it must be possible for a decision refusing to recognise the equivalence of a diploma granted to a worker who is a national of another Member State by the Member State to be made the subject of judicial proceedings in which its legality under Community law can be reviewed, and for the person concerned to ascertain the reasons for the decision.'²

The Council Directive 89/48 limits itself to the recognition of higher education diplomas awarded on completion of ~~professional education and training~~ of at least three years' duration. Other forms of professional education fall outside the scope of Directive No. 89/48. In order to also cover these, a new directive was passed, Directive No. 92/51 on a second general system for the recognition of professional education and training to supplement Directive 89/48.³ This complementary general system is based on the same principles and contains the same rules as the initial general system. This complementary system covers levels of education and training not covered by the initial general system, namely that corresponding to other post-secondary education and training courses, and that corresponding to long or short secondary courses, possibly complemented by professional training or experience.

Since the complementary system covers occupations the pursuit of which is dependent on the possession of professional or vocational education and training qualifications of secondary level and generally requires manual skills, the complementary system must also provide for the recognition of such qualifications even when they have been acquired solely through professional experience in a Member State which does not regulate such professions. The Directive 92/51 contains several systems of recognition, namely the system where a host Member State requires possession of a diploma (Arts. 3 and 4); the system where a host Member State requires possession of a diploma and the applicant is the holder of a certificate or has received corresponding education and training (Art. 5); and the system of recognition where a host Member State requires possession of a certificate (Arts. 6 and 7). Articles 8 and 9 of the Directive 92/51 deal with special systems for the recognition of other qualifications.

Mention should also be made of the Resolution of 3 December 1992 concerning transparency of qualifications⁴ and the Joint Opinion of the Social Partners of 3 July 1992 on vocational qualifications and certification.

1. O.J., 24 January 1989, No. L 19/16. A profession cannot be described as regulated when there are in the host Member State no laws, regulations or administrative provisions governing the taking up or pursuit of that profession or of one of its modes or pursuit, even though the only education and training leading to it consists of at least four and a half years of higher-education studies on completion of which a diploma is awarded and, consequently, only persons possessing that higher-education diploma as a rule seek employment in and pursue that profession (COJ, 1 February 1996, *Georgios Aranyitis v. Land Berlin*, Case C-164/94, *Jur.*, 1996, 135).
2. 15 October 1987, No. 226/86, IELL, *Case Law*, No. 111.
3. O.J., 24 July 1992, No. L 209/25.
4. O.J., 19 February 1993, No. C 49/1.

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FREE MOVEMENT AND FUNDAMENTAL RIGHTS

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Abstract

After sketching out the current legal framework for fundamental rights protected under EU law this article discusses the role of free movement law in delimiting the scope of application of EU fundamental rights, the balancing of fundamental rights and free movement, and finally the possible horizontal direct effect of EU fundamental rights on private economic actors, in particular employers, exercising their right of free movement.

Keywords: Charter of fundamental rights; free movement; fundamental rights; Lisbon Treaty

1. INTRODUCTION

The interface of national labour and social policy law and EU law on free movement is a topical issue. On the one hand, there is a wave of liberalisation and privatisation which is changing the traditional way of setting up labour and welfare rights. At the same time certain basic fundamental rights, values and principles are being pursued in the market place, elevating fundamental rights, values and principles from restrictions on state action to general principles of law binding for both the state and private actors on the market.

In this article I will discuss the role of free movement in delimiting the scope of application of EU fundamental rights, the balancing of fundamental rights and free movement, and finally the possible horizontal direct effect of EU fundamental

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rights on private economic actors, in particular employers, exercising their right of free movement. First I will sketch out the current legal framework for fundamental rights protected under EU law.

2. FUNDAMENTAL RIGHTS IN THE CURRENT LEGAL FRAMEWORK

2.1. THE EU CHARTER ON FUNDAMENTAL RIGHTS

On 7 December 2000, the Charter of Fundamental Rights of the European Union was solemnly proclaimed by the Council, the European Parliament and the Commission. The text of this declaration was only soft law. In the context of the drafting of the constitutional Treaty, the plan was to incorporate the text of the Charter into the basic Constitutional Treaty. In connection with the adoption of the Lisbon Treaty the idea of incorporating the whole text of the Charter into the basic treaties was abandoned. Instead Article 6(1) EU was amended so that, since the Lisbon Treaty came into force, it provides that the Union recognizes the rights, freedoms and principles set out in the Charter as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.¹

According to the Preamble of the Charter, it reaffirms the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the ECHR, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the ECJ and of the ECHR. There are seven chapters in the Charter: Title I. Dignity;² Title II. Freedoms;³ Title III. Equality;⁴

¹ The Charter and the updated explanations to it in the 2007-versions are published in OJ 2007 C 303. Three other texts of the 2007 Intergovernmental Conference also relate to the Charter: Protocol No 7 on the application of the Charter to Poland and the United Kingdom, Declaration No 51 by Poland on the Charter and Declaration No 53 by Poland on the Protocol concerning the application of the Charter to Poland and the United Kingdom.

² This title includes: human dignity, right to life, right to integrity of the person, prohibition of torture and inhuman or degrading treatment or punishment and prohibition of slavery and forced labour.

³ This title includes: right to liberty and security, respect for private and family life, protection of personal data, right to marry and right to found a family, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and of association, freedom of the arts and sciences, right to education, freedom to choose an occupation and right to engage in work, freedom to conduct a business, right to property, right to asylum and protection in the event of removal, expulsion or extradition.

⁴ This title includes: equality before the law, non-discrimination, cultural, religious and linguistic diversity, equality between men and women, the rights of the child, the rights of the elderly and integration of persons with disabilities.

Title IV. Solidarity;⁵ Title V. Citizens' Rights;⁶ Title VI. Justice⁷ and Title VII. General Provisions. The Charter contains 50 'rights, freedoms and principles' without identifying which of its provisions are rights, which are freedoms and which are principles.

Assessed by its substantive content, the main novelty of the Charter is Title IV on solidarity.⁸ Solidarity is prescribed as one of the (new) values of the EU in Article 2 EU (post-Lisbon). Before the Lisbon Treaty solidarity was only an aim of the EU in the context of solidarity between the Member States. The Charter, in particular its title IV, sets out in more detail what solidarity means in an EU law context.⁹

If one looks only at the substantive content of the Charter, the rights listed in the Charter hardly goes further than the ECJ could potentially have gone on the basis of the established criteria for recognizing fundamental rights in the EU. However, the enumeration of social rights in the Charter includes some rights that have not hitherto been declared fundamental rights in the case law of the ECJ.¹⁰

Article 53 of the Charter provides on the level of protection that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by EU law and international law and by the Member States' constitutions. The Charter does thus not lower the already existing level of protection. In current EU labour law there

⁵ This title includes: workers' right to information and consultation within the undertaking, right of collective bargaining and action, right of access to placement services, protection in the event of unjustified dismissal, fair and just working conditions, prohibition of child labour and protection of young people at work, family and professional life, social security and social assistance, health care, access to services of general economic interest, environmental protection and consumer protection.

⁶ This title includes: right to vote and to stand as a candidate at elections to the European Parliament, right to vote and to stand as a candidate at municipal elections, right to good administration, right of access to documents, ombudsman, right to petition, freedom of movement and of residence and diplomatic and consular protection.

⁷ This title includes: right to an effective remedy and to a fair trial, presumption of innocence and right of defence, principles of legality and proportionality of criminal offences and penalties and the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

⁸ See for the same view Koen Lenaerts and Eddy de Smijter: A 'Bill of Rights' for the European Union, *Common Market Law Review* 2001 p. 273 footnote 47.

⁹ See further Nielsen, Ruth: The Charter of fundamental rights and migrant workers' welfare rights in Neergaard, Ulla, Ruth Nielsen and Lynn M. Roseberry (eds.): Integrating welfare functions into EU law: From Rome to Lisbon, Copenhagen 2009 p. 97; Herve, Tamara and Jeff Kenner (eds.): Economic and Social Rights Under the EU Charter of Fundamental Rights: A Legal Perspective, Oxford 2003 and Menéndez, Agustín José: The Sinews of Peace: Rights to Solidarity in the Charter of Fundamental Rights of the European Union, *Ratio Juris* 2003 p. 374.

¹⁰ See on that case law Koen Lenaerts and Petra Foubert: Social Rights in the Case-Law of the European Court of Justice The Impact of the Charter of Fundamental Rights of the European Union on Standing Case-Law. Legal Issues of Economic Integration (Formerly: Legal Issues of European Integration), 2001 p. 267.

are more extensive rights than provided for in the Charter on a number of issues. That is, for example, the case in respect of gender equality.¹¹

2.2. TREATY PROVISIONS, IN PARTICULAR ARTICLE 6 EU AND ARTICLE 136 EC

The original Treaty of Rome 1957 did not contain specific provisions on the protection of fundamental rights. Article 151 FEU refers to the fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers. If the Lisbon Treaty comes into force, Article 136 EC will remain largely¹² unchanged as Article 151 FEU.

Article 6 EU was first included in the Treaty on European Union (the Maastricht Treaty), signed in 1992, and was subsequently amended by the Amsterdam Treaty in 1997 and by the Lisbon Treaty. It now (post-Lisbon) provides that the Union must respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law. The Lisbon Treaty substantially revised Article 6 EU. The most important change relates to the legal status of the Charter. The first part of Article 6(1) EU now reads as follows:

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The question whether the EU can accede to the ECHR was answered in the negative in 1996.¹³ The amended Article 6(2) EU provides that the Union shall accede to the ECHR. The new Article 6(3) EU builds on the previously existing Article 6(2), which has been used extensively by the ECJ in developing its fundamental rights jurisprudence. Article 6(3) EU provides that Fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

¹¹ See on the Charter and the gender equality *acquis* Sophia Koukoulis-Spiliotopoulos: The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality, European Gender Equality Law Review 2008-1, available from the website of the Commission's Network of Legal Experts on gender equality at <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>.

¹² The word 'Community' will be replaced by the 'Union' and the 'common market' by the 'internal market'.

¹³ Opinion 2/94 [1996] I-1759.

Article 51 of the Charter stipulates that the provisions of the Charter are addressed to the institutions, bodies and organs of the EU with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.

2.3. THE CASE LAW OF THE ECJ ON FUNDAMENTAL RIGHTS

Since 1970, the ECJ has developed a case law on fundamental rights. Starting in the late nineteen sixties, increasing concern was expressed in the courts of Germany and Italy on the question as to whether the fundamental rights guaranteed in their national constitutions were recognized and protected within EU law. In response to the threat that national courts would opt for the supremacy of their own national constitutional provisions on fundamental rights protection, the ECJ held that the protection of fundamental rights was a general principle of EU law. In 1969 in *Stauder*,¹⁴ the ECJ for the first time stated that fundamental rights were enshrined in the general principles of Community law and protected by the Court. In *Internationale Handelsgesellschaft* the reference to fundamental rights was expanded by the Court stating that respect for fundamental rights forms an integral part of the general principles of law protected by the ECJ and that these principles were inspired by the *constitutional traditions* common to the Member States.¹⁵ In 1974, the ECJ held in *Nold* that, in addition to Member States' constitutional traditions, *international conventions* could also supply guidelines which could be taken into consideration by the Court on matters concerning claims to fundamental rights.¹⁶ In particular, the ECHR has a special significance in this respect.

Fundamental rights were first specifically referred to in a labour law case in 1975 in *Rutili*.¹⁷ A migrant Italian worker in France was prohibited from residing in four departments in France. It was clear from the file on the case and from information supplied to the ECJ that the reason for the measures taken against him was that his political and trade union activities during 1967 and 1968 were the subject of complaint and that his presence in the departments covered by the decision was for this reason regarded as 'likely to disturb public policy'. The ECJ stated that the concept of public policy used in Article 39(3) EC must, where it is used as a justification for derogating from the fundamental principles of equality of treatment and freedom of movement for workers, be interpreted strictly. Taken as a whole, the limitations placed on the powers of Member States in respect of control of aliens are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 ECHR.

¹⁴ Case 29/69 *Stauder v Ulm* [1969] ECR 419.

¹⁵ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

¹⁶ Case 4/73 *Nold* [1974] ECR 491.

¹⁷ Case 36/75 *Rutili v Minister of the Interior* [1975] ECR 1219.

Fundamental rights have been invoked in some staff cases. In *Prais*,¹⁸ a Jewish plaintiff complained about a test for recruitment as translator with the Council being held on a date on which she could not participate on grounds of her religion. The ECJ held that if a candidate informs the appointing authority that religious reasons make certain dates impossible for him the appointing authority should take this into account in fixing the date for written tests and endeavour to avoid such dates. On the other hand if the candidate does not inform the appointing authority in good time of his difficulties, the appointing authority would be justified in refusing to afford an alternative date, particularly if there are other candidates who have been convoked for the test. In *Maurissen*,¹⁹ the ECJ held that in staff cases an EU institution must respect the principle of good administration. In *Dunnnett*,²⁰ the dispute concerned a measure taken by the European Investment Bank (EIB) as employer on the introduction of the euro on 1 January 1999. The ECJ stated that the EIB in a staff case was bound to consult staff representatives under a general principle of employment law before taking a decision to withdraw a benefit.

In *Laval*²¹ and *Viking*,²² the ECJ stated that the right to take collective action must be recognised as a fundamental right, which forms an integral part of the general principles of EU law. In *BECTU*,²³ the advocate general argued that the right to paid annual leave is not only guaranteed in the Working Time Directive but also constitutes a fundamental right.

In discrimination cases the fundamental rights of equality and non-discrimination are at issue. Of specific relevance to labour rights is *Defrenne-III*,²⁴ where the ECJ stated that there can be no doubt that the elimination of discrimination based on sex forms part of the fundamental rights. In *Mangold*,²⁵ the ECJ held that the principle of non-discrimination on grounds of age is a general principle of Community law. The Court held, under the application of the *Simmenthal* rationale,²⁶ that the national court must set aside any provision of national law which may conflict with Community law, in the particular case at hand with the general principle of non-discrimination.

¹⁸ Case 130/75 *Prais* [1976] ECR 1589.

¹⁹ Case 417/85 *Maurissen* [1987] ECR 551.

²⁰ Case T-192/99 *Dunnnett* [2001] ECR II-813, I-A-65, II-313.

²¹ Case C-341/05 *Laval* [2007] ECR I-11767. There is abundant literature on the *Laval* and *Viking* cases, see for example Blanpain, Roger and Andrzej Swiatkowski (eds.): *Bulletin of Comparative Labour Relations* No. 69, *The Laval and Viking Cases. Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia*, Kluwer Law International 2009 which is a special volume on the two cases and their impact in different countries.

²² Case C-438/05 *Viking* [2007] I-10779.

²³ Case C-173/99 *BECTU* [2001] ECR I-4881.

²⁴ Case 149/77 *Defrenne-III* [1978] ECR 1365.

²⁵ Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

²⁶ Case 106/77 *Simmenthal* [1978] ECR 629.

The interface of free movement and fundamental rights are also at issue in cases on family reunification, see below in section 4.

2.4. INTERNATIONAL TREATIES

All EU countries are members of the United Nations, ILO and the Council of Europe. Compared to the ECHR²⁷ the Charter goes much further in protecting economic and social rights.

The content of the solidarity provisions in the Charter draws heavily on the Council of Europe Revised Social Charter from 1996 to which there are many references in the Explanatory remarks. All 27 EU Member States are signatories to the Revised Social Charter, but twelve²⁸ of them have not ratified this convention and have consequently never been bound by it under public international law.

Eight ILO Conventions have been identified by the ILO's Governing Body as being fundamental to the rights of people at work, irrespective of levels of development of individual Member States. They are grouped into four categories: 1) freedom of association,²⁹ 2) abolition of forced labour,³⁰ 3) equality³¹ and 4) elimination of Child Labour.³² There is generally only scant reference to ILO conventions in EU law. That has been criticized in the literature.³³ In *Laval* and *Viking*, the ECJ did, however, refer to ILO-Convention 87 as a basis for considering the right to take collective action as a fundamental right. The *Laval*-judgment has been widely criticized for tipping the balance between market freedoms and the fundamental right to take collective action in favour of market freedoms. It may be argued that the limited right to take

²⁷ The ECHR offers some protection of economic and social rights. In *Airey v Ireland* (Application no. 6289/73, judgment of 9 October 1979), the ECtHR stated (emphasis added): Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that *the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.*

²⁸ Austria, Czech Republic, Denmark, Germany, Greece, Hungary, Latvia, Luxembourg, Poland, Slovakia, Spain and the United Kingdom.

²⁹ Convention no. 87, Freedom of Association and Protection of the Right to Organise Convention, 1948 and Convention no. 98, Right to Organise and Collective Bargaining Convention, 1949.

³⁰ Convention no. 29, Forced Labour Convention, 1930 and Convention no 105, Abolition of Forced Labour Convention, 1957.

³¹ Convention no. 100, Equal Remuneration Convention, 1951 and Convention no. 111, Discrimination (employment and Occupation) Convention, 1958.

³² Convention no. 138, Minimum Age Convention, 1973 and Convention no. 182, Worst Forms of Child Labour Convention, 1999.

³³ O'Higgins, Paul: Some problems of enforcement of rights under the Community Charter of Fundamental Social Rights of Workers in Vogel-Polsky, Eliane (ed): *Quel avenir pour l'Europe sociale: 1992 et après?*, Bruxelles 1992 p. 73.

collective action accepted by the ECJ in *Laval* falls short of the level of protection of the right to strike provided by ILO Convention 87. It has been suggested that the Swedish government in *Laval* should have invoked Article 307 EC [now 351 FEU] and contended that the Swedish rules on strikes are necessary to comply with duties undertaken under public international law before membership of the EU and therefore according to Article 307 EC take precedence over EU law.³⁴

In the Charter on Fundamental Rights and the explanations referred to in the Charter that set out the sources of its provisions, there is no explicit reference to ILO conventions. The eight fundamental ILO conventions are, however, all ratified by all 27 EU countries. Consequently they are 'international obligations common to the Member States'; see above on the ECJ's case law on fundamental rights and the Preamble to the Charter. For that reason they have become more binding as a matter of EU law and not only of international law after the Lisbon Treaty entered into force.

3. FIELD OF APPLICATION OF EU FUNDAMENTAL RIGHTS

Fundamental rights are binding on the institutions of the EU in the exercise of their powers for example as employers; see above on the *Prais*, *Dunnett* and *Maurissen* cases.

According to Article 51 of the Charter, it is in addition to the institutions of the EU also addressed to the Member States but only when they are implementing EU law. In the Explanations to Article 51, it is stated (emphasis added) that:

"As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act *in the scope of Union law*" (judgment of 13 July 1989, Case 5/88 Wachauf [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 ERT [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 Annibaldi [1997] ECR I-7493).

It is clear that the Member States must observe EU fundamental right when they implement EU law. In its case law, the ECJ has required Member States to respect the fundamental rights not only when they transpose an EU rule into national law but also when they take measures that may hinder the free movement of persons, services and capital. Situations where Member States put restrictions upon free movement

³⁴ See Ronnie Eklund: A Swedish Perspective on *Laval*, *Comparative Labor Law and Policy Journal* 2008 p. 551, compare Case C-158/91 *Levy* [1993] ECR I-4287 and Case C-13/93 *Minne* [1994] ECR I-371 where France and Belgium successfully defended with the help of Article 307 EC their commitments under ILO Convention 89 on Night Work for Women Employed in Industry, which the ECJ later found to be contrary to the provisions of the Equal Treatment Directive (76/207/EEC).

thus constitute a core area of applicability of fundamental rights in national law, see in particular *Eind* and *Carpenter*. In *Eind*,³⁵ the ECJ held that the right of a migrant worker to return and reside in the Member State of which he is a national, after being gainfully employed in another Member State, is conferred by EU law, to the extent necessary to ensure the useful effect of the right to free movement for workers under Article 39 EC [now 45 FEU]. That interpretation is substantiated by the introduction of the status of citizen of the Union, which is intended to be the fundamental status of nationals of the Member States. The ECJ stated:

"35 A national of a Member State could be deterred from leaving that Member State in order to pursue gainful employment in the territory of another Member State if he does not have the certainty of being able to return to his Member State of origin, irrespective of whether he is going to engage in economic activity in the latter State.

36 That deterrent effect would also derive simply from the prospect, for that same national, of not being able, on returning to his Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification.

37 Barriers to family reunification are therefore liable to undermine the right to free movement which the nationals of the Member States have under Community law, as the right of a Community worker to return to the Member State of which he is a national cannot be considered to be a purely internal matter."

In *Carpenter*,³⁶ the ECJ held that a Member State may invoke reasons of public interest to justify a national measure (in the case expulsion of a spouse) which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures. The Court stated:

"The decision to deport Mrs Carpenter constitutes an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter 'the Convention'), which is among the fundamental rights which, according to the Court's settled case-law, restated by the Preamble to the Single European Act and by Article 6(2) EU, are protected in Community law."

In support of this interpretation, the Court referred in *Carpenter* to *ERT*³⁷ and *Familiapress*.³⁸

³⁵ Case *Eind* [2007] ECR I-10719.

³⁶ Case C-60/00 *Carpenter* [2002] I-6279 paragraph 40.

³⁷ Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 43.

³⁸ Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 24.

As a result of this case law, migrant workers when exercising their right of free movement will be able to invoke the fundamental rights of EU law, even though comparable domestic workers would not be able to do this because the situation in relation to them would be purely internal.

In *Kremzow*,³⁹ the ECJ held that where national legislation is concerned with a situation which does not fall within the field of application of EU law, the Court cannot give interpretative guidance necessary for the national court to determine whether that national legislation is in conformity with the fundamental rights whose observance the Court ensures, such as those deriving in particular from the ECHR. Accordingly, provisions of national law not designed to secure compliance with rules of EU law are concerned with a situation which does not fall within the field of application of EU law even though a term of imprisonment imposed by virtue of those provisions may impede the person concerned from exercising his right to freedom of movement, since a purely hypothetical prospect of exercising that right does not establish a sufficient connection with EU law to justify the application of EU provisions. In *Vajnai*,⁴⁰ the problem was whether a penal provision in Hungary prohibiting the use of symbols of the international labour movement on pain of criminal prosecution was compatible with the fundamental EU law principle of non-discrimination. The question was put to the ECJ as to whether Article 6 EU, the Race Directive or Articles 10, 11 and 12 of the Charter of Fundamental Rights allow a person who wishes to express his political convictions by means of a symbol representing them to do so in any Member State. The ECJ rejected the question as inadmissible because the case concerned a purely internal situation in Hungary. Similarly, in *Polier*,⁴¹ the ECJ refused to answer a question about the compatibility of a French dismissal provision with the Charter⁴² (and some international provisions) and in *Bartsch*⁴³ it held that the application, which the courts of Member States must ensure, of the prohibition under EU law of discrimination on the ground of age is not mandatory where the allegedly discriminatory treatment contains no link with EU law. Fundamental rights, as general principles of law, apply not only to the scope of Community law as distinct from EU law but also to areas covered by the third pillar, see *Pupino*.⁴⁴

³⁹ Case C-299/95 *Kremzow* [1997] ECR I-2629.

⁴⁰ Case C-328/04 *Vajnai* [2005] I-8577.

⁴¹ Case 361/07, not reported, available in French at the ECJ website curia.europa.eu.

⁴² The question was: [L]’ordonnance 2005-893 [...], qui autorise le licenciement du salarié pendant la période de consolidation de deux ans, prévue par le [CNE], sans indiquer la légitimité de la rupture et [...] sans information préalable au regard du droit européen, tel que défini dans la charte des droits fondamentaux [de l’Union européenne], qui précise [...] le droit des travailleurs à ne pas être licencié sans motif valable, [est-elle valide?].

⁴³ Case C-427/06 *Bartsch* nyr.

⁴⁴ Case C-105/03 [2005] ECR I-5285.

As appears from the above it is settled case law that EU fundamental rights can be invoked when Member States put restrictions upon free movement and – like the free movement provisions – cannot be invoked in purely internal situations in the Member States. There is, however, criticism of the purely internal rule in the literature.⁴⁵ In the pending *Zambrano*-case⁴⁶ questions have been referred to the ECJ as to whether Articles 12, 17 and 18 EC confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States. The following questions is also referred to the ECJ:

“Must Articles 12, 17 and 18 of the Treaty establishing the European Community, in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right of a minor child who is a national of a Member State to reside in the territory of the State in which he resides must entail the grant of an exemption from holding a work permit to the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who, were it not for the requirement to hold a work permit under the national law of the Member State in which he resides, fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment making him subject to the social security system of that State, so that the child’s right of residence is coupled with the useful effect recognised by Community case-law (Case C-200/02 *Zhu and Chen*) in favour of a minor child who is a European citizen with a nationality other than that of the Member State in which he resides and is dependent upon a relative in the ascending line who is a national of a non-member State?”

4. BALANCING FREE MOVEMENT AND FUNDAMENTAL RIGHTS

The ECJ has been confronted with the interface between free movement on the internal market and fundamental rights on a number of occasions and has held that free movement and fundamental rights must be balanced against each other. The one does not automatically take precedence over the other or exclude the applicability of the other.

In *Omega Spielhallen*,⁴⁷ for example, the ECJ held that the freedom to provide services does not preclude an economic activity from being prohibited on grounds of

⁴⁵ See Shuibhne, N Nic: Free Movement of Persons and the Wholly Internal Rule: Time to Move on? CMLRev (2002) p. 731 and Spaventa, E: Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects, CMLRev 2008 p. 13.

⁴⁶ Case C-34/09 *Zambrano* pending.

⁴⁷ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

protecting public policy by reason of the fact that that activity is an affront to human dignity.⁴⁸ In *Laval*, on the other hand, it held that lawful industrial action under Swedish law was a violation of Article 49 EC [now 56 FEU] even though the right to take industrial action is a fundamental right under Article 28 of the EU Charter of Fundamental Rights.

The balancing exercise is governed by the usual justification test for restrictions on free movement which requires that the restriction must pursue a legitimate aim, and the means applied to achieve the legitimate end (the restriction) must be appropriate and necessary, i.e. the principle of proportionality must be respected.

In *Laval*, the Danish and Swedish governments argued that the right for Swedish workers to take collective action to force a Latvian employer to follow Swedish collective agreements towards posted Latvian workers working in Sweden constitutes a fundamental right and for that reason falls outside the scope of Article 49 EC [now 56 FEU] and the Posting of Workers Directive.⁴⁹ The ECJ accepted that the right to take collective action is a fundamental right but held that it is not for that reason outside the scope of the free movement provisions but has to be balanced against the freedom of movement (in that case the free movement of services). This balancing must be undertaken on a case by case basis. Recent judgments on posted workers such as *Laval*, *Rüffert*⁵⁰ and *Commission v Luxembourg*⁵¹ have been criticized for setting aside collective agreements and workers' rights in favour of free movement.⁵²

The Member States' possibilities for justifying a restriction on free movement is more limited if the restriction both limits the right to free movement and a fundamental right.

In *Carpenter* and *Festensen*⁵³ the ECJ ruled that in situations where a restriction on the free movement at the same time adversely affects the enjoyment of a fundamental right the restriction is to be considered particularly restrictive.

5. HORIZONTAL DIRECT EFFECT?

Originally the Treaty provisions on free movement were only binding for the Member States, not for private actors on the market. Over the years, ECJ case law has expanded the coverage of free movement law in the private sector. The issue, to what extent EU internal market law and fundamental rights, values and principles related to it are directly binding for private individuals and businesses, has been widely discussed in legal literature and been the object of adjudication for a number of years. It is, however, still controversial.

Articles 45 FEU and 157 FEU give rise to direct effects both in the vertical relationship against the Member States⁵⁴ and in horizontal relationships against private employers and organisations. In *Walrave/Koch v AUCI*⁵⁵ and *Dona v Mantero*,⁵⁶ the ECJ ruled that Article 39 EC gives rise to horizontal direct effect⁵⁷ against associations or bodies with competence of a collective nature which do not come under public law.⁵⁸ In *Angonese*,⁵⁹ the ECJ held that direct effect of Article 39 EC also applies against individual employers.

It is generally a condition for direct effect that the provision at issue is sufficiently precise. Some of the fundamental rights are reasonably precise.

In *Viking*, advocate general Maduro discussed the problem of horizontal effect at length in his opinion. In *Viking*, the ECJ held that Article 43 EC and in *Laval* that Article 49 EC are directly applicable in horizontal relations as binding for trade unions – also when they exercise a fundamental right such as the right to take collective action.

One may ask if the fundamental rights are also directly applicable as binding for employers when they exercise their right to free movement under Article 49 FEU or 56 FEU. One may, for example, ask if employers exercising free movement rights are bound by EU fundamental rights to the same extent as EU institutions as employers. There is no case law on this issue. In my view, the most important effect of the Lisbon Treaty upon labour law will be that the Charter of fundamental rights is elevated

⁴⁸ See generally on human dignity in the interpretation of human rights law McCrudden, Christopher: Human Dignity and Judicial Interpretation of Human Rights, European Journal of International Law 2008 p. 655.

⁴⁹ 96/71/EC.

⁵⁰ Case C-346/06 [2008] ECR I-0000 (not yet reported).

⁵¹ Case C-319/06 [2008] ECR I-0000 (not yet reported).

⁵² See on these judgments Ronnie Eklund: A Swedish Perspective on *Laval*, Comparative Labor Law and Policy Journal 2008 p. 551, Norbert Reich: Free Movement v. Social Rights in an Enlarged Union – the *Laval* and *Viking* Cases before the ECJ, German Law Journal 2008 p. 125, www.germanlawjournal.com/, Herwig Verschueren: Cross-Border Workers in the European Internal Market. Trojan Horses for Member States Labour and Social Security Law, International Journal of Comparative Labour Law and Industrial Relations, 2008 p. 167 and the articles in Blanpain, Roger and Andrzej Swiatkowski (eds.): Bulletin of Comparative Labour Relations no. 69, The *Laval* and *Viking* Cases. Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia, Kluwer Law International 2009.

⁵³ Case C-370/05 *Festensen* [2007] ECR-I-1129.

⁵⁴ Case 167/73 *Commission v France (the Merchant Seaman's Case)* [1974] ECR 359 and Case 41/74 *Van Duyn v Home Office* [1975] ECR 1337.

⁵⁵ Case 36/74 *Walrave/Koch v AUCI* [1974] ECR 1405. The case concerned rules of an international sporting federation.

⁵⁶ Case 13/76 *Dona v Mantero* [1976] ECR 1333. The Case concerned rules laid down by a sporting federation which is competent to control football on the territory of a Member State.

⁵⁷ See also Case 222/86 *Heylens v UNCTEF* [1987] ECR 4097.

⁵⁸ See Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 17, 18, 23 and 24; Case 13/76 *Dona* [1976] ECR 1333, paragraphs 17 and 18; Joined Cases C-51/96 and C-191/97 *Deliege* [2000] ECR I-2549, paragraph 47; Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 35; Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120; and Case C-519/04 *P Meca-Medina and Majcen v Commission* [2006] ECR I-6991, paragraph 24.

⁵⁹ Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139.

to a higher level in the hierarchy of sources of law and become binding and take direct effect on the same conditions as other Treaty provisions. Sufficiently precise fundamental rights – for example some of the bans on discrimination – will therefore become binding both in vertical and horizontal relations. Even under current law where fundamental rights are mainly based on the case law of the ECJ, *Mangold* may be seen as an argument for direct applicability of fundamental rights.

THE FUTURE OF LABOUR LAW: INSIGHTS FROM AN EAST EUROPEAN COUNTRY

CSILLA KOLLONAY*

Abstract

The accession of the eight former socialist countries to the European Union in 2004 (and further two in 2007) was preceded and also followed by intensive debates on the supposed effect of this accession to the labour standards in the fifteen "Old Member" states. This contribution, however, takes a somewhat different viewpoint, in light of the debate on the future of labour law in Europe. It not only takes the perspective of a so-called transitional country in the course of and after the accession to the European Union. It also encourages the search for viable solutions drawn from the pre-transition experience of Eastern European countries, without neglecting the opposite substance of centralized planned economies and market economies.

Keywords: Eastern European countries; future of labour law; pre-accession experience

1. INTRODUCTION

Questions about the future of labour law started to emerge about thirty years ago,¹ the situation is nevertheless radically different now. Predominantly under the well-known effects of the host of technical, economic, legal and demographic phenomena

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¹ The first major and up to now most quoted summary of these developments are found in the works of Alain Supiot: *Transformation of Labour and Future of Labour Law in Europe: Final Report* (European Commission, Brussels, 1998) [hereinafter Report]. Supiot, A., *Beyond employment. Changes in Work and the Future of Labour Law in Europe*, Oxford University Press, Oxford 2001. *Au delà de l'emploi. Transformations du travail et devenir du droit du travail en Europe* (Paris: Flammarion).

CONCLUSIONS

The directive of 8 May 2009 aims at increasing the number of European Works Councils and making them more effective. Indeed, at present only 36% of the enterprises, with more than 1,000 employees in the EU and at least 150 in two Member States, have a EWC. Their effectiveness should be improved regarding their information and consultation rights, especially as far as restructuring is concerned.

To that end the definitions of information and consultation have been clarified, their transnational character underlined, the links between various directives, involving employees, fortified. Trade unions can act as experts and become more directly involved. There are provisions regarding the training of the representatives of the employees.

The question remains however, whether, these measures will indeed increase the number of EWCs and make them more effective. Indeed, it is especially in the companies with less than 10,000 employees that EWCs are lacking. The reason is that trade unions do not have enough manpower to effectively support employees in the setting up and the running of the EWC's. It is not likely that they will now be in a real better position to provide more successful help in the establishment of EWC's.

Moreover, the Directive keeps the managerial prerogative of the companies intact.. As the economy is becoming still more and more globalised and supercapitalism reigns, the EWCs will be, not more than before, in a position to really influence transnational decision making. The Directive provides information and consultation rights, which are important, but no more.

THE TEMPORARY AGENCY WORK DIRECTIVE

HELEN FRENZEL*

Keywords: Directive 2008/104/EC; posting of workers; temporary agency work

1. INTRODUCTION

The Directive on Temporary Agency Work 2008/104/EC (TAWD) has been finally adopted in November 2008¹ on the legal basis of Article 137(2) EC Treaty. The immediate reactions of the European unions were rather positive,² satisfied mainly with the boost for social dialogue in the implementation procedure of the Directive and with the introduced equal treatment principle between the temporary agency workers (TAWs) and workers of the assigned user undertaking. The response of the employer's side was relatively reserved due to the fact that the equal treatment principle had included the component of pay.³ Yet it is doubtful whether the debate on temporary agency work has come to an end with the adopted Directive 2008/104/EC.

When analysing the process of adoption of the TAWD, original attempts to regulate temporary agency work within the European Union can be found within Council Resolution of 21 January 1974⁴ concerning a social action programme. After that, three other major attempts⁵ of regulating 'atypical work' have passed without great success. In March 2002, the European Commission released once more a proposal

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¹ OJ L 327/9 (The Directive is based on Article 137(2) EC Treaty).

² See here the reaction for ex of ETUC on 22.10.2008 available at www.etuc.org/a/5471 or overview of reactions EIROnline: www.eurofound.europa.eu/eiro/2008/11/articles/eu0811029i.htm.

³ See here for Business Europe available at: www.buinesseurope.eu/DocShareNoFrame/docs/1/OHLKDHFDJDPNEPIMKFFIDMHJIPDBW9DWDGTG9LTE4Q/UNICE/docs/DLS/2008-01079-E.pdf; however Eurociett welcomed the directive: www.euro-ciett.org/fileadmin/templates/eurociett/docs/press_releases/Eurociett_Press_Release_adoption_of_AWD_22-10-08.pdf.

⁴ Proposals of Directives submitted in 1982 (OJ No C 62/7 (12 March 1982) and OJ No C 128/2 (19 May 1982)) later redrafted (OJ No C 18/5 (22 January 1983) and COM (84) 159 final (84/C 133/01).

⁵ Second attempt in 1990 Commission proposed 3 new directives (COM (90) 228 final (90/C 224/04); COM (90) 228 final - SYN 280 (90/C 224/05) and COM (90) 228 final - SYN 281 (90/C 224/06));

of a Directive on Temporary agency work⁶ providing the basis for the now adopted TAWD. The proposal was strongly debated. After the 2003 negotiation breakdown⁷ it seemed again as if also this attempt would fail. But it succeeded after a hard fought compromise between member states and EU Parliament. When finally adopting the TAWD it has been interpreted as a first step towards a more social Europe.⁸

In sum, the long regulation process underlines that the regulation of temporary agency work at European level is a controversial issue. For the member states due to different national regulatory frameworks. As regards the European social partners, disagreement primarily exists over the level of protection for this type of workers.⁹

Temporary agency work is characterised by its triangular form of employment. The triangular employment relationship differs from the standard normative model¹⁰ in that two parties share employer responsibility. For TAWs this means that they are hired by the agency and send to work for a temporary assignment at a user undertaking which will supervise and direct the work. This implies that TAWs will change their place of work-site more often than the 'standard worker'.¹¹ This indicates further that the TAW will have less stable employment relationships. Therefore the triangular employment relationship turns away from the essential features of standard employment and challenges the goal of labour market regulations to preserve employee protection as associated with the standard employment relationship.

A need for the regulation of TAWs appeared more and more urgent. Other existing Directives either included TAWs¹² or excluded this type of workers.¹³ Consequently, legal obscurity introduced itself at European level, especially with regard to basic working and employment conditions of temporary agency workers. Furthermore, the International Labour Organisation (ILO) Convention No. 181, 1997 on Private

third attempt negotiations by the social partners ETUC, UNIC, CEEP, see here ILJ E.L. Jones, *Temporary Agency Labour: Back to Square One?*, Vol 31, No. 2, June 2002.

⁶ COM(2002) 149 final 002/0072(COD).

⁷ See article EIROOnline of 24 June 2003 available at: www.eurofound.europa.eu/eiro/2003/06/feature/eu0306206f.htm.

⁸ See here EIROOnline 07 January 2009; www.eurofound.europa.eu/eiro/2008/11/articles/eu0811029i.htm; EurActive.com 23.10.2008: www.euractiv.com/en/social/europe/social-partners-hail-agency-worker-discrimination/article-176599.

⁹ See here ILJ L.Zappala, *The Temporary Agency Work Directive: An impossible political Agreement?* Vol 32, No. 4, December 2003.

¹⁰ I use here the same expression as in L.Vosko, *Legitimizing the triangular employment Relationship: Emerging International Labour Standards from a comparative perspective*, *Comparative Labor Law and Policy Journal* Vol. 19, 1997. This term refers to an employee having only one employer works fulltime and expects to be employed indefinitely.

¹¹ This term will refer to the worker under the standard normative work model, see footnote 10.

¹² Directive on Health and Safety at Work 91/383/EEC, OJ No L 206/19 (29 July 1991) and Directive Posting of Workers 96/71/EC OJ No L 18, 21 January 1997.

¹³ Services Directive 2006/123/EC, OJ No L 376/36 27 December 2006, Fixed-term Work Directive 1999/70/EC OJ L 175, 10 July 1999.

Employment Agencies laid down key elements to be addressed in a national framework regulating temporary agency work. This Convention has been an important guideline for the European member states, also in newly acceding countries, where temporary agency work is a relatively new form of employment relationship.

There are two fundamental issues under debate with regard to temporary agency work: first, there is its place within employment policies; second, the mechanism of the triangular employment relationship is under debate, especially in relation to the legal obligations of the temporary work agency and the user undertaking towards the agency worker. The question analysed in this article is how the TAWD has addressed both of these fundamental issues. Furthermore, in an international mobility context, temporary agency is relevant as well in the context of the provision of services in the European internal market. Therefore, there is a need to further investigate whether the TAWD adds clarity to the Posting of Workers Directive 96/71/EC.¹⁴

2. THE DEVELOPMENT OF THE STATUS OF PROTECTION OF TEMPORARY AGENCY WORKERS

Although an open method of coordination is used in European employment policy, the guidelines determine pathways for member states, also when regulating employment and working conditions. In the case of temporary agency work we can observe two major trends or phases. The first phase can be called the 'era of atypical work', during which the intention was primarily to provide sufficient levels of protection within the employment relationship by reducing the regulatory gap with standard employment. The second phase pursues a clear change in employment policies with an emphasis on the combination of flexibility and security. Temporary agency work is attributed in this phase, with an own dynamic of contractual variety and a labour market function, called here 'the intermediary to workers mobility'.¹⁵

2.1. TEMPORARY AGENCY WORK IN THE 'ERA OF ATYPICAL WORK' REGULATIONS

The concept of 'atypical' work can be seen as having a dual face: it includes a drive towards both regulation (extension of social protection) as well as de-regulation (flexibility). The regulatory tendency aims to protect workers from precariousness. Flexibility is rather associated with decreasing such coverage. A realistic combination of both has therefore been put into question. Despite this duality, the concept of

¹⁴ OJ No L 18, 21 January 1997.

¹⁵ For the inspiration of this division in temporary agency work employment policies, see here N. Countouris, *The changing law of the employment relationship. A comparative analysis in the European Context*, Ashgate, 2007, Chapt.3.4, p. 121.

'atypical' work has largely been seen as an approach for a form of work which is less qualitative compared to standard employment relationships.

From the different attempts to legislate on 'atypical' work, three stages of development during this era have been deduced in research.¹⁶

The first regulatory frameworks concerning temporary agency work (including the national level) are part of the first stage denominated 'tolerance'. The trademark of this stage is that legislation limited quantitative use and determined abusive practices.

During the early 1960s temporary work agencies started to grow constantly. They provided a service of making workers available to a third party. Even if this activity did not correspond to typical activity of private employment agencies and thus were first excluded from ILO Convention No. 96 (Revised) on Fee charging employment agencies, member states wanted to make their labour markets more flexible and started to loosen regulation for this form of employment more and more.¹⁷ Therefore the EU Commission's goal in the 1980s was first of all the increase of the social acceptance of 'atypical' employment, by placing an emphasis on extension of social protection. Thus, it tried to reduce the level of precariousness, by advancing legislative proposals on part-time, fixed-term and agency work in a broad scope, even including social security provisions.¹⁸ It led to a first time lack of consensus between member states.

In the following attempts in the early 1990s, the proposed Directives were still presented under a broad scope. But only the Directive on Health and Safety at Work 91/383/EEC¹⁹ was finally adopted and concerned only fixed-term and agency work. The initiatives on distortion of competition and conditions of employment concerning all three types of 'atypical' work did not get through. The rejection of the member states was connected with the inclusion of social security provisions. At the time, 'tolerance' with regard to temporary agency services was not an accepted thought in all member states. Mainly Spain and Italy remained opposed and temporary agencies were outlawed in these countries until the European Court of Justice ruling of the Job Centre case,²⁰ ending the public monopoly of workers placement. This decision accelerated reforms in member states to regulate the service of temporary agencies.

¹⁶ Idem 16. These three stages had been observed in western European member states, the acceding states just started to regulate this form of work recently (2003) some do not have regulation in place such as Bulgaria, Latvia, Cyprus, Malta. See also Arrowsmith, Temporary agency work in an Enlarged Europe, European Foundation for the Improvement of Living and Working Conditions, 2006.

¹⁷ The typical activity would be in the area of recruitment and placement of workers. The exclusion of the Convention 96 was clarified by the ILO Director General in 1966 but continued to be debated. See source mentioned under footnote 10, p. 51.

¹⁸ See here also M. Jeffrey, The Commission Proposals on 'atypical work': Back to drawing board... again, ILJ, Vol 24, No. 3, September 1995.

¹⁹ OJ No L 206/19 (29 July 1991).

²⁰ Case 11 December 1997 C-55/96.

Under the second stage, tripartite negotiations were progressively introduced in order to provide at least equal basic working conditions²¹ for those in 'atypical work' as enjoyed by workers in standard employment. This was called the partnership approach under European employment policy. The equal treatment principle had the mission to raise the degree of social stability for agency workers. It provided for the possibility to create the same level of protection for employees in the virtual same employment relationship. Here the idea of the concept of 'divided employer responsibility' started to develop more and more. It was set to ensure that equal treatment could also be enforced at the level of the user undertaking. This normative model leans on the associated level of protection of standard employees.

The timeframe of this stage starts with the adoption of the ILO Convention No. 181 in 1997, legitimizing the services of temporary work agencies and similar staffing agencies. Member states continued to regulate temporary agency work adapted to their labour market situations.

It is also at this time when the EU Commission consulted EU social partners under the then new procedure of Article 138 EC on 'atypical work'.²² The attempt by the European social partners²³ to negotiate on temporary agency work failed, in particular because of the equal treatment dilemma²⁴ of temporary agency workers. An additional cause was that the workers side wanted to restrict the use of temporary agency work too drastically which did not find agreement within the employer's side. Remarkably is that on national level, regulations succeeded to introduce more and more equal treatment for temporary agency workers. Equal treatment provided same basic employment conditions, such as health and safety, working time, vacation, leave and increasingly as well pay with comparable workers at the user undertaking.²⁵

²¹ Referring here to working time, overtime, rest time, breaks, night work, holidays and public holidays, pay.

²² The ratification of the Amsterdam Treaty gave the option under Title XI, corresponding to social policy, to the EU Commission to consult social partners so they can take action through adoption of framework agreements. In addition, the new Title VIII on Employment, made coordination of employment policies between member states possible. Therefore the Luxembourg Council in November 1997 launched the European Employment Strategy which is an annual programme of planning, monitoring and examining of employment policies put into place in each of the member states. It is from this moment when adopted European employment guidelines direct and adjust national employment policies.

²³ UNICE, CEEP, ETUC statement from 21 May 2001, see here information EIROnline article available at: www.eurofound.europa.eu/eiro/2001/06/inbrief/eu0106215n.htm.

²⁴ Meaning here the debate on finding the right comparator has it had been established under the Fixed-term Work Directive 1999/70/EC who was compared to the worker with a permanent full-time employment contract in a similar position. For agency workers it was the question whether they should be compared to other temporary agency workers or workers in a similar position in the user undertaking.

²⁵ First member states with equal treatment were France, Greece, Finland, Italy, Portugal and Spain without any limitation, starting in 2000. See Storrie, Temporary Agency Work in the European Union, European Foundation of the Improvement of Living and Working Conditions, 2002.

It should be noted that during this stage the EU Commission Green-paper, 1997²⁶ and the following Employment Guidelines for 1998²⁷ and 1999 did not make further reference to temporary agency workers and their protection level. It mainly concerned lifelong learning opportunities for workers in stable employment and active labour market policies for the unemployed. In the meanwhile, the Framework Agreements on Part-Time Work²⁸ and Fixed-Term Work²⁹ were adopted under the light of reducing the gap of protection between standard employment and 'atypical' work.

A third stage came with member states using 'numerical stabilisation' as a promotion of agency work, in order to make it appealing for workers through special 'atypical' workers rights, such as for example the French 'precariousness bonus' at the end of fixed-term or agency work. The approach towards 'atypical' work became increasingly individualistic by putting forward the advantages for workers having the possibility to combine work and family life more conveniently. On the other side, it allowed employers more flexibility within the productive system of letting businesses decide on how to make use of the different forms of 'atypical' work.

Flexibility was combined with security within the four pillar approach of the adopted employment guidelines: employability; entrepreneurship; adaptability; equal opportunities. But the formula of combining flexibility and security changed with the adoption of the Lisbon Strategy in 2000. Especially the Employment Policy Guidelines for 2003–2005 set new standards in labour regulation.³⁰ The 'flexicurity' strategy intended to provide workers with pathways of exits from and entrances to the active labour market as easily and voluntarily as possible through worker adaptability measures. In this sense, 'atypical' work policies turned into an economically effective strategy, bringing growth and job creation. This approach moved to an understanding of flexible employment contracts as being qualitative, and due to increase the overall number of jobs.³¹

2.2. TEMPORARY AGENCY WORK: 'THE INTERMEDIARY TO WORKERS MOBILITY'

The following development of the 'flexicurity' approach is underlined in the preamble of the TAWD. Attention should be drawn to the Employment Guidelines for 2005–2008 which 'seek to promote flexibility combined with employment security and reduce labour market segmentation having due regard to the role of the social

partners'. The important role of temporary agency work in this strategy is due to the Employment Taskforce chaired by Wim Kok and its report made in November 2003.³² The report attributed temporary agency work the 'place of intermediary that can support flexibility and mobility of firms and workers' within the labour market. Furthermore, the report calls on "Member States to remove obstacles to the setting up and development of temporary work agencies as effective and attractive intermediaries in the labour market, offering improved job opportunities and high employment standards."³³ This new role for private employment agencies can be seen as the basis from which the European sectoral social partners³⁴ agreed and developed principles on the use and status of temporary agency work. The emphasis changed from temporary agency work being 'atypical' from standard employment, necessitating a separate employment protection status, to the role of temporary agencies as being the important tool in workers 'upward mobility' and employers way to adapt to the competitiveness of globalisation.

This view has been further strengthened by the EU Commission Guidelines for principles of flexicurity.³⁵ Flexible contractual arrangements are being attributed an important role in the realization of 'flexicurity', part of the European social model. In this respect the most important change is that temporary agency work is also to be approached with an economic motive in relation with the given context in the labour markets. The enormous turnover of temporary work agencies and the rapid growth in its use is often underlined. The 'flexicurity' approach inspired the sector social dialogue committee on temporary agency work to release a joint position paper³⁶ in 2007 demonstrating cohesion with the Growth and Jobs Strategy³⁷ and determination in eliminating unfair practices within the sector. This strategy has shown to be a motor. Another joint declaration just before the adoption of the TAWD,³⁸ reassured that the sector social partners agreed as well with the text of the modified proposal, even though with slight differences.

²⁶ COM(97) 128 final.

²⁷ COUNCIL RESOLUTION of 15 December 1997 No. 13200/97.

²⁸ Council Directive 97/81/EC 15 November 1997 OJ L014 20 January 1998.

²⁹ Council Directive 1999/70/EC 28 June 1999 OJ L 175/43 10 July 1999.

³⁰ Council Decision of 22 July 2003 (2003/578/EC).

³¹ See here introduction of proposal for a Directive on Temporary Agency Work COM (2002) 149 final, 20 March 2002.

³² Available at: www.maec.es/SiteCollectionDocuments/Espana%20y%20la%20Union%20Europea/PoliticasyComunitarias/empleo/wimkok.pdf.

³³ See p. 29, 30 of the report.

³⁴ Sectoral social dialogue committee on temporary agency work started its work in 2000 and was official launched by a joint declaration between Uni-Europa and Eurociett, declaration is available at: www.unionnetwork.org/unitwbs.nsf/f883670a51012647c125681100363a47/d1eba9de092ea237c1256a950046805a?OpenDocument and also website at EU Commission with further information: <http://ec.europa.eu/social/main.jsp?catId=480&langId=en&intPageId=75>.

³⁵ Brussels, 27 June 2007 COM (2007) 359 final.

³⁶ Available at: www.euro-ciett.org/fileadmin/templates/eurociett/docs/Eurociett_Uni-Europa_joint-declaration_on_Flexicurity_28-02-07.pdf.

³⁷ Brussels, 2 February 2005 COM (2005) 24.

³⁸ The document is available at: www.euro-ciett.org/fileadmin/templates/eurociett/docs/position_papers/2008_AWD/Eurociett-UNI-Europa_joint_declaration_on_AWD_-_May_08.pdf.

Under Article 2 TAWD determining the aim of the Directive, the double side of its substance is implied. The Directive is a tool to lay down minimum protection and rights for TAWs, which is its social policy side; at the same time it couples the laid down 'flexicurity' principles and market regulation of the sector which is its employment policy side.³⁹

The intention of the Directive is first of all to promote temporary agency work as being the employment contract which replies the most to the different needs of employers and employees. For employers it provides the necessary external flexibility and for employees it is a good way to reconcile family and work life. In this sense it appears that temporary agency work could become a common employment form. Yet, the Directive states clearly that the permanent open-ended contract should still be seen as the norm, consequently trigger better employment conditions⁴⁰ as temporary employment could provide. This might be an indication that the initial controversy over the status of temporary agency workers, between standard employment and 'atypical' employment has still not been resolved. Remarkable is that the debate of the three way employment relationship has as well taken a turn under the dynamic role of the temporary work agency. Under the concept of 'atypical' work the emphasis lay on a division of employer responsibilities and the Directive under the 'flexicurity' approach promotes the temporary work agency as the definite employer bound to meet all the employer obligations.

Evidence for this point can be found under Article 2.⁴¹ The solution appears by introducing a form of bilateralism into the three way work relationship. However the temporary work agency cannot be seen as a habitual employer due to the fact that the TAW does not exercise his working activity under the direct supervision of the agency. In order to become a standard employment relationship the focus should have been on finding a concept which embraces the fact that the triangular employment relationship is different. Therefore designing protective measures adapted to its temporary nature and the multiple parties involved. This should have included as well minimum rights when dismissed or made redundant. It also needs forms of protection which balance the instability factor due to work-site change. The 'flexicurity' concept responds to this problem by endorsing the adaptability and employability of TAWs facilitating them thereafter to move into a more stable employment relationship.

Under this view we need to analyze the provisions of the Directive.

3. THE PROVISIONS OF THE TAWD

The TAWD lays down a 'minimum of the minimum protective level'⁴² through the equal treatment principle as determined under Article 5.1 of the Directive, as well as collective rights under Article 7 and 8. Consequently TAWD has a rather restrictive scope on social policy by excluding social security provisions, dismissal rights or parental leave. Not including dismissal rights is now seen by TAWs as very unbeneficial in a time of economic crisis where TAWs are the first being made redundant without any redundancy payments or other specific state aides. The TAWD serves on the other hand the flexibility and security parts by Article 4 review of restrictions and prohibitions, and Article 6 transition pathways of workers and their development of employability.

3.1. EQUAL TREATMENT

It appears that under the TAWD the equal treatment principle adapts to the new dimension under the 'flexicurity' principles. The equal treatment principle is to be distinguished from the 'older' version due to the substitution of a direct comparator, a worker in a similar position in the user undertaking in a permanent full-time position.⁴³ The principle is more descriptive by determining that the TAW during his assignment in the user undertaking should benefit 'at least equally in consideration of basic working and employment conditions that would apply if they had been recruited directly by that undertaking to occupy the same job', applicable from day one. When interpreting this principle it would mean that there is no longer an emphasis on the type of contract, in order to avoid discrimination between workers due to their different employments status. Now equal treatment means that the general provisions⁴⁴ in relation to the determined basic working and employment conditions,⁴⁵ applicable in the user undertaking, binding for all its directly employed workers have to apply equally to TAWs. This provides the advantage of where in the cases before, no comparator could be found. It is also beneficial for the TAW when putting forward seniority and qualification level in order to evaluate the corresponding pay. It is also acceptable for businesses because it will take into account variations of pay between

⁴² Expression used by Commissioner Flynn when speaking of the Part-time Directive P. Flynn, European Commissioner for Social Affairs, quoted in *Agence Europe*, 8 December 1994; seen in article of M. Jeffrey see footnote 16. I see this alike when interpreting the TAWD.

⁴³ Compare here with the non discrimination principle Clause 4.1 of the Fixed-term work Directive 1999/70/EC: 'In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds'.

⁴⁴ Law, collective agreements etc.

⁴⁵ As they are defined under Article 3.1(f) TAWD.

³⁹ See here ILJ L. Zappala, *The Temporary Agency Work Directive: An impossible political Agreement?* Vol 32, No. 4, December 2003, 2. p. 310.

⁴⁰ See here the preamble TAWD recital 15.

⁴¹ '...and by recognising temporary work agencies as employers, ...'

sectors and professional categories. Yet, we need to observe cautiously the different levels of pay when they are explicitly applicable to TAWs in the company collective agreements or in universal applicable collective agreement establishing minimum pay for the temporary agency sector that they do not keep pay levels significantly lower or are disadvantageous.

If interpreting the equal treatment principle further, it appears that the TAW should be treated the same when determining basic working and employment conditions when hired out but can be treated differently with regard to other employment conditions excluded from the definition under Article 3.1 (f) because of their temporary agency work contract. The deviation possibilities of the equal treatment principle under Article 5 also show that the equal treatment dilemma did not reach a unanimous solution between member states, especially with regard to pay. The first one under 5.2 indicates that deviation will be possible specifically in the case once the TAW is employed under a permanent contract with the temporary work agency. Hence, one might come to the conclusion that there are two types of TAWs, those under permanent contract and those who are not. This implies that those who are not in a permanent relationship are the only ones needing better protection through equal treatment which refers again back to 'atypical work' regulations. Further research is needed to investigate, if a permanent work contract with the temporary agency can be compared with the standard employment relationship, due to the fact that the TAW's working environments will change during the time of employment and as well as the quality of work to be carried out.

The deviation possibility under Article 5.4 TAWD allows member states after consultation with social partners to derogate from the equal treatment principle through a qualifying period. It will further be necessary to evaluate what is seen as acceptable adequate level of protection for TAWs during the qualifying period. This deviation possibility has been created under the Directive mainly for Great Britain. Notably qualifying periods have been strongly criticised during debates of the proposal text which allowed before a general qualifying period of six weeks. The issue is controversial due to the appearance of declaring the TAW as second class worker and therefrom making it socially intolerable. It does not either fit into the concept of 'flexicurity' because under this concept temporary agency work should be promoted as a common form of employment and needs to prevent the creation of competition through cost advantages between all types of employment contracts.

It should as well be observed that the equal treatment principle is not going to generate many changes since in most of the member states it is already standard in the regulatory framework for temporary agency workers, with the exceptions of Great Britain (now 12 weeks qualifying period), Ireland and those who do not have a framework yet. At the same time we need to keep in mind that with regard pay, it is the member states who will define which components are included, also with regard to pensions and other social security provisions.

3.2. REPRESENTATION OF TEMPORARY WORKERS AND COLLECTIVE BARGAINING RIGHTS

The role of social partners in the regulation of temporary agency work is important to assess also because the 'flexicurity' strategy provides them with a central role of realizing the principles. Yet, temporary agency work has still the image among population of being a modern form of slavery.⁴⁶ This serves as a basis for arguments of national trade unions to opt for legislation which combines a very protective status for TAW with delimitation of the use of this form of employment. This protective strategy should make this form of employment only attractive by its temporary nature, especially for the use in cases of unforeseen tasks and events, like for ex illness of a permanent worker or higher demands in production. The belief is that delimitation of its use prevents the transformation of permanent employment into temporary agency work jobs. This however gives the appearance that on national level social partners are still at stage two of 'atypical work' regulation and not yet ready for the 'flexicurity' principles. Social partners at national level should be observed during the implementation process, due to their considerable role when it comes to the use of deviation possibilities from equal treatment with regard to pay and the other employment and working conditions.⁴⁷

With this regard, the aims pursued and terms of Article 5.3 TAWD which constitutes a deviation possibility from the equal treatment principle, are not very clear as to the aimed results in practice. The article states: '... the option of upholding and concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ' from the equal treatment principle. It can either mean that social partners add more rights to the equal treatment principle or it could refer to a special status of TAWs at the user undertaking not equal with the directly employed workers.

Attention should be paid to recent research on temporary agency work and collective bargaining⁴⁸ which observed that the organisation of representation for TAWs differs in member states, especially in new member states where four of them do not have yet an employer collective body.⁴⁹ Also on the trade unions side it has been

⁴⁶ This term has been used in relation with immigrants and migrants being employed by temporary work agencies (ex EIROOnline www.eurofound.europa.eu/eiro/2007/11/articles/nl0711019i.htm) as well as in relation with dumping wages, term is often used in German press articles ex available: www.n24.de/news/newsitem_3720909.html.

⁴⁷ See especially Article 5.3 and 5.4.

⁴⁸ J. Arrowsmith, *Temporary Agency Work and Collective Bargaining in the EU*, European Foundation for the Improvement of the Living and Working Conditions, available at: www.eurofound.europa.eu/eiro/studies/tn0807019s/tn0807019s.htm.

⁴⁹ This includes Bulgaria, Cyprus, Latvia, Malta. These are Member States where in general a regulatory framework for temporary agency has not yet been fully established. Additionally it should be

found that TAWs are not represented by a sub-division of a trade union regrouping only temporary agency workers.⁵⁰ Most of agency workers are members of the general most representative trade union in their sector or branch.

We might already observe that at EU level, the creation of a sectoral social dialogue committee for temporary agency work has been more productive with regard to agreements on joint positions able to address sector specific problems and knowing the needs of the business. It needs more research on this development, whether it is necessary to have social partners specifically for the temporary agency work sector in order to be able to develop its own practices under a given framework or whether it is enough that the most representative social partners in general continue to bargain in this sector. One argument that TAWs need to organize themselves in their own trade unions appears now in the time of economic crisis where TAWs are the first made redundant. It seems that they are often neither able to rely on help from the works council of the user undertaking⁵¹ nor from the temporary work agency. The TAWD supports this observation under Article 7.1 stating that TAWs should in general be counted for calculating the threshold of representative bodies at the temporary agency with an option for member states under 7.2 of combining it at the user undertaking. It could provide then the possibility, to impose working conditions agreed at the temporary agency in the user undertaking.

Within this discussion Article 4 and 11 of the ILO Convention 181 should be brought to the attention providing that freedom of association should not be denied as well as the right to bargain collectively. This issue should have been addressed more extensively by the Directive. The Convention 181 is not ratified by all member states.⁵² It is also an important question with regard to strikes. The TAWD states in its preamble⁵³ that it does not interfere in legislation of member states prohibiting the use of TAWs during a strike of workers in the user enterprise. There is however no further information with regard to the rights of TAWs when wanting to strike for their own employment and working conditions at the user undertaking or participate in a general strike there. Could the user undertaking make damage claims towards the temporary work agency and its workers? Here no European answer but this question demonstrates specifically that in the triangular employment relationships,

noticed that in many other member states only trade associations are established to represent the temporary agency business. They do not have a direct role in collective bargaining but influence soft regulations such determination of best practices and codes of conduct.

⁵⁰ See with regard to Union density in the different Member States, European Foundation for the Improvement of Living and Working Conditions, *Temporary Agency Work and Collective Bargaining in the EU*, p. 15, three exceptions France, Italy and Greece.

⁵¹ See interview of 13 May 2009 with Denis Pennel Chief of Eurociett available at: www.euractiv.com/en/enterprise-jobs/temp-chief-agencies-see-early-green-shoots/article-182296.

⁵² See the list of states which ratified this Convention under: <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byconv.cfm?conv=C181&hdroff=1&lang=EN>.

⁵³ Recital 20 in the preamble of the TAWD.

the interests of the parties are difficult to address by the protective standards for the 'typical' worker in a bilateral employment relationship.

3.3. REVIEW OF RESTRICTIONS AND PROHIBITIONS FOR TEMPORARY AGENCY BUSINESS AND ACCESS TO EMPLOYMENT FOR TAWs

It is under this chapeau where the 'flexicurity' principles find their concrete application. In order for private employment agencies to become the intermediary for 'upward mobility' it is necessary that temporary agency work becomes a common form of contractual diversity in labour markets which should be only restricted to a certain limit in its use. These limits are set out under Article 4 TAWD, by determining that member states need to review current restrictions and prohibitions. Only those restrictions are allowed which can be justified on delimited grounds of general interest such as the protection of the TAW, health and safety at work and the need to ensure that the labour market functions properly and abuses are prevented. In order to assess its impact on national regulatory frameworks, we need to wait after the implementation and consultations in each of the member states. Fears are that disintegration of restrictions in legislation of the use of agency work could create stronger competition between permanent and temporary job creation. Another risk might be as well abuse of protective rights of TAWs through opportunistic employers.

The revision will apply however only to the protective framework of TAWs because it explicitly excludes under Article 4.4 the regulation on registration, licensing and certification of private employment agencies. Nonetheless these regulations also do have an impact on the market of private employment agencies as such as we can see in the comparison between France and Great Britain for ex: when financial guarantees are high and registration is costly mainly the big multinational private agencies dominate the market (France) and where it is the opposite it allows also small and medium size agencies to be established (Great Britain).⁵⁴ Consequently the dynamics of the labour market and the private employment agencies market are very different. However the aim of Article 4 is to enhance the flexibility side⁵⁵ which needs to take into account the dynamic of the market of agency businesses as such.

The security side for TAWs appears under Article 6 of the Directive providing for the possibility of transition to the user undertaking when there are job openings (6.1).⁵⁶ Consequently under 6.2 the TAWD invites member states to provide for sanctions in the case of clauses prohibiting the transfer of the TAW for direct employment

⁵⁴ See J. Arrowsmith, *Temporary Agency Work and Collective Bargaining in the EU*, Eurofound, p. 6.

⁵⁵ ILJ vol 38 no. 3, September 2009, N. Countouris, R. Horton: *The Temporary Agency Work Directive: Another broken promise?* p. 336.

⁵⁶ Article 6.1 Temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent

at the user undertaking during the assignment. Nonetheless it still allows the private employment agency to ask a reasonable transfer fee to be paid by the user undertaking. The question is whether even a 'reasonable' fee could prevent a transfer and if the security side for TAW is hereby 'hard law' enough to prevent abuses. On the other hand, TAWs should not be charged for the services rendered by the private employment agency to avoid as well the creation of any competition from the latter toward public employment agencies.

Enhancing employability of TAWs through ensuring access to training and lifelong learning opportunities (6.5) is another component of providing security to the TAW ensuring the re-entry to the labour market after a passive time. This provision is in so far important here due to the fact that an important number of TAWs have a rather low skill qualification background.⁵⁷ Lifelong learning and training is a necessary tool for workers and employers to respond to the competition in the economy increasingly based on knowledge. When assessing thought the terms of the Directive, they turn out to be of a rather 'soft' nature. There is a risk that temporary work agencies do not invest enough in training because it appears to be less profitable due to the fact that the TAW might not come back to their agency for search of employment or is permanently hired by a user undertaking. Just another small comment here on this: it is rather doubtful that training is the only component of ensuring quality of employment for TAWs. There needs to be as well incentives for the worker in some form of recompense such as higher pay or 'upward mobility' to a more challenging activity. The concept of training is very individualistic and pre-requires a learning culture in society.

4. CONCLUSION

Tracing back the employment policy stages with regard to 'atypical' forms of employment demonstrates why the TAWD has a rather weak outcome. On the one side the TAWD should have been an instrument that provides 'flexicurity' a practical example. On the other side hesitation and controversy within decision makers and social partners regarding this strategy created 'soft law' provisions which could be an effect of the employment policy part which is in general the competence of member states. Consequently the provisions need to leave enough room for member states to adapt them to their national labour markets. However, whether the coordination of employment policies with regard to temporary agency work and harmonization of TAWs minimum rights within a same instrument will strengthen TAWs rights, is still under debate.

employment. Such information may be provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged.

⁵⁷ See here table 3 p. 8 J. Arrowsmith, *Temporary Agency Work in an enlarged Europe*, The European Foundation for the Improvement of Living and Working Conditions.

The adopted TAWD seems to be a proof, due to its long adoption procedure, of today's still reigning uncertainty among social partners and decision makers of the different member states, over how to apply the principles of 'flexicurity' and where to place in employment policy the diversity of contractual arrangements for workers strategically. A step towards developing an own character of temporary agency work in its own terms is regarded as a good course.⁵⁸ Yet, it seems that no rigorous change has been made within the TAWD away from 'atypical' employment. The concept of this three way employment relationship has been redefined as a more bilateral one, through the attribution of all employers' obligations to the temporary work agency. However in order to give this concept a stronger dynamic also in view of strengthening the rights of TAWs, it might need a different collective organisation.

Further solutions need to be apprehended when analysing the TAWD with regard to other adopted EU Directives. In the preamble recital 22 of the TAWD says as well that member states should implement this Directive in conformity with the Posting of Workers Directive 96/71/EC. Temporary work agencies can post workers for the provision of a service directly into a user undertaking established in a different member state. Until now, temporary agency workers benefited of the same status of employment as determined in the host member state. Yet, practice of the temporary agency business shows that workers get hired out by user undertakings for a similar purpose as a probation period in permanent contract. This means workers are not hired out for a temporary demand of workforce but to test workers capacity and employability. For this purpose the TAWD was urgent to be passed in order to determine its legal concept and distinguish it from other forms of multiple employment relationships. In this regard the TAWD wants to promote temporary agency work as an 'intermediary of upward mobility' therefore supports this purpose. The positive aspect could be in the future that temporary work agencies facilitate mobility within the European internal market. Yet the impact this would have on national labour markets is not yet known. It will be a specific task to follow the implementation process in the member states and observe whether the result is still in conformity with the aim of the Posting of Workers Directive, to promote cross-border mobility.

Finally, the Services Directive⁵⁹ has explicitly excluded temporary agency work from its scope. Social partners⁶⁰ had asked to deal with this question in a separate piece of legislation on temporary work agencies. Now the TAWD did not establish any further criteria concerning licensing or certifications as it was asked from the social partners. The result is that temporary agencies, wanting to post TAWs, would have

⁵⁸ See as well Chapter 2 *Beyond atypical* in O. Bergström, D. Storrie, *Contingent employment in Europe and the United States*, Edward Elgar Publishing Limited, 2003.

⁵⁹ OJ No L 376/36 27.12.2006.

⁶⁰ See here the opinion of Uni-Europa on the draft Service Directive available at: [www.union-network.org/unieuropeanews.nsf/3778822ca7c67239c1256f31002f87dc/\\$FILE/UNI-Europa%20initial%20orientations-English.pdf](http://www.union-network.org/unieuropeanews.nsf/3778822ca7c67239c1256f31002f87dc/$FILE/UNI-Europa%20initial%20orientations-English.pdf).

to comply with the standards of establishment in the host state. The determination of minimum establishment criteria or a licensing system comparable as for the transportation sector might have reduced legal uncertainty and introduced similar standards in all the member states. Conclusively, it would have promoted further cross-border working situations.

PRIVACY PROTECTION WITHIN ELECTRONIC COMMUNICATION

The Disputed Finnish "Lex Nokia"

ANDERS VON KOSKULL*

Keywords: constitutional fundamental rights; employers' right to check employee identification data within electronic communication; intense political and legal debate; protection of employee privacy and of employers' business secrecy

1. INTRODUCTION

Employers have a legitimate need to control the personnel's use of the corporation's ICT equipment. Although the employer owns the ICT equipment and the employee works for the employer, the employee has legally recognized interests of privacy protection. The adoption of "Lex Nokia"¹ in Finland mirrored tensions between these interests. The act (125/2009) amends the Act on the Protection of Privacy in Electronic Communications (516/2004; hereafter PPEC).²

In the Governmental Bill for Lex Nokia (Hallituksen esitys 48/2008 vp) the Government carefully explained *i.a.* the employer's (corporate subscriber, PPEC Section 2 (12) needs to monitor and prevent misuse of electronic communication. The Government also underlined the needs of the employer to protect business secrets. Lex Nokia was seriously criticized in the Parliament. Critique was also voiced by legal experts and the media attention was considerable.

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¹ The origin of this nickname is explained in part 5.

² The Acts mentioned in this report are available as unofficial English versions (translations by the ministry in question) at the site www.finlex.fi/en/laki/kaannokset. An exception is the Lex Nokia.

EPOS (European Platform on Social Dialogue)
Belgian Federal Ministry of Labour
European Working Group on Labour Law

The Essence of Social Dialogue
in (South East) Europe
A primary comparative legal survey

editors

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SOCIAL DIALOGUE AND HUMAN RIGHTS

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The great leap forward in terms of working conditions came after the First World War. G.A. Johnston suggests that this breakthrough was a direct consequence of the conflict. The war industry required close cooperation between the state machinery, employers and workers. "Governments therefore became much better informed on the thinking of the employers and the workers and much more inclined to give sympathetic considerations to their views".² Another equally important factor is the Russian Revolution.³ It dawned on the ruling classes that conflict between Labour and Capital should be avoided.

It is therefore not surprising that the structure of the ILO is based on cooperation between trade unions, employers and governments.⁴ During the interbellum this symbiosis often resulted in structured dialogue at the national level. We shall analyse this phenomenon in the introduction and subsequently provide an overview of the enabling conditions for social dialogue and its legal sources. Next, we shall examine if there is a human right to social dialogue, if so to what extent, and how it interacts with other human rights. Finally, we shall reflect on its future.

I. SOCIAL DIALOGUE: AN ANALYSIS

Only Articles 138 and 139 of the EC Treaty refer, albeit only implicitly, to social dialogue.⁵ Nonetheless, both the ILO⁶ and the European Union⁷

¹ The author is also visiting professor at the University of Antwerp Management School (UAMS) and at the Centre of Defence Studies (Advanced Military Administrator Course).

² G.A. JOHNSTON, *The International Labour Organisation*, London, Europa Publications, 1970, 11.

³ E. VOGEL-POLSKY, *Du Tripartisme à l'Organisation Internationale du Travail*, Brussels, Ed. de l'Institut de Sociologie de l'Université Libre de Bruxelles, 1966, 18.

⁴ *Ibid.*, 15 et seq.

⁵ Article 139(1) EC Treaty: "Should management and labour so desire, *the dialogue between them* at Community level may lead to contractual relations, including agreements".

frequently use the notion in all sorts of documents. In the following pages, we shall use that material⁸ to go through the essential components of social dialogue.

- Contents
- ✓ Social dialogue includes all types of
 - negotiation
 - consultation
 - exchange of information
- The level social dialogue takes place
- ✓ *Ratione loci* social dialogue takes place at the following levels:
 - supranational
 - national
 - regional
 - enterprise level
- The negotiating parties (from a quantitative angle)
- Dialogue normally assumes an interaction between two parties, but there can be more:
 - bipartite: employers (organisations) and workers (organisations);
 - tripartite: employers, workers and (representatives of) the government;
 - ✓ - tripartite-plus: the mentioned parties can also decide to involve others in an effort to gain a wider perspective, to incorporate the diverse views of other social actors and to build a wider consensus.
- The negotiating parties (from a qualitative angle)
- general cross-industry organisations;
- cross-industry organisations representing certain categories of workers or undertakings;
- specific organisations;
- sectoral organisations (employers' organisations and trade unions).

⁶ V° "Social dialogue": www.ilo.org/public/english/dialogue.

⁷ V° "Social dialogue": europa.eu.int/comm/employment_social/social_dialogue.

⁸ This analysis is almost entirely founded on texts which were found in the mentioned websites and is sometimes literally quoted.

- The nature of the negotiation
- ✓ Negotiation can be institutionalised or not. This means it can be organised in an informal way or it can be shaped as an institutional framework.
- The object of social dialogue
- ✓ The object of social dialogue is very diverse. However, it will usually deal with issues of common interest relating to economic social policy.
- Outline and goal
- ✓ - information-sharing: this is not a type of social dialogue, but a basic condition for communication. When a company faces financial problems and management is bound to take measures, the trade unions can only understand these measures if they possess background information, such as balance sheet figures.
- ✓ - consultation: when an employer wants to make a decision, he can consult the workers. Dialogue is intended to ascertain the workers' opinion in order to influence if possible decisions at the managerial level;
- ✓ - negotiations: the ILO distinguishes between "negotiation" and "collective bargaining". It appears that in the case of collective bargaining there is not necessarily a conflict. "Negotiation" implies that parties try to solve a conflict through dialogue and ratify the solution in an agreement.

II. THE ENABLING CONDITIONS OF SOCIAL DIALOGUE

Social dialogue is possible only when certain conditions are fulfilled:

- Strong independent workers' and employers' organisations with the technical capacity to access relevant information for participating in social dialogue *(donstar wil)*

In Article 3.5° of the ILO Constitution there is a reference to organisations which are "most representative". Also Article 3(a) of the Collective Bargaining Recommendation 1981 (No 163) enumerates "the recognition of representative employers' and workers' organisations as a mean of promoting collective bargaining. Consequently, social dialogue is only possible between strong partners. An employer would be unlikely to consider negotiation otherwise."

⁹ See D.A. MORSE, *Origine et Evolution de l'O.I.T.*, Frank W. Pierce Conferences. Paris, Librairie Sociale et Economique, 1969, 102-103.

- Political will and commitment to engage in social dialogue on behalf of all the parties;

Social dialogue is only possible if the parties are, to some extent, willing to sit around the table.

- Respect for the human rights of freedom of association and collective bargaining;

Freedom of association and collective bargaining are the two cornerstones of social dialogue.

- Appropriate institutional support

Social dialogue assumes interference on behalf of the authorities. Even if they do not participate in social dialogue, "measures appropriate to national conditions (should) be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements".¹⁰

III. A (HUMAN) RIGHT TO SOCIAL DIALOGUE?

"Classical" human rights concern mainly the right to freedom and protection. Individuals can claim the non-intervention of the State. Second and third-generation human rights (*droits créances et droits de la solidarité*) are the opposite. The State is assumed to cooperate actively to guarantee them.

Regarding labour relations, human rights are also possible.¹¹ But is there a human right to social dialogue and if so, how does it fit within the concept of human rights?

¹⁰ Article 4 of ILO Convention No. 98.

¹¹ See e.g. F. BRECHER, "Grundrechte im Betrieb" in *Festschrift für Hans Carl Nipperdey zum 70. Geburtstag*, I, München, Beck, 1965, 29-54; F. GAMILLSCHEG, *Die Grundrechte im Arbeitsrecht*, Berlin, Duncker & Humblot, 1989, 105 p.; E. VERHULP, *Grondrechten in het arbeidsrecht*, Reeks Vereniging voor Arbeidsrecht nr. 28, Deventer, Kluwer, 1999, 209 p.; see also P. HUMBLET, "Grondrechten in de onderneming: (g)een contradictio in terminis?" in M. RIGAUX and W. VAN ECKHOUTTE (eds.), *Actuele problemen van het arbeidsrecht*, 5, Gent, Mys & Breesch, 1997, 349-393.

If we assume that there is a right to social dialogue, it would be very much like second-generation human rights. The government should create a structure that allows social dialogue. However, we do not wish to classify social dialogue in this category.

Social dialogue is rather a paradigm to be compared to what Althusser called ideological state apparatuses:¹² "Un appareil idéologique d'Etat est un système d'institutions, d'organisations, et de pratiques correspondantes, définies. Dans les institutions, organisations et pratiques de ce système est réalisée tout l'Idéologie d'Etat. L'idéologie réalisée dans un AIE assure son unité de système, sur la base d'un «ancrage» dans les fonctions matérielles, propres à chaque AIE, qui ne sont pas réductibles à cette idéologie, mais lui servent de «support»"

Before the First World War, relations between Labour and Capital were dominated by violence.¹³ A consensus was generated through social dialogue.¹⁴ It became the fundamental condition for a free market economy.

Social dialogue implies respect for a number of human rights. These are often set out in constitutions, but most of all in international treaties. They concern a number of basic texts from amongst others:¹⁵

- The United Nations
 - Article 23(4) of the Universal Declaration on Human Rights
 - Article 8 of the International Covenant on Economic, Social and Cultural Rights
- The International Labour Organisation
 - Freedom of Association and Protecting of the Right to Organise Convention, 1948 (C 87)
 - Right to Organise and Collective Bargaining Convention, 1949 (C 98)
 - Workers' Representatives Convention, 1971 (C 135)
 - Rural Worker's Organisations Convention, 1975 (C 141)
 - Labour Relations (Public Service) Convention, 1978 (C 151)

¹² L. ALTHUSSER, *Sur la reproduction*, Actuel Marx Confrontation, Paris, PUF, 1995, 109.

¹³ Violence also had an ideological basis, cf. G. SOREL, *Réflexions sur la violence*, in Paris, *Le mouvement socialiste*, 1906.

¹⁴ Some interpret this as the domestication of the working classes. Cf. E. MEISKINS WOOD, "Labor, Class and State in Global Capitalism", in *Rising from the ashes? Labor in the age of "global" capitalism*, New York, Monthly Review Press, 1998, 10.

¹⁵ The enumeration is not exhaustive.

- Collective Bargaining Convention, 1981 (C 154)
- ✓ The Declaration on Human Principles and Rights at Work (1998)¹⁶
- R } - Collective Agreements Recommendation, 1951 (R 91)
- Voluntary Conciliation and Arbitration Recommendation, 1951 (R 92)
- Collective Bargaining Recommendation, 1981 (R 163) ✓
- The Council of Europe
 - Article 11 ECHR
 - Article 5 (revised) European Social Charter (ESC)
 - Article 6 ESC
 - Article 21 ESC

▪ The European Union

The European Union is rather ambiguous on this point. On the one hand, social dialogue is promoted,¹⁷ but on the other hand, the rights, which are necessary to achieve social dialogue, are not coherently recognised. Although the Community Charter of Basic Social Rights for Workers (1989) and the Charter of Human Rights of the European Union (2000)¹⁸ contain certain regulations which are essential to enable social dialogue, these are sources of inspiration rather than mandatory rules¹⁹.

The primary texts with regard to social dialogue (see above) formulate a number of general rules. Their interpretation is mainly carried out by the Committee on Freedom of Association²⁰ (ILO) (hereafter CFA) and the

¹⁶ This declaration covers among other things freedom of association and the right to collective bargaining.

¹⁷ European social dialogue has gained momentum since 1986. Following texts on the subject are: Commission communication "concerning the development of the social dialogue at Community level" (Com (1996) 448 final), Commission Communication "Adapting and promoting the social dialogue at Community level (Com (1998) 322 final), Commission Communication "The European Social Dialogue, a force for innovation and change" (Com (2002) 341 final), Commission Communication "Partnership for change in an enlarged Europe – Enhancing the role of European Social Dialogue (COM (2004) 557 final.

¹⁸ OJ C 364 2000, p. 1.

¹⁹ See K. LENAERTS and P. FOUBERT, "Social Rights in the Case-Law of the European Court of Justice. The Impact of the Charter of Fundamental Rights of the European Union on Standing Case-Law", *Legal Issues of Economic Integration*, 2001, 267-296.

²⁰ See *Freedom of Association. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Geneva, International Labour Office, 1996, 238 p.

*European Committee of Social Rights*²¹ (Council of Europe) (hereafter ECSR). When examining the case law of these committees of experts, we find that basic human rights generate in turn a series of other human rights. *The Digest of decisions and principles of the FAC*, for example, mentions with regard to freedom of association almost 20 parental human rights, such as the right to strike, protection against anti-union discrimination, etc.

Thus, social dialogue is not a specific human right, but rather the sum of several human rights.

IV. SOCIAL DIALOGUE UNDER SIEGE

One century after its appearance as a binding agent between Labour and Capital social dialogue seems to have lost some of its attraction.²² Its decline has several causes.

1. SOCIAL DIALOGUE GENERATES ITS OWN CONTRADICTION

One of the most important problems is probably that "case law" with regard to human rights both supports and undermines social dialogue. We shall illustrate this with the freedom of association.²³

ILO Convention No 87 does not explicitly mention the right to strike, but the FAC always accepted that this Convention guarantees the right to collective action.²⁴ In certain circumstances, even a sit-in is admitted.²⁵ On the other

²¹ See *Le droit syndical et le droit de négociation collective*, Cahiers de la Charte sociale n° 5, Strasbourg, Council of Europe Publishing, 2002, 112 p.

²² See also. J.M. SERVAIS, "Droits en synergie sur le travail. *Éléments de droit international et comparé du travail*, Brussels, Bruylant, 1997, 64 et seq.

²³ For an overview see L. SWEPSTON, "Droits de l'homme et liberté syndicale: évolution sous le contrôle de l'OIT", *R.I.T.* 1998, 187 et al.

²⁴ *Freedom of Association. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Geneva, International Labour Office, 1996, 101 et seq.

²⁵ *Liberté syndicale et négociation collective. Conférence internationale du Travail. 81^e session*, Geneva, Bureau International du Travail, 1994, nr. 174.

harsher action that increasingly tends to escalate into violence.²⁹ It seems as if we are now back to where we were before World War I.

4. EU-NEWSPEAK

Unionist
right

Furthermore, it appears that within Europe the emphasis lies on collaboration and cooperation³² between management and labour. This is translated into a social dialogue model confined to information and/or consultation.³³ This "limitation" could ultimately lead to the disintegration of social dialogue.

Contrary to the ILO, where representative organisations occupy a central position, the dialogue in Europe is often limited to the 'workers'.³⁴ Such a trend leads to a weakening of the representative trade unions' position and in the long term to the undermining of social dialogue.

²⁹ See e.g. S. BEROUD and R. MOURIAUX, "Violence et sabotage dans les grèves en France" in *Gellatex. Quand l'acide a coulé*, Paris, Syllepse, 2001, 139-167. The authors confine themselves to France, but the increase of violence is also felt in other countries.

³⁰ Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659.

³¹ G. GONZALES, *EC Fundamental Freedoms v. Human Rights in the Case C-112/00 Eugen Schmidberger v. Austria* [2003] ECR I-5659", *Legal Issues of Economic Integration* 2004, 223-224.

³² F. DORSEMONT, "Some Reflections on the Origin, Problems and Perspectives of the European Social Dialogue," in M. DE VOS (ed.), *A decade beyond Maastricht: The European Social Dialogue Revisited*, The Hague, Kluwer Law International, 2003, 5.

33 *Ibid.*

³⁴ See e.g. Directive 94/45/EC (*OJ L 254*, 30.9.1994) to promote the right to information and consultation of workers in undertakings in the European Union which left the appointment of employee representatives in the European Works Council to the Member States thus enabling employees who do not belong to a union to participate.

the essence of social dialogue in (East) a

Finally, Europe is also narrowing the margin of negotiations. In the past, for example, rises in wages were often linked to seniority. Such general agreements were set up between employers' organisations and trade unions. The prohibition of age discrimination formulated in Council Directive 2000/78/Ec³⁵ will probably end such practises. J\

CONCLUSION

Social dialogue is no longer evident. It is therefore a challenge to reflect on what Michel Hansenne, former director-general of the ILO (1989-1999) called "un tripartisme pour notre temps".³⁶ May the contributions hereafter add to this aspiration.

³⁵ OJ L 303, 2.12.2000.

³⁶ M. HANSENNE, *Un garde-fou pour la mondialisation. Le B.I.T. dans l'après-guerre froide*, Geneva, Ed. Zoé, 1999, 137.

GENERAL FRAMEWORK

For comparative purposes the national reports were compiled according to a prior agreed scheme. When sections were not applicable, they were left out. The numbering is therefore not always consecutive.

I. The actors in social dialogue

1. Trade unions

- 1.1. The applicable legislation or regulation
- 1.2. Identity of major workers' organisations
- 1.3. Type and structure of the trade unions
 - a. Type
 - b. Structure
- 1.4. Ideology of the major trade unions
- 1.5. Legal position of the trade unions
- 1.6. Representativeness of the trade unions
 - a. Representativeness in facts: unionisation rate
 - b. Representativeness: a legal or judicial concept (plus criteria)
 - c. Nature of representative organisations / level of recognition of representativeness
 - c1. Nature: general - sectoral (branch), professional organisations
 - c2. Level of recognition: national organisations, industry-wide organisations or organisations at the enterprise level
 - d. Representative organisations and their competence with regard to social dialogue

2. Employers' organisations

- 2.1. The applicable legislation or regulation
- 2.2. Identity of major employers' organisations
- 2.3. Type and structure of the organisation
 - a. Type
 - b. Structure
- 2.4. Ideology of the organisations
- 2.5. Legal position of the organisations
- 2.6. Representativeness of the organisations
 - a. Representativeness in facts: membership rate
 - b. Representativeness: a legal or judicial concept (plus criteria)
 - c. The nature of the representativeness of the organisation / level of recognition of representativeness
 - c1. Nature: general or sectoral (branch) level

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towards Brussels. By the inclusion of the Articles 138 and 139 in the EC Treaty they are given an exquisite opportunity to influence the content of European labour legislation.¹⁶ By concluding European agreements which can be turned into Community legislation, the employers' organisations, together with the trade unions, will have the content of this legislation in their own hands. They should use this opportunity because as interest organisations they are more aware of the needs of their members than is the legislator.

Whether the Euro will stimulate the conclusion of European agreements remains to be seen. To some authors it seems plausible to hold that the single currency will favour a kind of mutual influence between the different national systems.¹⁷ Others think, however, that the Euro will not have very much effect on wages. There are too many differences in productivity, taxes, social security systems, and purchasing power.¹⁸ These differences can also, however, (partly) disappear in the future. Community legislation towards harmonisation of tax systems and social security systems might be developed, which will make it easier to compare wages in different countries with each other.

There are thus in my view sufficient arguments in favour of Euro-bargaining. This legitimises a research on the legal aspects related to the European social dialogue, of which Euro-bargaining makes part.

1.6. Preconditions for the development of a European social dialogue

A major part of this thesis tries to answer legal questions with regard to the conclusion of European agreements. One can say that the conclusion of such agreements is only one aspect of a set of three rights: the freedom of association, the right to collective bargaining, and the right to strike. These three rights are inextricably linked to each other. The question is whether these three rights exist in Community law. It is not my intention to undertake a broad and extensive research with regard to these rights. However, the possibility to conclude European agreements can hardly be seen completely separately from the fundamental social rights mentioned above. Therefore, these rights will be discussed briefly hereafter. First, I will give a short overview of the development of human rights protection in Community law. This will be done in para. 1.6.1. Then I will focus on the freedom of asso-

16 This will be made clear in the Chapters 4 and 7.

17 M. Biagi, *The European Monetary Union and Industrial Relations*, In: *IJCLLR*, vol. 16, no. 1, 2000, p. 41.

18 R. Huiskamp and K. Vos, *EMU, Nederlandse bedrijven en arbeidsvoorwaardenoverleg*, In: *Tijdschrift voor Arbeidsvraagstukken*, vol. 17, no. 2, 2001, p. 143.

ciation (para. 1.6.2.), the right to collective bargaining (para. 1.6.3.), and the right to strike (para. 1.6.4.). I will verify whether Community law gives a legal basis for these rights. In para. 1.6.5., some conclusions will be drawn.

1.6.1. The development of human rights protection in Community law: a short overview

1.6.1.1. Human rights protection in general

The European legal order started as a functional legal order: it was set up in order to integrate the European peoples and states, mainly through an integration of their national economies. European law has been an instrument for political and social transformation of completely new dimensions for democratic societies, not meant to protect, but rather to change them with a view towards a common European future. Human rights were gradually introduced as limits to the discretion of the supranational institutions.¹⁹

In the Community Treaties as they were drafted in the 1950s, hardly any references can be found to fundamental rights and freedoms. The European Court of Justice (ECJ) also took a passive stand on the matter of fundamental rights in the Community. This changed at the end of the 1960s, partly under the influence of discussions in German legal circles.²⁰ In the *Stauder* case²¹ the ECJ confirmed for the first time that fundamental human rights were enshrined in the general principles of Community law and were protected by the Court. In the *Internationale Handelsgesellschaft* case²² the ECJ, repeating its statement from *Stauder*, indicated that whilst the protection of fundamental human rights was inspired by the constitutional traditions common to the Member States, it had to be ensured within the framework of the structure and objectives of the Community.²³ In the second *Nold* case²⁴ the ECJ said that not only could inspiration be drawn from the constitutional traditions of the Member States,²⁵ but that protection of fundamental rights also embraced the fundamental rights guaranteed in international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. These treaties can supply guidelines which should be

19 A. von Bogdandy, *The European Union as a human rights organization? Human rights and the core of the European Union*, In: *CMLR*, vol. 37, no. 7, 2000, p. 1308.

20 P.J.G. Kapteyn and P. VerLoren van Themaat/ L.W. Gormley, *Introduction to the Law of the European Communities*, London/The Hague/Boston, 1998, pp. 282-283.

21 Case 29/69, Judgment of 12/11/1969, *Stauder/Stadt Ulm* (Rec.1969,p.419), at 425.

22 Case 11/70, Judgment of 17/12/1970, *Internationale Handelsgesellschaft mbH/Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Rec.1970,p.1125).

23 Case 11/70, at 1134.

24 Case 4/73, Judgment of 14/05/1974, *Nold KG/Commission* (Rec.1974,p.491).

25 Case 4/73, at 507-508.

followed within the framework of Community law.²⁶ An example of such a treaty is the European Convention on Human Rights (ECHR). The ECHR, concluded in the framework of the Council of Europe, is interpreted and enforced by the European Court of Human Rights and offers protection to every person coming under the jurisdiction of a contracting party, whatever his or her nationality or place of residence. All EU Member States are contracting parties to the ECHR. Every action taken by a Member State authority, as an implementation of Union law or otherwise, should therefore be compatible with the ECHR. Several courts consider themselves competent to check that compatibility: in the first place national courts and in the second place the European Court of Human Rights. But when an act of a Member State authority comes within the framework of Union law, the ECJ is also competent to enforce the ECHR as part of the general principles of Community law.²⁷ This means that, on the one hand, the Strasbourg organs interpret and apply the ECHR. On the other hand, the ECJ has the final say when it comes to the application (and interpretation) of these two treaties in an EU or EC context. This could lead to differing interpretations.²⁸ Although the ECJ has insisted that it only takes account of the Convention as a "source of inspiration", in practice it has striven to respect the case law from Strasbourg.²⁹

In various other judgements, the ECJ has cited provisions of the ECHR in support of its reasoning³⁰ and has now started to refer directly to the provisions of the ECHR themselves.³¹ This case law has been followed by the

²⁶ Case 4/73, at 507.

²⁷ See e.g. Case C-260/89, Judgment of 18/06/1991, ERT/DEP (Rec.1991,p.I-2925), para. 42. See also K. Lenaerts and E de Smijter, *The Charter and the Role of the European Courts*, In: Maastricht Journal of European and Comparative Law, vol. 8, no. 1, 2001, p. 91.

²⁸ A.W. Heringa, *Towards an EU Charter of Fundamental Rights?*, In: Maastricht Journal of European and Comparative law, vol. 7, no. 2, 2000, p. 114. P. Oliver, *Fundamental Rights in European Union Law after the Treaty of Amsterdam*, In: D. O'Keefe and A. Bavasso (eds.), *Judicial Review in European Union Law*, Liber Amicorum in Honour Lord Slynn of Hadley, The Hague, 2000, p. 322.

³⁰ Case 36/75, Judgment of 28/10/1975, Rutili/Ministre de l'intérieur (Rec.1975, p.1219); Case 209/78 Order of 30/10/1978, Van Landewyck/Commission (Rec.1978, p.2111); Case 209/78 Judgment of 29/10/1980, Van Landewyck/Commission (Rec. 1980, p.3125); Case 136/79 Judgment of 26/06/1980, National Panasonic/Commission (Rec.1980,p.2033); Case 63/83 Judgment of 10/07/1984, Kirk (Rec.1984, p.2689); Case 222/84 Judgment of 15/05/1986, Johnston/Chief Constable of the Royal Ulster Constabulary (Rec.1986,p.1651); Case 222/86 Judgment of 15/10/1987, Unectef/Heylens (Rec.1987, p.4097).

³¹ See Case 46/87, Order of 26/03/1987, Hoechst/Commission (Rec.1987,p.1549); Case 46/87, Judgment of 21/09/1989, Hoechst/Commission (Rec.1989,p.2859); Case 85/87, Order of 28/10/1987, Dow Chemical Nederland/Commission (Rec.1987, p.4367); Case 85/87, Judgment of 17/10/1989, Dow Benelux/Commission (Rec.1989, p.3137); Cases 97/87, Judgment of 17/10/1989, Dow Chemical Ibérica and others/Commission (Rec.1989,p.3165); C-404/92, Judgment of 05/10/1994, X/Commission

Court of First Instance (CFI).³² The ECJ furthermore has referred in its case law to the European Social Charter (ESC)³³ and the ILO Conventions.³⁴ Human rights are, however, protected in Community law in so far as the human right in question is connected with a legal relation which is specifically regulated in the Treaty.³⁵ Furthermore, in the *Wachauf* case³⁶ the ECJ decided that the requirement of the protection of fundamental human rights in the Community legal order is also binding on the Member States when they implement Community rules.³⁷ In the Maastricht Treaty of 1992, Article F(2) was included in the TEU stating:

"The Union shall respect fundamental rights, as guaranteed by the ECHR, signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

The Article has been taken over in the Amsterdam Treaty of 1998 and has been renumbered as Article 6(2) of the TEU. Since the Amsterdam Treaty, the ECJ now has jurisdiction to ensure that Article 6(2) is observed by the institutions of the Union.³⁸ The EU institutions can however not be sued as such before the European Court of Human Rights, since neither the Union nor the Community is a party to the ECHR.³⁹ In the past, the Commission has proposed that the EC should accede to the ECHR. However, in its Opinion *Accession by the Communities to the ECHR*,⁴⁰ the ECJ stated that accession would require an amendment of the Treaties.

(Rec.1994,p.I-4737).

³² See Case T-19/91, Order of 07/06/1991, Vichy/Commission (Rec.1991,p.II-265), T-19/91 Judgment of 27/02/1992, Vichy/Commission (Rec.1992, p.II-415).

³³ Case C-24/86, Judgment of 02-02-1998, Blaizot/Université de Liège and others (Rec. 1988,p.379); Also opinion of AG Lenz in Case 236/87, Judgment of 22/09/1988, Bergemann/Bundesanstalt für Arbeit (Rec.1988,p.5125).

³⁴ C-149/77, ECR 1978, 1365.

³⁵ Conclusion of AG Trabucchi in Case C-118/75, ECR 1976, 1185, p. 1207-1208; Also F. Hendrickx, *Fundamentele rechten in de EU*, In: R. Blanpain c.s., *Europa na het verdrag van Amsterdam. Institutioneel en Sociaal*, Leuven, 1998, p. 133.

³⁶ Case 5/88, Judgment of 13/07/1989, Wachauf/Bundesamt für Ernährung und Forstwirtschaft (Rec.1989,p.2609).

³⁷ This was repeated in Case C-84/95, Judgment of 30/07/1996, Bosphorus/Minister for Transport, Energy and Communications and others (Rec.1996,p.I-3953) and Case C-177/95, Judgment of 27/02/1997, Ebony Maritime and Loten Navigation (Rec.1997, p.I-1111). Also F.G. Jacobs, *Human rights in the European Union: the role of the Court of Justice*, In: ELR, vol. 26, no. 4, 2001, pp. 333-335.

³⁸ Article 46 sub d TEU.

³⁹ Decision of the European Commission for Human Rights of 9 February 1990, M. & Co. v. Germany, Case 13258/87, Y. ECHR (1990), 46. See also the judgement of the European Court of Human Rights of 18 February 1999, Matthews v. United Kingdom, Case 24833/94, Reports (1999-I), para. 32.

⁴⁰ Opinion 2/94 of 28-03-1996 (Rec.1996,p.I-1759).

At the Nice European Council in December 2000, the political leaders of the EU adopted a legally non-binding declaration of intent on the protection of fundamental human rights in the EU: the Draft Charter of Fundamental Rights of the European Union (hereafter referred to as EU Charter⁴¹). It brings together for the first time, in a single document, classic human rights, social and economic rights, as well as rights and freedoms already known from the EC/EU. The EU Charter is to contain the fundamental rights and freedoms and basic procedural rights guaranteed by the ECHR, the ESC and the 1989 Community Charter of the Fundamental Social Rights of Workers (hereafter the Community Charter). A committee, consisting of representatives of national parliaments and governments, the European Parliament (EP) and the Commission, observers from the Council, the ECJ and the Council of Europe, has been set up to examine the possible inclusion of this EU Charter in the Treaty.⁴² The committee is also to consider *how* the EU Charter might be incorporated into the Treaties: as a political declaration or as a legally binding instrument which might apply to the Community institutions and to the Member States when acting in the sphere of Community law.⁴³

The EU Charter is at this moment not more than a political declaration. In the Declaration on the Future of the Union included in the Final Act of the Nice Conference, the European Council stated that it would address the question of the status of the EU Charter at the coming Council meetings. This will be at the earliest in 2004.⁴⁴ This does not mean however that the ECJ could not refer to the EU Charter as 'supportive evidence' of the Community's commitment to human rights protection.⁴⁵ The ECJ will probably draw inspiration from the EU Charter when it has to identify the contents of Community fundamental rights, in their capacity of unwritten principles of EC law.⁴⁶ According to de Witte, references to international human rights conventions and to common constitutional traditions, as can currently be found in the case law of the ECJ and the CFI, may even be entirely replaced by references to the EU Charter, on the assumption that these other sources are now incorporated in the text of the EU Charter.⁴⁷ Advocate General Tizzano has

already referred to the EU Charter in his opinion in the *BECTU* case.⁴⁸ Moreover, the symbolic importance of this document is that it confirms the Court's case law that there is a human rights *acquis* within the European Union and that a selective choice of fundamental rights has been confirmed by the Member States.⁴⁹ Furthermore, the Commission might use it as a basis for its social policy, as it used the Community Charter in the similar way for its social policy in the 1990s.

The EU Charter is intended to offer protection against human rights violations committed by the institutions of the Union: the EP, the Commission, the Council, the ECJ, and the Court of Auditors. Furthermore, the provisions of the EU Charter are addressed to the bodies of the Union which have been set up either by the EU Treaty or on the basis of the EU Treaty. These are, for example, the European Central Bank and advisory organs such as the Economic and Social Committee (ECOSOC) and the Committee of the Regions. The EU Charter furthermore offers protection against acts of bodies/organs which have been established on the basis of the EC/EU Treaty. Examples of such bodies/organs are the monitoring centres for drugs (in Lisbon) and for racism (in Vienna). The provisions of the EU Charter are also addressed to the Member States but only when they are implementing Union law.⁵⁰ The EU Charter is, however, primarily concerned with the relationship between individuals and EU institutions/bodies. The ECJ and the CFI would therefore often be the competent judges in case of a breach of the EU Charter if it were a legally binding document. Since the EU Charter is also intended to address certain Member States' breaches, the national courts may be confronted with the EU Charter as well. How these national courts should apply the EU Charter very much depends on its legal status. Only if and when the EU Charter has become legally binding, could private litigants, in principle, invoke its rights and freedoms directly before the national courts.⁵¹

Articles 52(3) and 53 of the EU Charter deal with the relation between the standards of the EU Charter and the standards of the ECHR. According to Article 52(3) of the EU Charter, the protection offered by the ECHR serves as a minimum in determining the meaning and scope of the rights stated in the

41 O.J. 2000, C 364/1.

42 L. Betten, *The EU Charter on fundamental rights: a Trojan horse or a mouse?* In: *IJCLLR*, vol. 17, no. 2, 2001, p. 152-153.

43 C. Barnard, *EC employment law*, Oxford, 2000, p. 41.

44 Annex IV to the Treaty of Nice, provisional text, Conference of the Representatives of the Governments of the Member States, SN 533/1/00 REV 1, Brussels, 22 December 2000, pp. 83-84.

45 L. Betten, *The EU Charter on fundamental rights: a Trojan horse or a mouse?* In: *IJCLLR*, vol. 17, no. 2, 2001, p. 157.

46 D. Curtin and R van Ooik, *The Sting is always in the Tail. The Personal Scope of Application of the EU Charter of Fundamental Rights*, In: *Maastricht Journal of European and Comparative Law*, Vol. 8, no. 1, 2001, p. 110.

47 B. de Witte, *The legal Status of the Charter: Vital Question or Non-Issue?*, In: *Maas-*

tricht Journal of European and Comparative Law, vol. 8, no. 1, 2001, pp. 84-85.

48 Case C-173/99, Judgment of 26/06/2001, *BECTU* (Rec.2001, p. I-4881), opinion delivered on 8 February 2001.

49 E. Szyszczak, *The New Paradigm for Social Policy: a Virtuous Circle?*, In: *CMLR*, vol. 38, no. 4, 2001, p. 1158.

50 D. Curtin and R van Ooik, *The Sting is always in the Tail. The Personal Scope of Application of the EU Charter of Fundamental Rights*, In: *Maastricht Journal of European and Comparative Law*, vol. 8, no. 1, 2001, pp. 105-108.

51 D. Curtin and R van Ooik, *The Sting is always in the Tail. The Personal Scope of Application of the EU Charter of Fundamental Rights*, In: *Maastricht Journal of European and Comparative Law*, vol. 8, no. 1, 2001, pp. 110-112.

EU Charter that correspond to rights guaranteed by the ECHR. The EU Charter as part of Union law may provide more extensive protection than the ECHR, but not a narrower one. According to Article 53 of the EU Charter, the provisions of the EU Charter can not be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized by, among others, the ECHR.⁵²

1.6.1.2. Socio-economic human rights

The ECHR is a treaty in which mainly "classic" human rights are laid down, which requires a passive attitude from the governments. Fundamental rights that are more related to socio-economic rights are laid down in the ESC and ILO documents. The ESC recognises the freedom of association (Article 5), the right to bargain collectively and the right to strike (Article 6). All Member States of the EU are a member of the ILO and have ratified ILO Convention no. 87 concerning freedom of association and protection of the right to organise and Convention no. 98 concerning the application of the principles of the right to organise and to bargain collectively.⁵³ However, problems associated with enforcement are often seen as the key barrier to implementation of ILO and ESC standards. Infringements of ILO instruments are identified through a system of reporting obligations and by complaints to the ILO Committee on Freedom of Association, but sanctions are rarely applied. Moreover, instruments promulgated by the ILO and Council of Europe are binding in international law on governments, but not on multinational enterprises or employers generally. A further problem is that in a dualist system such as the UK, international instruments are not incorporated into domestic law. The ESC, for example, has not been incorporated into UK law. In the UK the international conventions such as the ILO Conventions and the ESC have limited status: there are no means by which to seek the enforcement of ILO Conventions and the ESC in the national courts.⁵⁴ As mentioned above⁵⁵ the ECJ has occasionally referred to the ESC and ILO documents. This is, however, not enough to presume that the rights mentioned in the ESC and ILO documents form part of Community law.

52 Also K. Lenaerts and E de Smijter, *The Charter and the Role of the European Courts*, In: *Maastricht Journal of European and Comparative Law*, vol. 8, no. 1, 2001, pp. 97-98. The relation between the EU Charter and the ECHR is more extensively discussed by P. Lemmens, *The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights - Substantive Aspects*, In: *Maastricht Journal of European and Comparative Law*, vol. 8, no. 1, 2001, pp. 49-67.

53 Homepage ILO: <http://www.ilo.org>

54 Also P. Germanotta and T. Novitz, *Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action*, In: *International Journal of Comparative Labour Law and Industrial Relations*, vol. 18, no. 1, 2002, p. 75.

55 Para. 1.6.1.1.

The Community Charter recognises the freedom of association, the right to collective bargaining, and the right to strike as well (Article 11-14). The Community Charter has however very limited legal effects. It is not a legal act of the Community but a solemn political declaration adopted by Heads of State or Government of 11 of the then 12 Member States, and it has not been published in the Official Journal. In the Agreement on Social Policy attached to the Maastricht Treaty, the same 11 Member States which adopted the Community Charter were not willing to confer legal effect on the rights to which they had given their political support in the Community Charter.⁵⁶

In the Maastricht Treaty, a reference was made to the ESC and Community Charter, which has been taken over in the Amsterdam Treaty. Article 136, first sentence EC Treaty states that:

"The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion."

This does not mean, however, that the rights set out in the ESC and the Community Charter are directly enforceable against national institutions and private organisations. Direct enforceability is not in line with the traditions in the Member States. Article 136 EC Treaty has to be interpreted in such a way as to say that the Community and the Member States have as their goal the promotion of these social rights.⁵⁷ Furthermore the EU and the EC are, when social rights are concerned, under an obligation to respect fundamental rights.⁵⁸

56 Also opinion of Advocate General Jacobs in Case C-67/96, Judgment of 21/09/1999, Albany (Rec.1999,p.I-5751), para. 137.

57 F. Hendrickx, *Fundamentele rechten in the EU*. In: R. Blanpain, M. Colucci, C. Engels, F. Hendrickx, L. Salas and J. Wouters, *Europa na het Verdrag van Amsterdam*, Leuven, 1998, p. 125; Lenaerts and Foubert think that because an explicit reference is made to the Community Charter, it is no longer unthinkable that the ECJ might have the power to interpret and enforce the Community Charter. K. Lenaerts and P. Foubert, *Social Rights in the Case-Law of the European Court of Justice*, In: *Legal Issues of Economic Integration*, vol. 28, no. 3, 2001, p. 269.

58 A.W. Heringa, *Towards an EU Charter of Fundamental Rights?*, In: *Maastricht Journal of European and Comparative law*, vol. 7, no. 2, 2000, p. 113.

Furthermore, the EU Charter recognizes social rights including collective union rights, such as the freedom of assembly and the right to collective bargaining and the right to strike. I will discuss these three rights more extensively hereafter.

1.6.2. The freedom of association

The freedom of association exists in all Member States of the EU.⁵⁹ Furthermore the freedom of association is recognised in international documents. Article 5 of the ESC mentions the freedom of association. It reads:

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

In the opinion of the European Committee of Social Rights, Article 5 contains both a positive and a negative obligation for states: states must ensure that national law does not impair the exercise of the right to organise and they are required to take the necessary measures to guarantee the exercise of this right.⁶⁰ The freedom protected by Article 5 is to form or join local, national, or international organisations. Workers must therefore be free to organize at whichever of these levels they wish. National trade union organizations must be free to join international organizations.⁶¹

Article 11 of the ECHR also protects the freedom of association. The provision reads:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the

imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

Although not explicitly stated in Article 11, the provision also protects the freedom not to join a trade union. This is the result of the Strasbourg case law.⁶² The right under Article 11 to form trade unions involves the right of trade unions to draw up their own rules, to administer their own affairs, to establish and to join trade union federations. Such trade union rights are explicitly recognized in Articles 3 and 5 of ILO Convention no. 87, which must be taken into account in the present context. Accordingly, in principle trade union decisions in these domains must not be subject to restrictions and control by the states except on the basis of Article 11(2).⁶³

Article 11 of the Community Charter also provides for a right of association:

"Employers and workers of the European Community shall have the right of association in order to constitute professional organizations or trade unions of their choice for the defence of their economic and social interests.

Every employer and every worker shall have the freedom to join or not to join such organisations without any personal or occupational damage being thereby suffered by him."

Furthermore, the EU Charter recognizes in Article 12(1) the right to freedom of peaceful assembly and the freedom of association. The Article states:

"Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests. Political parties at Union level contribute to expressing the political will of the citizens of the Union."

This provision corresponds to Article 11 of the ECHR. Compared to the ECHR, the Charter contains a clarification of the scope of this freedom, since it states that the said right applies at all levels in particular in political, trade

⁵⁹ C. Barnard, *EC employment law*, Oxford, 2000, p. 552.

⁶⁰ C I 31; Also D. Harris and J. Darcy, *The European Social Charter*, Ardsley, 2001, p. 93.

⁶¹ C II 184 (Cyprus); Also D. Harris and J. Darcy, *The European Social Charter*, p. 94.

⁶² See P. van Dijk and G.J.H. van Hoof (eds.), *Theory and Practice of the European Convention on Human Rights*, The Hague/London/Boston, 1998, pp. 593-596, where this case law is discussed.

Appl. 10550/83, *Cheall v. the United Kingdom*, D&R 42 (1985), p. 185; See also P. van Dijk and G.J.H. van Hoof (eds.), *Theory and Practice of the European Convention on Human Rights*, p. 597.

union, and civic matters. This does not seem to constitute a widening of the scope existing under the ECHR.⁶⁴

The freedom of association is also recognised in ILO documents. In ILO Convention no. 87, Article 5 states:

"Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers (...)."

This article is interesting because the European social partners' organisations are "international organisations of workers and employers" to which the article refers.

The freedom of association is not directly laid down in the Community Treaties. With regard to the case law of the ECJ however, the opinion of Advocate-General Jacobs in the *Albany* case is interesting. In *Albany*,⁶⁵ *Brentjens*,⁶⁶ and *Drijvende Bokken*,⁶⁷ the ECJ for the first time had the opportunity to take a position concerning European competition law's relation with its labour law counterpart and the general validity of collective bargaining agreements. The main question was whether these agreements should be subjected to regular antitrust scrutiny.⁶⁸ In his opinion, Jacobs also paid attention to the question whether there was a Community right of association, of collective bargaining and of collective action.⁶⁹ He started by saying that the EC Treaty itself, although encouraging collective bargaining, does not explicitly grant any of these three rights.⁷⁰ He subsequently refers to the Community Charter in which these three rights are laid down, but admits at

64 P. Lemmens, The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights - Substantive Aspects, In: Maastricht Journal of European and Comparative Law, vol. 8, no. 1, 2001, p. 59.

65 Case C-67/96, *Albany International BV vs. Stichting Bedrijfspensioenfonds Textiel-industrie*, Judgment of 21 September 1999, (Rec.1999,p. I-5751).

66 Joint Cases C-115/97, C-116/97 and C-117/97, Judgment of 21/09/1999, *Brentjens* (Rec.1999,p.I-6025).

67 Case C-219/97, Judgment of 21/09/1999, *Drijvende Bokken* (Rec.1999,p.I-6121).

68 See for the discussion on these cases E.J.A. Franssen, A.T.J.M. Jacobs, A. Ph.C.M. Jaspers and K.J.M. Mortelmans, *Cao's en mededingingsrecht* In: SMA, 2000, no. 7/8, p. 324 and further. See also R.J. Van den Bergh and P.D. Camesasca, *Irreconcilable principles? The Court of Justice exempts collective labour agreements from the wrath of antitrust*. In: ELR, vol. 25, no. 5, 2000, p. 492 and further. See also S. Evju, *Collective agreements and competition law. The Albany puzzle and van der Woude*. In: IJCLLR, vol. 17, no. 2, 2001, p. 165 and further.

69 Para. 134.

70 Para. 135.

the same time that this Charter has very limited legal effects.⁷¹ Jacobs focuses, therefore, on the case law of the ECJ. He mentions some cases where the right to form and join associations and the right to take collective action were recognized by the ECJ.⁷² These cases are the *Union Syndicale Massa and Kortner* case,⁷³ and the *Bosman* case.⁷⁴ In the *Union Syndicale Massa and Kortner* case it considered a union organising a substantial number of officials and servants of the Community institutions and component bodies established in Brussels. The union was founded on the basis of the Staff Regulations of officials of the European Communities. The ECJ said:

"Under the general principles of labour law the freedom of trade union activity recognised under Article (...) of the Staff Regulations means not only that officials and servants have the right without the hindrance to form associations of their own choosing but also that these associations are free to do anything lawful to protect the interests of their members as employees."⁷⁵

In the *Bosman* case in which the system of transfer rules for professional football players was at stake, the ECJ said:

"(...) it must be recognised that the freedom of association, enshrined in Article 11 of the ECHR, and resulting from the constitutional traditions common to the Member States, is one of the fundamental rights, as the Court has consistently held and as is reaffirmed in the preamble of the Single European Act and in Article F(2) of the TEU, are protected in the Community legal order."⁷⁶

On the basis of these cases A-G Jacobs concludes that:

"The Community legal order protects the right to form and join trade unions and employers' associations, which is at the heart of the freedom of association."⁷⁷

71 Para. 136 and 137.

72 Para. 139.

73 Case 175/73, Judgment of 08/10/1974, *Union Syndicale and others/Commission* (Rec.1974,p.917).

74 Case C-415/93, Judgment of 15/12/1995, *Union royale belge des sociétés de football association and others/Bosman and others* (Rec.1995,p.I-4921). Jacobs also mentions the *Maurissen* case (joined cases C-193/87 and C-194/87, Judgment of 18-01-1990, *Maurissen and Union Syndicale/Court of Auditors*, (Rec.1989,p.1045), Cons. 11-16 and 21), although I do not read an express recognition of the freedom of association in these considerations.

75 Para. 14 of case 175/73.

76 Cons. 79 of case C-415/93.

77 Para. 158 of his opinion.

In its judgements the ECJ did not explicitly refer to a *Community* right of association. I think, however, that the ECJ can not deny the international aspects of the freedom of association. There is substantive basis to be found in the international documents which have been signed or ratified by all Member States to assume an international right of association.⁷⁸ So I think that it can be concluded that there exists a freedom of association at Community level.

1.6.3. The right to collective bargaining

Article 6(2) of the ESC reads that the contracting parties undertake:

"to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

This means that employers and workers must, "in accordance with legislation or industrial practice," be "at liberty to conclude collective agreements" and that a state must "actively promote the conclusion of such agreements if their spontaneous development is not satisfactory and, in particular, ensure that each side is prepared to bargain collectively with the other."⁷⁹ The qualifying words "were necessary and appropriate" are to give governments some discretion in cases where satisfactory machinery already exists or where other measures, such as statutory wage fixing machinery, are more appropriate than voluntary negotiating machinery.⁸⁰ In the *Swedish Engine Drivers Union* case,⁸¹ where Article 11 of the ECHR was under consideration, the European Court of Human Rights also commented upon the meaning of Article 6(2) of the ESC in the course of interpreting Article 11 of the ECHR. The European Court of Human Rights said that the prudence of the wording of Article 6(2) of the ESC demonstrates that the ESC does not provide for a real *right* to have a collective bargaining agreement concluded.⁸² It affirms instead the voluntary nature of collective bargaining and collective agreements. Article 11 of the ECHR does not mention collective bargaining as such. The question is whether a right to collective bargaining flows from the freedom of association which is protected by that provision, as discussed in para. 1.6.2. The European Court of Human Rights has carefully avoided concluding that the ECHR guarantees the right to collective bargaining. In the *Swedish Engine*

Drivers Union case the majority of the Commission of Human Rights had argued in favour of the recognition of trade union rights to engage in collective bargaining. The European Court of Human Rights held that it did not have to give a ruling on that question since, it said, such a right was not at issue and was granted to the applicant under the national law.⁸³ In *Gustafsson*⁸⁴ the European Court of Human Rights had to consider a conflict between a trade union and an employer who did not want to take part in the collective bargaining process in his industry. Through boycotts and other actions the trade union exercised pressure on him to join the employers' side of a sectoral collective agreement. The employer contended that compulsion to participate in the collective agreement would in practice amount to compulsion to join an employers' association. Thus, in his view the Swedish government should have intervened in order to protect his negative freedom not to join an employers association. The European Court of Human Rights said that it saw no reason to doubt that the union action pursued legitimate interests consistent with Article 11 of the ECHR. It continued that it should also be recalled in this context that the legitimate character of collective bargaining is recognised by a number of international instruments.⁸⁵

A specific right to negotiate and conclude collective agreements is laid down in the Community Charter and the EU Charter. Article 12 of the Community Charter states:

"Employers or employers' organisations, on the one hand, and workers' organisations, on the other, shall have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice.

The dialogue between the two sides of industry at European level which must be developed, may, if the parties deem it desirable, result in contractual regulations in particular at inter-occupational and sectoral level."

Article 28 of the EU Charter states:

"Workers and employers, or their respective organisations, have, in accordance with Community law and national law and practices, the right to negotiate and conclude collective agreements at the appropriate level and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

Article 4 of ILO Convention no. 98 states that:

78 See also A.T.J.M. Jacobs, *Het recht op collectief onderhandelen in Europees en rechtsvergelijkend perspectief*, 1986, p. 390.

79 C I 35; See also D. Harris and J. Darcy, *The European Social Charter*, p. 101.

80 Rec Proc TC 205.

81 *Swedish Engine Drivers Union Case*, 20 Eur. Ct. H.R. (ser. A) (1976).

82 Para. 39 of the judgment.

83 Para. 38 of the judgment.

84 *Gustafsson Case*, 25 April 1996, Reports 1996-II, Vol. 9.

85 Para. 53 of the judgment. See also P. van Dijk and G.J.H. van Hoof (eds.), *Theory and Practice of the European Convention on Human Rights*, p. 598.

"Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

This means that it only imposes on the contracting states an obligation to encourage and promote collective bargaining. No right is granted.⁸⁶

A-G Jacobs in his opinion on the *Albany* case stated that it can not be said that there is sufficient convergence of national legal orders and international legal instruments on the recognition of a specific fundamental right to bargain collectively. Moreover, he continued, the collective bargaining process, like any other negotiation between economic actors, is sufficiently protected by the general principle of the freedom of contract. Therefore, a more specific fundamental right to protection is not needed. In any event, the justified limitations on the alleged right to bargain collectively would arguably be identical to those on freedom of contract.⁸⁷ However, Jacobs continues, it is also clear from the analysis of the international instruments, that there is international consensus on the legitimate and socially desirable character of collective bargaining.⁸⁸ This consensus has also been reflected in the EC Treaty.

In 1987, Article 118b was incorporated into the EC Treaty stating:

"The Commission shall endeavour to develop the dialogue between management and labour at European level, which could, if the two sides consider it desirable, lead to relations based on agreement."

In the Agreement on Social Policy annexed to the Maastricht Treaty and later in the Amsterdam Treaty this provision was amended and Article 139(1) was included, stating:

"Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements."

I agree with Jacobs on his point that the collective bargaining process is sufficiently protected by the freedom of contract. The right to bargain collectively does, however, not mean that every organisation has the right to take part in negotiations that have been started by other organisations. This is confirmed by the CFI in the *UEAPME* case.⁸⁹

⁸⁶ See also Jacobs in his opinion in Case C-67/96, para. 147.

⁸⁷ Paras. 160 and 161.

⁸⁸ Para. 164.

⁸⁹ Para. 78.

The freedom to bargain collectively and conclude collective agreements is thus protected by private law and it is therefore not necessary to have it explicitly protected by Community law. This freedom can not be interpreted as an exclusive right to take part in negotiations.

1.6.4. The right to strike

In Article 6(4) ESC it is stated that the contracting parties:

"recognise (...) the right of workers and employers to collective action in cases of conflicts of interests, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into"

The right to strike is not mentioned in the ECHR. According to the European Court of Human Rights, Article 11 ECHR safeguards the freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the contracting states must both permit and make possible.⁹⁰ Article 11 does however not necessarily imply a right to strike, since the interests of the members can be furthered by other means.⁹¹ Strikes are considered by the Strasbourg organs as a very important, but not an exclusive means for union members to protect their interests. Referring to the ESC, the European Court of Human Rights held that a right to strike, assuming that it is protected by Article 11, may in any case be subjected to restrictions by the national legislature.⁹² The authorities have to leave the trade unions sufficient scope to stand up for the interests of the affiliated employees, since trade union freedom would otherwise be illusory, but it is largely for the authorities to decide what means to this end they allow the unions.⁹³

The right to strike is also mentioned in the Community Charter. Article 13 first sentence states:

"The right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligation arising under national regulations and collective agreements."

⁹⁰ *National Union of Belgian Police v. Belgium*, 27 October 1975, Eur. Court HR Rep., Series A, 19 (1975), para. 40.

⁹¹ *Schmidt and Dahlström v. Sweden*, 6 February 1976, Eur. Court HR Rep., Series A, 21 (1976), para. 36.

⁹² *Schmidt and Dahlström*, para. 16. Referred to by the Commission in Appl. 10365/83, *S. v. Federal Republic of Germany*, D&D 39 (1984), p. 237 (240).

⁹³ Also P. van Dijk and G.J.H. van Hoof (eds.), *Theory and Practice of the European Convention on Human Rights*, p. 599.

Finally, in the EU Charter the right to take collective action, including strike action, is recognised. This right is laid down in Article 28 which has already been cited in para. 1.6.3.. The ambit of the right to strike set out in that article only applies under conditions laid down in national laws and practices. The EU Charter thus in effect bases the right to strike in existing national laws and practices.⁹⁴ This means that there is still no Community level regulation on the types of strikes which are permitted or on the limits of the right to strike.

The jurisprudence developed by ILO supervisory bodies relating to the right to strike derives primarily from the interpretation of the guarantee of freedom of association contained in the ILO Convention no. 87 on freedom of association and protection of the right to organise, Convention no. 98, no. 151 and no. 154.⁹⁵

Article 137(6) EC Treaty specifically excludes the possibility of an EC Directive regulating industrial action⁹⁶ at least where such a Directive is based on Article 137(2) EC Treaty. Article 137(6) EC Treaty states:

"The provisions of this Article shall not apply to pay, the right of association, the right to strike, or the right to impose lock-outs."

The phrase "this Article" indicates that Community legislation based on Article 137 EC Treaty can never cover the issue of strikes. This does however not mean that Community legislation on strikes is completely out of the question. The Community institutions could use another basis in the Treaty to issue legislation on strikes.⁹⁷ The question whether the Community legal order contained a right to take collective action in order to protect occupational interests was also considered by A-G Jacobs in his opinion on the *Albany* case. Jacobs said:

"In my view, the right to take collective action in order to protect occupational interests in so far as it is indispensable for the enjoyment of freedom of association is (...) protected by Community law."⁹⁸

94 Also P. Germanotta and T. Novitz, *Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action*, in: *IJCLLR*, vol. 18, no. 1, 2002, p. 78.

95 L. Betten, *The Right to Strike in Community Law*, Amsterdam/New York/Oxford, 1985, p. 193.

96 Also P. Germanotta and T. Novitz, *Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action*, in: *IJCLLR*, vol. 18, no. 1, p. 76.

97 Also B. Bercusson, *Trade Union Rights in EU Law*, in: F. Snyder (ed.), *The Europeanisation of Law: The Legal Effects of European Integration*, Oxford/Portland Oregon, 2000, p. 203.

98 Para. 159.

He seems to base his conclusion on the judgements of the ECJ in the *Union Syndicale Massa and Kortner* case, the *Bosman* case, and the *Maurissen* case in which the collective right to take action was recognised by the ECJ. In the *Union Syndicale Massa and Kortner* case, the ECJ did not explicitly mention the right to strike but only the fact that "the associations are free to do anything lawful to protect the interests of their members and employees. The right to action is one of the means available for use by these associations".⁹⁹ However, the ECJ continues by saying:

"Under the Community legal system, (...) the exercise of this right is subject to the conditions determined by the system of forms of action provided for under the Treaties establishing the Communities.

Thus a staff association which fulfils these conditions is entitled, by virtue of the second paragraph of Article 173 of the EEC Treaty, to institute proceedings for annulment against a decision addressed to it within the meaning of that provision."¹⁰⁰

The "right of action" to which the ECJ referred in this case was the right to institute proceedings under Article 173 (now 230) EC Treaty and not so much the right to strike. Nor was the right to strike explicitly mentioned by the ECJ in the *Bosman* and the *Maurissen* cases. So the "right to take collective action" to which the AG Jacobs refers, does not necessarily mean a right to strike. Moreover, even if an explicit right to strike as such would be recognised, than it is still not clear what the conditions and limits of this right are. These conditions and limits differ from Member State to Member State. According to Betten and other authors, harmonisation of legal structures or Community Regulations by which the legality of certain types of strike action would be expressly recognised, would pave the way for international strike action in cases of international industrial conflicts.¹⁰¹ Transnational collective bargaining such as that envisaged in the context of the European social dialogue is not likely to be effective when there is no credible threat of international industrial action.¹⁰² Shifting production before or during a strike to another unit is a logical reaction on the part of the management of a multinational enterprise to the action of workers. Workers themselves can attempt to prevent this by seeking the solidarity of their colleagues and also by requesting workers at ports, etc. to support them by preventing products or materials from being imported or exported.¹⁰³ In the case of an international solidarity strike, workers face the problem that these actions are judged differently at

99 Cons. 24 and 25.

100 Cons. 26 and 27.

101 L. Betten, *The Right to Strike in Community Law*, p. 125.

102 Also P. Germanotta and T. Novitz, *Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action*, in: *IJCLLR*, vol. 18, no. 1, p. 79.

103 L. Betten, *The Right to Strike in Community Law*, p. 122.

national level. The action falls apart into a number of national actions which may be judged to be lawful in one country and unlawful in the other. At the national level there is still much insecurity with regard to the question of which law is applicable (the law of the country where the original strike action takes place, or the law of the country where the solidarity action takes place) as well as to the conditions of lawfulness of this type of action. At Community level this problem might be solved by creating uniform rules for lawful international solidarity strikes.¹⁰⁴ According to van Peijpe,¹⁰⁵ another reason to introduce an explicit right to strike in Community legislation is the tension between the free movement of goods on the one hand and strikes at national level on the other hand. In November 1997, the Commission formulated a proposal for a Regulation for the creation of a mechanism whereby the Commission can intervene in order to remove certain obstacles to trade.¹⁰⁶ The idea was to give the Commission the power to oblige a Member State by means of a decision to take measures against certain restrictions to the free movement of goods. This proposal must be seen against the background of a procedure which the Commission initiated against France. The reason for this procedure was the failure of the French state to act against actions of French farmers. These farmers protested against the import of agricultural products from other Member States. Through the actions of the French farmers the products from the other Member States could not be imported into France. This meant that the free movement of agricultural products was obstructed. In the proposed Regulation there was thus a certain tension between the principle of free movement of goods and the right to strike. This tension could be taken away by recognising explicitly the right to strike at Community level, according to van Peijpe. The case of the French farmers was brought before the ECJ which stated at 9 December 1997 that the French authorities have acted against the Treaty because they did not take all necessary measures to prevent the actions of the French farmers restricting the free movement of agricultural products.¹⁰⁷ The ECJ in the above mentioned case did not draw a comparison between the free movement of goods and the right to strike. When the Council adopted the proposal¹⁰⁸ an article was put in it, which did not appear in the proposal. Article 2 of the Regulation states:

"This Regulation may not be interpreted as effecting in any way the exercise of fundamental rights as recognised in Member States, including the right of freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States."

So it is already recognised in the Regulation that it may not be interpreted as affecting the right to strike. This means that the tension between the free movement of goods and the right to strike at national level is taken away by the Regulation. It can be argued that the right to strike as such does not need to be laid down at Community level, because it is already recognised in all Member States. However, the need for uniform rules with regard to the limits of the right to strike and the permitted types of strikes at Community level remains because of the reasons given by Betten and other authors as explained above. A right to strike which is laid down in Community law, gives the ECJ/CFI the opportunity to draw the boundaries to this right.

1.6.5. Conclusions

Although not explicitly recognised at Community level, the freedom to form or join international organisations of employers and workers will probably not be denied by the CFI/ECJ. This would be contrary to the international documents signed by the Member States. The freedom to collective bargaining and to conclude collective agreements flows from the freedom of contract. An explicit recognition at Community level is therefore not necessary. Only the right to strike should be laid down at Community level. The ECJ/CFI can in its case law determine which types of strikes are permitted as well as what are the limits of the right to strike.

104 L. Betten, *The Right to Strike in Community Law*, p. 128.

105 Also T. van Peijpe, *EU en het Stakingsrecht*, In: SMA, vol. 53, no. 4, 1998, pp. 149-150.

106 COM(97) 619 def. OJ C 10/14, 15-1-1998.

107 Case C-265/95, Judgment of 09/12/1997, Commission/France (Rec.1997,p.I-6959), Cons. 65 and 66.

108 Council Regulation (EC) No. 2679/98 of 7 December 1998, on the functioning of the internal market in relation to the free movement of goods among the Member States, OJ L 337/8, 12-12-1998.

SUMMARY OF DISCUSSION: SOME HIGHLIGHTS

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PRELIMINARY REMARK

This contribution presents a concise overview of some important and remarkable highlights of the discussions held during the Rome seminar. It is not a literal reproduction of the debate.

I. REPRESENTATIVENESS OF UNIONS AND EMPLOYERS' ASSOCIATIONS

The origin of the concept of representative organisation lies in the 1919 Treaty of Versailles, which also appears in Article 3(5) of the Statutes of the International Labour Organisation (ILO). This provision stipulates that member countries undertake to designate non-government representatives and technical advisers in consultation with their "most representative organisations" of employers and employees. The issue of representativeness is fundamental as it forms the basis of a sound and well-functioning social model. A modern system of social dialogue, aimed at improving working conditions and good industrial relations, requires legitimate social partners. The discussion on representativeness tried to find an appropriate answer to the question which employees' and employers' organisations are sufficiently representative and reliable to act as partners in a system of peaceful social dialogue.

In preparing for the European Union, Eastern European countries are addressing major political and socio-economical challenges. In the Soviet social model there was no private property, private contracts, collective agreements, pluralism or employers' associations. Workers and State were

players in a uniform social economic reality. In contrast, the European social model is built on representative employees' and employers' organisations. Eastern European countries therefore need to set up employers' organisations and involve them in socio-economic negotiation. In Montenegro, for example, the model of representative employers' organisations was not introduced until 2005.

In the transition from strictly communist to more pluralistic unions there had to be a re-division of patrimony. This proved to be a difficult and delicate task. Hungary for example has six unions: four communist and two newly developed ones without inheritance and patrimony. The central idea behind such re-division was to have trade unions with assets belonging to the workers. After peaceful but very difficult round table discussions marked by considerable competition, trade union assets were finally divided.

There are two systems for recognising employees' bodies as trade unions: statutory-law systems or case-law systems. This effectively comes down to a choice between a rigid system and a more flexible one. Moreover, the issue of the most desirable system has become more important owing to the increase of smaller, specialised unions. However, the distinction is no longer quite as strict as it used to be. For instance, Germany and the Netherlands were described as evolving from a rigid, statutory system, towards a more flexible one. This shift is not without consequences as it has an effect on collective labour agreements. Increasingly, these are concluded at the branch and professional level instead of the interprofessional level.

The criteria for representativeness vary from country to country. Without entering into details (see the national reports), the law of most Western and South East European countries provides more or less precise criteria. Whilst the number of members is not the sole criterion determining an organisation's representativeness, it is nevertheless important. The designation of the most representative employers' and employees' organisations has to be resolved in each individual country. In some countries these criteria are, or may be, the subject of judicial procedures. In countries where representativeness is considered to be (at least partly) a judicial concept, courts or administrative bodies are able to grant or refuse representative status to trade unions, resulting in varied case law on sometimes rather vague legal criteria of representativeness. The discussion for instance focused partly on the German criterion of "social power" needed by an employee organisation for recognition as a trade union. Small and specialised groups of workers such as

stewards can for example become a representative union if they fulfil a key position.

In order to nominate organisations which can be represented in an institutionalised social model, some countries provide official registration procedures within an administrative body. In Serbia for instance a tripartite panel has the right to provide advisory opinions to the Ministry of Labour which ultimately decides which organisations are recognised as representative for a limited period of time. Questions can be raised here about freedom of association and a lack of appeal procedures. Particular attention was also paid to the re-consideration of representativeness in some countries when recognition is only given for a limited period. Recognition of an organisation as representative trade union can be reconsidered at the request of an employer or another trade union. This system seems to be particular for Serbia.

Lastly, as far as discussion on criteria was concerned, the disputant of the national reports asked whether modern law systems needed more flexible models of representativeness. Criteria could be established in terms of the tasks of employees' and employers' organisations. For example, the appointment of lay judges does not have the same impact as the conclusion of collective labour agreements. Different criteria could be developed as a function of the tasks of a union or employers' association.

The system of having representative organisations consists in granting certain prerogatives only to the most important ones. Representative trade unions and employers' organisations are entitled to the right to bargain collectively, conclude collective labour agreements, etc. As far as the trade unions are concerned, in some countries only representative trade unions are granted the right to strike. In this respect, a problem could arise with the European Social Charter and particularly the provisions on the right to collective action. According to the Charter, the right to strike is an individual right, which *a fortiori* does not only belong to representative employees' organisations.

II. BI- OR TRIPARTISM

Democracy is built on government-backed bipartite negotiations. Over the course of many years and at their own pace, Western European countries

developed their bi-partite social model. Ideally, it is a model where workers and employers are both willing and encouraged to conclude agreements. However, as the disputant showed in his introduction, our societies face many challenges: globalisation, unemployment, ageing, life-long learning, social competition, etc. As a consequence, governments are becoming more involved, try to set the agenda and take decisions when the social partners do not succeed.

In contrast, the candidate and new member states did not have a tradition where bi-partite social dialogue was the answer to social economical questions. As they were state controlled and had no employers' organisations, bipartite culture could not evolve.

At the moment the social model in the transitional countries is being driven by the state. A culture of social dialogue has either been introduced to a tripartite social model or exists alongside bipartite social dialogue. In practice, this creates a situation where sector-level dialogue is not well developed.

Although both bi and tripartite models have some advantages, there was consensus among the participating countries that an exclusive bipartite or tripartite model is not desirable. In transition and candidate countries especially, which are still addressing many economical difficulties, the tripartite social dialogue system has advantages and is successful. Although such a tripartite structure is still necessary, it should evolve step by step into a bipartite model with strong bargaining power. One of the participants remarked that a "tripartite *plus*" social dialogue model is not institutionalised in Western and South East Europe. "Tripartism plus" refers to the involvement of non-governmental organisations in social dialogue, besides representatives of the government, trade unions and employers' organisations.

A strictly bipartite model risks failing if there are no strong employees' and employers' organisations with effective bargaining power. Nevertheless, the disputant of the national reports questioned over-exclusive investment in tripartism for different reasons. Firstly, too much governmental interference could prevent the social partners from taking enough responsibility themselves. Secondly, in a number of countries unions have already had to choose between soft non-binding agreements or no agreements at all. Lack of attention for bipartite dialogue could even strengthen this tendency further. Moreover, an imbalance between tripartite and bipartite social dialogue structures will reduce the importance of collective bargaining and collective agreements at the national and branch level, in favour of the enterprise level as the almost exclusive bipartite bargaining level. By way of example,

reference can be made to Hungary where the most important levels are the enterprise level for bipartite bargaining and the national level for tripartite social dialogue. Notwithstanding its importance, collective bargaining at branch or sectoral level conflicts with the Hungarian tradition of social dialogue.

Since strong representative unions and employers' organisations are the best guarantee for political democracy, the disputant concluded that state interference in social dialogue should be restricted to a minimum.

That said, it is clear that in Western Europe, where there is a greater tradition of stronger bipartite social dialogue and less governmental interference, the State is increasingly involved in social relations. Although Belgium has a system of free collective bargaining in principle, the government has power to intervene to preserve the competitiveness of enterprises. Finally, the "Europeanisation" of labour relations and social policy was identified as one of the most important reasons for growing state intervention.

III. COLLECTIVE BARGAINING AND COLLECTIVE LABOUR AGREEMENTS

In all participating countries, collective bargaining was acknowledged as an instrument of social justice. The right to collective bargaining has been recognised since the very founding of the ILO in 1919. The ILO Declaration on Fundamental Principles and Rights at Work (1998) stresses its importance. According to the Declaration, all Member States have the obligation to respect, promote and realise the principles concerning fundamental rights, whether or not they have ratified the relevant ILO Conventions. These fundamental rights include freedom of association and the effective recognition of the right to collective bargaining.

The French respondent to the national reports drew attention to the fact that the aim of collective bargaining is changing, so that two types of bargaining have appeared. On the one hand, collective bargaining aims to protect workers and improve their situation. On the other hand, collective bargaining has increasingly become a tool for adapting to changes due to globalisation and the restructuring of enterprises. Although it undeniably adheres to its historical

principles and goals, it is also becoming an instrument for adapting to economical changes.

The phenomenon of the collective labour agreement and its main principles is well known in all participating countries. The conclusion of collective labour agreements through collective bargaining is the most effective mechanism for achieving the goals of social dialogue. The national reports revealed that the concept of collective labour agreements is a wide notion covering various types of agreements; collective labour agreements concluded within or without a joint body, at different levels, for a fixed or indefinite period, generally binding or not-generally binding, etc. However, the multi-level bargaining model is common to all systems. Generally speaking, collective labour agreements can be concluded at three levels: at national or inter-professional level, branch level and company level. Nevertheless, the discussion showed clearly that the importance attached to the various levels and thus to the various collective labour agreements, differs from country to country. In some transition countries (e.g. Hungary) collective bargaining at branch level is not well developed yet.

In contrast, tripartite negotiation at the national level and bipartite concertation are broadly established. An exchange of view on this topic revealed that in countries with a longstanding tradition of collective bargaining at the three levels, branch level collective labour agreements are becoming increasingly framework agreements that have to be filled in at the lower company level.

Besides a shift between existing bargaining levels, there is also the issue of the most appropriate level given the highly changed economic circumstances. More precisely, the question was raised whether the three classic levels (national, branch or sector, enterprise) were sufficiently adapted to modern economic and industrial relations. For instance, the difficulties arising in the case of cross-border restructuring show the inefficiency of a strict national bargaining and concertation system and the problems caused by a lack of tradition of collective bargaining and social dialogue at the group level.

All participating countries have systems where the collective agreement, as a result of collective bargaining, becomes a legally binding document, not only for the contracting parties, but also for employees and/or employers who are not parties to the agreement as such. This is the principle of the general binding nature of the collective labour agreement and has led to questions

being raised about its legal status. The collective labour agreement could be considered primarily as an agreement between the contracting parties. However, it also plays the role of a normative regulation since the agreement binds not only the contracting parties, but also other non-identified persons (e.g. the other workers of a bound employer) and even future persons (e.g. those who will work in future for a bound employer or employers, and their employees, who subsequently become members of a bound employers' association). Although almost all participating countries were familiar with this system, comparison revealed some major differences. For instance, the Slovenian representative stated that extension of a collective agreement is not needed, since collective agreements already have an erga omnes effect on the basis of the law. For the record he added that new legislation on collective labour agreements is forthcoming and that the future regulation of the extension of collective agreements is being discussed in relation to the potential introduction of a legal system where collective agreements would cover only unionised workers (see also the Slovenian national report). Also the Romanian legislation does not have the concept of extension of the collective labour agreement, because it becomes automatically applicable to the whole branch or to the entire national economy on registration.

The overview of the national reports and the discussion showed that especially wages and working conditions (in the broadest sense, e.g. working time, flexibility measures) are the most important issues regulated by collective labour agreements. A system of free collective bargaining, where collective labour agreements can be concluded on almost every subject, exists in almost every participating country. Remarkably, there is a lot of substantive discussion in Slovenia. The issue is important as it affects the social partners' autonomy. According to one interpretation, the Slovenian social partners are only allowed to regulate "in detail" the rights provided by the law. Another interpretation confirmed the autonomy of the social partners to choose freely the matters that will be the subject of a collective labour agreement. Notwithstanding the fact that the latter interpretation seemed to prevail, the Slovenian participant stressed that the social partners' autonomy remained limited since new legal provisions determined the level of collective bargaining at which a respective right might be further regulated. Furthermore, the social partners are obliged to honour obligations agreed upon in tripartite concertation.

It is important that collective labour agreements do not infringe on rights provided by national or international law. However, individual labour

agreements may not conflict with the provisions of a collective labour agreement. Most participating countries are familiar with the implicit modification of an individual contract of employment which is contrary to the provision(s) of a collective labour agreement. As far as the hierarchy between the different legal instruments is concerned, the issue of derogation from a collective labour agreement was also examined. More precisely, there was discussion on the rather vague criterion of derogation "in favour of the employee". The French respondent remarked on the importance of the issue of derogation from a collective labour agreement, which is strongly connected to the new (or renewed) role of collective bargaining.

One characteristic feature of law is that it is enforced by sanctions. Summarised, three kinds of sanctions are possible: civil, administrative and penal. Not all the legal systems discussed provide for all three types simultaneously. The Belgian Collective Labour Agreement Act, for example, provides fines and prison sentences for employers who fail to respect its provisions. This caused considerable commotion. In practice, however, such penal sanctions are seldom applied. The only recent and well known case was the closure of the Renault plant in Vilvoorde, Belgium and the accompanying collective dismissal of more than 3,000 employees. The French CEO of Renault was condemned to pay a penal fine for not respecting the information and consultation procedure in case of closure and collective dismissal, which was provided for in a generally binding collective labour agreement.

IV. INDUSTRIAL DISPUTES AND DISPUTE SETTLEMENT

Most EU Member States have no formal legal rules for regulating and resolving collective conflicts in the private sector. Only the Italian law on essential services, production and delivery can be considered an exception. According to that legislation, the peaceful settlement of trade disputes is mandatory in specific cases, namely when essential services have to be safeguarded. Notwithstanding this legislation, most Western European legal systems leave it up to the social partners to resolve any (potential) industrial dispute. As a result there are many different dispute-settlement systems. In general, the social partners can choose between collective action, social dialogue and (re)bargaining existing or new collective labour agreements, recourse to the court or conciliation, mediation and arbitration procedures.

With regard to the latter, some of the participants remarked on the subtle and confusing variations in terminology, i.e. the precise differences between mediation, reconciliation, arbitration, etc., are not always clear.

Western European countries rarely have a legal conciliation framework for the uniform settlement of collective conflicts between workers and employers. In this respect, they differ from some Eastern European countries that have a specific law on collective labour dispute settlement. Bulgaria, for example, has rules not only on the settlement of labour disputes, but even on the conditions for and limits to the collective action/conflict itself. In countries without a uniform legal framework, such as Belgium, conciliation procedures have been inserted into collective labour agreements at sectoral level. Continuing with the example of Belgium, special conciliation procedures make provision for both joint bodies with a conciliatory mission and officials entrusted with the task of conciliation. The conflicting parties are free to accept or reject the conciliation. The voluntary nature of conciliation is common to all systems. The Croatian national report, for instance, revealed that Croatian labour law foresees a system of mandatory mediation in collective labour disputes. Moreover, compulsory dispute settlement is directly linked to the exercise of fundamental collective rights, since conciliation in Croatia is a precondition if the trade union wants to strike.

The national reports of the Eastern European countries showed that a lack of tradition of social dialogue can have a direct impact on dispute-settlement procedures by means of conciliation and mediation. There is less successful mediation in transition countries because employees do not trust mediators and conciliators who are perceived as being not very objective or independent from the State. Moreover, they are badly paid and often poorly motivated thus adversely affecting the success of such dispute-settlement procedures.

The representative of the ILO, who was respondent in this part of the colloquium, stated that there has been remarkable progress in the domain of dispute settlement in South East Europe. He illustrated this evolution with the example of the chemical sector in Bulgaria. With the assistance of the ILO, the Bulgarian National Institute for Conciliation and Mediation offered the sectoral social partners training on the techniques and procedures of collective bargaining. Other countries are also trying to set up appropriate procedures to promote social dialogue and the peaceful settlement of industrial disputes. Although it cannot be denied that South Eastern European countries still have to find their place within the overall industrial relations landscape, it is

important to note that they have to achieve in ten years what others did in decades. The respondent concluded that the challenge for the young systems of peaceful dispute settlement is to be recognised and used more systematically by social partners with the view of strengthening bipartite social dialogue and promoting social peace at the work place.

V. COLLECTIVE BARGAINING AT ENTERPRISE LEVEL

Generally speaking, the issue of collective bargaining at enterprise level is influenced by two strong trends occurring simultaneously: Europeanisation and decentralisation. This was the starting point of the seminar's last topic. After examining decentralisation more closely, it seems that the enterprise level is becoming more important for collective bargaining. As far as this bargaining level is concerned, different models of employee representation can be distinguished, namely the single channel model, the dual system and mixed channel systems. With regard to Europeanisation, several initiatives for strengthening industrial relations at company level are worth mentioning. The discussion looked at the different systems in the participating countries, the hierarchy of the bargaining levels, the limitations of decentralisation and the influence of relevant European directives.

At first, the interventions of both the "old" and "new" or candidate Member States showed that the company level is becoming very important for collective bargaining. As one of the participants stated, this evolution could be risky because there is also a strong tendency to derogate from collective labour agreements concluded at a higher level. This could lead to fragmentation of social protection at different levels.

While discussing the general report, different participants also stressed and explained some particularities of their national system concerning collective bargaining at company level. In Turkey, for instance, it was important to distinguish between collective bargaining at the branch and enterprise level and allow the former to prevail. Turkey had equal collective bargaining power at the sector and plant level. Consequently, a wage increase of 75% could be agreed at the sector level while at the same time a wage increase of 50% was bargained at the company level. Both collective agreements were applicable.

In Bulgaria, plant-level bargaining depends on the extension of branch collective agreements in both unionised and non-unionised companies. Collective agreements agreed at branch and company level are registered. In substantive terms, there is no precise dividing line between issues that should be regulated at one level or another. Special relevant issues can therefore be discussed at enterprise level.

As far as company level agreements are concerned, the Romanian situation seems to be comparable to the Bulgarian. Agreements at company level must also be registered there in order to become valid. Nevertheless, there is discussion about whether the agreement becomes applicable after registration or after publication in the official journal. In terms of the content of sectoral or company level agreements, Romania also does not have a precise dividing line between issues that should be regulated at one level or another. The Romanian participant noticed that it is therefore hard to say which level is most important.

In Serbia, the general rule is that everything can be negotiated at all levels. In practice, however, the branch level is more important in the public sector while plant-level bargaining is more common in the private sector. In non-unionised companies employees can come to an agreement with the employer by being represented in a council of employees. The council is empowered by at least 50% of the total number of employees with that employer. Questions arose about the independence of employees in non-unionised companies.

In most countries, trade union representatives have the prerogative for collective bargaining. For instance, the Bulgarian representative stressed that trade unions, not works councils, negotiate collective labour agreements. Nevertheless, non-unionised workers can participate through information channels which deliver timely and understandable information. As a result, Bulgaria seems to practice a single channel bargaining system with respect for non-unionised employees. Collective bargaining at company level is, also in Slovenia, related to trade union representation, but at that level collective bargaining cannot start without trade union representation. In such cases the employer can decide and organise the working conditions in the enterprise, but must respect branch-level agreements.

The (desirable) limits of decentralisation were also a point of discussion. The platform generally agreed on the fact that a free rider situation at the enterprise level should be avoided. A number of different, but relevant

remarks were also made. First of all, strong and well organised unions have more power to bargain at the enterprise level and limit the topics to be discussed in the enterprise. Secondly, good information and consultation practices lead to a balanced bargaining process at the company level. The EU directives on works councils are therefore important. In addition, different participants stressed the importance and influence of European legislation on industrial relations at the company level in general. Thirdly, the platform prefers a system of organised decentralisation to a system of unorganised decentralisation, a distinction which was made in the report on the present issue. Fourthly, there should be no opposition or "social competition" between the workers' representatives and the works council in the company. And finally, when it comes to collective labour agreements, after some discussion the platform felt that opening clauses should be restricted. They also believed that collective bargaining at the enterprise level should not be limited only by collective labour agreements. This situation would be too dangerous and flexible.

COLLECTIVE BARGAINING AT THE ENTERPRISE LEVEL: SOME COMPARATIVE OBSERVATIONS

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[Comment expliquer et admettre] que le juste et l'injuste changent de qualité en changeant de climat, que trois degrés d'élévation du pôle renversent la jurisprudence, qu'un méridien décide de la vérité?... Plaisante justice qu'une rivière ou une montagne borne ! Vérité en deçà des Pyrénées, erreur au-delà !

Pascal

The use of the comparative method requires knowledge not only of the foreign law, but also of its social, and above all its political context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit, which ignores this context of the law'.

O. Kahn-Freund

I. PARADOX: DECENTRALISATION AND EUROPEANISATION

Collective bargaining in the European Union is characterised by two simultaneous processes, Europeanisation and decentralisation. Europeanisation and decentralisation share one crucial feature: they reduce the efficacy of multi-employer collective agreements. The concurrence of both processes means that multi-employer or sectoral bargaining comes under pressure from two sides. However, both processes are analytically different: while decentralisation means that collective bargaining increasingly occurs at plant or company level, Europeanisation does not mean that collective bargaining progressively takes place at European level.

The move towards enterprise-level bargaining is shifting the balance of power to the detriment of trade unions. In Germany, for the first time, a social

democratic prime minister used the threat of government intervention in autonomous collective negotiations by claiming publicly that the government would take action if sectoral agreements did not introduce a framework for increased flexibility. The aim was to secure more employment pacts at the enterprise level ("Bündnisse für Arbeit". Declaration of Government, 14 March 2003; H. Wolter, *NZA*, 2003, nr. 23, 1317). After the implementation of the "Aubry laws" on the introduction of the 35-hour week of 1998, the implementation of the law has been subject to negotiations at company level. In Belgium too, collective bargaining on working time increasingly takes place at workplace level.

Bargaining at company level has also had some positive effects. When the coverage of social protection decreased in many Western European countries, collective agreements were extended to this area. Provisions on company pensions and health insurance schemes have been inserted into local agreements. As is generally known, Article 139 EC Treaty does not contain a legal system providing for the conclusion of genuine (binding) collective bargaining agreements.¹

II. DANGERS OF COMPARATIVE LAW

First we have to cope with complex notions such as the *Rappresentanze Sindicali Unitarie* (RSU). RSU are partly elected by all the workers in the workplace. This election concerns 67% of the seats. The remaining 33% are allocated to the main union confederations distributed on an equal basis to guarantee some form of conferral representation at company level.

The expression *collective bargaining* does not always refer to the same phenomenon. In fact, in some countries, such as the Netherlands, Germany or Greece, where the employer may not take decisions on certain matters without the prior consent of the works council, agreements are formalised by means of written accords. However, technically they are not considered to be collective agreements, even though bargaining activity clearly takes place.

¹ Read E. FRANSSEN, *Legal aspects of the European Social Dialogue*, Antwerp, Intersentia, 2002, 101. Agreements exist on part-time work, fixed-term contracts, telework, parental leave and work-related stress, and sectoral agreements on working time in civil aviation and working time of seafarers.

This is the case in Germany, which in this respect expresses precisely the concept of *Mitbestimmung*.

In order to speak of genuine collective bargaining at the workplace level, it seems to me that the bargaining agent must have the power to resort to industrial conflict. Secondly, we may be confronted with vague notions such as *accords atypiques*.² In France, many agreements are signed by the elected representatives in the absence of *sections syndicales d'entreprise*. This practice is widespread owing to the lower unionisation rate (less than 10%). However, such agreements do not enjoy the status of proper collective agreements, being simply *accords atypiques* governed by the general rules of common law of contracts.

Thirdly, a major danger for comparativism lies undoubtedly in the possibility that the researcher may be influenced by the system in his/her own country ("parochialism"). Another threat is "ideological hangovers", which can hamper exchanges of ideas and consequently comparative work.³ The debate on workers' participation for example has been extremely confused, since those involved in the debate depart from different ideologies.

III. THIRD PARTY INTERVENTION AND HIERARCHY OF COLLECTIVE AGREEMENTS

The government often joins up with employers and trade union representatives as a third party. Good examples of tripartite multi-employer coordination can be found in the Netherlands and Hungary (interventions emanating from the Foundation for Labour and the Social-Economic Council).⁴ Belgium provides us with an instance of state intervention. In 1996, following the failure to achieve a tri-partite 'Contract for the Future on Employment',

² "L'absence de syndicats, une représentativité par trop artificielle, les pressions des représentants élus du personnel, la volonté de donner au dialogue noué avec eux, au fil de réunions régulières, un prolongement conventionnel, expliquent la fréquente conclusion d'accords - généralement qualifiés d'atypiques - entre l'employeur et les délégués du personnel ou comité d'entreprise." (B. TEYSSIE, *Droit du travail. Relations collectives*, Paris, Litec, 2002, n° 523).

³ R. BLANPAIN, "Comparativism in Labour Law and Industrial Relations" in R. BLANPAIN and C. Engels (eds.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, The Hague, Kluwer Law International, 2001, 7th edition, 17-18.

the government unilaterally introduced three framework laws covering the main points of the negotiations, such as the increase of wages.

This shows already two major concepts of decentralisation, i.e. *organised* decentralisation 'as opposed to *'disorganised* decentralisation or 'de-collectivisation'. Multi-employer bargaining was largely replaced by enterprise or workplace bargaining in the UK, while devolution of only certain aspects of collective bargaining to lower levels took place in Germany, with the practice of concluding umbrella framework agreements at sectoral level continuing. Organised decentralisation is produced for instance by a strict hierarchy between the collective agreements of the trade unions and the agreements of the works council. Negotiations at company level are often determined by national agreements or sectoral collective bargaining agreements. This means a strict hierarchy between high level collective agreements and collective agreements at the company level. This is the case in countries like Belgium and in principle also Germany and Romania. The situation is more complicated in the Netherlands and France.⁴

It is important to note that local bargaining relies on information, consultation, and co-determination structures (see below). In the new EU Member States and the candidate countries, tripartite partnership is the predominant objective of social dialogue at the national level. All these countries have created tripartite national councils, in which formal discussions are held between the state and social partners. These discussions rarely lead to negotiation where the social partners were part of the decision-making process. Despite its rather formal structures, tripartism has helped to avoid major conflicts and strikes in periods of economic recession.

IV. DECENTRALISATION: COMPANY LEVEL AND TERRITORIAL LEVEL.

Decentralised bargaining may be conducted at company level (UK, Ireland, Hungary, Poland, the Baltic States, and the Czech Republic)⁵ or at 'territorial level, i.e. agreements signed to cover a particular district, province or region (Italy, Belgium and Germany). At present the Consiglio Nazionale

⁴ S. SCIARRA, 2003, p. 13 and 28, concerning a 2004 French law, the *Loi Fillon*.

⁵ X., *Social dialogue and EMU in the acceding countries*, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2003, 19.

dell'Economia e del Lavoro has concluded almost 600 territorial agreements, most of them signed between 1996 and 2004. There is little collective bargaining at the regional level in the new EU Member States. Exceptionally there are some signs of social dialogue at the regional level in Poland.

V. EU INITIATIVES IN THE FIELD OF COMPANY LEVEL INDUSTRIAL RELATIONS

The EU has taken several important initiatives over the years in the field of company level industrial relations, relating in particular to worker information and consultation. The European Works Council Directive of 1994 applies to undertakings or groups with at least 1,000 employees and at least 150 employees in each of two Member States. It allows for the establishment of a European works council, which must be informed and consulted on the progress of business and any significant changes. Today, European works councils have been established in some 650-700 transnational groups.

The European Company Directive of 2001 (2001/86) provides for rules on information, consultation and possible participation in the European Company. When a European Company is to be created, negotiations between management and employee representatives must start as regards the employees' involvement in the future European Company. The directive may imply board-level participation when this existed already in the company (for instance in German companies). If negotiations fail, standard rules will apply. Standard rules stipulate that 'a representative body' is to be informed and consulted on transnational matters.

The Information and Consultation Directive of 2002 (2002/14) seeks to strengthen dialogue within enterprises. It applies to undertakings with at least 50 employees or establishments with at least 20 and provides that employee representatives must be informed and consulted on developments relating to the economic situation and of employment and decisions likely to lead to changes in work organisation or contractual relations. One possible stumbling block is the concept of 'employee representatives': does this mean the works councils or the trade unions? The deadline for transposition of the directive by the Member States is March 2005.

Moreover, we should not forget the EU directives on the transfer of undertakings (77/187, now 2001/23) and on collective redundancies (75/129, now 98/59), which provide a specific duty for company bargaining.

VI. DIFFERENT TYPES OF REPRESENTATION

In Europe there are three main types of employee representation in enterprises:

- representation in a general body such as the works council;
- trade union representation;
- representation in managing organs of the enterprise.

Sometimes employees have some power in the company through employee ownership.

There are two models of representation in the Community

- "Single channel" (based on bargaining): representative institutions have developed on a contractual basis through industry-wide agreements and have given the trade unions the status of single or privileged interlocutor (currently in the United Kingdom, Ireland, Finland, Sweden, Denmark, Poland, Lithuania, Cyprus and Malta). The advantage of single channel systems is their simplicity, as union and council functions are merged. The disadvantages are that non-union members and employees in firms in which unions are not recognised may be excluded from representation. This problem is relatively small in countries such as Sweden, Finland, Denmark and Cyprus, where unionisation rates are high, but it is a problem where the basis of union membership is small, as in Poland and Lithuania. In many countries this system is established by law or by agreement with employers. In Ireland and the United Kingdom, however, the system is based on a voluntary and fairly limited basis;
- The "dual system" (based on information and consultation): all employees of an enterprise are represented by an elected body not connected (in principle) with the trade union. This body is generally called a works council and forms a second focus of representation alongside the trade union. This system is found in Germany, Austria, Hungary, France, Belgium, Luxembourg and the Netherlands, and has been adopted, following the return to democracy, by Spain, Portugal and Greece. In this model the rights of representation, information and consultation are

conferred on individual workers (in firms above a certain threshold), irrespective of the trade unions. Consequently, there may be competition between the works council and the unions, though in reality lay union officials and representatives tend to play a leading role in the councils and may be a recruitment ground for trade unions. Works councils tend to be highly unionised. Another encouraging sign is that voter turnout in workplace election tends to be high, between 65 and 85%.

Under the dual system one can distinguish between joint representative bodies which are chaired by the employer (France, Belgium and Luxembourg) and representative bodies made up solely of employee representatives (Germany, the Netherlands, Spain and Greece).

But there are also mixed channel systems. In mixed channel systems employee rights are in principle expressed through the union, but non-union members are included directly (Italy) or through a supplementary channel in non-union enterprises (Czech Republic, Latvia, Estonia). Thus, Italian works councils, based on agreements with employers and the statutory rights bestowed on all employees (in firms above a certain size) are a mixed case insofar as no distinction is made between union and non-union members, and the unions voluntarily extend union rights and benefits to non-union members. In the Czech Republic, Latvia and Estonia, the law provides for mechanisms of employee representation in non-union firms, additional to the rights bestowed on unions in enterprises where they are present. Under the 2001 law, Czech employees have the right to establish a works council in non-union firms. However, the council must be dissolved if a workplace union is set up. In anticipation of EU legislation, Lithuania will move towards a mixed or even dual model. In Poland and Estonia, government attempts to establish works councils, independent of the unions, have stalled because of union opposition in alliance with employers! In Spain both channels of representation (comités de empresa and secciones sindicales) share bargaining power at company level.

VII. EMPLOYEE REPRESENTATION IN MANAGEMENT ORGANS.

There are two types of limited liability company in the European Union:

- those in which all powers are vested in the board of directors (single structure), as is generally the case in France, Belgium and the United Kingdom;
- those in which a management body coexists with a supervisory body known as the supervisory board (dual structure) as is the case in Germany and the Netherlands. These structures may have a significant impact on employee representation. In the second case, employees may serve on the supervisory body or appoint members to it without taking part in the management. In Germany, one third of the members of the supervisory board are employee representatives (up to half in the mining industry and in enterprises with over 2,000 employees), see *Drittelbeteiligungsgesetz*. In the case of the Netherlands, the members of the supervisory board are appointed by the shareholders but the works council may propose candidates (*Structuurregeling* for big companies with at least 100 employees, legislation changed in 2004).

In some countries the situation is rather complex. In some limited liability companies in France, i.e. some *sociétés anonymes*, a few members of the works council are also members of the board of directors. In other French companies, some members of the works council have the right to assist, not to decide, in the meetings of the board of directors. In Hungary, exceptionally for a new Member State, workers also sit on the supervisory board of companies employing more than 200 workers.

VIII. PREDOMINANT BARGAINING LEVEL

14.5.07.

Recognition of the dominant level of collective bargaining is a difficult task. It seems that in some countries the multi-industry (or intersectoral) level continues to be important, for instance, in France, Belgium, Denmark and Greece, but also in Slovenia. In France, there is a legal duty to bargain and the state plays a very large role in extending coverage of collective agreements. In many countries, however, sectoral multi-employer bargaining (the industry level) tends to be the norm.

It seems that company bargaining ^{level} prevails in at least nine Member States: Lithuania, Latvia, Estonia, Poland, the Czech Republic, Hungary, Malta, Cyprus and the United Kingdom. This is a very different way of collective bargaining. In between are countries where sectoral multi-employer bargaining is established (Slovakia), or less relevant (Luxembourg, Cyprus).

One has to be very careful with comparative (international) reports assessing the dominant bargaining level. Belgium is often mentioned as a country with a dominant multi-industry level. In fact, the sectoral level is the most important bargaining level. According to some writers, in Latvia the dominating bargaining level should be the company level. But this is not the case in sectors such as transport, energy and forestry where sectoral collective agreements dominate. In France, the legal obligation to negotiate is different for bargaining at sectoral and company level. Especially in countries with a dominant company bargaining level, figures about collective agreements are scarce because many are not registered. (Kakio mnog bel. ug. kod pol. a pr. v. 6. n. in registracii, medtaja pored. to. p. a. a. o. p. u. i. 2 ap. bel.)

What are the reasons explaining the weakness of sectoral/social dialogue? Authors believe it is due to the following:

- weak representativeness of social partners at the sectoral level;
- the ambiguous role of the State;
- weak institutional framework for sectoral collective bargaining;
- instable or difficult economic environment;
- ✓ - the spectacular growth of small private firms; *it*
- the extreme diversity of enterprises within the same sectors. *S*

IX. EMPLOYEE OWNERSHIP AS A FORM OF WORKERS' POWER

Some Western EU countries promote share ownership by workers, for instance France and recently Belgium. Many countries in Central and Eastern Europe, with the exception of the Czech Republic, have widely developed employee ownership as a form of privatisation. In countries such as Bulgaria, Hungary, Lithuania, Poland, Romania and Slovenia, a significant proportion of shares has been successfully distributed, at least during a certain period, among employees. This form of property was found neither to reduce trade union influence nor to limit collective bargaining. It also seems to be gradually disappearing.

X. INFLUENCE OF TRADE UNION AFFILIATION

Collective bargaining at company level is without any doubt influenced by the degree of trade union affiliation. Well-organised and representative trade unions are an important part of the European model. Indeed, union density is higher in Europe than in the United States or Japan, or in most parts of the world. Nevertheless, on average union density in the EU has declined from 32.6% in 1995 to 26.4% in 2001, a decline of 1 percentage point per year. Union density remains high in countries such as Sweden, Denmark and Finland (70% or more). In contrast, union density is low in some countries (less than 20%), such as Poland, France (only 9.7%) and the United States (12.9%). In many countries the impact of low unionisation is augmented by a weak and fragmented collective bargaining structure and sometimes by inter-union rivalry.⁶

But it is dangerous to jump to conclusions. In a country such as France, 90% of the workers are covered by a collective bargaining agreement thanks to a system of extension of sectoral collective agreements.

XI. SOME OBSERVATIONS ON INDUSTRIAL RELATIONS AT THE ENTERPRISE LEVEL IN CENTRAL EUROPE

Central European countries are known for radical changes in labour-management relations at enterprise level. The collapse of the Communist regime led to large scale privatisation and the birth of new private enterprises. This resulted in a general decline in trade union membership (e.g. 20% in Hungary). There has been a rapid growth of small and medium-size enterprises. In this context, 50-60% of all employees in CEECs work for small units with fewer than 50 employees. In Slovakia, more than 97% of workers are active in units with fewer than 50 employees; among them, more than 80% work for a micro enterprise with fewer than 10 employees.

Many foreign investors are not in favour of collective agreements. Considering the weight of foreign investment in the economies of Eastern European, but

also in small Southern countries like Malta and Cyprus, their impact on industrial relations practices is not negligible. Trade unions remain vulnerable in terms of presence in small and medium enterprises, even though this category represents 90% of the enterprises in Central Europe. Although many EU Member States are also characterised by a large proportion of SMEs, their industrial relations culture and human resources management seem better established than in the new market economies, where this process can be more detrimental for working and employment conditions. It is a feature that should also be seen in the light of sectoral agreements. As a result, the percentage of employees covered by a collective agreement, either at sectoral or enterprise level is rather low in these countries.

XII. SOME PROBLEMS OF COLLECTIVE BARGAINING AT COMPANY LEVEL

1. A general problem is implementation of agreements and legislation on the ground. In general, works councils are a phenomenon of large firms. Even where the law provides for works council structures and employee representation in small and medium enterprises and firms with less than 100 employees, usually only a minority of these firms establish councils, or make do with informal consultation mechanisms. In Germany, for example, the law provides statutory rights in firms with five or more employees. The establishment of a works council is not mandatory and according to survey figures from 2002, works councils cover just 11% of all firms and 50% of all employees within the law's scope. Coverage is related to the size and age of the firm, with smaller and newer firms much less likely to have established a works council. (They are also less likely to join an employers' organisation or have a collective agreement. Around one third of German employees is neither covered by an agreement nor by a council.) In the Netherlands, councils are mandatory in all firms of 50 or more employees. There are councils in about half of all firms between 50 and 99 employees, whereas implementation approaches 100% in larger firms. In France, the Ministry of Employment estimates that of small firms (10-19 employees) less than 20% have a form of workplace representation for employees. This percentage increases to 56% for firms with 20-49 employees and to 90% in firms with more than 50 employees. In Greece, it appears that less than 5% of the firms covered by the law have actually established a works council. These figures strongly suggest that where union members are absent (in small firms) there

⁶ European Commission, *Industrial Relations in Europe 2004*, Luxembourg, Office for official publications of the European Communities, 18.

will also be less activity and pressure to set up a works council and implement whatever firms are required to do by law or agreement. ① WYJ

Besides the lack of adequate information and monitoring, non-implementation is still a problem in EU-10. According to a study of the European Foundation for the Improvement of Living and Working Conditions, there is a general lack of institutionalisation and councils are virtually non-existent in many of the new Member States (including Cyprus and Malta), with the partial exception of Slovenia, Poland (public sector), and perhaps Slovakia, and only in Hungary and Slovenia are councils comparable with the fully-fledged types in EU-15. There seem to be virtually no works councils in the Czech Republic. The law establishes a right, not an obligation, that works councils be established in enterprises where no unions are present. However, the council must be disbanded if a trade union is established. In Slovakia, the law was changed in 2003, making works councils a secondary channel for information and consultation even in enterprises where unions are present. Previous legislation had provided for employee representation only in non-unionised workplaces, but few works councils had been established. As noted by the report, *Industrial relations in Europe 2002*, on the state of industrial relations in the accession and candidate countries, there is a clear lack of workers' representation especially in companies without trade unions, the number of which is growing rapidly. This is leading to a situation in which many of the new Member States, and some of the old, face the impossibility of ensuring workers' information and consultation, despite the fact that it is granted in their national legislation and represents an important element of the Community acquis.

2. A second problem is the division of powers in dual channel systems and single channel systems. Usually, when councils have co-determination rights, they must be consulted over the implementation of pay systems and working-time schedules. Moreover, in some Member States, the law permits elected employees' representative bodies to negotiate so-called plant agreements regulating issues not covered by collective agreement with management. This is a rather sensitive issue from the trade unions' point of view. Unions tend to consider such legislative entitlements as infringements of their bargaining rights. Trade unions have nearly always, by law or by agreement, priority in negotiating and signing collective agreements. Yet works councils, even when established as a second channel, often play a supplementary role. This role has become more important in recent times, especially with increased attention for negotiating change and variation in

working time, performance-related pay systems, secondary benefits, and the application of 'opening' or 'hardship clauses' which allow firms to suspend parts of (sectoral) collective agreements in case they face financial and business difficulties. These clauses have become more important in recent years, as will be seen below, but the application of such clauses requires the exchange of credible information and representative structures for consultation at the level of firms. Where such practices and structures are missing, or not trusted by employees, decentralisation of bargaining, with a view to creating more flexibility in response to the challenges facing firms, is often obstructed.

In single channel systems, the division of bargaining tasks and responsibilities between the 'external' and 'internal' union is a matter of internal union decision and discipline. In dual channel systems, it involves the law. Usually, councils are legally barred from collective bargaining and calling a strike. Only in Spain, for historical reasons connected with the transition to democracy in the 1970s, do works councils have a recognised role in collective bargaining. But also in Germany, in spite of legal provisions, many works councils engage in collective bargaining over working hours and even pay with or without the prior consent and knowledge of the union. In Hungary, the law that had given councils the right to negotiate an agreement if no union is present was repealed in 2002. In the Netherlands and Austria, councils may negotiate wages and working hours in firms where no union is present or when the industry agreement permits such negotiations ('opening clause'). Company bargaining in the Netherlands usually takes place with trade unions, since management prefers the professionalism and legal responsibility of 'external' and 'independent' unions. But in some non-union sectors, for instance in information technology and business services, works councils step in. However, under Dutch law, while collective agreements are legally binding, it is not the case when the agreement is signed by the works council. The presumption is that councils are not independent and that employees have no choice. They can voluntarily join and leave the union, and union negotiators are not on the firm's payroll. The conditions do not apply to works councils.

In the Baltic countries, a supplementary channel is created in non-union enterprises. Authorised representatives of employees are legally entitled to conclude collective agreements if the company is a non-union company, i.e. if the employees are not represented by a trade union (supra paragraph 6. "mixed channel systems").

In dual channel systems, union workplace organisation may be absent, for instance in the Netherlands. In France, legislation introduced in 1969 provides for separate union representation in enterprises. In Belgium and Luxembourg, this is guaranteed by central agreement. In Germany and elsewhere this may be subject to sectoral agreements and hence it may vary considerably across the economy (usually stronger in manufacturing and public services, and absent in commercial services). The effectiveness of workplace representation and also of works councils will be influenced by inter-union competition. Where competition is strong, the works council has a stronger *raison d'être*, since it provides for unitary representation. Council elections have the important secondary function of providing some measure of the popularity and representation claims of rival unions in, for instance, Belgium, Luxembourg, France, Spain and Italy, in the latter case also against the excessive representation claims of the independent unions.

3. A particular third problem is the recent development in sectoral bargaining of opening, hardship, inability to pay, opt-out or drop-out clauses, which allow firms under certain conditions to negotiate lower pay or longer working hours with their workforce than stipulated in the sectoral agreements. Such opt-out clauses have become more prominent in recent years in Austria, France, Germany, Ireland, the Netherlands, Spain and all the Scandinavian countries (Sweden, Finland, Norway and Denmark), although it is not easy to establish the degree to which employers make use of them. In Spain most collective agreements, affecting as many as 70% of all employees, have a so-called 'drop-out' clause, laying down situations in which companies may fail to fulfil wage guarantee clauses. A major innovation in the 2004 agreements in Denmark is that the parties at the local level may now conclude local agreements that deviate in either direction, above and beneath the minimum conditions that are stipulated in the agreement. They must however inform the signatory parties at the higher level. This means more flexibility for firms, but at the same time the trade unions gain a stronger role for employee representatives, since such deviations can be concluded only in enterprises which have union-elected employee representatives and only by agreement. With regard to working-time arrangements, the Danish agreements signed in 2004 stipulate that, within the framework of a local agreement, the actual organisation of working hours may now be subject to direct agreement with the individual employee or groups of employees. A similar provision entered Dutch law and collective agreements after the adoption of the Working Time Act of 1996. For the employers, this is a step in the direction of 'individualisation', while the trade unions are pleased to have

maintained the collectively agreed framework. Danish employers dropped their demand for lower bonus payments for unsocial hours and inconveniences. These new provisions can be seen as an extension of decentralisation in the bargaining system, with the sectoral agreements increasingly acting as a framework for bargaining at enterprise level.

XIII. CONCLUDING REMARKS

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decollectivization
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The formulation of a conclusion is a hazardous operation, not least because of the risk of misinterpreting the law of the different European countries and the sociological environment. The trend of de-collectivisation or decentralisation of labour relations, which started in the 1980s, has not yet stopped. It is by no means surprising that employee participation at the micro level is channelled through human resource management initiatives. The European process of de-unionisation has to be assessed with particular reference to its potential destabilising effect on industrial relations systems. It seems correct to speak of a decline of employee participation and a rise in employee involvement. In the absence of either supportive legislation or strong union power, participation of workers is always exposed to destabilising pressures of management. Collective bargaining can be successful if both parties, the employer and the employees, have legally enshrined or factual bargaining power. The bargaining power of the employees is related to the possibility to strike.

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But there is not only bad news. In some countries, bargaining at the company level compensates for the decreasing coverage of social protection in the field of pension and health insurance schemes. European legislation provides incentives for further development of bargaining at company level. In many countries decentralisation to the company level is not disorganised, but restricted by collective agreements to a higher sectoral or multi-industrial level. In some countries, company agreements have become less substantial whilst the importance of sectoral wage bargaining has increased within a renewed multi-industry framework. Despite decentralisation, most EU-15 countries have shown remarkable stability in their wage-bargaining structure. However, this picture does not seem to hold for the more unstable decentralised situation in some Member States.

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SOME FINAL COMMENTS

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The FPS is happy that the EPOS meeting was able to take place and appreciative of the outstanding level of the technical and well-argued contributions. This is promising for the book we are preparing. My colleagues and I from the Ministry are glad that this extended network has been set up and thank you all for your trust in it. We greatly appreciate the spirit of cooperation.

We received during this meeting in Rome considerable quality material within a very short time frame. Thanks are due for the well prepared outlines and reports, comparable data and procedures for further reflection, research and political follow-up. They are an excellent basis for continuing our observatory mission of following the evolution of facts, laws, institutions and procedures in the region concerned.

This material is of considerable support also for the Bucharest Process (BP), a political process of cooperation in the Balkan States to stimulate capacities, creativity and good regulations as regards the design of employment policies in South Eastern Europe, and the supportive contributions of the social partners. The FPS, at the origin of this Process, managed by the Council of Europe in close cooperation with the ILO under the auspices of the Stability Pact for South Eastern Europe, has similarly asked the Belgian trade unions to assist their sister organisations in the region to participate fully in the national debates and procedures in the field of employment policy. A similar process with employers' organisations has recently started. From the outset, the reviews of employment policies revealed the need for strong social dialogue in support of and as a concrete tool of employment policy. Unions claimed clearly that they cannot work efficiently and put pressure on governments without meeting with well-organised employer counterparts. Both observed during their preparations of the Process' last Sofia ministerial meeting that some issues could indeed be dealt with in the Economic and Social Councils where they exist and where sometimes there is not yet an agenda. Thanks to

and consultation rights that workers' representatives have under the directives concerning collective redundancies (1975), transfer of undertakings (1977) and the different health and safety directives, one must ascertain time and again that the notion of 'workers' representatives' must be seen in the national context. The social action programme (1990) limited its proposals concerning collective labour law aspects, beside existing initiatives (the fifth Directive and the SE), which we will discuss later, to a Community instrument regarding information, consultation and participation of employees in undertakings with a European dimension.

In Part II of this book on European Labour Law and Industrial Relations, we will first examine the likelihood of European collective bargaining (Chapter 1); secondly, we deal with the proposals concerning workers' participation (Chapter 2), namely: information and consultation (§1) the proposed fifth Directive (§2), the European SE (§3) and the European Works Councils (§4). Especially the last item, the EWC, opens new perspectives since the adoption of a directive on EWCs and/or a procedure for the purpose of informing and consulting the employees. The directive concerns some 1,500 European-scale enterprises.

Chapter 1. Collective Bargaining

§1. THE SOCIAL DIALOGUE

840. The promotion of a social dialogue constitutes one of the key elements of European social policies. This follows clearly from Article 138(1) TEC, which reads as follows: 'The Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.' The notion of social dialogue self-evidently also includes collective bargaining, the conclusion of agreements between the social partners. Consequently, Article 139(1) TEC says: 'should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements'.

841. Collective bargaining, however, is a delicate flower. Indeed, quite a number of questions pop up over which opinions, especially between the social partners, are diverse. First of all, what is the division of tasks between European and national levels? That the answer to that question leads to controversies follows clearly from the rather heated discussions concerning the appropriateness of the conclusion of a European agreement on information and consultation rights of employees at national level. For the employers, this is an issue to be dealt with exclusively at national level and no business whatsoever for the Community, while the trade unions defend fiercely that this is a matter to be dealt with at European level and that European minimum requirements are necessary.

Secondly, there is the reality of the *power relationship* between the European social partners, or better the lack of power of European trade unions in pushing the employers to the European bargaining table. That lack of power is, however, efficiently compensated by political pressures from the European institutions, especially from the European Commission. There is indeed a kind of situation which one could call 'Damocles bargaining'. This goes as follows. The European Commission invites the European social partners to have a dialogue and negotiate an agreement on a given issue, let's say on information and consultation rights at national level. The parties and especially the employers know that the Commission, if no agreement is reached, will push for European legislation. So employers are put under pressure and have to consider to join or not to join and eventually to negotiate a given deal in order to prevent legislation, the outcome that would escape them almost completely anyway. So there is a sword hanging above their heads.

842. There is, on top of that, the problem of *credibility*. The European social partners exist. They want to prove that they are more than mere lobbyists and are able and willing to play a constructive role. Concluding agreements is one way of indicating that they are doing more than merely talking to each other.

843. The Damocles tactic is now widely used at European level. This is not only so for inter-industry-wide agreements, like the ones we discussed concerning parental leave and part-time work, but also for the level of the European enterprise. Let us take the example of the EWCs. Here also, enterprises are put under pressure of either negotiating an agreement, allowing for some flexibility or undergoing mandatory rules, which come into force when no agreement is reached. A similar scenario is in the pipeline for the introduction of workers' participatory schemes in the framework of the European Company Statute. But, on this last point, more later.

I. The Beginning: 1985-1996

844. There is no doubt that the Commission does its utmost to develop and sustain a bilateral 'social dialogue' at a European level, in addition to the numerous meetings which take place between the European social partners and parties in the ESC and other consultative bodies. Over and over again the Commission has expressed the desire to have a constructive dialogue, especially since 1985, around themes like 'employment and the introduction of new technologies', which could possibly lead to European framework agreements, to which national sectoral and inter-industry-wide bargaining could refer. These talks which are more or less regularly held, at the initiative of the Commission, between the social partners have led to agreement on texts, which were made public under the name 'common orientations'. Partners in this dialogue are UNICE, CEEP and ETUC. The agreements took the form of joint opinions concerning training and motivation, information and consultation (6 March 1987) and on setting of a European area of occupational and geographical mobility, improvement of the labour market in Europe (13 February 1990), on Education and Training (19 June 1990), on the Transition from School to Adult and Working Life (6 November 1990), on New Technologies, Work Organisation and Adaptability to the Labour Market (10 January 1991), on Ways of Facilitating the Broadest Possible Effective Access to Training Opportunities (20 December 1991), on Vocational Qualifications and Certification (13 October 1992), Guidelines for Turning Recovery into a Sustained and Job-Creating Growth Process (16 May 1995) and a joint declaration called: Action for Employment in Europe: a Pact of Confidence (14 November 1996).¹ Finally, one can mention the sectoral and joint committees and informal groups, which operate at sectoral level and are a forum for the exchange of information and ideas, rather than a setting in which collective bargaining takes place.²

1. The text of these joint opinions is published in the *Codex European Labour Law*, which is a part of the IELL.

See I Intro n, §10

II. The First Annual Review of the EU-level Social Dialogue 1997

845. The first annual review of the social dialogue process at the European Union level was adopted by the Commission on 6 May 1997. The review characterised 1996 as 'a particularly fruitful and productive year' for the social dialogue at European level.

In 1996, there was the adoption of a joint declaration on employment by UNICE, CEEP and the ETUC. The year 1996 also witnessed the conclusion of a framework agreement on part-time work.

Activities in all areas of the sectoral social dialogue gained momentum, with 30 joint opinions, memoranda, recommendations and agreements being adopted. The majority of joint opinions were concerned with the preservation of the basic principles governing activities in the sectors concerned, or the safeguarding of employment in the industry. Agreements, opinions and recommendations adopted in the sectoral social dialogue process included the following:

- agreements recommending the application of all or part of Council Directive 93/104/EC on working time were concluded in the railways, sea transport and civil aviation sectors;
- the social partners in the cleaning industry adopted a memorandum on new services to private individuals and on agreements covering workers engaged in the new activities thus created;
- the social partners in the distributive trades and private security industries issued opinions and recommendations aimed at improving their image and outlining ways of achieving greater professionalism;
- in the agricultural sector an agreement was formulated aimed at reducing working time and developing new areas of activity;
- the fishing industry considered the implications of environmental policy on its activities;
- health and safety issues were the focus of discussions in the construction industry; and
- the textiles, clothing and footwear industries commenced preparation of their own codes of practice in a context of widening international competition (regulation of child labour and respect for fundamental rights).

In another area of European-level industrial relations, more than 400 pre-directive agreements on the establishment of European Works Councils were concluded prior to the coming into force of Council Directive 94/45/EEC in September 1994.

Another area where social dialogue is developing is at the cross-border level, via the interregional trade union committees set up by ETUC. These operate in close conjunction with the EURES network linking up Member States' national employment agencies in a number of regions.

Developments in cross-industry advisory committees and in the Standing Committee on Employment are also covered by the review.

846. Summing up the findings of this first annual review, the then Employment, Industrial Relations and Social Affairs Commissioner, Pádraig Flynn, argued that:

'the European level dialogue is starting to produce significant results but the links between it and the national, and the national and industry levels, are creating problems. We have to invent a European industrial relations culture, which integrates Europe into the social partners' strategies and dialogue at all levels. And that requires, at least, major efforts and training to make the social partners aware of the issues of European integration.'

III. The Social Dialogue in some Sectors

A. The European Commerce Sector

847. The social dialogue in the European commerce sector, between EuroCommerce (for employers) and Euro-FIET Commerce (for employees), produced on 6 August 1999 an agreement on fundamental rights and principles at work, covering the elimination of forced labour, a ban on child labour, the elimination of discrimination, freedom of association and the right to collective bargaining. Topics for future social dialogue discussion in this sector include racism, teleworking and the situation of older workers.

Sectoral social dialogue in the commerce sector was first established in the mid-1980s and has since produced a variety of agreements, joint opinions and declarations on a range of subjects, including child labour, employment, training and violence. Social dialogue in this sector entered a new phase following the European Commission's Communication of 20 May 1998 on adapting and promoting the social dialogue at Community level.¹

On 30 November 1998, EuroCommerce and Euro-FIET Commerce concluded an agreement to establish a formal sectoral dialogue committee to replace their informal working party. This committee is consulted on developments at Community level which have social policy implications and is responsible for developing and promoting the social dialogue in this sector. In the agreement setting up the sectoral dialogue committee, the social partners state that their priority for topics for discussion within the framework of the dialogue are:

- employment promotion;
- electronic commerce;
- enlargement of the EU;
- child labour; and
- racism and xenophobia.

The structure of the social dialogue set out in the agreement includes an annual plenary session, which is the main steering body of the dialogue. This is complemented by bipartite working groups focusing on specific issues. In 1999, focus groups were established in areas such as: employment; education and vocational training; electronic commerce; racism and xenophobia; child labour; and wholesale trade and commercial sales agents.

¹ COM(98)322.

848. The 1999 agreement on fundamental workers' rights contains the four sets of rights defined by the International Labour Organisation (ILO) in its 1998 Declaration on fundamental principles and rights at work. The ILO Declaration deals with forced labour; child labour; non-discrimination in respect of employment; and freedom of association and collective bargaining.

Under the terms of the agreement, the social partners state that their members should encourage companies and workers in the commerce sector to abide by and promote the following rights:

- the elimination of all forms of forced or compulsory labour;
- the effective abolition of child labour;
- the elimination of discrimination in respect of employment and occupation; and
- freedom of association and the effective recognition of the right to collective bargaining.

Euro-FIET and EuroCommerce have both recommended that their members endorse the accord. The social partners have agreed to review and evaluate the implementation of the accord on a regular basis and, within the framework of their European social dialogue, undertake any consequent necessary action.

On 29 September 1999, they agreed to negotiate European framework accords on 'distance work with computers' - telework - and on protecting older workers in the context of structural and technological changes, and discussions have since occurred on these issues. On 24 November 1999, an agreement on combating racism and xenophobia was concluded.¹

¹ I. B. Neil, 'Commerce social dialogue agrees on fundamental workers' rights', <http://www.eurofound.ie/>.

B. European Agriculture

849. On 24 July 1997, GEOPA - the Employers' Group of the Committee of Agricultural Organisations in the European Union (COPA) - and the European Federation of Agricultural Workers' Trade Unions (EFA) - one of the European industry committees of the ETUC - signed a European sectoral framework agreement. The initiative builds on previous 'agreements' on working time concluded between the social partners in the sector in 1978, 1980 and 1981, as well as a joint declaration on employment in agriculture of 30 March 1995.

The 'recommendation framework agreement' seeks to contribute to the improvement of paid employment in agriculture. Significantly, it includes recommendations on the adaptation of working time and supplementary provisions relating to working conditions.

The signatory parties agree to take concerted action to implement measures to improve the employment situation in the agricultural and rural sector in the EU. These measures should be concerned with:

- improving the image of employment in agriculture;
- promoting vocational training and skills;

- preventing occupational risks specific to the sector;
- identifying and implementing new types of contracts which both enhance competitiveness and boost employment in the agricultural sector, such as fixed-term contracts, part-time work, seasonal work and temporary work;
- reorganising and improving the labour market; and
- the demands of society concerning the environment and town and country planning.

The agreement also calls for a wide exchange of information on national, regional and local good practice. It recommends the joint promotion and development of projects and initiatives under all Community funds aimed at consolidating and promoting agricultural and rural employment in Europe. The social partners also look for the development of employment-creating 'synergies' with other sectors such as rural tourism, the environment and regional development.

850. The Community is requested to take the need to enhance competitiveness into consideration when defining the Common Agricultural Policy. A renewed request is made for the extension of the early retirement scheme in Regulation 2079/92 to agricultural workers. The social partners argue that it is also crucial to tackle the problem of illegal and undeclared employment in the sector at European, national, regional and local level, and call on the respective authorities to take relevant steps to combat this problem.

In relation to the adaptation of working time, the agreement recommends the institution of a maximum annual working time of 1,827 hours, having regard to national, regional and/or local practices. The supplementary provisions relating to working conditions cover the issues of guaranteed income, overtime, rest periods, night work and periods to be considered as working time, as well as paid leave and public holidays.

C. The Footwear Sector

851. On 16 September 1998, the European-level social partners in the footwear industry signed a common accord to extend the coverage of their charter on child labour, initially formulated in March 1995, to cover footwear retailing as well as manufacture. The issue of child labour has been one of the key concerns of the social dialogue in this sector.

The European-level social dialogue in the footwear sector has a relatively long history, as a European Commission-sponsored joint committee for the industry was active from 1977 to 1984. The dialogue was revived in December 1991 in a different format, with the formalised joint committee process being substituted with a more informal working party arrangement. From 1999, the informal working party, along with its counterparts in other sectors, was to be transformed into a 'sectoral dialogue committee'. The party to the footwear dialogue on the employers' side has been the European Confederation of the Footwear Industry (ECFI). Representing the workers' side is the European Trade Union Committee: Textiles, Clothing and Leather (TCL). This body brings together 47 trade union organisations from 23 countries representing more than 1.5 million workers across Europe.

As well as committing themselves to action to eradicate child exploitation and to provide positive support for incentive measures to eliminate the use of child labour, the social partners' commitments embodied in the charter centre around four main points to be implemented by all employers and trade unions affiliated to the signatory organisations. These are as follows:

- not to employ, either directly or indirectly, children under the age of 15, or below the age of completion of compulsory schooling;
- to support the development of training and apprenticeship programmes within companies to provide for the personal development of young workers;
- to distribute the charter to companies, subcontractors and suppliers; and
- to support ILO Convention No. 138 on the minimum age of admission to employment.

As part of the updated version of the original charter, the social partners agreed to draw up an annual report monitoring its progress and implementation.

On 16 September 1998 the coverage of the footwear child labour charter was extended from footwear manufacturing to include footwear retailing, with the inclusion of the European Confederation of Shoe Retailers' Associations (CEDDEC).

D. Teleworking Agreement Signed in Commerce (2001)

852. The European-level social partners in the commerce sector – EuroCommerce for the employers and UNI-Europa Commerce for trade unions – signed a European agreement on guidelines on telework in commerce on 26 April 2001. Commerce is the EU's largest sector, employing some 23 million workers (16 per cent of the EU workforce). It follows a European-level agreement in the telecommunications sector, signed in February 2001.

The parties to the agreement state that the constantly changing nature of the European economy, of consumer demands and of the needs and aspirations of employees is having an effect on work organisation and job design. They stress that it is important that 'any changes in work organisation or job design, which would introduce or change work done from a distance, using new technologies, are carefully organised and introduced'.

For the purposes of the agreement, telework is defined as all tasks which are 'comparable to those which could be carried out by an employee at the workplace but which may also be done at a distance, using computer technology, normally connected to the information network of the company'. The agreement does not cover telework performed occasionally and relates only to main employment relationships. It recommends a number of detailed guidelines to be followed by the social partners in the commerce in different Member States.

1. Introduction of Telework

853. The accord states that decisions concerning the introduction or implementation of telework should be made in a way which is transparent and which respects

existing information and consultation structures and procedures. Ideally, teleworking arrangements should be designed so that they are favourable to both the employer and the employee.

When introducing telework, measures should be taken to ensure that social contact between the teleworker and the workplace is not lost. This could be achieved through a combination of teleworking and work on company premises. Further, it suggests that 'virtual communities' for teleworkers could be created.

If a teleworker wishes to return to an office-based working arrangement, 'efforts should be made to make this possible'.

2. Employment Conditions

854. The agreement states that teleworkers should have the same rights as office-based employees, including comparable employment rights, remuneration structures and career opportunities. In accordance with EU Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, the employer should notify a number of employment conditions to the teleworker, including:

- the identification of the parties involved;
- the place of regular work (or a statement to the effect that the employee works at a variety of locations) and the registered place of business;
- the use of premises for telework;
- a job description;
- the date of the beginning of the contract or employment relationship;
- the length of the normal working day or week; and
- the basic amount of remuneration and other elements of remuneration to which the employee is entitled.

In addition, the parties to the agreement suggest that, in line with good employment relations and working practices, the following areas should be explained to teleworkers:

- social security protection and insurance;
- supervision and consultation structures;
- data protection and confidentiality; and
- training.

Any legislation, collective agreement provisions or company provisions concerning working time should be applied to teleworkers in a way which takes account of their particular circumstances.

Any absences due to sickness, holidays or any other reasons should be notified in accordance with the general practice of the company. The company should also make sure that any tasks usually performed by the teleworker should be covered in the case of their absence.

3. Tasks and Confidentiality

855. The agreement states that if the work performed by a teleworker is supervised and monitored, the employer must ensure that 'full respect' is given to any legislation or practices which ensure the privacy and integrity of the worker. Particular care should be taken in respect of restrictions on the right to register data.

For their part, teleworkers should respect established rules of confidentiality and take 'reasonable steps' to ensure that confidential data cannot be accessed by unauthorised people.

4. Venue and Equipment

856. The agreement notes that the venue for teleworking should, as far as possible, be recognised as equivalent to other working premises of the company. Further, the design of the work station and equipment must, whenever possible, conform to the same regulations as those which apply to equipment on company premises. The employer is responsible for the purchase, installation, servicing and updating of the equipment required for teleworking, although the teleworker should take 'reasonable care' of the equipment supplied. A separate clause states that all computer systems should be used only for business purposes and that teleworkers must not distribute illegal, offensive or confidential material via any system or via the Internet.

5. Health and Safety

857. In terms of health and safety, the agreement states that health and safety representatives and other employer-nominated representatives should have the right to gain access to and inspect the teleworking venue, after having informed the employee of the visit.

6. Compensation for Costs

858. The employer should in general devise a system of compensation for costs generated by teleworking, including insurance to cover damage to the equipment and damage to third parties or the teleworking premises.

7. Trade Union Rights

859. All teleworkers have the right to communicate with their colleagues, using the equipment and facilities provided. This right must include communicating about work-related matters and about labour relations 'with the trade union organisation to which the teleworker belongs or with other bona fide personnel representatives'.

These communications should be confidential – the employer may not have access to them.

8. Trade Union or Other Personnel Activities

860. Lastly, the agreement states that the teleworker must have the same right as office-based employees to participate in any trade union or other personnel activities taking place in the company, although with the proviso that participation in union activities and communications between teleworkers and employee representatives 'should not lead to unreasonable costs for the company', in comparison with costs resulting from similar activities in the case of office-based workers.

E. Code of Conduct in the Personal Services Sector (2001)

861. European social partners in personal services have signed an agreement on a code of conduct for the hairdressing sector, which employs 1 million people in about 400,000 salons. The 'how to get along' code is hailed as the most comprehensive adopted at European level so far. It covers important themes such as good working conditions, fair wages, profits and lifelong learning. It also includes principles on employee information and consultation and the fight against black and non-declared work.

The code was agreed on by CIC Europe (employers) and UNI-Europa Hair and Beauty (trade unions). It establishes general principles, guidelines and standards for conduct in hairdressing. The guidelines are designed to be distributed to all stakeholders and to reach a broad audience. Although the text is not legally binding, the European social partners strongly recommend that their national members implement it in daily practice. The code will be followed up in the sectoral social dialogue committee. The guidelines are as follows:

'Bearing in mind their respective responsibilities and, acting within the framework of applicable law, prevailing labour relations and employment practices of the country in which they operate and taking the specific peculiarities of the hairdressers' sector into account, salons and employees should:

1. work together, in a spirit of *co-operation* and mutual understanding, in order to effectively contribute to the economic, social and environmental progress of the hairdressers' salons for the benefit of all the stakeholders – customers, employees, managers, owners and/or shareholders – on the understanding that it is and must be the objective of any business in the hairdressing sector to make profits and that they should work together in order to totally ban "black market work and non-declared work";
2. *not discriminate* against customers and employees on any ground such as sex, race, colour, ethnic or social origin, genetic features, languages, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation, nationality, or for any reason whatsoever;
3. respect the principles for the *protection of children* and young workers;

4. provide the *best possible wages and benefits*, so as to be able to attract the best apprentices and guarantee sustained high quality of services to the customers;
5. provide the *best possible conditions of work* with respect to health, safety and dignity in their operations and guarantee the observance of regulations concerning maximum working hours, daily and weekly rest periods and an annual period of paid leave, taking the necessary flexibility for the operations of the businesses into account;
6. help *reconcile family and professional life*;
7. provide room for *self-expression* and *co-responsibility* of the employees, based on continuing training and lifelong learning with a view to improving skills levels and development, so as to guarantee the employability of the employees and to increase their mobility; and wherever possible, provide room for job enrichment;
8. observe the rules concerning protection against *unfair dismissal*;
9. respect the *right to freedom of association and collective bargaining*;
10. *inform and consult employees* and their representatives in good time on basic business figures of the "salons" and on matters of mutual concern.

IV. Divergent Views on Future Role of the Social Dialogue¹

862. It is increasingly clear that employers and trade unions do have diverging agendas towards developing the agenda and role of the intersectoral EU-level social dialogue process, particularly in relation to the desirability of further framework agreements.

In March 1999, the ETUC made proposals for a social dialogue work programme involving the negotiation of framework agreements on the issues of temporary agency work, telework, access to lifelong learning and complementary social protection (portability of occupational pensions), together with possible recommendations on the revision of the 1993 working time Directive and anti-discrimination measures under Article 13 of the Treaty and sexual harassment.

UNICE, on the contrary, wants to give priority to the completion of an ongoing joint social partners' study of 'best practice' and 'factors for success' in the area of agreements balancing flexibility and security as promoted by the EU Employment Guidelines and also proposed joint work on health and safety issues. It reserved its position on the issues of sexual harassment and Article 13 measures.

The social partners' agreement on fixed-term work excluded workers supplied to a user enterprise by a temporary work agency, but stated that: 'It is the intention of the parties to consider the need for a similar agreement relating to temporary agency work.' In December 1999, the ETUC insisted on negotiations over an agreement on the regulation of temporary agency work.

It is clear that the scope for, and desirability of, Community-level agreements continues to be controversial, both among the social partners and among EU institutions and governments. It is clear that the main motive for UNICE to engage in negotiations is the threat of the European legislator stepping in.

1. M. Hall, 'Divergent views on future role of social dialogue', <http://www.eurofound.ie/>.

V. Trade Union Strategies: European Coordinated Bargaining

A. The ETUC

863. In December 2000, the ETUC's executive committee welcomed and endorsed a guideline on the coordination of wage bargaining, formulated by the ETUC's committee for the coordination of collective bargaining.¹

The guideline's three main objectives are as follows:

- to allow trade unions at European level to provide a general indication of wage bargaining developments in response to the European Commission's broad economic policy guidelines and European Central Bank (ECB) guidelines, and generally to influence the 'macroeconomic dialogue' at European level;
- to avoid situations which may lead to social and wage 'dumping' and wage divergence in Europe; and
- to coordinate wage claims in Europe, and especially in those countries which are part of the euro single currency area, and to encourage an 'upward convergence' of living standards in Europe.

The guideline contains a formula for pay claims, as follows:

'nominal wage increases should at least exceed inflation, while maximising the proportion of productivity allocated to the rise in gross wages in order to secure a better balance between profits and wages; and any remaining part of productivity should be used to fund other aspects in collective agreements, such as qualitative aspects of work where these are quantifiable and calculable in terms of cost.'

Furthermore, public and private sector pay should increase in parallel.

The guideline emphasises two other aspects of collective bargaining in particular for the forthcoming period: developing the right of all workers to training and life-long learning as an investment in the quality of work; and combating low pay and securing equal pay between men and women for equal work and work of equal value.

The ETUC executive committee stated that, as part of the implementation procedures relating to this guideline, it will review wage developments each year and progress on qualitative aspects of work every two years. This will be carried out on the basis of a common analysis of the situation in EU Member States and Member States of the European Economic Area. In addition, ETUC invites its affiliated organisations in the countries applying for membership of the European Union to take part in the evaluation exercise.

Guidelines on the coordination of collective bargaining have already been agreed by a number of European sectoral trade union organisations in the metal working sector, textiles and clothing and the services.

1. 'ETUC executive committee endorses guideline on collective bargaining coordination', www.eurofound.ie.

B. The Doorn Group¹

864. On 7-8 September 2000, more than 50 leading representatives of trade unions from Belgium, Germany, Luxembourg and the Netherlands met in Luxembourg for the fourth annual joint meeting of the 'Doorn group'. As well as major sectoral unions, the participants represented the major national confederations. In addition, representatives from the ETUC, the European Trade Union Institute, the European Commission and the Luxembourg Ministry of Labour were invited to participate as observers in the meeting.

The Doorn group takes its name from the Dutch town where in 1998 the unions concerned adopted a joint declaration which expressed a strong need for close cross-border coordination of collective bargaining within the EU Economic and Monetary Union. The 'Doorn declaration' represented the first time that unions from different European countries had determined a set of joint bargaining guidelines. In order to prevent possible downward competition in wages and working conditions, the unions involved agreed

'to achieve collective bargaining settlements that correspond to the sum total of the evolution of prices and the increase in labour productivity;

to achieve both the strengthening of mass purchasing power and employment-creating measures (e.g. shorter work times);

regularly to inform and consult each other on developments in bargaining policy.'

The Doorn group decided to hold an annual summit conference of leading representatives from the major national union organisations involved, while in between annual meetings a small transnational working group should organise a regular and intensive exchange of information on current developments in collective bargaining.

The transnational working group has since established a very close cooperation network and meets every two or three months.

There was a general consensus among all the unions involved that, after four years of existence, the Doorn group must now enter into a new stage and intensify its transnational cooperation. Under the slogan of 'improving coordination of collective bargaining policy in euro-land', the unions published a joint press release at the Luxembourg conference in which they presented their work projects for the period until the next annual meeting in Belgium in September 2001.

First, the unions have agreed to continue their coordination on pay policy on the basis of the Doorn formula. Since the Luxembourg meeting showed that there are significant methodological difficulties in calculating the 'value' of the provisions of collective agreements, as well as different national interpretations of the meaning of the formula itself, the unions resolved to organise a joint workshop with trade union and external experts on these issues.

Second, the Doorn group has decided to improve its cooperation on non-wage aspects of collective bargaining policy. The unions agreed to concentrate on the issues of working time and continuing training and to organise joint workshops on

these topics. The small transnational working group has been given the task of assessing whether a joint transnational collective bargaining project on these issues is possible in the medium term. At the next annual meeting, the unions will decide whether or not to launch a joint transnational campaign on some non-wage issues in collective bargaining policy.

Third, the Doom unions called for further improvement of the day-to-day exchange of information on trade unions' demands, ongoing negotiations and new collective agreements, as well as on macroeconomic data for the countries involved. As one means of improving information exchange, the Doom group plans to set up its own worldwide web page.

1. 'Doom group' holds fourth annual meeting, www.eurofound.ie.

865. In the meantime negotiations on temporary work agencies broke down in May 2001, while UNICE only wants to negotiate a 'voluntary' agreement regarding telework.

§2. EUROPEAN COLLECTIVE AGREEMENTS

866. In this section we want to raise some problems which accompany the possibility to conclude European collective agreements, pursuant to Articles 138 and 139 TEC. In order to do so a number of introductory remarks are called for since collective bargaining constitutes a complex and delicate set of relationships, which are not self-explanatory. Collective bargaining within national boundaries already is not an easy subject, neither politically, sociologically, nor legally; *a fortiori* it is even more complex if undertaken at European or at a wider international level. We also put the first European Collective Agreement on Parental Leave (14 December 1995) into perspective.¹

1. See Part I, Chapter 7, §4.

I. Introductory Remarks

A. Broad and Narrow

867. There are at least two meanings of the term 'collective bargaining': a broad one and a narrow one. In a broad sense collective bargaining embraces 'all sorts of bipartite or tripartite discussions concerning labour problems' involving both sides of industry and governmental authorities aimed at wider understanding, resolutions, preparing or implementing policies, trying eventually to reach compromises, without necessarily resulting in a binding agreement. Self-evidently this broad meaning of bargaining comprises all forms of consultation, co-operation and concertation.

A narrower meaning of collective bargaining focuses on discussions leading to binding agreements, either *de facto*, moral or legal and usually confined to both

sides of industry. Collective bargaining in this sense involves a process of negotiations between employers and representatives of the employees as well as an agreement containing binding rules. It is in this latter and thus narrower sense which we use the term throughout this chapter.

1. S.G. Bamber, and P. Sheldon, 'Collective Bargaining' in: *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (ed. R. Blanpain and C. Engels), 7th ed., Kluwer, 2001, pp. 549-584.

B. A Multifaceted Role

868. As E. Cordoba¹ rightly indicates, collective bargaining serves various functions, namely: determining wages and working conditions, settlement of disputes and the regulation of relations between the collective parties, and it is *de facto* also a form of employee participation.

1. *Op. cit.*

C. Agreement with a Double Content

869. Given its complex nature the collective agreement is like a double-yolked egg: it has a double content.

1. The Normative Part

870. On the one hand the collective agreement contains stipulations about wages and working conditions which regulate the labour relations between the employer(s) and the employees. These wages and working conditions have a *normative nature*; they are the norms which regulate the working conditions of those which fall within the territorial, personal and occupational scope of the collective agreement.

871. The normative part of the collective agreement contains *individual normative stipulations*, comprising the conditions of the individual employees (wages, benefits, cost of living clauses, job classification, working time, holidays, vacations and so on). They also comprise *collective normative stipulations* in the enterprise or the branch of activity. They are norms which generate obligations neither for the contracting parties nor for the employer in relation to individual employees. They are a sort of in-between rules (between individual normative and obligatory), which regulate 'collective' labour relations. Examples of collective normative rules are the provisions in e.g. sectoral collective agreements covering: (1) the establishment, competence and functioning of the works council in the enterprise; (2) procedures for the settlement of industrial disputes; (3) establishment of certain funds and the like.

2. The Obligatory Part

872. The collective agreement, like any other agreement, generates obligations between the contracting parties which have to be clearly distinguished from the normative rules. These obligations can be explicit (e.g. concerning the interpretation of the agreement) or implicit. To the implicit obligations, in certain EC countries, belong among others the peace obligation (abstention from industrial action as long as the agreement is in force), which can be relative or absolute. Some also accept that there is an implicit duty for the contracting parties to implement the collective agreement (exercise influence on their members to live up to the agreement). A peace obligation can, self-evidently, also be dealt with *explicit verbis*.

D. Free Collective Bargaining: Pluralist Democracy

873. It is not superfluous to recall in this context that free collective bargaining and the autonomy of the parties have always been regarded as fundamental aspects of the freedom of association.¹ Indeed, freedom of association, collective bargaining and the right to strike go, like we said earlier, hand in hand. Employees, and eventually employers, associate in order to bargain collectively and bargaining without the right to strike amounts to collective begging. Autonomous collective bargaining constitutes a prerequisite for a pluralist democratic society; 'pluralist' means more institutions and persons than one group, e.g. a given political party, participate in social decision and rule making. Needless to say, collective bargaining (point 12) as well as the right to strike (point 13) belong to the fundamental social rights of workers as expressed in the Community Charter of 1989.

1. B. Creighton, 'Freedom of Association' in: *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (ed. R. Blanpain), 7th ed., 2001, 227-262.

E. Subsidiarity

874. The subsidiarity rule, pointing out that problems must be settled at the most suitable level, addresses not only the relation between the European and national or regional levels, as far as European or national governmental authorities are concerned, but also whether problems can be dealt with either by governmental intervention or by agreements between the parties concerned, which in the social arena means the social partners. So the subsidiarity rule also points out that there is room for collective bargaining at European level when this is the best way of doing things.

F. Abstention from an International (Legal) Framework

875. There is no doubt that international legal instruments have always been almost mute as far as collective bargaining at international or European level between

management and labour is concerned, as bargaining at that level is bedevilled by strategic considerations by the parties involved. Even the Guidelines for Multinational Enterprises, like those promulgated by the OECD Member States (1976, as amended) or the ILO Tripartite Declaration on Social Policy of Multinational Enterprises (1977), neither explicitly nor implicitly refer to transnational bargaining, given the conflicting views of the governments and the social partners involved. Thus, Articles 138 and 139 TEC are a break-through in this area, but they self-evidently do not contain precisely formulated rules, legally organising and monitoring the different juridical questions which accompany European collective agreements.

G. Specific Legislation

876. In the absence of specific European legal rules, the question arises as to which legal rules should apply in case a collective agreement is concluded at European level. There is no doubt that there are insufficient European general principles of law to deal satisfactorily with the legal problems which accompany a European collective agreement. In order to do so one will have to look to national law for a solution. Here one must distinguish between two possibilities: either the parties choose the national law which will apply to their agreement or they do not. In the latter case the national legal system with which the agreement is most closely connected may apply. Reference in this framework could be made to the Convention on the Law applicable to Contractual Obligations of 19 June 1980, although the drafters of that Convention certainly did not have collective European agreements in their minds when they elaborated the Convention. In any case, unless European law ultimately would prevail, national law will be applied by the local courts in case of a dispute concerning the application of the terms and conditions, laid down by a European collective agreement, of e.g. an individual employment contract.

877. It follows from the judgment by the Court of First Instance of 17 June 1998 in the UEAPME case, concerning the notion social partner under European law, that the European judge intervenes in the legality of European collective agreements and more especially in the decision by the Council to implement the framework agreement on parental leave by way of a directive.

It is, however, not excluded that the Court of Justice would have to answer questions regarding the 1994 directive on EWCs and eventually concerning the agreements parties establishing an EWC have concluded, including the legal status of the agreements, the legal capacity of the parties, content and the like.

878. In the present legal state of affairs, the European Court does not seem to be competent to handle any preliminary question regarding the validity or the interpretation of a European agreement, giving the wording of Article 234 of the EC Treaty, whereby preliminary questions are limited to actions of the Community institutions.

II. Parties to the Agreement

879. A collective agreement is an agreement between one or more employers or employers' association(s) and one or more trade unions, including other *bona fide* representatives of employees, concerning the terms and conditions of employment and the rights and the obligations of the contracting parties.

Agreements at European level can be either a:

1. European company agreement;
2. European industry agreement;
3. European multi-industry-wide agreement;
4. European multi-regional agreement.

A. The European Company Agreement

880. In the case of a European company agreement the employers' side is composed of either a European company having non-incorporated subsidiaries in various EC Member States or the representatives of various legally incorporated subsidiaries located in Member States which are part of a European or a multinational group. It is clearly not necessary that there are subsidiaries in all EC countries. One could, moreover, envisage that some subsidiaries are not situated in the EC and yet nevertheless are involved in the bargaining and the consequent agreement; equally that agreements are only concluded with some of the subsidiaries.

881. The labour side could be composed of representatives of the *trade unions*, which represent employees working in the different subsidiaries, or (theoretically at least) of a *European company trade union*, which may have been established and which has competence and thus a mandate to bargain over and conclude an agreement concerning wages and conditions in the company.

One can also envisage that an EWC could be party to a European collective company agreement, depending on the composition and the competences of the council. The EWC could be composed of representatives of employees who are directly elected to that end, e.g. at national level, or who are delegates of national councils or similar bodies, such as shop stewards, committees of hygiene and others. These (direct and indirect) representatives should have a mandate to bargain and to agree at a European level. There should be at best an explicit mandate in both cases. In the case of direct representation, this is self-evident; in the case of indirect representation, there should be an explicit mandate certainly for those representatives who do not enjoy that competence at home, which is the case for many works councils, since in a number of countries the (legal) right to bargain is reserved to the trade unions. The problems which ensue are discussed in the light of the structure of EWCs, below.¹

1. See Chapter 2, §4, IV.

882. The possibility of multi-company agreements cannot be excluded *a priori*.

B. The European Industry Agreement

883. Parties to the European industry agreement are self-evidently employers' associations and trade unions.

The (national) trade unions, representative of the employees in that branch of industry and competent to bargain, could either form one or more European sectoral trade unions, which have a mandate to negotiate and conclude agreements or be represented as such around the negotiation table and become parties to the collective agreement, or could mandate a negotiating committee.

The same goes *ceteris paribus* for the employers' side. We refer in this context to the sectoral dialogue committees.¹

1. See General Introduction, §1, III, K.

C. The European Multi-Industry Agreement

884. The European multi-industry agreement could either cover the European private sector (profit - socio-profit)¹ as a whole or more than one branch of industry. Again one can conceive that one or more European confederal trade unions, grouping national confederations, could be party to a collective agreement provided that they have a mandate to that end. There may be a difficulty, resulting from the fact that some national confederations may not themselves have the competence to conclude collective agreements and therefore could not delegate that competence to a European body. One could also imagine that national confederations would be party to the agreement.

1. Public companies, affecting the functioning of the common market, included.

885. In the case of an inter-industry-wide agreement, covering only some sectors of industry, one might imagine that national unions, representing those sectors, could be party to the collective agreement.

886. On the part of the employers one or more European confederations of employers' associations may be a party, maybe the national confederations themselves. The same thing can be said regarding competence and agreement covering only some sectors, as is the case with the unions.

D. The European Multi-Regional Agreement

887. An agreement could also be concluded covering different regions of the European Community, situated in different Member States. These agreements could be industry or multi-industry agreements.

Here European regional employers' association(s) could be a party to the agreement as well as the (national) regional employers' organisations or national employers' organisations.

From the trade union side, there could be European regional trade unions, (national) regional trade unions or national trade unions at the negotiation table.

III. The Competence to Conclude Collective Agreements

888. In order to be able to conclude collective agreements the parties must have the necessary competence. Here we have to distinguish between the power to negotiate, the power to conclude and the power to ratify the agreement.

In the case of organisations; there must be a mandate to this end, given by employer or employee members to their organisation or conferred by law. In the case of a European organisation, the composing organisations must have the competence to give such a mandate to their European organisation.

Such a mandate can be explicit or implicit.

Of course there is the possibility for e.g. national organisations to constitute a bargaining team, which would conduct negotiations on behalf of the organisations and conclude the agreement while retaining the power of ratification.

IV. Articles 138 and 139 TEC. Specific Legal Problems

889. As has already been indicated, very intricate problems arise regarding European collective agreements under the TEC, both for those which will be implemented by a decision of the Council as well as for those agreements which will have to stand on their own (legal) feet.

A. Implementation in Accordance with National Practice

1. Contracting Parties

890. The first question which arises is: who can be a party to a European collective agreement? A party may be an employer, let us say a European company, or a European employers' organisation, or a European trade union of employees organised at either regional, sectoral, or confederal level. As indicated earlier, parties must have the necessary competence to conclude a collective agreement. In order to do so they should have a (explicit) mandate from their members. Members of UNICE, who do not have the practice of bargaining at a national level like e.g. the *Deutsche Arbeitgeberbund* or the Confederation of British Industries, may be in a difficult position to give such a mandate, unless the constituent members of the latter organisations would agree to do so. This may eventually involve an amendment of the by-laws of those organisations.

Contracting parties in the Agreement on Parental Leave are the 'cross-industry organisations', UNICE, CEEP for the employers' side and ETUC for the employees' side. In the *considerans* (13) to the directive it is noted that the Commission has 'taken into account the representative status of the signatory parties'. See, however, regarding this point our earlier remarks on the representativity of the European social partners.¹

1. See General Introduction, §3, IV, C1b.

2. Content of the Agreement

891. Parties can conclude agreements on wages and working conditions, in the broadest sense of the word. The parties are autonomous and are not bound by the areas which are excluded in Article 137(6) TEC, although one must recognise that agreements on issues like the right to strike or the right to impose lock-outs at a European level are hardly likely, although theoretically possible.

The Collective Agreement of 14 December 1995 deals with parental leave, which is a working condition in the sense of Article 137(1) TEC.

3. Form and Language

892. The European collective agreement will probably have to be drafted in writing in the various official languages of the Member States in which the agreement is intended to have an effect, although it does not seem that this would condition its validity, except when national legislation, applicable to the agreement, would contain certain linguistic requirements, as is the case in Belgium.

4. Scope

893. The territorial scope of the agreement will not necessarily be limited to the 15 Member States and the EEA Members as some of the possible contracting parties, e.g. UNICE and the ETUC, have membership outside the Community (of the 15 Member States and the EEA Members). The personal scope of application of the agreement will depend on the content of the agreement itself, namely the kind of employers and employees which are meant to be covered: in principle all employers and employees who fall within the territorial and professional scope of the collective agreement. The professional scope is determined by the sectors of activity for which the contracting social partners are competent. The agreement can apply to all undertakings which operate in the common market. It is in this context not relevant whether they are private or public (owned by the Government or other public authorities or operating under their control). The only important factor is whether they affect the functioning of the common market. The agreement can, however, not apply to the public sector *sensu stricto*, i.e. those institutions which involve direct or indirect participation in the exercise of powers conferred by public law in the discharge of functions whose purpose is to safeguard the general interests of the State or of other public authorities.¹

1. Cf. *Lawrie-Blum v. Land Baden-Württemberg*, 3 July 1986, No. 66/85, ECR, 1986, 2121.

5. Binding Effect

894. As far as the binding effect of the agreement is concerned we must distinguish between the obligatory and the normative part of the agreement. The binding effect of the obligatory part will depend on the law applicable to the contract. If this

is Belgian, as e.g. the agreement was concluded in Brussels and parties did not choose another legal system, the relations between the contracting parties might be governed by the Belgian Act of 5 December 1968 on joint committees and collective agreements, with all the problems this involves.

895. The binding effect of the agreement on the members of the contracting parties, e.g. on the national confederations of employers as far as UNICE is concerned, will depend on the by-laws of UNICE. The obligations resulting from those by-laws may eventually be sanctioned by disciplinary measures in case of non-compliance. At any rate, there is no legal obligation whatsoever for any national association to put a European collective agreement on the national negotiation table, nor is there an obligation of result, namely that there should be a collective agreement at national level. Mandatory bargaining does indeed not belong to a widespread European tradition.¹

1. A legal obligation for some forms of mandatory bargaining does, however, exist in France, Luxembourg, Portugal and Spain and for some issues in Denmark and the Netherlands.

896. The only obligation which exists for members of contracting parties, like employers' associations or trade unions, may follow, as indicated earlier, from the by-laws of their respective European organisations and may oblige them to engage in collective bargaining at national or lower levels. It is questionable, however, whether e.g. an individual employee could sue either a national employers' organisation or a trade union which does not start to bargain on the issues laid down in the European agreement. Much will depend here on the status of national law and the rights of third parties relating to contractual or other obligations others may have.

897. Implementation of the normative part of the European collective agreement will consist in developing collective bargaining according to the rules of each Member State. Here problems arise as certain Member States do not have procedures to provide for an *erga omnes* effect of collective agreements, while at the same time, the binding effect of the collective agreements, as far as the hierarchy of legal sources (legislation, work rules, individual agreements, custom...) is concerned, differs considerably from country to country. Some Member States have procedures of extension of agreements to the private sector as a whole, others do not. In certain countries, the non-compliance with a collective agreement, thus extended, is penally sanctioned, while in other countries no penal sanctions apply.

Thus, there are no real guarantees that the agreements will be fully and *erga omnes* implemented through normal (national) collective bargaining structures or mechanisms. In order to obtain an *erga omnes* effect with a comparable legal outcome, consequently one is, in attendance of further legislative Community developments in this area, *de facto* bound to turn to the Council for a decision.

6. Interpretation

898. As has already been indicated, the European Court does not seem to be competent to handle any preliminary question regarding the interpretation of a

European collective agreement, given the wording of Article 234 of the EC Treaty, whereby preliminary questions are limited to actions of the Community institutions. Interpretation mechanisms may, however, be provided for by the contracting parties themselves in the collective agreement, either by way of conciliation or even arbitration mechanisms. National courts could also be called upon to rule on the meaning of the language of European collective agreements. As a general rule, the party seeking interpretation will, in order to qualify as a litigating party, have to give evidence of a manifest interest.

The first Collective Agreement, namely on Parental Leave, provides, in its final provisions (6), that 'without prejudice to the respective role of the Commission, national courts and the Court of Justice, any matter relating to the interpretation of this agreement at European level should, in the first instance, be referred by the Commission to the signatory parties who will give an opinion'. That opinion, obviously, has only an indicative nature and is not binding. Final binding decisions on the interpretation of the agreement will be made by the Court of Justice.

Parties could obviously conclude an interpretative agreement that could be rendered binding by a Council decision, but that is another matter.

7. Duration

899. Parties will have to lay down in their agreements rules concerning the duration and termination of the agreement: as a general rule, agreements are either for an indefinite or a fixed duration. In case of an indefinite duration a period of notice and certain formalities might be provided for. The national law applying to the agreement will then have to be followed.

The Agreement on Parental Leave is for an indefinite period. It does not contain provisions to denounce the agreement partly or totally. It has, however, a clause that parties will review the application of the agreement after the date of the Council decision if requested by one of the parties. This does not take away that either party has the right to denounce the agreement at any time. In that case, the directive might become an empty shell.

B. Implementation by Council Decision

900. Much of what has been said about the implementation by national procedures is also relevant to the implementation of a European collective agreement by way of a Council decision. We limit ourselves to a number of specific points.

As indicated earlier, the first inter-industry-wide European Collective Agreement on Parental Leave was implemented by a directive of 4 June 1996.

1. Which Agreements?

901. It is evident that the collective agreements which qualify the first to be implemented by a Council decision are the European multi-industry agreements,

which cover all employers and all employees. It is indeed these agreements which are meant to replace Council directives, which apply in principle to all employers and employees of the Community. One can, however, not exclude *a priori* the possibility of implementing by way of a Council decision sectoral, regional or even European company agreements. First, the text of Article 139 TEC is fairly general and not limited to exclusively inter-industry-wide collective agreements. Secondly, one has to respect and to promote, also in view of fully implementing the subsidiarity principle, the dynamism and the autonomy of collective bargaining. In other words, a decision by the Council implementing collective agreements other than inter-industry-wide is not only *de jure* but also *de facto* a viable possibility.

2. Content

902. The content of the agreement has to be limited to matters covered by Article 137(1) and (3) TEC, which were enumerated above. It seems to me that the Council has to accept or reject the text of the agreement as a whole and that it cannot change the content or retain only a part of the agreement, unless the contracting parties and the Commission agree. The Council decision will only implement the normative part of the agreement. Actually, it does not seem necessary that the decision should cover the contractual relations (obligatory part of the collective agreement) between the parties as well.

3. Scope

903. The territorial scope of the agreement will, self-evidently, be limited to the territory of the 15 Member States. The decision will affect the EFTA countries in the framework of the EEA Agreement.

4. Binding Effect

904. The binding effect of the decision will depend on the instrument which the Council decides to use: a regulation, a directive or a decision. Here the Council is the guardian of the *erga omnes* effect. This means that the European agreement, in case of a regulation or a directive, will supersede national legislation and national collective agreements, work rules, individual agreements and the like. Such a Council decision could also, it seems to me, amend or abolish previous regulations, directives or recommendations.

One may ask whether multi-industry Community agreements, implemented by a Council decision, would also supersede sectoral agreements or regional or company agreements, which are also implemented by a Council decision. The answer seems, in the present state of affairs, to be positive, in the sense that the higher collective agreement contains minimum standards which agreements at a lower level have to respect and can expand. As indicated earlier, the Council always has the last word

and can at all times withdraw its decision implementing the agreement or adopt another instrument, which simply amends or abolishes the collective agreement completely or partially.

The Collective Agreement on Parental Leave was, as indicated earlier, implemented by way of a directive. This seems to be the logical path, since it is a framework agreement leaving much to be filled in at national level, either by the Member States or by the competent social partners. The directive is binding on the Member States as to the results to be achieved, but leaves them the choice of form and method.

5. Interpretation

905. In case of a Council decision the agreement is self-evidently up for eventual interpretation by the European Court pursuant to the relevant Treaty provisions concerning preliminary questions.

Again, the contracting parties may elaborate their proper arrangements to settle interpretation problems, e.g. by way of conciliation or arbitration.

Regarding the Collective Agreement on Parental Leave, we refer to A.6 of this section.

6. Master or Slave

906. The relation between the (European collective) agreement and the Council decision implementing the agreement is of the utmost importance. The question arises indeed whether the collective agreement will, through the implementation procedure, become incorporated in the Council decision and thus *de jure* disappear, as being absorbed by the Council decision, cease to exist or whether the agreement will continue to live its own life and the decision is thus only giving an *erga omnes* effect to an agreement which remains in a sense in the hands of the contracting parties. Much will depend on how the Council decision will be constructed: whether the decision will simply absorb the text of the agreement or whether the decision will state that the (following) agreement has become implemented by a Council decision. In the latter case, the agreement remains the property of the social partners, which can denounce the agreement at their will or follow the provisions of the agreement if they want to do so, which otherwise would not be possible. In that case the Council decision would become an empty shell. It is appropriate, in order to respect to a maximum the autonomy of the social partners, not to follow the road of incorporation of the agreement into the Council decision.

The Directive of 3 June 1996, implementing the Collective Agreement on Parental Leave, respected the autonomy of the social partners by giving binding force to the agreement, which was published as an annex to the directive. The text of the agreement was thus not amended in any way. The European Parliament, however, complained that it was not really involved and could only come in after the text was agreed upon by the social partners and the Commission had taken the steps for implementation by a Council decision.

7. Collective Bargaining and Competition

907. In three similar cases¹ of the same date, the Court of Justice had essentially to ascertain whether a decision taken by the organisations representing employers and workers in a given sector, in the context of a collective agreement, to set up in that sector a single pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make affiliation to that fund compulsory for all workers in that sector is contrary to Article 85 of the Treaty. All three cases dealt with a single sectoral pension fund and a supplementary occupational scheme established by a sectoral collective agreement that had been declared binding *erga omnes*. This has a consequence that all employers and employees had to be affiliated to this fund. Some companies did not like this compulsion and contended that they could provide arrangements at a lower price and that the compulsory arrangement was contrary to free competition in the common market. The Court confirmed the validity of the collective agreements declared binding *erga omnes*.

The Court stated that Article 81(1) EC and Articles 136 EC to 143 EC are construed as an effective and consistent body of provisions; it follows that agreements concluded in the context of collective negotiations between management and labour, in pursuit of social policy objectives such as the improvement of conditions of work and employment, must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 81(1) of the Treaty. The Court continued:

'An understanding in the form of a collective agreement which sets up in a particular sector a supplementary pension scheme to be managed by a pension fund to which affiliation may be made compulsory by the public authorities does not, by virtue of its nature and purpose, fall within the scope of Article 81(1) of the Treaty. Such a scheme seeks generally to guarantee a certain level of pension for all workers in that sector and therefore contributes directly to improving one of their working conditions, namely their remuneration.

A decision by the public authorities, at the request of the parties to the agreement, to make affiliation to such a fund compulsory cannot therefore be regarded as requiring or favouring the adoption of agreements, decisions or concerted practices contrary to Article 81 of the Treaty or as reinforcing their effects. Accordingly, the Treaty does not preclude a decision by the public authorities to make affiliation to a sectoral pension fund compulsory at the request of organisations representing employers and workers in a given sector.'

1. C.O.J., 21 September 1999, *Albany v. Stichting Bedrijfspensioenfonds Textielindustrie*, Case C-67/96; *Brentjes' Handelssonderneming v. Stichting Bedrijfspensioenfonds voor de handel in bouwmaterialen*, Joined Cases 115-117/97 and *Drijvende Bokken v. Stichting Pensioenfonds voor de vervoer en havenbedrijven*, Case C-219/97, ECR, 1999, 5751. See N. Bruun and J. Hellsten (eds), *Collective Agreement and Competition in the EU: The Report of the COLCOM project*, Copenhagen, 2001, 226 pp.

Chapter 2. Workers' Participation

§1. INFORMATION AND CONSULTATION

908. Under this heading we pay special attention to the so-called Vredeling proposal,¹ named after the then social Commissioner H. Vredeling, which was adopted by the Commission on 24 October 1980 concerning the information and consultation of employees employed in undertakings with a complex structure, especially multinational enterprises.² The target of the proposal was both the national enterprise and the group as a whole, so that local management would be in a position to give the employees of the subsidiary a clear picture of the activities of the undertaking as a whole, when this undertaking operates in various countries. Secondly, the proposal intended to provide for the local workers' representatives to have access to top management when information at a local level would be insufficient. Finally its purpose was that local management would be able to provide the workers' representatives with adequate information at a local level and with consultation opportunities regarding important decisions affecting local conditions that would be taken at distant headquarters.

1. One should also mention the following proposals, which provide for a certain role to be played by workers (participation, or if not possible, at least information and consultation):
 - Proposal for a Council Directive supplementing the statute for a European association with regard to the involvement of employees, O.J., 21 April 1992, No. C-99;
 - Proposal for a Council Directive supplementing the statute for a European cooperative society with regard to the involvement of employees, O.J., 21 April 1992, No. C-99;
 - Proposal for a Council Directive supplementing the statute for a European mutual society with regard to the involvement of employees, O.J., 21 April 1992, No. C-99.
2. See further for a more detailed study: R. Blanpain, F. Blanquet and others, *The Vredeling Proposal, Information and Consultation of Employees in Multinational Enterprises*, Kluwer, 1983, 219 pp.

909. According to the proposal, at least every six months the management of the parent company would forward to the local management information concerning the group as a whole and relating in particular to:

- a. structure and manning;
- b. the economic and financial situation;
- c. the situation and probable development of business and production and sales;
- d. the employment situation and probable trends;
- e. production and investment programmes;
- f. rationalisation plans;

CHAPTER 2

SOME EUROPEAN SOCIAL PARTNERS' ORGANISATIONS

2.1. *Introduction*

In this chapter I will describe some European social partners' organisations. Since they are the main actors in the European social dialogue, it is useful to have a certain idea of the way they are composed and the way they work. Furthermore I will, in later chapters, discuss the representativity and internal decision making process of those organisations which conclude European agreements, as well as the binding effect of these agreements on the national affiliates of the European organisations. It is therefore important to give a broad description of these organisations.

At the present time,¹ there exist more than 60 European employers' and workers' organisations. To discuss them all would be excessive in a study on legal aspects of the European social dialogue. I have decided, therefore, to select those which have in one way or another played a role in the European social dialogue.

There are several categories of social partners' organisations at European level. In the first place, there are intersectoral organisations representing all categories of workers and employers. This will be discussed in para. 2.2. Secondly, one finds intersectoral organisations which represent specific categories of workers or undertakings. This will be discussed in para. 2.3. Finally, there are sectoral organisations, representing workers/employers from a particular branch of industry. This will be discussed in para. 2.4. The legal status of European social partners' organisations in general will be discussed in para. 2.5 and I will try to indicate the legal status of the organisations described in this chapter. Finally in para. 2.6 some conclusions will be drawn.

2.2. *Intersectoral organisations representing all categories of workers and employers*

First, the three most important intersectoral organisations, the European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederation of Europe (UNICE) and the European Centre for Public Enterprises (CEEP) are discussed. Their internal structure is described to give an idea of how they are organised. This is important because in later chapters the internal decision-making procedures within these organisations are con-

¹ March 2002.

sidered. Furthermore, I will say something about their main objectives and attitude towards the European social dialogue.

ETUC, UNICE and CEEP played an important role in boosting the European social dialogue. They were the ones who were invited by the President of the European Commission in the mid-80s to give the European social dialogue a new impulse.² Furthermore, they concluded the first three intersectoral agreements on the basis of the Articles 138 and 139 EC Treaty.³

2.2.1. The European Trade Union Confederation (ETUC)

ETUC was created in 1973, bringing together a number of different trade union bodies at the Community level since the early 1960's. Before 1973, the European trade union organisations were highly fragmented, being split on religious and ideological grounds. However, as a result of the influences of regionalism, détente and the multinationals, these separate trade union organisations decided to dissolve themselves and form a single federation named ETUC.⁴ The ETUC represents some 60 million members who belong to 67 national trade unions from 33 countries.⁵ It also comprises 14 European Industry Federations (EIFs) and 38 Interregional Trade Union Councils (ITUCs). The EIFs represent individual trade unions from a particular sector or from several public or private sectors. The ITUCs are transnational structures, enabling trade unions in various border-regions to cooperate at cross-border level.⁶ Within the ETUCs member confederations, women, young people, pensioners and managerial staff have special interests that cannot be dealt with or taken account of sufficiently by either committees or working groups. The ETUC has therefore set up special bodies designed to help them achieve their aims. Some of these special bodies are e.g. the Women's Committee, ETUC Youth and the European Federation of Pensioners and the Elderly (FERPA).

ETUC consists of 4 organs: the Congress, the Executive Committee, the Steering Committee and the Secretariat.⁷ The Congress stipulates ETUCs policy priorities. It also supervises the work of the other institutions. Furthermore, it elects the members of the Executive Committee, the President, the General

² See Chapter 3, para. 3.3.2.

³ The European Framework Agreement on Parental Leave on 14 December 1995, the European Framework Agreement on Part-Time Work on 6 June 1997 and the European Framework Agreement on Fixed-Term Work on 18 March 1999.

⁴ P. Teague, *The European Community: the social dimension*. London, 1989, p. 89. See also B. Barnouin, *The European labour movement and European integration*, London/Wolfeboro, 1986, p.7-10.

⁵ R. Blanpain (ed. in chief), *Encyclopedia of Labour Law and Industrial Relations*, European Labour Law, suppl. 231, June 2000, par. 134.

⁶ Homepage of the ETUC, March 2001. [Http://www.etuc.org/en/](http://www.etuc.org/en/)

⁷ Article 6 of the ETUC Constitution.

Secretary, the Deputy General Secretaries and the Auditors. Finally, it can change the Constitution.⁸

The Executive Committee is the highest body between Congresses. Like the Congress, the Executive Committee consists of representatives of national confederations, EIFs and the Womens' Committee, but the division of the seats is different. The Executive Committee generally meets every 3 months and takes the policy decisions required to implement the general strategy adopted by the Congress. It also decides on the positions to be taken vis-à-vis European employers' organisations and the European institutions. It oversees the work of the Steering Committee and of the Secretariat and draws up the internal rules of procedure. Finally, it fixes the level of affiliation fees and approves the budget and the extra-budgetary resources.⁹ Furthermore, it is the organ which plays a leading role in the European social dialogue. It decides on the mandate and the composition of the delegations which negotiate with the European employers' organisations.¹⁰

The Steering Committee is composed of the President, the General Secretary and a maximum of 15 additional members elected by the Executive Committee. At least three of them must come from the EIFs and one member is provided by the Women's Committee.¹¹ It normally meets every 2 months to decide on urgent actions required to implement the strategies laid down by the Executive Committee. It also deals with financial and administrative matters, prepares the Executive Committee's agenda and submits recommendations to the Executive Committee. Finally, it is responsible for overseeing the negotiations with European employers' organisations and representations made to European institutions.¹²

The Secretariat carries out the tasks assigned to it by the 3 decision-making bodies. These tasks include representing trade unions' interests *vis-à-vis* the European institutions, engaging in dialogue and negotiations with the European employers' organisations and the co-ordination of joint European actions.¹³

The President is the chairman of the Congress, the Executive Committee and the Steering Committee.¹⁴ The General Secretary is the chief spokesperson of ETUC and the co-ordinator of all its activities. The Deputy General Secretaries assists him/her.¹⁵

ETUC "aspires to be a unified and pluralistic organisation representing all working people at European level".¹⁶ The ETUC is an enthusiastic supporter

⁸ Article 7 of the ETUC Constitution.

⁹ Article 12 of the ETUC Constitution.

¹⁰ Article 13 of the ETUC Constitution and the ETUC home-page, March 2001.

¹¹ Article 20 of the ETUC Constitution.

¹² Article 19 of the ETUC Constitution.

¹³ Article 23 of the ETUC Constitution.

¹⁴ Article 10 of the ETUC Constitution.

¹⁵ Article 22 of the ETUC Constitution.

¹⁶ Preamble of the ETUC Constitution.

of a more robust regulation of the EC labour market, and wants a transnational system of labour relations. ETUC is a supporter of Community regulation in order to remove the national differences as much as possible. Such regulation could, *inter alia*, take place through collective agreements at European level. ETUC is very keen on European-level bargaining, as it believes that only through bargaining can a union organisation achieve legitimacy at a particular level and avoid acting merely as a lobby.¹⁷ Political issues have generally played a secondary role in ETUC's activities, though the organisation occasionally adopts formal resolutions expressing its support of political freedom, democratic forms of government, strict observance of human and trade union rights, peaceful coexistence and negotiated steps towards disarmament.¹⁸

2.2.2. The Union of Industrial and Employers' Confederation (UNICE)

UNICE was created in 1958. It organises 33 principal business federations from 27 European countries and 6 federations as observers.¹⁹ The two most important bodies are the Council of Presidents and the Executive Committee. The Council of Presidents consists of the representatives of the national affiliates, which are mostly the President of their affiliation.²⁰ The Council of Presidents is the supreme decision-making body as regards UNICE's policies and strategies and has full powers.²¹ One of its tasks is to define the attitude to be taken by UNICE and to approve results negotiated in the framework of the dialogue between the social partners.²²

The Executive Committee consists also of the representatives of the national affiliates, normally the director-general of the national affiliation. Its tasks are, *inter alia*, to decide on financial and major administrative matters and to direct and supervise UNICE's activities and the implementation of its policies.²³ Furthermore, there are 5 Policy Committees. Its membership is determined by the Executive Committee on the basis of nominations.²⁴ The Committees monitor developments and help devise the Association's policies in their regard, suggest actions to be taken and implement the strategies adopted.²⁵ Some 1500 experts from federations and companies in 60 working

17 Maastricht and social policy - part three. In: EIRR, no. 241, February 1994, p. 33.

18 R. Blanpain (ed. in chief), Encyclopedia of Labour Law and Industrial Relations, European Labour Law, suppl. 231, June 2000, par. 142-153 for more examples.

19 Homepage of UNICE. <http://www.unice.org/>

20 Article 6.1. of the UNICE Statutes.

21 Article 6.2. of the UNICE Statutes.

22 Article 6.3. of the UNICE Statutes.

23 Article 9.3. of the UNICE Statutes for a complete overview of the tasks of the Executive Committee.

24 Article 12.1 and 12.2. of the UNICE Statutes.

25 Article 12.1. of the UNICE Statutes.

groups participate in this work.²⁶ The President of UNICE is elected by the Council of Presidents, and he/she chairs the Council of Presidents and the Executive Committee.²⁷ He/she is the authorised representative of the Council of Presidents and represents UNICE at high level.²⁸ The Secretary-General of UNICE is appointed by the Council of Presidents which determines his/hers tasks and powers. He/she is responsible for the day-to-day running of UNICE.²⁹

UNICE believes that the only sure way to fight unemployment and pay for social progress is through improved competitiveness, leading to investment and economic growth. Furthermore, subsidiarity and proportionality must be respected and over-harmonization avoided.³⁰ Generally spoken, UNICE's position with regard to legislation in the social policy field can be characterized as reserved. A free internal market is important and this should not be hindered by excessive legislation at European level. However, facing the fact that the Community institutions introduce more policy proposals, it concluded that it was wise to have an influence at the European legislation process.³¹ Until the 90's, UNICE was resolutely opposed to reforms in the direction of law by collective agreements. However, the Belgian, Dutch and Italian employers' representatives began to break ranks with UNICE's hard line on framework agreements in 1990, arguing that an involvement of employers in European policy-making through bargaining was a far better option than the implementation of new directives via statute.³² UNICE started therefore to participate in the framework agreement on parental leave in 1995. Since then, it has concluded 3. intersectoral agreements with the ETUC and CEEP.

2.2.3. The European Centre for Public Enterprises (CEEP)

CEEP was created in 1961. CEEP is the association of enterprises or organisations with public participation or carrying out activities of general econo-

26 Home-page of UNICE, February 2000.

27 Article 8.1. and 8.2. of the UNICE Statutes.

28 Article 8.3 of the UNICE Statutes.

29 Articles 14.1. and 14.2. of the UNICE Statutes.

30 R. Blanpain (ed. in chief), Encyclopedia of Labour Law and Industrial Relations, European Labour Law, suppl. 231, June 2000, par. 126. See also R. Hornung-Draus, European employer organisations: Structure and recent developments. In: Industrielle Beziehungen, vol. 5, no. 2, 1998, p. 218-235.

31 See amongst others the position paper of UNICE on the future role of the social partners at European level, 17 June 1991. See also G. Falkner, The Maastricht Protocol on Social Policy: Theory and practice. In: Journal of European social policy, vol. 6, no. 1, 1996, p. 8-9.

32 M. Rhodes, The future of the 'Social Dimension': Labour market regulation in post-1992 Europe. In: Journal of Common Market Studies, vol. 30, no. 1, 1992, p. 40.

mic interest. Members are enterprises, enterprise groups and employers' organisations. Its general secretariat is situated in Brussels.

The institutional bodies of CEEP are the General Assembly and the Council of Administration. The General Assembly consists of representatives of the full members and holds all the powers necessary to permit the achievement of CEEP's objectives.³³ The General Assembly, among others matters, approves the budget and accounts, is responsible for the modification of the Statute and the dissolution of CEEP and, in that event, the reallocation of its assets.³⁴ The Council of Administration consists of a maximum of 2 members per section, representing the member enterprises of CEEP, which are appointed by the General Assembly.³⁵ It has all the powers required for management and administrative purposes, except those held by the General Assembly.³⁶ There are also Permanent Committees whose task is to make studies and do preparatory work in order to facilitate the decision-making within CEEP. They prepare draft positions for CEEP on technical aspects or points of principle arising in their respective fields. For the European social dialogue, a Committee on Social Affairs exists, which is established on a permanent basis. In the Rules of Procedure of CEEP, a special section is included regarding the internal decision-making procedure of CEEP when it comes to the conclusion of European collective agreements with other organisations. The tasks of the Committee on Social Affairs are outlined therein.³⁷ Finally, CEEP has a President and a Secretary-General. The President is elected by the General Assembly, and chairs both the General Assembly and the Council of Administration. The Secretary-General is appointed by the General Assembly.

The purposes of CEEP are, *inter alia*, to represent its members before the institutions of the European Union and within existing or future Community organisations, agencies, centres, committees, etc. Furthermore, CEEP exercises all the prerogatives and obligations relating to its status as a social partner. It also wants to facilitate and develop contacts and cooperation with the other European social partners and national and European organisations that may help it to achieve its purpose.³⁸

CEEP is a warm supporter of the intersectoral as well as the sectoral social dialogue at European level. CEEP wants to see the development of real European economic and social policies. Therefore the scope and themes of the social dialogue must not be limited.³⁹

33 Article 9 and 10 of the CEEP Statutes.

34 Article 10 of the CEEP Statutes.

35 Article 14 of the CEEP Statutes.

36 Article 17 of the CEEP Statutes.

37 Articles 43-49 of the Rules of Procedure of CEEP.

38 Article 3 of the CEEP Statutes.

39 CEEP Opinion on the Communication Concerning the Development of the Social Dialogue at Community Level, 18 September 1996.

2.2.4. Conclusions

The ETUC is the most important intersectoral trade union at European level. UNICE and CEEP represent the intersectoral employers. These three organisations have played an important role in the stimulation of the European social dialogue. To date they have concluded three intersectoral agreements. While UNICE represents the employers from the private sector, CEEP-members are associations of enterprises or enterprises with public participation. All three organisations have a clear internal structure and a constitution and/or statutes in which the internal relations are described.

2.3. Intersectoral organisations representing certain categories of workers and employers

There are also organisations which represent only specific categories of workers or employers. Since most European organisations of workers/employers are structured in more or less the same way, I will not expand on the internal structure of these organisations, as this has already been done for ETUC, UNICE and CEEP. Categories of workers are for example represented by the Confédération Européenne des Cadres (CEC), which was founded in 1989 and EUROCADRES. The employees that CEC represents are defined by it as those who "perform duties which involve a particularly high degree of responsibility competence and professionalism in the management and implementation of corporate and institutional objectives". EUROCADRES also seeks to represent the managerial and professional staff. So in a way both organisations overlap each other. Categories of undertakings are for example represented by the European Association of Craft and Small and Medium-sized Enterprises, (UEAPME). Another organisation representing certain categories of undertakings is EUROCOMMERCE, which represents the employers in the commerce sector.

2.3.1. The European Association of Craft and Small and Medium Sized Enterprises (UEAPME)

I will discuss UEAPME more extensively. Although it has not yet been a party to a European agreement, it was the first European organisation to bring a case before the European Court of First Instance (CFI) regarding the European social dialogue and in particular the issue of representativity. This case is discussed in later chapters. Furthermore, since 1998, UEAPME participates in the negotiations in which UNICE is involved thanks to a cooperation agreement concluded between them on 12 November 1998. This means that it has also been a party, though indirectly, to the Framework Agreement on Fixed-Time Work.

UEAPME was founded in 1979 as a result of the amalgamation of various European trade associations and organisations of medium-sized enterprises.

It currently represent 10 million businesses employing 50 million people. Its main objectives are:

- To inform its members about developments in European policy;
- To promote joint action on the part of the national organisations at European level;
- To ensure that the interests and views of its members are understood and reflected by the institutions of the EU.⁴⁰

The organs of UEAPME are the General Assembly, the Administrative Council and the General Secretariat. Furthermore, there are several Committees including the one on Social Affairs. This Committee covers the issues of the European social dialogue.⁴¹

UEAPME has members in all EU Member States, but also in non-Member States, mainly in Eastern Europe. For several years UEAPME held the view that the 3 intersectoral organisations, the ETUC, UNICE and CEEP formed a closed shop and that the interests of small and medium-sized enterprises were insufficiently represented by them.⁴² However, this problem has been solved thanks to a cooperation agreement with UNICE concluded in 1998. This means that it will be involved in the decision making process within UNICE if the last mentioned is involved in the European social dialogue either by means of consultation or in the negotiation procedure on a European agreement.

2.3.2. Conclusions

There are several organisations which represent certain categories of workers or undertakings. UEAPME is an organisation which represents small and medium-sized industries. It was the first European social partners' organisation to bring a claim before the CFI against a Council Directive which was based on a European agreement. In 1998 it concluded a cooperation agreement with UNICE. Thanks to this agreement, UEAPME will in the future be involved in the decision making procedure within UNICE.

2.4. Sectoral organisations

Most European social partners' organisations are organised at sectoral level. They represent a specific branch of industry, such as, for example, the agricultural sector. Sectoral European agreements are concluded so far in transport, in particular in civil aviation, in the maritime transport sector and in the rail transport sector. These agreements all cover the issue of working time.

⁴⁰ Home-page of UEAPME. <http://www.ueapme.com/en/index.html>. March 2000. See also Article 3 of the UEAPME Statutes.

⁴¹ See the UEAPME Statutes for a broader description of the tasks of the various organs.

⁴² Stated at a press conference on 10 October 1996.

Furthermore, a sectoral agreement has been concluded in the agricultural sector.

As regards civil aviation, workers are represented by the European Transport Federation (ETF) and the European Cockpit Association (ECA). Employers are represented by the Association of European Airlines (AEA), the European Regional Airline Association (ERA) and the International Air Carrier Association (IACA). In recent years, there has been increasing competition between providers, mergers between existing airlines and the emergence of new providers. Working time and vocational training are important issues in this sector. An agreement on working time has been concluded on 22 March 2000.⁴³

In the maritime transport sector, workers are represented by the Federation of Transport Workers in the European Union (FST) and employers by the European Community Shipowners' Association (ECSA). The social dialogue in this sector has largely focused on the issues of employment, health and safety and working time. An agreement on working time has been concluded on 30 September 1998.⁴⁴

In the rail transport sector, workers are represented by the Federation of the Transport Workers Unions in the European Union (FST) and employers by the Community of the European Railways (CCFE). Although railway companies remain state-controlled in a number of Member States, recent years have seen increasing moves towards privatisation. This has affected employment and working conditions in the industry. The Commission has already highlighted the particular problems in the railway industry in the absence of the European regulatory framework on working time, in the light of the increasing liberalisation of the market.⁴⁵ On 30 September 1998, the FST and the CCFE concluded an agreement on working time.⁴⁶

In the agricultural sector, workers are represented by the European Federation of Agricultural Workers' Trade Unions (EFA) and employers by the Committee of Agricultural Organisations in the European Union. (COPA). The EFA acts within the framework of the decisions of principle of the ETUC. It is a Trade Union Committee of the ETUC.⁴⁷ It has the goal of contributing

⁴³ European Agreement on the Organisation of Working Time of Mobile Staff in Civil Aviation on 22 March 2000.

⁴⁴ European Agreement on the Organisation of Working Time of Seafarers on 30 September 1998.

⁴⁵ The sectoral social dialogue in transport: working time firmly on top of the agenda. In: *Euronline*, Features, August 1998.

⁴⁶ Agreement on some aspects of the Organisation of Working Time in the Rail Transport Sector on 30 September 1998.

⁴⁷ Preamble of the EFA Constitution.

CHAPTER 9

CONCLUSIONS AND RECOMMENDATIONS

The Inclusion of the Articles 138 and 139 in the EC Treaty

Article 138 EC Treaty lays down certain obligations of the Commission with regard to the support given to the European social partners' organisations and with regard to their consultation. The Sectoral Dialogue Committees (SDCs) installed by the Commission in 1998 serve as consultation bodies for the Commission and as fora for the promotion and development of the social dialogue at sectoral level. These SDCs consist of European social partners' organisations at sectoral level. Article 139 EC Treaty lays down that agreements at Community level can be concluded and that these agreements can be turned into Community legislation. The articles were originally included in the Agreement on Social Policy which was annexed to the Protocol on Social Policy by the Maastricht Treaty of 1992. The Commission, the Council, consisting of all Member States and the European employers' and workers' organisations all had their own reasons to support the inclusion of these articles in the Agreement. The conclusion of agreements at European level between the European social partners' organisations, has, however always been possible. It was not necessary to put that explicitly in the EC Treaty. Meetings between the social partners' organisations at European level already took place before the Maastricht Treaty, but these meetings never resulted in the conclusion of binding agreements. New aspects of the Maastricht Treaty are that the European social partners' organisations are officially involved in the drafting of European social legislation, and that their agreements can be turned into Community legislation. This means that they fulfil a role as advisory organs and as semi-legislators.

Reasons to conclude European agreements

Agreements are concluded between European social partners' organisations at intersectoral as well as sectoral level. The intersectoral organisations ETUC, UNICE, and CEEP play the most active role when it comes to the conclusion of European intersectoral agreements. European workers' organisations such as the ETUC consider the conclusion of European agreements as a way to participate actively in the making of European labour law. They are, however, at this moment still very dependent on Community institutions such as the Commission and the Council. Because of the active role of the Commission in the field of social policy legislation, employers' organisations seem willing to come to the negotiation table in order to conclude European agreements with trade unions. This means that the European trade unions are still dependent on the "threat of legislation". They are at this moment, as

Bercusson has rightly put it, "bargaining in the shadow of the law".¹ This is illustrated by the fact that the agreements concluded so far all covered subjects which had already been on the agenda for legislation since a long time. The threat of legislation is absent in the fields where the Community institutions do not want or are not allowed to legislate. An important instrument for trade unions at national level to force employers' organisations to negotiate with them is the threat of strikes. This instrument has not yet been used very much at European level. The fact that there is no express right to strike at Community level does not stimulate the use of this instrument because it is not clear what the limits to this right are and which types of strikes are permitted. Without a right to strike at Community level it will be difficult to develop a genuine European social dialogue.

Legal character of and conditions for European agreements

Present situation

So far, three intersectoral agreements have been concluded and four sectoral agreements. These agreements are all cautiously formulated and can certainly not be called very revolutionary as regards their content. The fact that they have been concluded at all is more important than their content. Community law does not say anything about the legal character of European agreements. Since it regards international agreements, international legal sources should be used to determine their legal character. The now existing European agreements can be regarded collective agreements because they fulfil global definitions of collective agreements laid down in ILO documents, in the ESC and as given by the ECJ in the *Albany* case.

Recommendations for the future

If a European collective labour legislation were to be developed in the future it is recommended that it determines what the legal character is of the European collective agreements. Inspiration could be found in the Principles of European Contract Law or international legal sources, such as ILO documents, the ESC or the case law of the ECJ. In such a European collective labour legislation it should also be determined that European collective agreements fulfil certain conditions with regard to the concluding parties, the bargaining procedure, their form and their content. This is also the case with regard to collective agreements in most Member States. It would increase the legitimacy of European collective agreements. Important requirements with regard to the concluding parties of a European collective agreement are in my view that they have democratic internal decision-making procedures and that they be independent from each other and from the European, national, and local authorities. An important requirement with regard to the bargain-

ing procedure is that the European social partners' organisations have a clear mandate from their national affiliates to bargain on their behalf. They should also be authorised in their statutes by their national affiliates to conclude valid collective agreements. With regard to the form of the agreement it is recommended that the agreement be in writing and that it be stipulated in the agreement which language version is the official one. Furthermore, awareness of European collective agreements should become more available to the public. This could be done by publishing the agreement in the Official Journal of the EC and on the internet. With regard to the content of the agreement, it is important that it is not contrary to Community law, fundamental human rights or the public order. Since European collective agreements will be implemented by the national affiliates of the European organisations, the latter have to make sure that the agreement is not contrary to the national legislation of the Member States unless it contains provisions that are more favourable to those to be protected by it.

Legal consequences of European collective agreements

Present situation

Indicating the legal character of agreements concluded between the European social partners' organisations is one thing. Finding out what the legal consequences are of the conclusion of such agreements is another. In the following, I will make the assumption that the European collective agreement will not be turned into Community legislation but will be implemented by the national affiliates of the signatory parties, in accordance with the procedure of Article 139(2), first part, EC Treaty. There are several actors involved in the conclusion of European collective agreements. These are the European social partners' organisations, their national affiliates – consisting of national trade unions and national employers organisations – and the individual workers and employers in the various Member States. Since Community legislation does not give any hints as to the legal consequences of the conclusion of European collective agreements for the various actors, I have tried to indicate these consequences mainly on the basis of (private) international law. If European collective agreements have legal consequences there should also be possibilities to enforce these consequences. Community legislation is also silent on this point. So here, I have used (private) international law as well to indicate enforcement possibilities.

Legal consequences for the signatory parties are created as soon as a European collective agreement has been concluded, even before it is implemented in any way whatsoever. I have argued in Chapter 5, that there are reasons to assume that the European collective agreements concluded so far are contracts between the signatory parties in accordance with Belgian private law. This means that the enforcement of the compliance with the provisions addressed to the signatory parties also has to be done in accordance with

¹ B. Bercusson, *European labour law*, p. 538-539.

Belgian contract law. Belgian contract law indicates four basic courses of action: Specific performance, damages, *exceptio non adimpleti contractus*, and termination. Specific performance is only effective when it can be combined with economic pressure, for example in the form of an *astreinte*. This will be difficult because certain European social partners' organisations lack legal personality. Therefore the claim of an *astreinte* can not be made effective. Furthermore, specific performance only makes sense when it is very clear what can be expected from the party who has to perform. This means that the claim of performance has to concern clear and concrete rights and obligations. The rights and obligations for the signatory parties in the European collective agreements concluded so far are often not sufficiently concrete to make the claim of specific performance effective. The action of damages can not be made effective either, for the same reason as the *astreinte*: the lack of legal personality of certain European social partners' organisations. The action of *exceptio non adimpleti contractus* could be effective. For example, if the European employers' organisations were to obstruct the realisation of the aims set out in the European collective agreement, the European trade union could call a strike. Furthermore, the threat to terminate the European collective agreement can also be an effective enforcement mechanism. This instrument in particular will not, however, readily be used by the trade unions, since it is very difficult to conclude European collective agreements at all, due to the reluctant attitude of the employers' organisations. This means that the European trade unions have at this moment only one real enforcement mechanism: the strike at European level. I very much doubt however, whether this instrument will or can very often be used. It would require that individual workers in several Member States would be willing to strike in order to enforce the compliance with the European collective agreement. The law on strikes differs from Member State to Member State and it is therefore questionable whether such a European strike could be made effective. The trade unions can of course always ask the Commission and Council to issue legislation if the European collective agreement is not complied with by the employers' organisations. This means, however, that their dependency on the Community legislator is maintained. But also the employers' organisations are benefited by compliance with the European collective agreement by the trade unions. Collective agreements generally contain obligations for employers and workers. This will not be different for collective agreements at European level. Moreover, the Commission might want to issue legislation on the field covered by the European collective agreement if it concludes that this agreement is not effective. This will be the case if the European trade unions do not comply with its provisions. This legislation could turn out worse for employers than the European collective agreement. The European employers' organisations can of course terminate the European collective agreement in case of non-compliance by the trade unions. I think however that this will not be very fruitful for them since also in that case the Commission could decide to propose legislation in the field covered by the

(terminated) agreement. Therefore the enforcement mechanisms of specific performance (together with an *astreinte*) and damages must not be underestimated. Effective use of these enforcement mechanisms could prevent the termination of the European collective agreement – and thus prevent Community legislation – or the outbreak of strikes in which probably very few workers would participate. The use of enforcement mechanisms such as specific performance and damages requires however that the European social partners' organisations acquire legal personality in accordance with Belgian law. This is something that could easily and quickly be done at this moment.

As soon as the European collective agreement has been concluded, legal consequences for the national affiliates of the signatory parties can only derive from the internal rules of the European social partners' organisations in combination with private international law. Private law concepts such as mandate and agency could be used to answer the question whether the national affiliates are obliged to implement the European collective agreement. But since the concepts of mandate and agency differ from country to country, the question as to the obligations for the national affiliates can lead to different answers as well. Even if on the basis of these concepts rights and obligations for the national affiliates can be assumed, enforcement will be difficult. The European organisation can of course expel its national affiliate in accordance with its internal rules of procedure. The internal rules of procedure of most European social partners' organisations do not, however, give any specific rules with regard to the obligations of the national affiliates flowing from the conclusion of the European collective agreements.

European collective agreements do not create direct legal consequences for individuals because Article 139(2) EC Treaty specifically states that European agreements have to be implemented. This means that European collective agreements only have legal consequences for individuals if they have been implemented by national collective agreements. It is from these national agreements that rights and obligations can be derived for individual workers and employers, in accordance with the national law of the Member States. If European collective agreements have not correctly been implemented, individual workers and employers can not undertake any legal actions. The enforcement of the terms of the European collective agreement against individual workers and employers will be done in accordance with national law if the European collective agreement has been implemented by the national affiliates of the European signatory parties.

For the Member States legal consequences will never be created by European collective agreements. That is so, at least, not as long as these agreements have not been turned into Community law. The Declaration of the Member States which was added by Article 139(2) EC Treaty in 1992 was therefore not

really necessary. This Declaration confirms that European collective agreements can never impose any obligations whatsoever on Member States.

Recommendations for the future

Complicated problems with regard to the legal consequences and enforcement of European collective agreements can easily be avoided if all agreements are turned into a Council decision on the basis of Article 139(2) EC Treaty. However, this has several disadvantages. In the first place, it will make the European social partners' organisations very dependent on Community institutions such as the Commission and the Council. In the second place, the subjects of the European collective agreements will be limited. A European agreement can only be turned into a Council decision if it covers subjects that are mentioned in Article 137 EC Treaty. If the European social partners' organisations want a genuine European social dialogue without too much involvement from the Community institutions, they have to develop clear rules on the legal consequences and enforcement mechanisms with regard to European collective agreements. In Chapters 5 and 6, I have given some ideas for the future as regards the legal consequences of the conclusion of European collective agreements and the enforcement of these legal consequences for the various actors. The best option would be to develop a European collective labour legislation. In this legislation, the legal consequences of the conclusion of European collective agreements could be clearly laid down, as well as the means to enforce these legal consequences. It will probably take a long time before such a collective labour law is developed, apart from the question whether the actors in the European social dialogue want such legislation. Therefore, where possible, I have also given some ideas which can be used in the near future, without having to develop a specific European collective labour legislation.

The rights and obligations for the signatory parties should be clearly laid down in the European collective agreements themselves. A future European collective labour legislation could provide that European collective agreements create legal consequences for the signatory parties, unless they stipulate in the agreement itself that they do *not* want to create legal consequences. Whatever legal consequences for the signatory parties will be created, I think that every European collective agreement should imply at least two basic obligations for the signatory parties. The first is the obligation to exercise influence on their members to implement the European agreement. The second is the peace obligation. For the supervision on the compliance with these obligations a conciliation, mediation, or arbitration service could be developed. The already existing Sectoral Dialogue Committees could fulfil a useful role as a conciliation organ. These Committees could provide conciliation services if one of the signatory parties is of the opinion that the other one(s) do(es) not comply with its/their obligations. There should however also be a

body of appeal which I have called a European Conciliation and Mediation Service (EMCS). This service could already play a role during the negotiations on the European collective agreement and could fulfil arbitration tasks if conciliation prove fruitless. The advantage of an EMCS above the SDCs is that the members of the EMCS could be selected on their independence from the signatory parties and on the basis of certain qualifications such as special mediation skills and knowledge in the field of industrial relations. Such an EMCS could be established by a European collective agreement. In this way the European social partners' organisations are free to determine its functions and powers.

In the near future, clear internal consultation processes during the negotiations on European collective agreements can prevent national organisations being unwilling to implement these agreements. These consultation processes could make sure that possible barriers for the national organisations to the implementation of the European collective agreements can be removed. Enforcement of the European collective agreement towards the national affiliates could in the near future be made easier if these national affiliates sign the European agreement as well. In this way they are directly bound to the European agreement without complicated theories on mandate and agency having to be applied. If at the same time it is laid down which national law applies to the European collective agreement, enforcement against the national affiliates can be done in accordance with this national law. It is also important to lay down that as long as the European collective agreement is in force, national agreements must not be contrary to them. This is important because otherwise national agreements could be concluded to implement the European collective agreement and after a certain time be terminated and replaced by agreements that are contrary to the European collective agreement. A future European collective labour legislation could more precisely lay down what the legal consequences of a European collective agreement are for the national affiliates of the signatory parties. The obligation for the national affiliates in the future should in my view be that they implement the European collective agreement within a certain time by using it as a basis for negotiations at national level. Practically this can mean that it is stipulated in the national collective agreement that the European collective agreement will be incorporated in it. Also here the Sectoral Dialogue Committees could play a useful role. They could help the national affiliates to implement the European collective agreement by advising them on how certain provisions of the European agreement should be implemented and/or interpreted. The EMCS could play a role again if non-implementation of the European collective agreement leads to a conflict between the signatory parties themselves. This could occur, for example, if the European employers' organisation is of the opinion that the European trade union does not put enough pressure on its national affiliates to implement the agreement.

Individual workers and employers could gain a stronger position in the future if European collective agreements could under certain conditions have direct legal consequences for them. In this way individuals would not be completely dependent on national trade unions and employers organisations. National organisations would at the same time be stimulated to implement the European collective agreement. The question whether certain provisions of the European agreement have direct effect could be answered by the Sectoral Dialogue Committees. The national court or institution, to which the individual worker or employer has to go to seek the direct effect, could ask a preliminary advice from these Sectoral Dialogue Committees. Direct effect of European agreements can only be developed if Community legislation on the legal effects of European collective agreements would be developed. I have give some ideas for such legislation with regard to the conditions for the entering of direct effect, the conditions on the provisions to be directly applicable, and direct effect from one individual towards another. The idea of individuals invoking damages from the national organisations for the non-implementation of a European collective agreement is not preferred by me. It is not very useful since it will sometimes be difficult to determine who exactly is responsible for the non-implementation of European collective agreements. There are always more parties who are responsible for this implementation.

Representativity of the European social partners' organisations in the consultation phase

Present situation

The new role of the European social partners' organisations since the Maastricht Treaty poses questions as to their representativity. This is a subject which is important when it comes to the question which organisations are to be consulted by the Commission. On the basis of Article 138(2) and (3) EC Treaty, the Commission has a legal obligation to consult the social partners before submitting proposals in the social policy field. By its first Communication on the European social dialogue of 1993, the Commission has annexed a list of European social partners' organisations which it considers representative enough to be consulted. It has formulated this list on the basis of certain representativity criteria. These are that the organisations should:

- be cross industry or relate to specific sectors or categories and be organized at European level;
- consist of organisations which are themselves an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible;

- have adequate structures to ensure their effective participation in the consultation process.

On the basis of these criteria the Commission will keep under review the list of organisations to be consulted. The European Parliament, the ECOSOC, and the social partners' organisations ETUC, UNICE and CEEP have formulated a number of representativity criteria as well. These criteria have not been taken over by the Commission.

Recommendations for the future

Certain of the criteria formulated within the EP, ECOSOC, and ETUC, UNICE, and CEEP are very valuable and should be seriously considered by the Commission. On the basis of the suggestions of these other groups, I have formulated a list of representativity criteria myself in Chapter 4, which in my view should be used by the Commission. Nevertheless, with regard to the representativity issue, differences of opinion can remain between the Commission and the European social partners' organisations. The Commission can for example decide not to consult certain organisations because it does not consider them representative. This problem can easily be avoided without giving a verdict on the representativity criteria of the Commission. The Commission could publish its proposal for the first and second consultation on the basis of Article 138(2) and (3) EC Treaty in the Official Journal. All organisations who want to give their comments and critics can do this. The Commission can consider the comments and take a well founded decision, which must be available for the public, with regard to the final proposal it has formulated. In my opinion, the Commission is certainly not obliged to take over all the comments of the social partners if it consults them on the basis of Article 138(2) and (3) EC Treaty. Arbitrary decisions can however be avoided by stating the reasons for the ultimate Commission proposal. I think that this procedure would be the best option at the moment since it is absolutely not certain whether European social partners' organisations could legally attack Community measures on the basis of Article 230(4) EC Treaty which have been taken without them having been consulted. Such an attack will only be successful if the CFI/ECJ would be willing to adopt a broad approach to the right to legal protection.

Representativity of the European social partners' organisations in the implementation phase

Present situation

The other moment in the European social dialogue in which the representativity is important is when it comes to the implementation of European collective agreements by means of a Council decision. This is done in accordance with the procedure prescribed in Article 139(2) EC Treaty. The conse-

quence of this implementation is that agreements concluded between private parties, i.e. the European social partners' organisations, become Community law, which applies on all Community citizens. This includes those who are not represented by the parties that concluded the agreement. The parties to these agreements should therefore be representative. For Council decisions on the basis of Article 139(2) EC Treaty the Commission first has to formulate a legislative proposal on the basis of the European collective agreement. The representativity of the European social partners' organisations is checked by the Commission. It thereby uses the same criteria as when it consults them on the basis of the Articles 138(2) and (3) EC Treaty. If it considers the European social partners' organisations not representative, it can refuse to formulate a legislative proposal for the Council on the basis of their agreement. The European social partners' organisations can not legally attack the refusal of the Commission to formulate a legislative proposal. The situation is different when they want to attack Community measures which have been taken in accordance with the procedure of Article 139(2) EC Treaty. This implies that the Commission first has formulated a legislative proposal on the basis of a European agreement. It has therefore checked the representativity of the signatory parties to this agreement and concluded that this representativity was sufficient. It is possible that certain European social partners' organisations consider themselves representative but nevertheless have been excluded from the negotiations on the European agreement. These organisations might want to seek the annulment of the Council decision, because they are of the opinion that the Commission has not applied the representativity check correctly. This was, among others, at stake in the *UEAPME* case. The *UEAPME* case has proved that a Council Directive which has been adopted in accordance with the procedure of Article 139(2) EC Treaty can in principle be legally attacked on the basis of Article 230(4) EC Treaty. Although formally the legal claim was submitted against the Council Decision taken on the basis of Article 139(2) EC Treaty, the complaint of *UEAPME* was directed against the way the Commission had applied its representativity criteria. The CFI said that the signatory parties to the underlying agreement must *taken together* be sufficiently representative. If an organisation, whose particular representation is necessary for that degree of representativity, has been excluded from the negotiations on the European collective agreement, the Council and the Commission must refuse to implement the agreement at Community level. Although *UEAPME* lost the case, the CFI has stated that the claim *in itself* was in principle admissible. This is supported by its consideration in which it states that if, for example, *CEEP* had not been one of the signatory parties to the said agreement, and subsequently submitted a legal claim against the Directive, it would have been admissible. In that case the Directive would probably have been annulled.

Recommendations for the future

I support the fact that the Commission checks the representativity of the signatory parties of a European collective agreement, before it formulates a legislative proposal on the basis of such an agreement. Nevertheless, I think that the representativity criteria should be broadened with the other criteria that I have mentioned in Chapter 4. Furthermore, to avoid arbitrariness in the application of the representativity criteria, I support the introduction of a motivation duty. The motivation duty could be introduced when the Commission submits a European collective agreement to the Council in the form of a legislative proposal on the basis of Article 139(2) EC Treaty. The proposal, which will in fact consist of the European collective agreement, could be published in the Official Journal and all European social partners' organisations could submit their comments on it. Serious comments and objections should be taken into consideration by the Commission. If the Commission, notwithstanding serious objections, formulates a legislative proposal, it should give a clear motivation for it. A rejection of the European collective agreement should also be motivated by the Commission, especially when it has consulted the social partners and gave them the opportunity to negotiate an agreement in accordance with Article 138(4) EC Treaty. In my opinion, the Commission can not refuse to formulate a legislative proposal on the basis of such an agreement for lack of representativity.

Role of the Commission in the European social dialogue

Present situation

The representativity issue is only one example which proves that the role of the Commission is very substantial compared to the role of the other Community institutions such as the Council or the European Parliament (EP). The Commission also takes important decisions with regard to the financial and technical support given to European social partners' organisations on the basis of Article 138(1) EC Treaty. In Chapter 4, I have described how these decisions are taken. This support must be seen in the light of the development of the European social dialogue. The development of European industrial relations can not be compared to the development of industrial relations in the Member States. The relations between the social partners in the Member States often have a long history involving many social and economic aspects. This is less the case for the development of industrial relations at European level. In this sense, the European social dialogue could be regarded as a less spontaneous development. It was created mainly by the Commission to give more legitimacy to European social policy. The Commission is not completely free in determining whether and how much support the European social partners' organisations receive. In the first place, the budget for its support is subject to control by the European Parliament. In the second

place the decision of the Commission to grant or refuse financial support can, if the case law of the ECJ is consequently applied, be legally attacked, for example by organisations who did not receive such support. This will especially be the case if their application for support has been seriously taken into account by the Commission. This can be derived from the *Murgia Messapica* case.

Also when it comes to their role as advisors, the European social partners' organisations are less dependent on the Commission than the words of the Articles 138(2), (3), and (4) EC Treaty suggest at first sight. The European social partners' organisations do not have to wait passively until the Commission consults them. Nothing in the Treaty or anywhere else forbids them to advise the Commission on their own initiative. The Commission, on the other hand, is legally obliged to consult the European social partners' organisations before it submits proposals in the social policy field. The subjects on which the Commission has to consult the social partners are not limited to the ones mentioned in Title XI of the EC Treaty. The social partners have to be consulted with regard to all proposals having a social or socio-economic significance. This means that they should also be consulted if the Commission submits proposals on the basis of the Articles 42, 158-162, and 125-130 EC Treaty. If a Council decision in the field of social policy is taken without any social partners' organisation being consulted by the Commission, this measure can successfully be attacked by the European social partners' organisations under Article 230(4) EC Treaty. However, I do not think that this will ever be the case. More realistic is the scenario that certain organisations will be consulted and others not. When discussing the representativity issue, I have given a possible solution to avoid this problem.

The social partners' organisations can negotiate and conclude European collective agreements at any moment they want. They do not have to wait for consultation by the Commission, as Article 138(4) EC Treaty seems to suggest. There are no legal obstacles at all to start negotiating and to conclude agreements at any given moment. This competence does not derive from Community law but from private law. There might be political obstacles however. If the social partners' organisations want their agreement to be turned into a Council decision in accordance with the procedure mentioned in Article 139(2) EC Treaty, they should rather cooperate with the Commission as much as possible. In particular in the procedure leading to negotiations between the social partners' organisations, the interplay between these organisations and the Commission is important. By means of the consultation phase the social partners can find out whether a certain agreement concluded by them will be accepted by the Commission as a basis for a legislative proposal.

If a European collective agreement is concluded, whether or not the European social partners' organisations first have been consulted, the signatory parties can ask the Commission to formulate a legislative proposal for the Council on the basis of their agreement. Also here, the important role of the Commission is clear. The Commission is in the first place not obliged to formulate a legislative proposal on the basis of a European collective agreement. Secondly, if it does, it applies five checks on the agreement: the representativity check (which I already discussed above), the mandate check, the legality check, the SME check and the assessment check. The application of these checks is legitimated by the Treaty (as regards the legality check, the SME check and the assessment check) and by the Court of First Instance in the *UEAPME* case (as regards the representativity check and the mandate check). It is possible that certain European social partners' organisations want to submit protests against the way the Commission applies these checks. Legal claims can however only be submitted against the Council decision, because only then will legal consequences be created, which is a requirement for admissibility under Article 230(4) EC Treaty. The *UEAPME* case proves that the application of the checks by the Commission can be subject to legal attack, at least when it considers the application of the representativity check, which will probably be the most attacked.

Recommendations for the future

If the European social partners' organisations want to become strong and independent actors in the formulation of European social policy it is recommended that they do not depend too much on financial support from (European) government institutions. National trade unions and employers' organisations should therefore make sure that the European mother organisation in Brussels receives enough money. I have made some suggestions with regard to the application of certain checks of the Commission. The mandate check in itself is necessary, but an aspect related to this check is even more important: the internal decision-making procedures of the European social partners' organisations. These processes should be democratic. This does not mean that all decisions of the social partners should be taken unanimously, but that the decision making should be organised in such a way that the will of the majority of the national affiliates is reflected in the decisions of the European organisations. The legality check should not only comprise the check whether the agreement is not contrary to Community law, but also whether it is not contrary to fundamental human rights. The SME check is in my view not necessary as a separate check, since it already falls under the legality check. The motivation duty, which I already discussed under the representativity issue, should also apply with regard to the other checks. This motivation duty could be made easier for the Commission if it develops clear and elaborated policy rules in which the procedure and criteria for the acceptance of European collective agreements as legislative proposals is laid down. These

policy rules of the Commission could be based on the (more elaborated) checks it already applies now to European collective agreements.

Role of the Council in the European social dialogue

Present situation

The ultimate decision to turn the agreement into legislation is with the Council on the basis of Article 139(2) EC Treaty. The Council is not obliged to take a decision. This flows from the voting requirements within the Council. The Council has to decide either by qualified majority or by unanimity. The form of the Council decision shall in any case have to be a legally binding act, which excludes the instruments of the Recommendation and Opinion. The most suitable instrument will be a Directive. So far, all European collective agreements which have been implemented by Council decision have been turned into a Directive. If there have been no objections against the way the Commission checked the agreement of the social partners organisations or against the way the Commission has followed the consultation procedure, there will be no legal objections against the Council decision implementing the European collective agreement either.

Recommendations for the future

I recommend an obligation for the Council to motivate its decision if it refuses to take over the legislative proposal of the Commission. This means that the European collective agreement does not become Community law. Given the special character of the procedure of Article 139(2) EC Treaty I think that the European social partners' organisations have a right to know why the Council rejected their agreement. Motivation also has the advantage that the social partners can take the arguments of the Council into account by the formulation of new European collective agreements.

Role of the EP and the ECOSOC in the European social dialogue

Present situation

At present there is no official role for the EP and ECOSOC in the decision making procedure of Article 139(2) EC Treaty. In practice the Commission sends the agreement of the social partners' organisations to the EP and ECOSOC for an opinion, before it is submitted to the Council.

Recommendations for the future

I do not see a clear reason why the EP and ECOSOC have been excluded from the legislative procedure of Article 139(2) EC Treaty. There are strong

reasons to give them a role in this procedure. When the European collective agreement covers subjects of Article 137(1) EC Treaty, the EP should have strong role in the decision making process, analogous to its role in the procedure of Article 251 EC Treaty, with the difference that the EP cannot amend the European collective agreement. If the agreement covers subjects of Article 137(3) EC Treaty, the Council should be obliged to ask the (non-binding) advice of the EP. The Council should also be obliged to ask the advice of the ECOSOC. This advice should be non-binding. In this way the two organisations representing all peoples of all sectors of economic and social life within the Community will be involved in the important process of a European collective agreement becoming Community law.

Procedure after amendments to or rejection of the European collective agreement

Amendments to the European collective agreement can be made by the Commission as well as the Council when they turn the agreement into Community legislation. This means, however, that the procedure of Article 139(2) EC Treaty can not be followed anymore. Article 139(2) EC Treaty explicitly prescribes that agreements of the European social partners' organisations can be turned into Community law. In case of amendments, one can not speak of agreements of the European social partners' organisations anymore, since their content has been changed by the Community institutions. Amendments made by the Commission or Council means that the "normal" legislative route of Article 250 or 251 EC Treaty have then to be followed. It also implies in my view that the European social partners organisations should under certain circumstances be consulted again. This is especially the case if it regards substantial amendments.

It is also possible that the Commission or Council reject the European collective agreement. After all, neither of the two institutions is obliged to accept the agreement as a basis for Community legislation. Nevertheless, I have stated above that under certain circumstances the Commission may in my view not reject the European collective agreement for lack of representativity of the signatory parties. If the Commission, after rejection of the European collective agreement, wants to issue legislation, it shall sometimes have to start the consultation procedure of Article 138(2) and (3) EC Treaty (again). This depends on the reasons for the rejection and on the question whether the agreement has or has not been concluded spontaneously. If the Council rejects the European agreement, it can not continue the procedure of Article 139(2) EC Treaty for the same reasons as if it amends the agreement. If it nevertheless wants to have legislation on the subject of the (rejected) ment, it shall have to ask the Commission to formulate a new legislative proposal. A new consultation on the basis of Article 138(2) and (3) EC Treaty will under certain circumstances be necessary. This is dependent on the question

...on procedure and on the question whether the Commission wants to legislate on the same issue as the issue of the (rejected) agreement. The consequences of amendment or rejection of European collective agreements by the Commission and/or Council have been put in a scheme in Chapter 7.

Present situation	Future Recommendations
European agreement is collective agreement.	European collective labour legislation should lay down what the legal character is of European agreements and what the conditions are for valid European agreements.
European collective agreements are contracts between the signatory parties according to Belgian private law if they fulfil the conditions given by this Belgian private law. There are four instruments to enforce compliance with European collective agreements. Only two of them - exceptio non adimpleti contractus and termination - can be effective, but will probably not be used very much. The other two instruments cannot be used effectively since many European social partners' organisations lack legal personality.	In the near future, European social partners' organisations could acquire legal personality. In this way, the enforcement mechanisms of specific performance and damages could be used effectively. A future European collective labour legislation should lay down what the rights and obligations are for the signatory parties; at least two obligations: obligation to influence national affiliates to implement the European collective agreement and the peace obligation. Conciliation by SDCs in case of conflicts between the signatory parties. If conciliation is fruitless, mediation by EMCS, consisting of independent experts in industrial relations. The EMCS could give a binding award.
European collective agreements create legal consequences for the national affiliates of the signatory parties on the basis of the internal rules of the European organisations. If internal rules are absent, legal consequences on the basis of theories like mandate and agency in combination with	In the near future, national affiliates should sign the European collective agreement as well. It should also be laid down which law is applicable to the European collective agreement. Clear internal consultation processes during the negotiations on the European collective agreements can remove

private international law. This leads to different outcomes for the various national affiliates since the concepts of mandate and agency differ from Member State to Member State.	possible barriers for the national affiliates to implement them. In a future European collective labour legislation, the legal consequences for the national affiliates could be stipulated. SDCs could be helpful for the national affiliates in advising them how to interpret and implement European collective agreements.
European collective agreements do not create legal consequences for individuals as such. They first have to be implemented through national collective agreements. Enforcement of the terms of the European collective agreement towards individuals will be done in accordance with the national law of the various Member States.	Under certain circumstances direct effect of European collective agreements for individuals. National institutions could ask preliminary advice from SDCs on the question whether certain provisions of European collective agreements have direct effect. The question on whether or not European collective agreements have direct effect on individuals could be laid down in a future European collective labour legislation.
European collective agreements do not create legal consequences for the Member States as long as they are not implemented by a Council decision.	No recommendation
Commission consults the European social partners' organisations on the basis of representativity criteria which it has formulated itself. Organisations which have not been consulted can not legally attack the refusal of the Commission to consult them.	Representativity criteria should be broadened. Commission proposal should be published in the Official Journal, whereby all European social partners' organisations could submit comments. Useful comments can be selected by the Commission and the final proposal should be thoroughly motivated.
Commission checks representativity of the signatory parties to a European collective agreement before it decides to formulate a legislative proposal on the basis of this agreement. The	Motivation duty for the Commission if it decides that the signatory parties are (not) representative.

Commission decision is legally reviewable of a Council decision is taken (UEAPME case).	
Commission gives financial and technical support to the European social partners' organisations. Control by EP. Commission decision to refuse support can be legally attacked by European social partners' organisations (Murgia Messapica case). Commission is legally obliged to consult European social partners' organisations with regard to all proposals having a socio-economic significance. European social partners' organisations do not have to await a request from the Commission to give their advice. European social partners' organisations can also start negotiations at any moment they want. Commission is not obliged to formulate a legislative proposal on the basis of a European collective agreement. If it formulated a proposal, it applies five checks on the European collective agreement. UEAPME case proves that the application of the representativity check is legally reviewable, but only after the Council decision is taken on the basis of Article 139(2) EC Treaty.	European social partners' organisations should become financially independent from the Commission. The Commission should also check whether European social partners' organisations have democratic internal decision making procedures, and whether the European collective agreement is not contrary to fundamental human rights. The SME check is a duplication of the legality check and therefore not necessary. Motivation duty of the Commission with regard to the application of the checks. Commission should develop elaborated policy rules for the acceptance of European collective agreements as legislative proposals.
Council decision based on Article 139(2) EC Treaty must be a legally binding act. Council is not obliged to turn the European collective agreement into legislation.	Motivation duty for the Council if it rejects the European collective agreement.
No official role for the EP and the ECOSOC in the procedure of Article 139(2) EC Treaty.	If the European collective agreement covers subjects mentioned in Article 137(1) EC Treaty, the EP should have co-decision, but <i>not</i> the right to amend the agreement. If the European collective agreement covers subjects men-

	tioned in Article 137(3) EC Treaty, the EP should be asked its non-binding advice. The ECOSOC should be asked its non-binding advice.
Amendments to the European collective agreement may be made by the Commission or Council. However, the route of Article 139(2) EC Treaty will be closed then. The route of Article 250 or 251 EC Treaty shall have to be followed. European social partners' organisations have under certain circumstances to be consulted again. Commission and Council may reject the European collective agreement. If the Commission wants legislation it shall sometimes have to consult the European social partners' organisations again. If the Council after rejection of the European collective agreement wants legislation, the Commission first has to formulate a new proposal. New consultation of the European social partners' organisations will under certain circumstances be necessary.	No recommendation.

CROSS-BORDER COLLECTIVE
ACTIONS IN EUROPE:
A LEGAL CHALLENGE

A Study of the Legal Aspects of Transnational
Collective Actions from a Labour Law and
Private International Law Perspective

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THE RIGHT TO COLLECTIVE ACTION IN EUROPEAN LAW

A.PH.C.M. JASPERS

1. INTRODUCTION

Within the European Union the right to take collective action is not explicitly recognised in any (binding) legal document to date. Both charters, the Community Charter of the fundamental rights of workers of 1989 (point 13) as well as the Charter of fundamental rights of Nice of 2000 (Article 28) give employees and their organisations the right to take collective action when there is a conflict of interests, but both documents lack any legally binding effect. The right to strike is even explicitly excluded from the body of competences of the European Community (Article 137, para. 5 EC). This could be seen as an indication that the European Union is abstaining from this fundamental (social) right as a right guaranteed by the EU or EC. The adoption of the proposed Treaty on the European Constitution could remedy the situation by adopting the right to collective action as part of the constitution. In the recent discussion in the EU it transpires that fundamental rights including the right to take collective action will be omitted from the draft EU constitution. That implies the EU member states have to rely on other international and European sources as bases for the recognition and application of the right to take collective action if they cannot rely on their own constitution.¹ Since all the EU member states have ratified the relevant ILO conventions (Nos. 87 and 98), the International Covenant on Economic, Social and Cultural Rights (Article 8) as well as the (Revised) European Social Charter (Article 6, para. 4), this right seems to be sufficiently recognised within the EU. However, that also implies that since the right to take collective action is a matter for the individual states subject to their own body of rules and court rulings, the content of this fundamental workers' right differs or at least may differ from country to country. The comparative reports either from a labour law point of view or from a private international law perspective demonstrate the differences in approaches and application. A more or less uniform right to take collective action

¹ Countries like France, Germany, Italy and Sweden. Cf. the national reports in this study; see also the comparative report by Filip Dorsemont in this study, p. 245.

does not exist in the European Union. That could mean that, depending on the country where the industrial action is taking place, an assessment of the legality of such a collective action can differ substantially. That could cause problems in cases of collective actions with a cross-border dimension. A kind of forum shopping is not excluded and that can influence and affect the exercise of the right to take collective action.

So the question has to be raised whether there is a need for a European-framed right to take collective action. Not only for the most obvious cases of cross-border labour conflicts in the maritime industry but also, as Deirdre Fitzpatrick and Wiebke Warneck have pointed out in their contributions², for conflicts of and within transnational companies. One may wonder whether it is acceptable that strike actions that simultaneously take place in several member states will be assessed completely differently depending on the country where it is located. Not only could this give rise to forum shopping, it may also imply that collective actions called on a European scale are substantially restricted in some member states since the exercise of this right has not been harmonised, at least concerning the essential aspects. Finally, there is another reason for an increasing need for a European approach to the right to take collective action and its possible restrictions: the recent Laval and Viking cases in which the fundamental freedoms guaranteed as the main pillars of the EC collide with the fundamental right to take collective action.

For all these reasons it is worthwhile investigating the essentials of the right to take collective action as they are recognised internationally and more in particular within the European context in order to find out whether a EU-wide accepted framework can be developed and adopted.

The difference in the wording of the restrictive provisions in the various international instruments will leave room for more than one interpretation. A main topic of discussion is whether, if restrictions are imposed on unions or workers calling a strike, the principle of proportionality can be or has to be applied.³ Within the framework of this study, in particular when discussing the Laval and Viking cases with a potential reference to the Schmidberger case in which the EC Court has used this principle, this topic seems to be gaining in importance.⁴

² One could think of major restructuring activities of a multinational enterprise which affect several plants in various European countries. Cf. Deirdre Fitzpatrick, *infra*, p. 85; and Wiebke Warneck, *infra* p. 75.

³ I will come back to this proportionality principle later.

⁴ See *infra*, p. 67.

In the context of this study it is relevant to take into account the various forms of collective action because we are dealing with collective actions across national boundaries or with a cross-border impact. The internationalisation of the economy and of production leading to a constant restructuring and outsourcing will be encountered by the internationalisation of workforces and their trade unions aiming to defend the rights of workers in cross-border situations. The coordinated activities of the International Transport Federation are the most well known example.⁵ The recent Laval and Viking cases also show why this issue is becoming more common and particularly interesting.⁶ The assessment of the legality of a transnational collective action as an answer to these developments cannot be done properly without an awareness of these distinctions.

2. THE RECOGNITION OF THE RIGHT TO COLLECTIVE ACTION

2.1. THE HISTORICAL BACKGROUND

The need for or at least the desirability of an explicit recognition has been discussed since the 1970s.⁷ In its Memorandum the Commission advocated attaching more importance to fundamental rights, more in particular (fundamental) economic and social rights, in the EC.⁸ In 1974 in the light of the discussions on regulating some aspects of multinational enterprises some members of the European Parliament had proposed to insert in the proposed European legislation a provision aiming at eliminating obstacles that apparently exist in member states to sympathy strikes. They did not succeed, but the issue of a certain way of protecting, within EC law, some forms of collective action by workers was tabled. The issue gained importance due to some industrial disputes with a transborder dimension. In a Danish firm (1976), in the French newspaper industry (1977) and at the London Times employers tried to circumvent the consequences of a strike in their firms by making use of German, Belgian and again German workers in order to continue their activities.⁹ In the discussions in the European Parliament that asked for legislative measures, any action was refused referring to a possible collision between strike law and the free movement

⁵ The national reports in this study provide proof of this. See also the contribution by Deirdre Fitzpatrick, *infra*, p. 85.

⁶ Brian Bercusson highlights this point in his foreword, *supra*, p. 3.

⁷ Cf. Lammy Betten, *The Right to Strike in Community Law*, Amsterdam – New York – Oxford 1985, p. 114.

⁸ EC Bull. Suppl. 2/79.

⁹ Cf. Lammy Betten, *op. cit.*, p. 117–119; and Antoine Jacobs, "Towards Community Action on Strike Law", CMLR 1987, 141–142.

principle that without any doubt should prevail because this was a pillar of the European Economic Community. The support of academics¹⁰ by stressing that at least the right to take solidarity action had to be legally recognised and protected did not effectively influence the approach of the EEC Institutions. It was clear, politically speaking, there was too little space for reaching a kind of consensus on the issue. The eventual fruitless discussions in the EEC on the right of workers and their representatives to information and consultation in the enterprise proved that the time was not ripe to introduce Community legislation on these collective labour law issues.

The Community Charter of 1989

It took nearly another decade before new initiatives were taken. The ETUC had lobbied for the adoption of socio-economic rights. This was picked up by members of the European Parliament and the Economic and Social Committee who pleaded for 'certain social rights' under which was 'the right to freedom of association and the right to organise, including recourse to collective action'.¹¹ The Community Charter of the fundamental rights of workers of 1989, on which eleven of the twelve member states agreed¹², set out, with reference to ILO Conventions and the European Social Charter of the Council of Europe as sources of inspiration, the principle of freedom of association and the rights connected to that principle. Point 13 entailed the right to 'resort to collective action', including the right to strike, in case of a conflict of interest. From a legal point of view the Community Charter is rather weak. In the first place, in accordance with the subsidiarity principle, as laid down in the preamble and in point 27 of Title II, it is left to the member states to implement these rights in their national legal orders. As a consequence the Charter itself does not provide for an effective right to take collective action directly. Moreover, even if the Charter could have a legal status as binding Community law, which is not the case since it is only a 'solemn declaration', it would lack a legally binding effect due to the fact that article 13 states that the right to take collective action is subject to national regulations (and collective agreements as usual).¹³

¹⁰ Cf. Jacobs, see note 3, p. 143/44.

¹¹ Opinion of the Economic and Social Committee on Community Basic Social Rights [1989] OJ C126, 4-9. Cf. Tonia Novitz, *International and European Protection of the Right to Strike*, Oxford 2003, p. 157.

¹² For well-known reasons the UK remained outside and was not willing to commit itself to such an instrument.

¹³ On this point the Community Charter is weaker than the 'sister' Charter of the Council of Europe that does not contain a reference to national regulation as a method of restricting the right beyond the scope of the limitations set by Article 31 of the ESC. I will return to this later.

And, finally, point 28 of the Charter restricted the competence of the European Commission to propose legal instruments relating to these rights to those 'which come into the Community's area of competence'. The right to freedom of organisation and its corollary rights are not considered as falling within this competence.¹⁴ Although the legal meaning of the Community Charter is completely lacking, from a political point of view the adoption of the Charter nevertheless was an important signal. Next to the economic principles of the EEC, still the pillars of the Community, social rights for workers were given a kind of recognition as general principles that have to be taken into account. Although explicit references were lacking in primary EC law, the Court of Justice of the EC took these rights as a source of inspiration for their decisions. In the *Stauder* case¹⁵ the ECJ stated, contrary to its own previous case law, that fundamental rights were enshrined in the general principles of Community law. And since the *Nold* case of 1974¹⁶ the ECJ had consistently held that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. These fundamental rights guide the Court's decisions as general principles of Community law.¹⁷ In a case particularly relevant for our subject: the *Bosman* case, the court argued that the principle of freedom of association, enshrined in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and resulting from the constitutional traditions common to the Member States, is one of the fundamental rights which, as the Court has consistently held and has been reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, is protected in the Community legal order.¹⁸

This perfectly fits within the promotion and further development, on a European level, of a structure of social dialogue between both sides of industry. It is not by accident that this took place simultaneously with the drafting of the Community Charter.¹⁹ It indicates a further recognition of the principle of collective bargaining between employers and trade unions as the workers' representative bodies. It was even considered as a possible genuine legislative instrument in the EEC.

¹⁴ The Action Programme of the Commission aiming at the implementation of the Community Charter refers to the social partners as the most designated actors, and in the second place, when appropriate, the member states. See COM(89) 568 final, para 6.

¹⁵ Case 29/69 [1969], ECR p. 419. Cf. Lammy Betten, *The right to strike in Community Law*, Amsterdam-New York-Oxford, 1985, p. 30 ff.

¹⁶ Case 4/73 [1974] ECR, p. 491.

¹⁷ Case C-260/89 ERT [1991] ECR [1991] I-2925, paragraph 41.

¹⁸ Case C-415/93 (*Bosman*), ECR [1995] I-04921, para. 79. In joined Cases C-193/87 and C-194/87 *Maurissen and European Public Service Union v Court of Auditors* [1990] ECR I-95, paragraphs 11 to 16 and 21 the court confirmed the fundamental nature of the right to organise in trade unions specifically.

¹⁹ The adoption of the Single Act in 1986 wherein the social dialogue was recognised as a fundamental tool of European law, underlines the importance of these social developments. The president of the Commission, Delors, played an important role therein.

This development ran parallel to what was taking place in the economic sphere: the internationalisation of businesses resulting in a growing number of multinational enterprises. The consequences of this internationalisation process for the workers, threatening redundancies and a loss of protection, became a matter of concern within the EEC. The European answer to this challenge was the creation of a kind of involvement of trade unions or other representative bodies in this process of scaling up.²⁰ Although this does not imply a formal, hard law recognition in the law of the EEC of a (fundamental) right to collective bargaining on industry or enterprise level, let alone its corollary rights such as the right to collective action which generally speaking is seen as an essential and indispensable element of the right to collective bargaining, it can nevertheless be considered as a step forward in the effective recognition of fundamental workers' rights.

The reluctant approach of the EC towards these fundamental social rights has been confirmed in the Agreement on Social Policy and the Amsterdam Treaty. In both sources the competence of the EC to regulate the right of association and consequently the right to strike is *expressis verbis* excluded despite the explicit reference that is made to the European Social Charter and the Community Charter of 1989, both recognising the right to take collective action as a fundamental right of workers.²¹

The Nice Treaty

Although the Treaty of Nice has not changed this, the developments towards an EU constitution, including a charter of fundamental rights among which are trade unions rights, could lead at least potentially to a new phase in the European context. The adoption of the Charter was promising, but since the Charter as part of the Treaty on the EU Constitution has not been accepted by all the member states, it lacks legal effect. But even when the Charter becomes part of the European legal body and will be provided with legal effect, it is not at all certain that the relevant provisions of the Charter will effectively contribute to the exercise of these rights as secured by EU law.

Article 28 contains a provision on the right 'in cases of conflicts of interest, to take collective action to defend their interests, including strike action'. This seems to be

²⁰ The two directives immediately connected to this subject date from the mid-1970s: Collective redundancies: 1975/125, and transfer of enterprise: 1977/187. In both directives the right of workers' representatives to be informed and consulted on the issues that affect the workers was effectively recognised and supported.

²¹ Article 2.6 of the Agreement on Social Policy and Article 137.6 EC Treaty. The Agreement does not contain an explicit reference to the ESC, but the preamble to the Single Act did contain such a reference, as did the former Article 117 of the EEC Treaty. In the present EC Treaty this failure has been rectified: Article 136 EC refers to the ESC next to the Community Charter of 1989.

an improvement from the point of view of adhering to the international approach. It follows the lines adopted in the ILO and the Council of Europe as well as in the UN.²² In the explanatory report it states that this article is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14). In addition, it also refers to the decisions of the European Court of Human Rights that have recognised the right to take collective action as one of the elements of trade union rights laid down by Article 11 of the ECHR. In accordance with the subsidiarity principle the explanatory report emphasises that "collective action, including strike action, is coming under national laws and practices". In combination with the potential restrictions as laid down in Articles 51 and 52 of the EU Charter it seems that the assessment of the legality of collective actions is not governed by EU law, but by the national law of the member state(s) where the action takes place. It is likely that this approach can be derived from a sentence in the explanatory report stating that "the question of whether it (the collective action, TJ) may be carried out in parallel in several member States" has to be assessed by national laws and practices. If this is the case the EU Charter does not have any real meaning for the subject at issue unless article 51 of the Charter will be given a wider meaning as to the restrictions that could be imposed by the law of the member states on the exercise of the right to take collective action. This will be examined hereunder. An approximation of differing (national) laws is therefore not considered to be the objective of the EU Charter.

In conclusion it has to be stated that although the right to collective bargaining has reached a higher status in EC law than the right to take collective action, both rights seem to be excluded from any legal action by the EC/EU. From a legal point of view the EU Charter is not likely to have any added value concerning this point.

The case of the officials of the European Institutions

That does not mean that EC law is completely silent on this issue. In cases of officials and servants of the European institutions being involved in a dispute with their employer, the Court has dealt with these issues. Indeed, the court did not take an explicit decision recognising the right to association of the officials and servants of the European institutions as laid down in the Staff Regulations (Article 24b: *Officials shall be entitled to exercise the right of association; they may in particular be members of trade unions or staff associations of European officials*) nor the annexed rights, but in some cases the court did make indications in that direction. In a 1974 case²³ the

²² In both covenants (ICCPR and ICESCR) these rights are recognised.

²³ Case 18-74 [1974] ECR 00933 (General Union of Personnel of European Organizations v Commission of the European Communities). The case concerned deductions to the salaries of those employees who had taken part in strike action. Indirectly, the right to strike was at stake. The

court stated that "Under the general principles of labour law the freedom of trade union activity recognised under Article 24a of the Staff Regulations²⁴ means not only that officials and servants have the right without hindrance to form associations of their own choosing, but also that these associations are free to do anything lawful to protect the interests of their members as employees". This approach was confirmed in a later case in 1990, the case of *Mauressen and European Public Service Union*.²⁵ By repeating the rule in Article 24b of the Staff Regulations as explained in both former cases the court stated that "the Community institutions and bodies may not prohibit their officials and servants from joining a trade union or staff association or from participating in trade union activities, or impose any penalty whatsoever on them by reason of such membership or activities. It also follows that the Community institutions and bodies must allow trade unions and staff associations to fulfil their proper role, inter alia by keeping officials and servants informed, representing them vis-à-vis the institutions and other bodies and participating in consultations with those institutions and bodies on all matters affecting staff".²⁶ The court was not inclined to extend the rights of the workers' representatives beyond the ambit of article 24b of the Staff regulations unless there are arrangements in collective agreements between both parties. It denied an extension to collective relations between the employer, i.e. the Community institutions, and bodies and trade unions or staff associations. Additionally, the court recognised the requirement for Community institutions "to respect such trade union activities as may prove necessary in order to ensure effective participation in that consultation process. Freedom of trade union activity entails the possibility of trade unions participating in such consultation and thus taking part in decision-making". They have to grant the workers' representatives the necessary facilities to enable them to participate in the meetings.²⁷

From these decisions a certain judicial support could be derived as to the effective exercise of trade union rights, including the right to participate in decision making by the employer. Although the court did not go into the issue of the right to collective action one may assume that the right to collective action as such could be covered by the protection which the court gave to these connected fundamental rights.

application was dismissed as inadmissible. See also *Tonia Novitz*, *op. cit.*, p. 249. The court used the same argument in case 175/73 (*Union Syndicale, Massa and Kortner*) [1974] ECR 917 (paragraph 14).

²⁴ Now Article 24b.

²⁵ Joint cases C-193/87 & C-194/87 (*Maurissen and European Public Service Union*) [1990] ECRI-95. See Patrick Macklem, "The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right", in: Philip Alston, *Labour Rights as Human Rights*, Oxford 2005, p. 79.

²⁶ Paragraphs 14 and 15 of the judgement.

²⁷ Paragraphs 35 and 36 of the judgement.

2.2. COUNCIL OF EUROPE INSTRUMENTS

2.2.1. *The European Convention on Human Rights*

The Council of Europe provides for two instruments with regard to the subject at issue. Article 11 of the European Convention on Human Rights guarantees the freedom of association, including the right to form and to join trade unions for the protection of the interests of their members. The (Revised) European Social Charter is a more elaborated source. In both (ESC and RESC) the right to strike is explicitly recognised as a fundamental social right.²⁸

The European Court of Human Rights, when deciding on cases related to Article 11 of the ECHR, is very reluctant to extensively interpret this article.²⁹ Up until now it has refused to subsume the right to strike under this article. In general the Court has shown itself not to be very willing to meet the claims of the trade unions regarding the right to collective bargaining or even the right to consultation,³⁰ let alone the right to strike based on Article 11 ECHR. Even in cases where the Court has admitted an infringement of Article 11 by a contracting state (in the case of the UK), if under its domestic law a state fails to secure the rights laid down in Article 11 ECHR³¹, the Court adheres to its standard position by stating that these rights, such as the right to collective bargaining are "not indispensable for the effective enjoyment of trade union freedom. Compulsory collective bargaining would impose on employers an obligation to conduct negotiations with trade unions". And that is not contained in Article 11. It also reiterates "the Contracting States enjoy a wide margin of appreciation as to how trade union freedom may be secured". According to the case law of the Court the states do enjoy wide possibilities to secure by law the exercise of the

²⁸ Article 6, para. 4 ESC and Article G, para. 4 RESC.

²⁹ In the past the European Commission of Human Rights took a somewhat more positive stance, but never recognised the right to strike as contained in article 11. Cf. *Tonia Novitz* (2003), p. 224 ff.

³⁰ See for instance. ECHR 27 October 1975, App. No. 4464/70, *National Union of Belgian Police v Belgium*, 1 EHRR [1979] 578.

³¹ ECHR 2 July 2002 (App. nos. 30668/96, 30671/96 and 30678/96), *Wilson, National Union of Journalists and others v. UK*. The applicants' claim dealt with the employers' non-recognition of the unions for collective-bargaining purposes and they offered more favourable conditions of employment to employees agreeing not to be represented by the unions. The applicants claimed that this was an infringement of art. 11. The Court condemned the UK because it had failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention. This failure amounted to a violation of Article 11. Cf. Bernard Ryan, "The Charter and Collective Labour Law", in: Tamara Hervey and Jeff Kenner, *Economic and Social Rights under the EU-Charter of Fundamental Rights - A Legal Perspective*, Oxford-Portland 2003, p. 71.

rights conferred in Article 11.³² In the Court's vision the sensitive character of the social and political issues involved has to be kept in mind as well as the wide degree of divergence between the domestic systems in this field. Although the Court now and then refers to the opinions of the ILO supervisory committees³³ and the European Committee of Social Rights³⁴, it does not feel that it is bound by these judgements.³⁵

Taking this position of the Court into consideration, it is not surprising that the court did not read into Article 11 of the Convention a right to take collective action, let alone recognising that the right to strike is entailed and therefore guaranteed by that article. In several cases the court was quite clear about this. Applicants in one case³⁶ claimed to have been deprived of certain benefits due to union activities they had deployed: certain retroactive benefits paid to members of trade unions other than the belligerent unions (to which they belonged) and to non-union employees who had not participated in the strikes. They were 'discouraged from availing themselves of their right to strike which according to their stand is "an 'organic right' included in Article 11 of the European Convention". The Court disagreed with this. In two other cases the Court took a similar position. It admitted that "the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. Article 11 para. 1 nevertheless leaves each State a free choice of the means to be used towards this end. The grant of a right to strike represents without any doubt one of the most important of these means, but there are others".³⁷ Article 11 does not expressly enshrine such a right and, moreover, under national law it may be subject to a regulation that limits its exercise in certain instances.³⁸ The court concluded that in this case, as in other cases, Article 11 had not been infringed. The

³² It has to be stated that the Court leaves less room in cases of a violation of the negative freedom of association: see the recent case in 2006 of *Sørensen and Rasmussen v Denmark*, App. Nos. 52562/99 and 52620/99 repeating its view in the case *Swedish Engine Drivers' Union v. Sweden* of 1979 (Series A no. 20); the *Young, James and Webster* case of 1982; the *Sigurjonsson* case of 1993; the *Gustafsson* case of 1996, (App No. 18/1995/524/610); and the case of *Schettini and Others v. Italy* (2000), App. No. 29529/95.

³³ Monitoring ILO conventions 87 and 98.

³⁴ See recently the Court in the *Sørensen and Rasmussen* case in 2006, para. 72. In this case the court also referred to the Community Charter as well as to the EU Charter: paras 73 and 74. See also the case of *Wilson, National Union of Journalists and others v. UK* (see note 31).

³⁵ This implies that it does not follow them even in cases where these expert committees do have quite clear judgments on one of these subjects.

³⁶ Two trade unions (the National Union of Journalists and the National Union of Rail, Maritime and Transport Workers) together with a number of employees.

³⁷ ECHR 1976, (App. No. 5589/72), *Schmidt and Dahlström*; (emphasis TJ). Similarly the cases: ECHR 1984, *S v Federal Republic of Germany*; and ECHR 1998, *NATFHE v UK*. It has been reaffirmed in the *UNISON* case: ECHR 10 January 2002 (App. No. 53574/99).

³⁸ The Court referred to the ESC (art. 6) that also allows some limits as to the exercise of the right to strike.

"personal freedom of association" of these workers – and in the opinion of the court that is what article 11 guarantees – to exercise their right to take collective action has been retained.³⁹ In the 2002 decision in the case between Unison, a big British trade union in the public service, and the UK the court seemed to leave open the possibility to adopt a wider stance concerning this issue.⁴⁰ UK law was presumed to be unjustifiably restricted due to a narrow definition of immunities from industrial action. The Court decided that the strike action, called in order to influence the terms for transferring an undertaking in the health service, must be regarded as being covered by the definition of Article 11: it concerned the occupational interests of trade union members. The prohibition of the strike, by a British court, was considered to be a restriction of the union's power to protect the interests of its members. After stating this, however, the court felt that restricting the strike was justified under the conditions of paragraph 2 of Article 11 because the restriction pursued a legitimate aim: the rights of others.⁴¹ Again the state concerned was offered a broad margin of appreciation.

In conclusion the European Convention on Human Rights does not provide a solid basis for the recognition of the right to take collective action.⁴² Article 11 does not entail such an explicit right and up until now the European Court of Human Rights has not adopted a firm stand. The recent decision in the Unison case could be seen as a turning point, however. The court tends to be of the opinion that the right to take collective action is covered by Article 11, but the exercise of that right can be governed by rather strong restrictions as laid down in paragraph 2 of that article. If we can conclude that the Court has switched its approach, it has to be stated that due to the broad margin of appreciation which the Court leaves to the states, including the national courts, the right to collective action could be extensively restricted. In this respect it could be helpful to look at the other Council of Europe instrument that explicitly recognises the right to take collective action. If the Court is moving towards a recognition of the right to strike the (R)ESC and the case law developed by the

³⁹ As Novitz correctly stated this judgement is at least not in conformity with the opinions of the ILO Committee on Freedom of Association and neither with that of the European Committee of Social Rights. Tonia Novitz (2003), p. 230.

⁴⁰ ECHR 10 January 2002, *UNISON* (App. No. 53574/99). The case concerned a transfer (in fact a privatisation) of parts of a hospital (a public health institution) to a consortium of private companies. The trade union took strike action fearing that the employment and the employment conditions of the workers would be damaged (after the transfer).

⁴¹ Cf. Tonia Novitz (2003), p. 231. At stake was the right of the employer to pursue the most effective delivery of the health service! I will come back to the possibilities of restricting strike actions later.

⁴² Advocate General Mengozzi came to a similar same conclusion in his opinion in the Laval case (C-341/05) in particular Para. 72.

European Committee of Social Rights could serve as guidelines as the Court has already stipulated.⁴³

2.2.2. *The (Revised) European Social Charter*

Both Social Charters of the Council of Europe (of 1961 and 1996) contain an explicit recognition of the right to take collective action. Article 6 paragraph 4 (R)ESC states that the state parties to the charter⁴⁴ shall "recognise the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike". The framing of the provision allows us to conclude that there is direct effect⁴⁵ because the wording is clear, unambiguous, unconditional and, as such, it does not need further legislation to elaborate or to clarify the norm of Article 6 para. 4 ESC. That does not mean that the right is absolute. Article 6, in combination with article 31 of the Charter⁴⁶ (Article G RESC), contains various restrictions on the exercise of this right. In accordance with the very substance of this right the restrictions imposed on those exercising it may not go so far that it should "reduce the substance of the right to strike as to render it ineffective".⁴⁷ Such a restriction "can hardly be considered as a 'restriction' which might be justified under article 31 of the Charter".⁴⁸ The states have to effectively recognise the right to strike. The remaining question will be how far these restrictions may go. The ECSR is playing an important role as to the interpretation of the right to collective action as well as the content and scope of the

restrictions allowed, although the committee does not have a jurisdictional power similar to the European Court of Human Rights.

A general point of discussion as to the scope of Article 6(4) is the reference therein to "in cases of conflicts of interest". These words could be understood as a simple statement that the right to collective action can be exercised if the 'belligerents' are involved in a dispute on conflicting interests and if in order to reach a solution the deployment of force is felt to be necessary. Since the right to strike is entailed in the framework of (collective) bargaining it is obvious that the conflict that has arisen because the parties could not agree is a conflict of interests. The debate relates to what is understood and what is covered by the term 'conflict of interest'. The ECSR has greatly contributed to the definition of this term.

It can be argued that the wording 'in case of a conflict of interests' does not add an essential element. Although on the other side, if one places more emphasis on this term contrary to the term 'conflict of law' it will gain a deeper meaning. If the parties have a dispute that can be solved by law, the right to collective action cannot be exercised lawfully, as the ECSR argued.⁴⁹ Similarly, its sister committee at the ILO decided: "The solution to a legal conflict as a result of a difference in interpretation of a legal text should be left to the competent courts".⁵⁰ But right from its beginning the ECSR did not intend to adopt a broad concept of 'conflict of law' as an obstacle to recognising the right to strike for trade unions.⁵¹ Actually, the ECSR defines 'conflict of interest' very broadly. If a problem of common interest that can be the subject of bargaining between the two parties (employer(s) and trade union(s) or even another body representing the employees), "whatever its nature may be", it is covered by article 6. "There are many circumstances which, apart from any collective agreement, call for 'collective bargaining', such as when dismissals have been announced or are contemplated by a firm and a group of employees seeks to prevent them or to serve the re-engagement of those dismissed". Collective actions called in such a conflict fall under the protection of Article 6 ESC.⁵² This approach of the ECSR is fully in line with the opinion of the ILO expert Committee: "The right to strike is

⁴³ See for instance ECHR 2 July 2002 (App. nos. 30668/96, 30671/96 and 30678/96), *Wilson, National Union of Journalists and others v. UK*, para. 48 of the judgement.

⁴⁴ Since all the Member States of the EU have ratified the ESC, including article 6 (albeit that some of them have made reservations to certain elements), they are all 'bound' by this provision.

⁴⁵ It is important to state this. Countries with a (mixed) monist constitutional system not only have to take this provision seriously, they are also bound by it and they have to apply it directly in vertical relations between the citizen and the state as well as in horizontal relations. An example is the Netherlands: the Dutch Supreme Court has given direct effect to article 6, para. 4 ESC: HR 1986, NJ 1986, 688. Many Eastern European countries have also adopted a monist constitutional system. In countries with a dualistic system, many of the EU member states do have such a system and these provisions do not have a direct effect, at least not in horizontal relations.

⁴⁶ Article 31 ESC contains a general limitation clause. Article 31 ESC (article G RESC) lists the terms under which the exercise of the right might be restricted. The wording of this limitation is rather similar to other international rulings. Cf. the ECHR (Article 11 para. 2) and the ICCPR (Article 22 para. 2) as well as the ICESCR (Article 8, para. 1(a)).

⁴⁷ European Committee of Social Rights, *Conclusions XVII-1* p. 318 (2004) (The Netherlands); repeated in the case of Hungary: *Conclusions XVII-2/1*, p. 387 (Hungary) and of The Netherlands and Germany: *Conclusions XVII-1/1*, p. 204 (Germany) and *Conclusions XVII-1/2*, p. 317 (The Netherlands).

⁴⁸ The European Committee of Social Rights (ECSR) has repeatedly stressed this. See i.a. *Conclusions XII-1*, p. 128 as to Iceland and more recently *Conclusions XVII-1*, p. 204 as to Germany: a general or absolute ban on some categories of strikes is not in accordance with Articles 6 and 31 ESC.

⁴⁹ This question had been raised by Germany in the very first cycle. The Committee of Independent Experts, the predecessor of the ECSR, found that disputes concerning rights "are not covered by the Charter"; ECSR *conclusions I*, p. 184. In other European countries, such as The Netherlands, there is debate as to whether this is a decisive requirement for a strike to be lawful. Cf. A.Ph.C.M. Jaspers, "Nederlands stakingrecht op een nieuw spoor?", *op.cit.* p. 23 ff.

⁵⁰ Cf. the ILO Committee CFA, Digest 1985, p. 75.

⁵¹ Contrary to the German government the Committee found that a strike aimed at compelling an employer to comply with safety regulations imposed by law "could not be regarded as outside the terms of Article 6, paragraph 4 of the Charter". ECSR *Conclusions II*, p. 28.

⁵² ECSR *Conclusions IV*, p. 50. The Committee had reaffirmed its position in *Conclusions XV-1*, 2, p. 431 in the case of Norway and in *Conclusions XV-2-add*, p. 167, in the case of the Slovak Republic.

one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests. These interests not only have to do with better working conditions and pursuing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of indirect concern to the workers'.⁵³

The adoption by all the EU member states of Article 6 of the (R)ESC does not imply a uniform legal rule to be applied in strike cases. The reason is the lack of any legal effect of this (R)ESC provision in national legal systems.⁵⁴ But even when a direct effect exists, the courts deciding on cases concerning strikes do not refer to or let alone apply the case law of the ECSR. Recourse to international instruments is less necessary if the constitution of the countries concerned entails an explicit provision recognising the right to take collective action.⁵⁵ That does not mean that in all the countries this right is of an equal strength. It depends on the wording of the respective provisions, their personal and material scope, and their interpretation and application in the case law of the national courts. Consequently, the meaning of the right to take collective action can vary a great deal from country to country.⁵⁶ This is another ground for searching for a common concept of the right to take collective action when it comes to an assessment of cross-border actions.

3. A HARMONISING ROLE FOR THE EXPERT COMMITTEES

From the perspective of this study on transnational collective actions it could be useful to look at legal sources and at the practice of the supervising bodies when interpreting and applying these sources because they extend beyond national borders and look for a common set of norms. Within the European hemisphere it is obvious that we should firstly investigate how the European Committee of Social Rights of the Council of Europe has developed in its 'case law' the legal concept and the scope of the

⁵³ Committee of Experts on the Application of Conventions and Recommendations (CEACR), in: *Freedom of association and collective bargaining, General Survey of the reports on Conventions 87 and 98*, Geneva 1994, p. 65. In the same sense the ILO Committee on the Application of the freedom of Association (CFA).

⁵⁴ See note 45.

⁵⁵ Italy is one of these countries. Cf. the national report by Orlandini in this book; p. 149 as well as the report on Spain. Cf. the report by Valdés Dal-Ré; p. 193. As for France the preamble to the Constitution (Article 7) refers to this fundamental right. The Constitutional Council has provided this article with effect by stating that this right is one of the values guaranteed by the Constitution. Cf. Palli in her report, p. 124. Cf. Dorssemont in his comparative report, p. 245.

⁵⁶ See the national reports in this study and the comparative report by F. Dorssemont, p. 271.

right to take collective action. Since the (R)ESC and the case law based thereon provide for the most elaborate body of law on this subject this is quite logical. Due to the lack of any other European body with jurisdictional competence to interpret and to apply the law on collective actions this committee of experts, experienced in this field since its establishment and functioning from the early 1970s onwards, has developed an European concept of the right to take collective action. It has done this in rather close co-operation with the ILO.⁵⁷ The committee makes use of the opinions of the ILO supervisory committees on this subject although it does not rigidly follow the ILO bodies. So on the basis of the jurisprudence of the ECSR backed by the usually identical views of the ILO bodies of experts it must be possible to depict a European concept of the right to take collective action, or at least to develop elements which are common to a European concept.

The perspective of the ILO instruments as interpreted by the ILO supervisory bodies could be somewhat broader than the Council of Europe institutions have. That is due to the fact that the right to take collective action is not explicitly recorded in the relevant ILO Conventions. The supervisory bodies consider this 'fundamental right of workers' as a corollary and therefore indispensably connected to the freedom of association and the right to collective bargaining. Since *the promotion and the defending of the economic and social interests of workers/members of the workers' associations* are the main and essential components of the freedom of association and subsequently the main tasks of these organisations, the ILO committees use a broader concept: "the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests".⁵⁸ This wider concept of the right to have recourse to collective action could have certain consequences as actions which are taken to defend economic and social interests can fall under the protective umbrella of the fundamental right to take collective action. The interpretation by the ILO committees can therefore be helpful to make the content and the scope of this right more precise.

We are dealing with various types of cross-border collective actions. While investigating these different types we have to take into account the different nature and characteristics thereof. Sympathy actions, well known in the seafaring world, have

⁵⁷ The regular meetings of the ECSR are usually attended by an official of the Bureau of the ILO.

⁵⁸ Committee on the Freedom of Association (CFA): *CFA Digest of Decisions*, Geneva 1985, para. 388, since then repeated on several occasions, lastly in the *329 Report of the CFA* (2002), para. 135. In a similar sense the CEACR in its *Individual Observation concerning Convention No. 87*, ILO 2001 (Australia); cf. Tonia Novitz (2003), p. 291.

to be distinguished from other transnational actions by trade unions on a sectoral level aiming at negotiating on common issues to be observed, maintained or applied by the enterprises and employers active in that sector in the various European countries,⁵⁹ or collective actions in multinational enterprises (MNEs) on issues with a transnational impact or effect.⁶⁰ As already said, this is another ground for developing a sort of at least a European concept of the right to take collective action. Its purpose is to try to unify the way of assessing the legality of those actions that could take place simultaneously in different countries. The development of a common European concept could be helpful to solve private international law questions in this field.⁶¹

After discussing issues as the personal and substantial scope of the right to take collective action we have inevitably delved into the issue of the extent and the way of restricting the exercise of the right to take collective action. A great deal of the case law of the supervisory bodies deals with this issue. From the point of view of the general acceptance of the principle of the right to take collective action, it is logical to face the issue of the restrictions legally set in treaty provisions.

4. THE LEGALITY OF COLLECTIVE ACTIONS

Following the order of the provisions determining the right to take collective action we have to sort out the different elements, the different criteria to be used for the assessment of the legality of collective actions. We have already dealt with one element: collective actions have to concern a conflict of interest. From the case law of the supervisory bodies it has transpired that a broad concept of 'conflict of interest' is accepted. A second element is whether the objective to be achieved by deploying a collective action is part of the legality assessment. In this context the question will arise whether a secondary action has to be assessed in the same or in another way, in other words more severely than the common primary collective action. A third point which should be taken into account is how to judge political collective action because the action is not targeted at the employer(s) but at the government or its policies. Separately, we have to deal with the restrictions based on the provision explicitly

⁵⁹ We leave outside sectoral bargaining beyond the borders of the EU. We also do not touch upon the sphere of negotiations on the European level based on Articles 137–139 EC competences. Disputes that may arise in these negotiation processes are of a different kind. At first sight they do have a more or less political gist.

⁶⁰ Comparable to the developments in EC law in the field of transfers of enterprises mostly in the context of a European-wide restructuring of the MNE.

⁶¹ The second part of this study specifically deals with this subject. See the comparative report by Aukje van Hoek in this study p. 425, in particular 466 ff.

allowing the exercise of this right to be restricted. As to this last point we will discuss the principle of proportionality.

4.1. ASSESSMENT OF THE OBJECTIVES

The case law of the supervisory bodies as well as of the national courts shows a great variety in objectives being assessed as to whether they can be considered as permissible grounds for a lawful collective action. On some issues the judgments are contradictory. That makes it more difficult to make sound and uniform conclusions. Generally, a distinction is made between primary and secondary collective actions. The first category is directly connected to a potential conflict between the employer(s) and the unions mostly in a process of collective bargaining on all kinds of issues affecting the employment and the employment conditions. Secondary actions are characterised by solidarity or sympathy with workers who are in conflict with their employer in order to support them and to increase the pressure on the employer to give in to the demands of the strikers. In the context of this study this type of collective action is of particular importance. A great deal of transnational collective actions will take the form of solidarity or sympathy actions. That is not only true for the typical examples in the maritime sector but also in cases of disputes concerning restructuring measures in a MNE affecting plants in several countries. Apart from this distinction there exists another categorisation of collective action. This refers to what is called the political strike.

4.1.1. *The linkage with collective bargaining*

Since the right to collective action is part of the provision dealing with the right to bargain collectively, collective actions connected to collective bargaining are the most obvious examples of lawful actions.⁶² These kinds of actions are directly linked to the hard core of the principle of freedom of association: the right to collective bargaining in order to be able to represent and defend the interests of workers/members. This is the consistent opinion of the ECSR as well the supervisory bodies of the ILO.⁶³

⁶² There could be reasons to deny this right, but these reasons are not based on collective bargaining (rights) as such. Here I only mention the problem raised by Germany and other countries denying the right to collective action to civil servants since a system of collective bargaining does not exist in the civil service. The ECSR disagrees with this position by stating that it is not in conformity with the (R)ESC to exclude completely civil servants and their trade unions from the right. Recently ESCR Conclusions XVII, I, Volume I, p. 204 and XVIII, I, Volume I (Germany). The right to strike could be denied to some parts of the civil service; the treaties ((R)ESC and ILO conventions 87 and 98 as well as ICESCR) do allow it on the grounds laid down in the treaties.

⁶³ See A. Jaspers (2004), p. 40 ff. Also Tonia Novitz (2003), p. 287 ff.

This approach is not generally accepted, however. Countries as well as some academics strongly support the opinion that the right to take collective action is a corollary of the right to collective bargaining. By implication, the right to take collective action is only protected within the framework of collective bargaining.⁶⁴ So the right to take collective action is restricted to conflicts in relation to and in the context of collective bargaining. This can have far-reaching consequences as to the addressees of the right to take collective action. As a corollary to the right to collective bargaining resulting in collective labour agreements, it can only be used by the bargaining parties which are able and competent to bargain and to conclude collective labour agreements. In this approach, on the employees' side only trade unions, being exclusively competent to conclude collective labour agreements on the basis of negotiations, are entitled to this right.⁶⁵ Subsequently in these countries and their legal systems other entities or persons cannot have recourse to the right to take collective action.⁶⁶

The ECSR, many countries as well as the majority of authors take a position which is contrary to this. They recognise a right to take collective action outside the narrow scope of collective bargaining and they are of the opinion that it is open to bodies other than only (representative) trade unions.⁶⁷ The ECSR interprets it rather broadly: "Any bargaining between one or more employers and a body of employees aimed at solving a problem of common interest, whatever its nature may be, should be regarded as "collective bargaining" within the meaning of Article 6".⁶⁸ In the view of the Committee it is decisive whether a subject-matter, whatever it is, could be the subject of collective negotiations. The range of subjects could be very wide not only as regards the subjects themselves, but also as to the persons who will be affected by the issues tackled in the negotiations. A broad range will include all kinds of issues, even entrepreneurial decisions such as restructuring, decisions about investments or measures affecting the employment conditions in the future or the employment conditions of future workers.

The European Court of Human Rights does not seem to adhere to this broad concept. In the case of *Gustafsson v Sweden* in 1996 the court held that the system of collective bargaining and collective labour agreements for justifying the legitimacy of the trade

⁶⁴ This position is repeatedly taken by the German government. German law restricts the right to strike to trade unions and to a breakdown in the collective bargaining process. The ECSR has 'condemned' Germany since the second cycle for violating Article 6(4) ESC. See note 62.

⁶⁵ That is the reasoning for denying civil servants and their organisations the right to take collective action, because the employment conditions will not be established by free negotiations but unilaterally by the government. Germany is again the most well known and striking, but not the only example.

⁶⁶ Germany and Austria are examples of this approach.

⁶⁷ Countries such as Belgium, France, Italy, The Netherlands, Spain, Sweden.

⁶⁸ Conclusions IV p. 50 (Germany).

union action against an employer who refused to apply the employment conditions of the existing collective agreement to which it was not bound did not qualify. This kind of collective action retains its legitimacy, however, even when the trade union is deploying the action without the consent of or even the support of the workers employed in the enterprise to which the action has been directed.⁶⁹ Since a secondary action is usually assessed more strictly than primary actions the court seemed to argue this point without making any distinction. In this case the court⁷⁰ felt that a collective action, even a secondary action, targeted towards collective bargaining or forcing a (not involved) employer to observe the results of the negotiations, is legitimate.⁷¹ In the more recent *UNISON* decision the ECHR narrowed the scope somewhat.⁷² It decided that only the occupational interests of those workers employed by the (transferring) enterprise could amount to legitimizing the recourse to collective action. The decision of the employer to transfer (parts of) the public service to a private company could not and neither could the interests of other (future) workers.⁷³ The court seemed to require that the interests of the present workers of the enterprise affected by the collective action have to be at stake.⁷⁴

As shown above, this approach by the ECHR is not in conformity with the opinions of the ECSR and ILO supervisory bodies. These specialised bodies consider the right to take collective action to fall within the framework of collective bargaining in a broad sense (ESCR) or as a weapon in the hands of workers and their organisations to defend their economic and social interests (ILO bodies) in bargaining procedures or even beyond these procedures. Looking for a general standard to be used when assessing collective actions as to their lawfulness it is comprehensible to stick to the interpretations of the ECSR (supported by the ILO supervisory bodies). There are

⁶⁹ ECHR 25 April 1996, 22 EHRR 409. In this case it was a so-called blockade and boycott action by the trade union against an employer who refused to join the collective agreement of the sector or at least to apply it by concluding a separate agreement aiming at the application of the employment conditions of the collective agreement. The employer concerned opposed this by stating that he had been forced to join the collective agreement and therefore his negative right to freedom of association had been infringed.

⁷⁰ It has to be stated that it was a small majority. There were several 'dissenting' judges advocating a more restrictive interpretation. Cf. Tomia Novitz (2003), p. 234 ff.

⁷¹ One has to take into account that the employment conditions of the workers of the enterprise affected should be improved when the action turned out to be effective.

⁷² ECHR 10 January 2002, *UNISON* (App. No. 53574/99). It has to be taken into account this decision was about the admissibility of the claim of the British trade union and not a judgement on the substance.

⁷³ Cf. Tomia Novitz (2003), p. 286.

⁷⁴ In the *Albany* a.o. case before the ECJ A-G Jacobs took an even more restrictive approach. Only the core subjects of collective bargaining such as 'wages, working time or other working conditions' could be taken into account. Case C-67/96 [1999] ECR I-5751 (point 111). I will come back to the possible conflict with EC law in section.

at least two reasons for this. The European Convention on Human Rights does not mention the right to collective bargaining explicitly, let alone the right to take collective action. Both are considered as corollaries to the right endorsed in Article 11 ECHR: the freedom of assembly and of association. The (R)ESC, on the contrary, directly refers to the 'right to collective bargaining' and the 'right to collective action'. Since the (R)ESC is not subordinated to the ECHR⁷⁵, although there exists a major difference as to the legal nature of the provisions of both instruments, their legally binding effect and consequently the enforcement possibilities, there are sound reasons for taking the (R)ESC as a guide for interpreting the rights concerned. Moreover, since nearly all the European countries, including all the EU member states⁷⁶, have ratified Article 6(4) (R)ESC it can be argued that this approach can be considered as the general principle by which a collective action in the framework of collective negotiations has to be assessed as to its legality. The case law of the ECSR could therefore provide a catalogue of leading principles or more preferably criteria for assessment. Taking this position, the difference in the treatment of this matter in the various countries can be equated.

4.1.2. *Subject to conciliation*

It is argued that the scope of the right to take collective action is further restricted by another element of the structure of the Charter. It has deliberately been placed within the ambit of Article 6 (R)ESC. To guarantee the effective exercise of the right to bargain collectively the right to take collective action has been placed last in the row: joint consultation, voluntary negotiations, an appropriate machinery for conciliation for the settlement of labour disputes and then, finally, recourse to collective action. So the issue has been raised whether the right to take collective action is part of the existing system of dispute resolution. This means that before a strike can be called other dispute resolution mechanisms have to be exhaustively used. Over the years the ECSR has developed a line of reasoning that, on the one hand, supports the approach as developed and put into practice in many countries to solve industrial disputes peacefully, and, on the other, rejects national practices prescribing compulsory arbitration resulting in a denial of collective action or even conciliation and

mediation before a strike can be called.⁷⁷ The ECSR as well as the ILO Committees are unanimous in rejecting limitations on the right to take collective action by making it subject to previous compulsory arbitration or even mandatory conciliation. If parties agree on previous voluntary conciliation, the committee feels that this is compatible with Article 6(4).⁷⁸

4.1.3. *Employment conditions and beyond*

Finally, there is the question of whether the scope *ratione materiae* is restricted to issues related to employment conditions. The relevant provisions of the (R)ESC do not refer explicitly to this term, but in practice in some countries as well as in the academic debate it is strongly advocated that the right is related to employment conditions since the negotiations between the two sides of industry concern employment conditions. If that is true, the question remains what has to be understood by the term 'employment conditions'. Since countries are using different definitions and since there is no competent court with the power to take decisions that are binding for the member states, the practices can and surely will differ substantially. This could raise the problem of competing legal systems as regards the right to take collective action and therefore a potential distortion of competition between countries which is a really sensitive issue within the EC. It is not uncommon that this motive is used as a ground for Community regulation. I have to return to this later when examining the compatibility of the right to take collective action with EC law.

The restriction of the material scope to employment conditions implies that objectives other than these fall outside the scope of the internationally recognised right to take collective action. That means other types of actions, such as sympathy and solidarity strikes, are not protected by these provisions. Actions with such an aim do not apparently target the employment conditions of the persons participating in the collective action. The same is true of collective actions on political grounds.

⁷⁵ See Tonia Novitz (2003), p. 131 ff. on the history of and the relationship between both instruments of the Council of Europe. The (R)ESC is considered as the social counterpart to the 'classic' human rights catalogue with less effectiveness and enforceability due to the supposed programmatic nature of the (R)ESC.

⁷⁶ Some countries have not accepted or have made reservations to the full application of Article 6(4). Andorra, Austria, Greece, Luxembourg, Poland and Turkey have not accepted Article 6(4). Germany, The Netherlands and Spain have made reservations with regard to the civil service.

⁷⁷ Cf. the conclusions of the ECSR from the XIth to the most recent cycle (XVII). A suspension of collective actions for an unlimited period is not in conformity to Articles 6(4) and 31 ESC. A short 'cooling-off period' in the context of a conciliation/mediation procedure is acceptable, as the conclusions of the ECSR demonstrate. Cf. the conclusions of the XVIth and XVIIth cycle for various countries. Norway and Denmark were for several cycles condemned by the ECSR on this point.

⁷⁸ Even when a country requires a conciliation effort by law, the committee does not reject that as being contrary to Article 6 ESC. Anyhow the parties could not be forced to accept the result of the conciliation. Cf. Conclusions XI-1, p. 89-90; Conclusions XII-1, p. 130 and Conclusions XIII-1, p. 158/159. Cf. also Novitz (2003), p. 278 ff.

4.2. SECONDARY ACTIONS

It is generally accepted that primary collective actions are permissible since they are directed against employers and concern collective bargaining issues. If those actions meet certain procedural requirements they are lawful in principle although not without restrictions. The restrictions imposed on exercising the right to take collective action vary from country to country, as this study shows.⁷⁹ Unanimity also does not exist on the international stage concerning the scope of the restrictions that according to international and European strike law could be imposed. The discussion concerns the scope of these possible limitations.⁸⁰

The lawfulness of secondary actions is even more disputed not only nationally as this study shows⁸¹, but also internationally. It is part of the discussion on all kinds of collective action other than the usual strike. Not only secondary actions such as solidarity and sympathy strikes are disputed but also wildcat strikes, a partial stoppage of work, go-slow actions, work to rule, sit-downs, boycotts as well as the occupation of premises. The mixing of all these different kinds of collective action is confusing. They have to be distinguished as separate forms to be assessed on their own characteristics.⁸² They cannot therefore be considered and put on the same footing as solidarity and sympathy actions.

Solidarity as well as sympathy collective actions, although from a conceptual point of view they are not the same,⁸³ have to be assessed or are usually assessed in accordance with their objective. Since they are mostly linked to conflicts concerning the economic or social interests of fellow workers with whom the strikers are sympathising or whom they are supporting in their industrial dispute⁸⁴, these types of collective actions should be judged as a corollary to or as derivatives of the 'normal' collective actions concerning employment conditions. From the opinions of the ILO supervisory committee (CEACR) as well as of the ECSR it can be derived that

⁷⁹ See also Stefan Clauwaert, Transnational primary and secondary collective action: an overview of international, European and national legislation, *Transfer*, Volume 8, No. 4 (2002), p. 633 ff.

⁸⁰ See hereafter Section 6.

⁸¹ See also Lammy Betten, *The Right to Strike*, op. cit., p. 156–158. And Tonia Novitz (2003), p. 70 ff.

⁸² These different types of collective action are not part of this study.

⁸³ A definition does not exist. It is usually considered according to its specific character in the specific situation. Cf. Lammy Betten, *The Right to Strike*, op. cit., p. 149.

⁸⁴ These secondary actions have in common that they are not directed against one's own employer due to or directly linked to a conflict which they themselves have with their employer (which is not party to the dispute) although those actions could have an indirect beneficial effect for them (solidarity strike actions in the maritime transport sector against 'cheap' shipowners could have (additionally) the aim of preventing a levelling down of their own employment conditions.

they tend to assess these secondary actions if they concern issues which are the subject of collective bargaining in a similar way as primary actions. The ECSR and the CEACR have on more than one occasion criticised countries that limit or even prohibit secondary actions. The CEACR points to the need to start secondary actions "because of the move towards the concentration of enterprises, the globalization of the economy and the delocalization of work centres". The committee considers "that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful."⁸⁵ If states restrict these kinds of actions, these restrictions could only be justified if the action ceases to be peaceful, as its sister committee (CFA) states.⁸⁶

The ECSR has taken a similar opinion concerning secondary action. Just as its sister ILO committee, it feels that restrictions on secondary actions in the case of labour disputes within a group of enterprises or within an MNE are not compatible with the right to take collective action. It refers to cases where "the structural organisation of parent, subsidiary or subcontracting companies leads to a situation where the interests of the workers cannot necessarily be resolved with their direct employer". If trade unions may only take action against "their" own employer, the committee feels that this makes it "impossible for them to take action, inter alia, against the company which is the true "employer" but which may hire the workers through an intermediary company".⁸⁷

In conclusion the supervising bodies are quite unanimous in their conviction that solidarity and sympathy actions have to be assessed as to their lawfulness similar to other 'usual' forms of actions. At least the nature of the action as such is not decisive to assess them in another, more severe way. Since in many countries legal practice is heading in another direction, the need for a kind of harmonisation or at least a more uniform way of assessment becomes apparent.

⁸⁵ CEACR, *General Survey*, (1994), para. 168. The CFA is considering this under the right to form (con)federations that also protects the right of these (con)federations to call strikes: the case of Swaziland (case No 1884), 306th Report No. 306 of the CFA (1997), para. 686. In the same sense see Report No. 340 of the CFA (2006), para. 1026 (case No. 2416, Morocco).

⁸⁶ CEACR, *General Survey*, (1994), paras. 216–218. See also CFA Report No. 260 (1988), cases Nos. 997/999/1029 (Turkey).

⁸⁷ ECSR, *Conclusions XII-1*, p. 132 and *Conclusions XIV-1*, p. 305 (UK). CEACR, *Report 1997 ILC*, 85th Session (also UK).

4.3. POLITICAL STRIKES

The legality of collective actions by workers against the government and/or its policies has been strongly disputed. These actions, called political strikes, are presumed not to be protected by the (R)ESC or the ILO conventions. However, it is not very clear what has to be understood by a 'political collective action'. Among academics there is conflicting debate, but also the international supervisory bodies have differing opinions. In the view of those with a strict standpoint on this matter collective actions targeted against the government and its economic or social policy cannot be justified while not being covered by the ILO conventions, the (R)ESC or other international sources. Opposing this strict view is a group of labour lawyers who argue that the policy measures of the government when they are linked to or interfere with collective bargaining or the conclusion of collective agreements could be considered as part of the industrial dispute between the workers and their organisations and the employers. The policy measures affect the (content of) the collective agreements and therefore affect the employment conditions or the employment of the workers concerned. For that reason they belong to the sphere of workers' economic and social interests. Bearing in mind the broad interpretation of the concept adopted by the ECSR in its consistent case law it is likely that in cases where the collective action is also directed towards the government which substantially interferes in the collective bargaining of the employers' and employees' associations, the collective action cannot be considered as unlawful due to the fact it is targeted against the state and therefore to be characterised as a political action.⁸⁸ As regards collective actions for (purely) political ends⁸⁹ almost complete consensus exists as to its unlawfulness in general. Almost since its establishment the ECSR has consistently pointed out

⁸⁸ This reasoning stems from Dutch case law where the Supreme Court in two cases felt that 'if such actions (against an announced measure of the government reducing by decree the salaries of civil servants and railway personal), which concern labour conditions which are usually (or should be) the subject of collective negotiation, are directed against the government, they are covered by art. 6, para. 4 ESC'. 6 ILR 3 (1986) p. 6-7. Cf. Lammy Betten & Teun Jaspers, *The Implementation of the European Social Charter*, The Netherlands, in Betten & Teun Jaspers, *25 Years European Social Charter*, Deventer 1988, p. 135 ff. Also Tonia Novitz (2003), p. 289. Original source; HR 30 May 1986, NJ 1986, 688 and 11 November 1994, NJ 1995, 152. The ECSR did not take a final decision on this due to the fact that the decision of the Dutch Supreme Court felt that this collective action, while affecting collective agreements, was covered by Article 6 para. 4 ESC.

⁸⁹ This has to be distinguished from collective actions by civil servants against their employer (the local or state government) on issues linked to collective bargaining. Germany and some other states (e.g. Finland, Denmark) refuse the right to take collective action to trade unions organising these civil employees only because they are civil servants. The ECSR completely disagrees with this stance. Recently *Conclusions XVII-1/1*, p. 204 (Germany). *Conclusions XVII-1/1*, p. 169. *Conclusions XVII-1/1*, p. 131 (Denmark).

"that Article 6 para. 4 could not be relied upon to justify strike action taken for political ends".⁹⁰

The ILO supervisory bodies take a broader view: 'strikes purely political in character do not fall within the scope of freedom of association' and they are therefore not protected by the relevant ILO conventions. On the other hand, the ILO committees have difficulty in distinguishing these from actions which concern economic and social interests to be represented and defended by trade unions "since a policy adopted by a government frequently has immediate repercussions for workers or employers".⁹¹ Trade unions ought to have the possibility of resorting to protest strikes in particular where they are aimed at criticising a government's economic and social policies.⁹² That right is not unlimited in the view of the ILO expert committees, but as such they are not prohibited because they fall outside the scope of the protection offered by the ILO Conventions.⁹³

5. PERSONAL SCOPE

Before we move on to the issue of (permissible) restrictions on the right to take collective action we have to address – briefly – the question of who is entitled to call a collective action. The international and European sources seem to be clear. Although the relevant ILO conventions do not explicitly mention the right to take collective action and so an addressee is subsequently lacking, the supervisory committees – which recognise the right to take collective action – do grant 'workers' the right of recourse to collective actions. On the basis of the wording and the structure of the conventions (Nos. 87 and 98) it can be argued that (international) trade unions (usually confederations) are entitled to call such (cross-border) actions. Convention 87, article 3 guarantees (also international) trade unions the right to organise their activities in order to benefit from the freedom of association. Being a corollary to

⁹⁰ ECSR, *Conclusions II*, p. 28 (Germany) affirmed in *Conclusions XIII-4*, p. 361 (Germany). *Concl XV-1/2* add, p. 28 In the same sense *Conclusions XIII-5*, p. 62 (Finland): "state civil servants and municipal public servants cannot strike in protest against Government social and economic policies". In some countries (Portugal and Norway) political strikes are presumed to be lawful, unless they pursue an obviously illegal objective such as overthrowing the Government. *Conclusions XV-1/2*, p. 475 (Portugal). In Norway political action could be lawful, for example as a protest against the state's budgetary policy. *Conclusions XV-1/2*, p. 430.

⁹¹ Cf. CEACR, *General survey* (1994), para. 165.

⁹² CEACR, *General Survey*, (1994), para. 165. Also the CFA in various cases assessed by the CFA: Report No. 260 (1988) Case Nos. 997, 999 & 1029 (Turkey) and Report No. 300 (1995), Case No. 1777 (Argentina).

⁹³ For a more complete overview of political strikes: see Tonia Novitz (2003), p. 294–302.

the freedom of association aiming inter alia at defending the economic and social interests of workers/members it is likely that this right is reserved to trade unions.

The (R)ESC uses the word 'workers (and employers)' as addressees of the right to take collective actions. Criticising the German position the ECSR is quite clear about who is granted this right. The Committee rejects the German view according to which a series of requirements for qualifying 'a body of employees' as a bargaining agent, and therefore entitled to take collective action, have to be fulfilled resulting in the situation where only big trade unions fall within this definition.⁹⁴ Without these qualifications a body of employees cannot be part of the collective bargaining system and therefore lacks the power and the ability to put pressure on the other side by deploying strike activities in order to try to resolve an industrial dispute with its counterpart at the bargaining table. The Committee disagrees with this stance and has taken the view that recourse to collective action is not reserved for trade unions which are party to the negotiations on employment conditions.⁹⁵ The committee speaks of, not by accident, "a body of employees (whether *"de jure"* or *"de facto"*) aimed at solving a problem of common interest".⁹⁶ So a group of employees, even when they are not organised in an official trade union, are assigned with the right to take collective action. It must be a group of persons and that seems to be logical since collective action has by definition a collective nature. A dispute between a single employee and his employer cannot be considered as a collective dispute trying to resolve a common interest.⁹⁷ Incidentally, this does not imply that the requirement of being a formally organised group of workers able and capable to take part in negotiations on employment issues is contrary to Article 6(4) (R)ESC. According to the Committees'

view in these cases it must be very easy to establish or form such a group "without undue delay and formalities".⁹⁸

This position of the ECSR means that wildcat strikes deployed by a group of workers fall within the ambit of Article 6(4) (R)ESC. It could even be an 'ad hoc' group of disappointed workers. In the context of this study, assuming that a dispute can arise within a (multinational) enterprise with the board of that MNE, it is interesting to ask ourselves whether a works council, a group of works councils from various plants or the European works council is entitled to call a collective action. Since the case law of the ECSR is clear on this point, it is likely that also this group of workers is entitled to call a collective action in the case of a conflict of interests with the employer, albeit an MNE.⁹⁹ If the (European) works council takes part in negotiations with the board of an enterprise on substantive issues related to e.g. restructuring the enterprise or even when it is not involved in these negotiations, it then comes into conflict with the board and so the question can arise whether the works council can rely on Article 6(4) of the (R)ESC to legitimize a call for collective action spread over various plants. According to the wording of Article 6(4) (R)ESC and taking into account the interpretation of the ECSR it seems evident that this right could not be denied to the works council provided that the action fulfils the requirement of being lawful.¹⁰⁰ Additionally, the question arises whether a group of workers who are disappointed about the results of transnational negotiations between the management of the (multinational) enterprise and international (sectoral) trade unions may call a collective action that is covered by Article 6(4). By analogy it can be argued they have.

6. PERMISSIBLE RESTRICTIONS

6.1. GENERAL RESTRICTION CLAUSES

The general recognition of the fundamental right to take collective action by the international sources allows only limited possibilities to restrict the exercise of that

⁹⁴ These requirements are: 1. it must constitute a voluntary association of workers at supra-enterprise level (überbetrieblicher Ebene), i.e. it must organise workers from more than one enterprise. Single enterprise unions are however recognised for the railways and the postal service; 2. it should constitute a permanent association of a substantial number of workers, i.e. its existence should be independent of incidental fluctuations in the size of the membership; it must be able to exercise real pressure and counter-pressure and it must be taken seriously by its counterparts, i.e. it must have a certain social power (soziale Mächtigkeit); 3. it must perceive itself as a counterpart to or opponent (Gegenspieler) of the other social partner and it cannot therefore include both workers and employers in its membership (although the membership of single employers or single persons representing employers would probably not be a problem); 4. its internal organisation and decision making must be based on democratic principles; 5. it must consider itself bound by collective labour law and it must have as its objective the conclusion of collective agreements promoting the social and economic interests of its members.

⁹⁵ ECSR Conclusions XV-1, add 2, p. 28 (Germany).

⁹⁶ ECSR Conclusions IV, p. 50 (Germany). Emphasis added.

⁹⁷ A strike against the dismissal of one person can be covered by Article 6(4) ESC. The issue addressed by the collective action is not decisive; that can refer to one person.

⁹⁸ ECSR Conclusions XV-2, p. 476 (Germany). "Even for the purpose of calling a strike"; ibidem. Also ECSR Conclusions XV-2, p. 565 (Sweden): some formalities are allowed such as some form of organisational structure. Subsequently it is not allowed to restrict the right to collective actions to 'the most representative' trade unions, as was (is) the case in France: ECSR Conclusions XV-1, p. 254.

⁹⁹ Germany again refuses works councils to have the right to take collective action according to the same reasoning as is used for wildcat strikes or strikes called by (unions of) civil servants.

¹⁰⁰ Of course another problem to be solved is the jurisdictional issue: should the action be assessed on the basis of or in accordance with the national law in the state where the action takes place. See for this issue the comparative report by Aukje van Hoek, p. 425 ff.

right. Some of these restrictions are based on the concept of the right to take collective action as worded in these treaty provisions. Article 6(4) (R)ESC limits the right to 'cases of conflicts of interest' and 'peace clauses' in collective labour agreements. The first one has already been discussed above. The second is logical because the right to take collective action is linked to the collective bargaining process between both sides of industry dealing with employment issues. That is supposed to be the terrain of the social partners. It also fits within the long standing practice (in the industrialised market economies) of industrial relations shaped primarily by agreements between both parties regulating labour relations. This restriction is or at least should be limited to the issues laid down in these collective agreements. It has been argued that this limitation is inherent in the system of collective bargaining and collective agreements: the parties abstain from collective action concerning issues covered by the collective agreement: the 'silent' peace clause.¹⁰¹ The restriction by the peace clause is usually a relative one. That implies that other issues not regulated in the agreement could be the subject of an industrial dispute and can therefore be challenged by a collective action provided that the action fulfils all the requirements for being lawful.

Some international and European sources such as the ICESCR and the EU Charter¹⁰² contain a restriction by reference to the national laws of the country. One may wonder what the international recognition of a fundamental right such as the right to take collective action does mean if the exercise of the right is dependent on the national laws due to the fact that 'it has to be "in accordance with" or "in conformity to" national laws'.¹⁰³ The effect of the international law will be strongly reduced if the national courts, in assessing the lawfulness of collective actions, are allowed by international law to apply a more restrictive national law to collective actions even when the national law is not in line with the international regulations as interpreted by the supervisory bodies. To avoid this it will be necessary that on a national level the case law of these supervisory bodies has to be 'recognised' as a source for the application of national law.

All the sources entail a general limitation clause: "No restrictions may be placed on the exercise of this right other than those which are *prescribed by law and which are necessary in a democratic society in the interests of national security or public safety*,"

¹⁰¹ It differs from country to country whether this silent peace clause exists in the labour law system. Israel and Argentina are two examples, but one can state that many European countries immanently apply the principle such as Germany, the Scandinavian countries, The Netherlands, Greece and Ireland.

¹⁰² See Article 8 ICESCR. Article 28 of the EU Charter also refers to national laws and practices as well as to European Union law.

¹⁰³ I will come back to this when dealing with EU law and the restrictions which EU law imposes on the (exercise of the) right to take collective action.

public order, the protection of public health or morals or the protection of the rights and freedoms of others".¹⁰⁴ It has to be noted that the wording of the general limitation clause in the (R)ESC is noticeably somewhat different from the other sources.¹⁰⁵ On the one hand, the wording of the (R)ESC is narrower although, on the other hand, it is also wider. It speaks of 'for the protection of' instead of 'in the interests of ...'. And, secondly, it uses the term 'public interest' instead of 'public order'.¹⁰⁶ Public interest seems to have a broader meaning than 'public order'. It is likely to cover more situations.

6.2. PUBLIC ORDER/PUBLIC INTEREST

As to the first difference in the wording, the term 'in the interest of' seems to leave more room for appreciation by the judiciary than 'for the protection of'. In the first approach judges do have the possibility to weigh the use of the right to collective action and its effects against the interest of a possible disturbance to national security, the public order, public health etc. That is more in line with the approach of, for instance, the European Court of Human Rights that generally speaking attaches more weight to a margin of appreciation to be applied to assess whether a fundamental right has been violated or whether a restriction can be justified. That leaves room for a process of weighing the interests involved in a certain case. When widening the 'margin of appreciation' and the use thereof by judges, it could imply a substantial restriction of the right to take collective action. As we will see hereafter this approach to the 'margin of appreciation' also in the context of European Community law can have a great impact on the limitations to a fundamental social right such as the right to take collective action.¹⁰⁷

The ESCR has interpreted this restrictive clause as really threatening or jeopardising national security, the public interest or public health. The burden of proof to be provided by the state concerned is rather onerous. The committee has consistently decided that "the national authorities – legislative, executive and judicial – (when appealing to this possible restriction) have a responsibility for ensuring that these conditions are strictly applied".¹⁰⁸ This issue mostly arises in cases of collective action

¹⁰⁴ Article 8 ICESCR and Article 22 ICCPR. Article 11 ECHR uses another wording. It speaks of 'public safety', and 'the prevention of disorder'.

¹⁰⁵ Article 31 of the ESC or Article G of the (R)ESC

¹⁰⁶ It has to be noted that the French text uses the term "l'ordre public", which is obviously different from the English wording: 'public interest'.

¹⁰⁷ See hereafter section 7.2.3, p. 67 ff.

¹⁰⁸ Recently ECSR Conclusions VVII-1/2 p. 419 (Portugal).

within the civil service.¹⁰⁹ A total ban on collective actions relying on the 'protection of public security or public order' is not acceptable in the eyes of the committee. A restriction such as this could only be justified "if the collective actions in these sectors could pose threats to public order and national security".¹¹⁰ The committee judges this in connection with the regulation on providing 'essential services'. A total ban is not in conformity with the (R)ESC because by not making any distinction as to the functions and tasks to be performed, it is going beyond what is necessary to secure public security/order.¹¹¹

As to the first difference: 'public interest' or 'public order', there is some confusion in the case law of the ECSR. The committee refers to the first term apparently because the (R)ESC uses that term. First of all, it has to be stated that the 'translation' of public or general interest into 'damage to the national economy' is generally speaking not accepted by the supervisory committees, nor by the ECSR or the ILO committees. Only in cases of serious economic damage to the national economy as a whole could there be a ground for limiting the right to take collective action.¹¹² That implies that economic damage to a sector or branches of industry is not regarded as a justifiable ground. Furthermore, from the case law of the ECSR we can deduce that the way it fills in this notion shows that it tends to use that term in a rather restrictive meaning. Again the assessment whether a collective action threatens or endangers the 'public interest' is carried out in relation to whether or not an essential service is at stake. Restricting collective actions is justified when essential services, or in the words used by the ECSR: "services of a general (public) interest", are no longer provided.¹¹³ Moreover, whether relying on the 'general/public interest' as a ground for limitation can be accepted has to be assessed not in a general way but taking into account the specific circumstances of the case.¹¹⁴ The conclusion we can draw from this is that certain services, or the extent to which they are provided, have to be considered as

¹⁰⁹ Since public services have been privatised it can also cover private enterprises providing public services such as energy, water etc. Another example is (private and public) health services.

¹¹⁰ *ECSR Conclusions 2004-2*, p. 516 (Slovenia) and similarly *ECSR Conclusions 2004-2*, p. 347 (Lithuania).

¹¹¹ In other words: it is disproportionate. *ECSR Conclusions 2004-2*, p. 347 (Lithuania). Ensuring that essential services are provided and subsequently prohibiting the right to take collective action in those sectors is a justified ground for restricting the right to take collective action.

¹¹² Cf. CFA Digest 1985, p. 82. The CFA speaks of: "serious hardship to the national community".

¹¹³ Cf. *ECSR Conclusions 2002*, p. 81-83 (Italy), as well as the recent *ECSR Conclusions* of September 2004 on Bulgaria, Denmark, Estonia, Hungary, Latvia, Lithuania, Romania; *Conclusions XVII-1/1* and *XVII-2/1* and *2* and *Conclusions 2004/1* and *2*. Cf. the study on this particular issue: M. Rigaux, F. Dorsemont, *Vitale behoeften, essentiële diensten, minimumprestaties en stakingsrecht*, Antwerp/Groningen 2003 (mostly in Dutch); cf. Tonia Novitz (2003). P. 310 ff.; and B. Bercusson Bercusson (ed.), *European labour Law and the EU Charter of Fundamental Rights*, Baden-Baden, 2006, p. 96 ff.

¹¹⁴ *ECSR Conclusions XV-1/2*, p. 431 ff (Norway).

essential and therefore as 'services of general (public) interest'. The functioning of these services has to be guaranteed because they are of a general public interest. That is in line with the case law of the ILO supervisory committees which speaks of 'endangering the life, the personal safety or health of the whole or part of the population'.¹¹⁵ So at least it must be a 'serious' threat to or a danger for society. In conclusion the restriction that can be imposed on collective actions goes beyond the term 'public order'. That also seems to be the case in the case law of the other international supervisory committees (the ILO committees and the expert committee of the ICESCR).

6.3. RIGHTS AND FREEDOMS OF OTHERS

In the context of the issues at stake in this study two other restrictions are important to discuss. The first one is related to the protection of the rights and freedoms of those who are not directly involved in the industrial conflict but are certainly affected by the collective action. In some countries the meaning of this term has been extended to 'interests of third parties'.¹¹⁶ Harming the interests of persons who are not involved in, but are affected by the action, is considered to fall under the term of 'protection of the rights and freedoms of others'. The ECSR is not in favour of this extension. It tends to restrict the right to take collective action too far because it leaves a wide margin of appreciation and therefore it harms the real 'essence' of the fundamental right.¹¹⁷ Damage to third parties caused by the collective action is as such not accepted by the committee as a solid ground for imposing a restriction. That can only be the case when third persons¹¹⁸ who are deprived of certain important services are seriously hampered in exercising their rights or freedoms. Usually, this is connected to the question whether it concerns an essential service or whether the persons affected have been deprived of certain general public (essential) services for a long time or to a great extent.¹¹⁹ That is assessed by applying the principle of proportionality. Contrary to the practices in some countries¹²⁰ where the economic damage suffered by the employer involved in the strike action is taken seriously into consideration by judging whether the collective action can be restricted for that reason only, the ECSR does

¹¹⁵ *CEACR General survey* (1994), p. 68-71.

¹¹⁶ For instance The Netherlands, but recently also Belgium by using the term 'abuse' of the right to take collective action. Cf. A.Ph.C.M. Jaspers, *Nederlands stakingsrecht op een nieuw spoor?*, Deventer 2004, p. 97 ff. For Belgium: F. Dorsemont, *De prullenbak, een locus naturalis voor het leerstuk van misbruik van stakingsrecht*, *SR* 2002-11, p. 320 ff.

¹¹⁷ The wording used by the EU Charter, Article 52, para. 1.

¹¹⁸ Like patients or the consumers of, for instance, public transport or energy.

¹¹⁹ That could depend on whether there are alternatives available. If so, a ground for limitations is for that reason absent.

¹²⁰ The Netherlands is the most striking example. Cf. A.Ph.C.M. Jaspers, *op. cit.* p. 101 ff.

not accept this as a ground for restriction. Only if the enterprise's very existence is endangered could it justify a limitation on collective action.¹²¹

This potential ground for limiting the exercise of the right to take collective action has become a striking issue in EU law since the decision of the European Court of Justice in the *Schmidtberger* case and recently in the *Laval* and *Viking* cases. In all three cases the proportionality principle was put forward as a criterion for assessing the legality of these kinds of actions alleging that the exercise of the right to take (cross-border) collective action infringes one of the fundamental freedoms of the European Community: the freedom to provide services. In section 7 of this study I will go into this issue more extensively and also into the consequences which this possibly could have for the right to take collective action in a cross-border context or even further.

6.4. A LAST RESORT, THE PREMATURE NATURE OF THE COLLECTIVE ACTION

A final point to be dealt with concerns the limitation of the right to take collective action due to the rather 'premature nature of the action'. I refer to the practice of arbitration and conciliation procedures in several current legal systems in order to avoid or to prevent collective actions as a way of alternative dispute resolution. Or even going somewhat further, taking into consideration that the right to strike cannot be exercised lawfully when the negotiations are still ongoing and/or the possibilities for reaching an agreement between the bargaining parties have not been exhausted. I leave aside the situation where the negotiations have not been definitely completed due to the fact that one of the bargaining parties wants to continue the negotiations whereas the counterparty/parties has broken off the negotiations for (in their opinion) good reasons.¹²²

In general it is accepted that the collective action should be 'a last resort'. But it is not clear what that means exactly. Should other means of resolving the dispute be explored during which period the actions should be suspended? In the international instruments references are made to a structure of voluntary bargaining at first, to be

¹²¹ Cf. ECSR Conclusions XV-1 Add. 2, p. 27 (Germany). A cooling-off period can be an adequate solution as well as mediation/conciliation so as to postpone the actions (at least temporarily).

¹²² In some countries collective action is currently considered to be 'premature' because the negotiations are not definitely finished: in that situation the collective action is not used as an 'ultimum remedium'. A striking example is The Netherlands. The ECSR has decided that this is not in compliance with Article 6(4) (R)ESC. See ECSR Conclusions XVI-1/2, p. 447. See also A.Ph.C.M. Jaspers, *op. cit.*, p. 63.

promoted and supported by the state, and further the development and the establishment of appropriate machinery for conciliation and (voluntary) arbitration as an attempt to settle the dispute peacefully.¹²³ Collective action is seen as the ultimate step when other means of dispute resolution have failed.¹²⁴ Conciliation and, eventually, voluntary arbitration should therefore precede any collective action. Subsequently, cooling-off periods and conciliation are considered to be suitable, fitting in the whole procedure starting by negotiations. They are acceptable and have also been accepted by the supervisory bodies if they are settled by law or by collective (labour) agreements provided they are not too long (cooling-off periods) or indefinite as to the time they will take. Conciliation machinery must serve and facilitate the bargaining process. It may not be so complex or slow that a lawful action becomes practically impossible or loses its effectiveness.¹²⁵ It must not result in an almost 'illusory' right to take collective action.¹²⁶ The imposition of mandatory arbitration can only be accepted when the conditions of the limitation provision are met.¹²⁷ The right to take collective action will be 'suspended' during the cooling-off period or during conciliation. In cases where compulsory arbitration is permissible, that means falling within the limits of Article 6(4) in conjunction with Article 31 (R)ESC or similar provisions, a certain protection of workers concerning their employment conditions should be provided. Any absence of such protection constitutes a breach of the right contained in Article 6 (R)ESC.¹²⁸

¹²³ Cf. Article 6 (R)ESC as well as art. 4 ILO Convention 98.

¹²⁴ Cf. Article 6 (R)ESC. The ILO conventions do not entail *expressis verbis* such references to conciliation procedures, but the expert committees feel that conciliation and mediation in the case of an industrial dispute are compatible with ILO law (Article 4 ILO Convention No. 98); see CEACR 1994, p. 75. They refer to Recommendation No. 92 (of 1951) on voluntary conciliation and arbitration that states that the recommendation may not be interpreted 'as limiting, in anyway whatsoever, the right to strike'.

¹²⁵ CEACR 1994, p. 75. The CFA has progressed to this position since the 1990s. See e.g. Case No. 1930 (China) 316th Report of the CFA (1999), para. 365: "the Committee must once again recall that it has always considered the right to strike to be one of the essential means through which workers and their organizations may promote and defend their economic and social interests (see *Digest of decisions and principles of the Freedom of Association Committee*, 4th edition, 1996, para. 475).

¹²⁶ ECSR Conclusions XII-1, p. 130 (Norway). Compulsory arbitration resulting in a prohibition of strikes in an unlimited manner is not acceptable in the eyes of the Committee if it is exercised in an abusive way, i.e. beyond the limitations of Article 31. If there exists no limitation on the power to intervene in strike action by imposing mandatory arbitration (or even mandatory conciliation) and if any protection of workers is lacking, it constitutes a breach of Article 6 para. 4 since "without any such protection there is no real recognition of the right to strike as required by this provision of the Charter".

¹²⁷ See ECSR Conclusions XI-1, p. 89 (Norway). Similarly ECSR Conclusions XII-1, p. 130 and XIII-3, p. 141 (also Norway) and more recently ECSR Conclusions XVI-1/1, p. 141 (the Czech republic).

¹²⁸ ECSR Conclusions XIII-3, p. 141 (Norway). Cf. Similarly Tonia Novitz (2003), p. 280. The UN Committee on Economic, Social and Cultural Rights has expressed itself in the same way; E/C.12/1995/18, para. 224.

6.5. DEVIATING TYPES OF COLLECTIVE ACTION

A final issue to be dealt with in the context of this study concerns those forms of industrial action which are not the traditional one: a work stoppage. Besides actions such as go-slows, work to rule, relay actions or rotation actions and so on which in general are considered to fall under the protection of the international sources if they fulfil the normal requirements¹²⁹, we are interested in actions which are characterised as an occupation of the premises or the use of the employer's means of production or blockades or picketing. The expert committees have not explicitly dealt with these forms of collective action. From the rather rare conclusions where such an issue had been raised, it can be deduced that these forms of collective action are by definition not prohibited because of their 'deviating' nature. It seems that the committees assess these forms similarly to 'normal' actions. Even the occupation of business premises or (similarly) a blockade of the entrance to those premises (on both sides of the door) by strikers are not condemned by the committees as being excluded from the protection of the right to take collective action.¹³⁰ It can be argued that these kinds of actions, although they could be considered as violating the employer's right to property, should be assessed as collective actions in an industrial dispute.

The sources, in so far as they use the term collective action, do not define this term. They have to be judged according to the restrictions provided by the international instruments themselves. Scholars defend the thesis that an occupation of the enterprise is a violation of the 'rights of others' as protected by Article 31 ESC (Article G RESC). One may wonder whether the employer affected by the occupation can be considered as 'a third person' because he is directly involved in the dispute. If the collective action has to be characterised as a secondary action, the occupation (or similar action) can fall under the protection of the 'rights of others'. These actions are considered to be covered by the right to take collective action if they are carried out peacefully.

Picketing is a phenomenon which has been considered by the supervisory bodies.¹³¹ Subject to the peaceful exercise of picketing, this form of collective action is acceptable. The use of violence against workers who wish to work is considered to be unlawful and can be punished by criminal sanctions or by other disciplinary measures.¹³²

¹²⁹ Cf. ECSR in its conclusions as well as the ILO expert committees.

¹³⁰ In some of its more recent conclusions where these questions have been or could be raised, the ECSR has not taken the opportunity to give a clear statement/opinion on the lawfulness of these forms of actions under Article 6 para. 4 (R) ESC. Cf. *ECSR Conclusions XV-1/2* (Spain) and (Sweden). In the case of Denmark the ECSR did not react to the contention that picketing, if it involves physically blocking the entrance, is unlawful. *ECSR Conclusions XV-1/1*, p. 151.

¹³¹ The national contributions in this study deal with the case law of the countries studied on this issue.

¹³² *CFA Digest of Decisions*, 1996, para. 598. In its decision the ECSR argued and decided in a similar way although no use of violence was at stake: *ECSR Conclusions XIII-1*, p. 156.

In conclusion it can be stated that both the international supervisory bodies (ILO committees and the ECSR) dealing more extensively with the issue at stake are more open to recognising an effective right to take collective action. The supervisory bodies are unanimous in rejecting any restrictions that could make the right 'illusory', or could imply a denial of that right. The restrictions should be limited to those mentioned in the instruments themselves. And if the grounds for a restriction have been invoked, these have to be assessed in accordance with the formal restrictions set out in the treaties. In this context and keeping within the ambit of the restrictive rules concerned, the concept of 'guaranteeing of essential, or minimum services' has been presented as a very useful requirement.

7. TRANSNATIONAL ACTIONS AND EU/EC LAW

After exploring the international sources explicitly recognising and regulating the right to take collective action it has to be examined whether EU or EC law touches upon the issue of transnational collective action. First, we will analyse the EU and EC legislation or the presence of any regulation on collective action. Secondly, we will look at a possible conflict of EC law, more in particular the law on fundamental freedoms with the fundamental right to take collective action in particular. This problem has been raised since the EC Court of Justice has been confronted with this question, more indirectly in the Schmidberger case and directly in the cases of Viking and Laval.

7.1. EU/EC LAW AND THE FUNDAMENTAL RIGHT TO COLLECTIVE ACTION

Since neither the European Community nor the European Union have been provided with legislative power or competence to determine this issue¹³³, the field of regulating collective bargaining and of its corollary – collective action – has been left to the member states. On the other hand, the Nice Charter and the draft Constitution of the EU do recognize these collective rights as fundamental rights (Article 28 resp. II-88). By interpretation the explanatory report annexed to the draft Constitution states that in accordance with the basic principle of subsidiarity these rights and the exercise thereof fall under 'national laws and practices'. Does that mean that the EU Constitution is useless in this respect because strike actions have to be assessed in

¹³³ Article 137 para. 5 explicitly excludes this competence.

accordance with national laws?¹³⁴ If so, one can wonder what could be the meaning of the EU Constitution when guaranteeing the exercise of fundamental rights enshrined therein. An adverse view seems to contradict the approach of the EU, confirmed by the Court of Justice of the EU in its case law. The EC Treaty as well as the EU Treaty refer to the European Convention on Human Rights as well as the (Revised) European Social Charter.¹³⁵ It can be and has been argued that by virtue of the transnational nature of the EU and the EC the reference to national laws and practices should be interpreted in such a way that it at least does not jeopardise the supremacy, the prevailing power of EC Law.¹³⁶ In a recent case the Court took a similar position by stating "the principal aim of the Charter (of Nice)¹³⁷, as is apparent from its preamble, is to reaffirm rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights".¹³⁸ This reasoning can also be used for the interpretation and application of the fundamental right to take collective action. The right recognised in the EU Charter and backed by other international treaties has to be applied as an international obligation to be observed. It cannot be modified by national laws and practices in such a way that it loses its value and meaning.

Since the draft Constitution is disputed due to the fact two Member States have rejected the draft in a referendum and some other Member States have postponed its ratification, it is uncertain whether this part of the EU Constitution will be upheld. Another obstacle to the effective application of the Constitution, provided that it remains as it is, concerns the meaning of Article II-111. This provision has an ambiguous character: on the one hand, the EU, its institutions as well as the member states are obliged to respect these fundamental rights while, on the other hand, the field of application of these rights is restricted. Could it nevertheless be argued that

these rights can be invoked in concrete cases because they are recognised as fundamental rights to be observed and applied within the Union? The EC Court of Justice has repeatedly decided on the meaning of certain fundamental rights that have been disputed. They will be considered as 'general principles' of EC law.¹³⁹ By consequence the fundamental right of collective bargaining and to take collective action is at least one of the leading principles of the EU and its member states. The EC Court has confirmed this on several occasions: "it must be recognized that this principle, enshrined in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and *resulting from the constitutional traditions common to the Member States* (emphasis added), is one of the fundamental rights which, as the Court has consistently held and as is reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order".¹⁴⁰ The mere fact that all Member States have accepted and ratified the (R)ESC means that they all recognise these trade union rights. Therefore these rights can be considered as common to the national constitutional tradition of the member states.¹⁴¹ Both criteria are met and consequently the right to take collective action has to be considered as a fundamental principle of EU/EC law.

The statement that fundamental rights do exist in EC law is supported by other sources. The Monti Regulation of 1998 is one of them.¹⁴² The background to this regulation is the 'Spanish strawberries' case. The free movement of cheaper agricultural products from Spain and Belgium to France was violently hindered by French farmers. The French government was 'condemned' by the Court of Justice because it had failed to fulfil its obligations under Article 30 of the EC Treaty, in conjunction

¹³⁴ This raises many private international law problems. See the comparative report by Aukje van Hoek, *infra*, p. 425 ff.

¹³⁵ Article 6 of the EU Treaty proclaims the EU "shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (...) as general principles of Community law". Article 136 EC Treaty is explicitly referring to the (R)ESC.

¹³⁶ Cf. B. Bercusson Bercusson (ed.), *European labour Law and the EU Charter of Fundamental Rights*, Baden-Baden, 2006, p. 92 ff.

¹³⁷ Inserted in the draft EU Constitution.

¹³⁸ ECJ 20 June 2006. Case C-540/03; *European parliament v Council*, paragraph 38. The Court was also referring to other international sources of this kind, such as: the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the ESC. This case concerned the right of minor children to family reunification and the right to respect for family life, enshrined in the various international sources.

¹³⁹ The most well known is the 'equal treatment' principle. See the ECJ in the *Defrenne* case: ECJ 8 April 1976. Case 43/75, *Jur EG* 1976 p. 0455. In other, even earlier, cases the Court took a similar position. See also ECJ 1969, Case 29/69, *Stauder vs Ulm*, *Jur.* 1969, 419; ECJ 1970, Case 11/70, *Internationales Handelsgesellschaft*, *Jur.* 1970, 1125 and more recently ECJ 26 June 2001, Case C-173/99, *Broadcasting, Entertainment, Cinematographic and theatre Union (BECTU)*.

¹⁴⁰ ECJ 15 October 1995. Case C-415/93 (*Bosman*), *Jur.* 1995, I-04921, para. 79. In cases C-193/87 and C-194/87 (*Maurissen and European Public Service Union v Court of Auditors*), *Jur.* 1990, I-95, para. 11 t/m 16 and 21, the court had recognised the fundamental character of the right to organise. In a recent case (ECJ 20 June 2006. Case C-540/03; *European parliament v Council*) the court again referred to the Charter of Nice (comparable to the charter of fundamental rights) as a general principle of EC law. A-G Mengozzi underlined this in his opinion in the *Laval* case, C341/05, para. 78. See also B. Bercusson Bercusson (ed.), *European labour Law and the EU Charter of Fundamental Rights*, Baden-Baden, 2006, p. 51 ff. See also B. Bercusson in the foreword of this book.

¹⁴¹ The Nice Charter, inserted in the draft European constitution, uses a similar wording by referring to the constitutional traditions common to the Member States (article II-112).

¹⁴² OJ L 377, 12 December 1998, p. 8. See also Stefan Clauwaert, Transnational primary and secondary collective action: an overview of international, European and national legislation, *Transfer*, Volume 8/4 (2002), pp. 629-630; and Giovanni Orlandini, The Free Movement of Goods as a Possible 'Community' Limitation on Industrial Conflict, *ELJ*, 6, 4 (2000), pp. 341-362.

with Article 5 of that Treaty while not adopting all the necessary and proportionate measures in order to prevent the free movement of fruit and vegetables from being obstructed by the actions of private individuals.¹⁴³ The Monti Regulation was designed to ensure that the free movement of goods between member states is not obstructed by (collective) actions by private persons. The earlier draft of the regulation could at least potentially hamper and anyhow endanger the exercise of workers' rights to take collective action. The ETUC rang a bell in this respect. No provision was foreseen to safeguard this fundamental right of workers in case of an industrial dispute with cross-border implications. It feared that this fundamental right could easily be sacrificed to the EC's freedom of movement principle. By taking measures by the Commission in order to ensure a member state was fulfilling its obligation of guaranteeing free movement, a collective action could have been prohibited only because the free movement of goods was not guaranteed. Under pressure from the European Parliament the Commission amended the proposal by inserting a new provision stating: "this Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike". Other kinds of collective action were also protected provided they were part of the 'specific industrial relations system in Member States'.¹⁴⁴ That is important to state when we are talking about secondary actions or other types of action.

Another indication of a tentative recognition of the fundamental right to take collective action can be found in the recently adopted Services Directive.¹⁴⁵ Also in this directive the European parliament insisted that fundamental rights recognised by the Community and the member states should not be affected by the services directive. It refers explicitly to typical trade union rights under which the right to take collective action is included. The wording is quite similar to the wording of the Monti Regulation. Article 1 para. 7 of the Services Directive stipulates that "This directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law". This provision of the Services Directive is likely to be interpreted as has been elaborated above, although contrary to the Monti Regulation the text of this provision refers to 'national law and practices respecting Community law'. This addition is not superfluous or without any meaning as I will show below.

¹⁴³ ECJ 9 December 1997. Case C-265/95 (*Commission v France*), Jur I-6959.

¹⁴⁴ Article 2 of the Regulation.

¹⁴⁵ Directive 2006/23/EC of 12 December 2006 on services in the internal market, OJ 27 December 2006 L 376/36.

It has to be borne in mind that a recognition of the right to take collective action by European law does not imply that no restrictions on the exercise of that right exist. It is obvious that restrictions set by European law have to correspond to the restrictions set by the supervisory bodies interpreting and applying the international sources containing this right. To bring about and to retain uniformity as to the application of the right to take collective action as governed by EC law the EC Court can and has to play an important, if not a decisive role, in interpreting the actual meaning of the provisions of the Charter/EU Constitution.

7.2. COLLISION BETWEEN FUNDAMENTAL FREEDOMS AND THE FUNDAMENTAL RIGHT TO TAKE COLLECTIVE ACTION

A further obstacle to the full recognition of the right to take collective action by EC law can be found in the assumed predominance of the fundamental freedoms guaranteed in EC law being the pillars of the common market. It is quite clear that I am here referring to the provisions containing the four fundamental freedoms of the common market. In the EC we already had cases of a potential collision between EC law and fundamental rights, i.e. the right to bargain collectively and to conclude collective labour agreements.

In the Albany case and even more explicitly in the Van der Woude case¹⁴⁶, the question arose as to whether collective (labour) agreements could come into conflict with European competition law. Also under discussion was the compatibility of the fundamental right of collective bargaining resulting in collective labour agreements with the prohibition on cartels or on the abuse of a dominant position within the common market. Even though Advocate-General Jacobs had argued that the recognition of a fundamental right to bargain collectively would therefore not suffice to shelter collective bargaining from the applicability of the competition rules¹⁴⁷, the EC Court saw this differently and resolved the dilemma by granting immunity to the collective labour agreement if and insofar as the social objectives were pursued.¹⁴⁸

More recently, this issue again emerged in the Schmidberger case. In this case, the fundamental right of freedom of expression and the basic right of assembly had to

¹⁴⁶ ECJ 21 September 2000. C-222/98. Jur. I-07111.

¹⁴⁷ A-G Jacobs, C-67/96, no. 163.

¹⁴⁸ This line was confirmed in the judgment of 21 September 2000. Case C-222/98; Jur. I-07111 (*Van der Woude*). In his statement with the judgment, A-G Fennelly fully endorsed this approach.

compete against the free movement of goods within the EC. The decision of the EC Court was once again in favour of the fundamental right, albeit under specific conditions. It was a different story in the French fruit and vegetables case.¹⁴⁹ In that case, the Court ruled that France had failed to guarantee the free movement of goods. In the eyes of the Court, actions by French farmers to block transit, including on the Spanish and Belgian borders, found no justification for an obstruction of the free movement of goods. Finally, this issue was also present in the Omega Spielhallen case.¹⁵⁰ The Court admitted a violation regarding an economic activity consisting of the commercial exploitation of games which simulated acts of homicide. The Member State concerned (Germany) had adopted 'a prohibition measure on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity'. The Court accepted this limitation on the freedom to provide services (in particular the ban on operating certain 'gambling machines') and the free movement of goods (the trade in those types of machines) by relying on public order.¹⁵¹ In such a case, however, this has to involve "a genuine and sufficiently serious threat to a fundamental interest of society".¹⁵²

In conclusion it can be stated that fundamental rights recognised in and by EU law are at least on an equal footing with the fundamental principles of the common market. The proportionality principle will play an important role. Analysing the Viking and Laval cases I will come back to this.

7.2.1. Viking and Laval

In the Laval and Viking cases, there is again a debate about a potential collision between the fundamental freedom of establishment and service provision with a social fundamental right. In a nutshell, the Laval case involves a tender for the construction of a school in Sweden that was awarded to the Latvian construction firm Laval and Partners Baltic. They did not use any local Swedish construction workers, but recruited "their" employees in Latvia. They were temporarily seconded for the construction of the school. These Latvian employees were paid wages on a level that

was well below the usual Swedish wages. Despite a formal promise in the tender contract to conclude a Collective Labour Agreement with a Swedish trade union or to become a party to a similar existing Collective Labour Agreement, the Latvian construction firm Laval refused to pay the wages usually paid in Sweden. The Swedish trade unions held discussions in order to urge the firm to change its mind. Even after months of negotiations, no Collective Labour Agreement (CLA) was concluded, nor did Laval become party to the CLA for the Swedish construction industry. In the meantime, Laval had signed a CLA with a Latvian trade union. The Swedish trade unions announced a boycott that consisted of a blockade of all Laval construction activities in Sweden and sympathy action in support.¹⁵³ The trade unions complied with a statutory mediation and reconciliation procedure. That had no influence on Laval; they kept on stubbornly refusing to meet the demands of the Swedish trade unions. The boycott was inevitable. Swedish employees refused to supply the building site with the necessary construction materials, but they did not block the entrance to the construction site. The Latvian employees were not refused entry to the building site. The Swedish unions were of course worried about "social dumping" because work was being done in the Swedish market for much lower (Latvian) wages. This social competition had to be blocked. The Latvian employer was not forced to join the Swedish Employers Union, but it was however required to comply with the CLA concluded between the Swedish trade unions and the employers union. It sufficed to conclude a "Substitute Agreement" ("hångavtal") for accession to the CLA.¹⁵⁴

The Finnish Viking case is a classic example of what often occurs in international (maritime) transport. This also explains the involvement of the International Transport Federation. In Viking, the Finnish unions opposed the fact that the ferry Rosella, operating between Helsinki and Tallinn, had been put under an Estonian flag of convenience. The Finnish shipowner set up a subsidiary company in Estonia for this purpose. That would then take over the Rosella. After registering the ship in Estonia, it could be put under a different flag. Part of the objective was to replace the mainly Finnish crew by an Estonian crew and to adopt a lower-cost Estonian CLA for that crew. With their actions, the Finnish unions tried to prevent Viking from putting the Rosella under an Estonian flag, or if that did not work, to force Viking to keep paying the crew in accordance with the Finnish CLA. For the Finnish unions, putting the boat under an Estonian flag of convenience was not the ultimate obstacle. Replacement of the (mainly) Finnish crew by (cheaper) Estonians had to be prevented,

¹⁴⁹ ECJ 9 December 1997, Case C-265/95, *Jur.*, I-6959. See from a labour law perspective on this issue: Giovanni Orlandini, *The Free Movement of Goods as a Possible 'Community' Limitation on industrial Conflict*, *ELJ*, Vol. 6, No. 4, December 2000, p. 344-352.

¹⁵⁰ ECJ 14 October 2004, Case C-36/02.

¹⁵¹ Article 46 EC.

¹⁵² ECJ 14 March 2000, Case C-54/99 (*Église de scientologie de Paris*), *Jur.* I-1335 with a reference to ECJ 28 October 1975, Case 36-75 (*Rutili v Minister for the Interior*) ECR 1219, No. 28. In this case, a statement by an Italian citizen from France who took part in trade union actions in May 1968 (with a reference to the danger for public order) was deemed not to be in agreement with the free movement of employees. The exercising of trade union rights was implicitly under discussion in this case.

¹⁵³ In his contribution, Bruun examines the typical Swedish situation with regard to the universal validity of collective labour agreements. See following *infra* p. 212 ff.

¹⁵⁴ See in particular Kerstin Ahlberg, Niklas Bruun and Jonas Malmberg, *The Vaxholm case from a Swedish and European perspective*, *Transfer*, Volume 12, 2 (2006), pp. 155-166 ff., *loc. cit.*, p. 158/59. In his contribution to this study, Bruun also examines this, see *infra* p. 214.

or in any case, Finnish wage levels as set out in the Finnish CLA had to be maintained. To resist the pressure from the Finnish unions and the ITF, Viking petitioned the British Commercial Court in London with the request to forbid the trade unions from starting any collective action against Viking.¹⁵⁵ Viking stated that such actions were in conflict with the free movement of services (Article 49 EC) and with the freedom of establishment (Article 43 EC). After the Commercial Court ruled in Viking's favour, the Court of Appeal referred the case to the EC Court of Justice in order to obtain clarity with regard to the potential conflict with EC law.

Although there are similarities between the two cases, there are also significant differences. Viking relates to a special economic sector. It is characteristic of the maritime sector that employees can be exposed in an exceptional manner to a downward spiral of social competition. The 'place' where the work is carried out (*locus laboris*) is determined in real terms by the country in which the vessel in question is registered: the country of the flag which it is flying. If it occurs that that country pays relatively low wages, it is not difficult to imagine that a process of levelling down is lurking in the wings. That applies, first of all, to the employed (Finnish) workers: because they are so 'expensive', they are in danger of being replaced by cheaper (Estonian) workers. Or, if they want to keep their jobs, they are forced to accept lower wages.¹⁵⁶ The actions of the Finnish trade unions are therefore much more of a primary than a secondary nature.¹⁵⁷ With regard to this case, it must be remembered that it is in fact relatively simple to make this change because one can rather easily opt for reflagging.¹⁵⁸ Outsourcing is then primarily more of a legal than a physical operation.¹⁵⁹ In the case of Viking, it sufficed to set up a subsidiary in Estonia and to register the *Rosella* there. That is why the employees had to do without a significant portion of European protection.¹⁶⁰

¹⁵⁵ The British court was resorted to because the ITF has its head office in London.

¹⁵⁶ It is considered that low pay is not the only factor. For example, even if it means higher pay, higher productivity through better qualification levels, this can be a reason for hiring more expensive, better educated employees. Vgl ook Ahlberg *et al.*, *op. cit.*, p. 157, where they also refer to this.

¹⁵⁷ Also see Tonia Novitz, *The right to strike and re-flagging in the European Union*, *Lloyd's Maritime and Commercial Law Quarterly* 2006, p. 244.

¹⁵⁸ It sufficed to set up a subsidiary in an EU member state and to register the ship there.

¹⁵⁹ A consequence thereof is that the European directives that regulate the position of employees in transnational restructuring for employees on board seagoing ships does not apply. That applies for the Collective Dismissal directive, the Transfer of Undertaking directive and Secondment directive.

¹⁶⁰ It could be said that in the Viking case an even closer aspect of the freedom of collective industrial organization could be discussed: the negative freedom of collective industrial organization. Because here we are primarily concerned with the right to take collective action, this will not be discussed any further.

In both cases, the European Court was faced the question whether the restriction imposed on free movement between member states by the organization and carrying out of strikes or other collective actions by trade unions had to be regarded as an illegal curtailment and on those grounds was not lawful. In parallel with the Schmidberger case, the question was whether the Member State involved should have taken measures to put an end to the infringement of fundamental common market freedoms or to prevent that such an infringement could occur. Or, it would have to be assumed that exercising a fundamental right, such as collective action, implies a justification for infringement. The British court also asked the Court of Justice to pronounce on the question whether a proportionality test had to be introduced.

7.2.2. Fundamental right (to take collective action) versus fundamental freedom (free movement)

Apart from the question of whether, from the European perspective, it is of any importance for the main question of what type of collective action is involved: a primary action or a secondary action¹⁶¹, a different aspect is does it revolve around a case of primacy: is the fundamental right to collective action on the same level with the fundamental freedoms of the EC, or is the one 'higher' than the other? That makes a major difference. If the right to resort to collective action takes precedence over the free movement of services or of free establishment, then it would seem that the case is quickly resolved. In the other case, the question is more complicated. The primacy of the fundamental freedoms of the EC does not make the right to strike obsolete. It would be admissible either if it came under one of the exceptions that the Treaty allows or the collective action would have to be deemed to be a justification for an infringement of the freedoms. If neither is recognised as having a priority position and so both are on an equal footing, then a solution based on weighing the interests involved would apply in a case such as that of Schmidberger. It could be referred to as the balance model.¹⁶²

One can denote three sources for a certain priority position of the right to take collective action. I have pointed to these above. So I will only mention them: First of all, there is the Nice Charter of Fundamental Rights that has been taken over in

¹⁶¹ Attention is paid to this question in the various contributions to this study. Secondary actions were judged even more harshly than primary ones. Cf. F. Dorsemont in his comparative report, *infra*, p. 260. Both Advocates General, Mengozzi in the Laval case and Pólares Maduro in the Viking case, assessed these forms of collective action in another, stricter way than the 'normal' cases of collective action. See C-341/05, para. 80 ff. (Mengozzi); and C-438/05, para 67/68 (Pólares Maduro).

¹⁶² Cf. Filip Dorsemont and Teun Jaspers, *Coölectieve actie en vrij verkeer*, *NJW* 2007, no. 154, p. 2-14.

the draft treaty for a European constitution¹⁶³ and that the right of collective action is recognised as a fundamental right, albeit that for exercising the right to take collective action granted in Article II-88, Union law and national laws and practices are referred to. As has been stated above, the explanatory report to the EU Charter¹⁶⁴ explicitly refers to Article 6 of the European Social Charter and to the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14) as well as to the case law of the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR.

The second source is the Monti Regulation, which came about in reaction to the 'Spanish strawberries' case.¹⁶⁵ It guarantees the free movement of goods, but without "in any way infringing the exercising of the fundamental rights as granted in the member states, including the right to strike or freedom to strike".¹⁶⁶

Thirdly, one can refer to the Services Directive. Besides the usual trade union rights (such as the right to bargain collectively and the right to conclude and enforce CLAs), the right to take collective action is also explicitly included herein. One could also derive from this the recognition of the right to strike in EC law, albeit subject to the usual restrictions.¹⁶⁷

If a certain recognition of the fundamental right to take collective action can be derived from this, the sources should be an argument for the position that there is no question of a clear subordination of this right to the fundamental freedoms of the common market neither the other way round. On the basis of the latter two sources, it could be argued that it may be an illusion that the free movement provisions in the Treaty do not block the exercise of the right to take collective action. From a labour law perspective it may well be tempting to derive the absolute primacy of the fundamental right to take collective action over the fundamental principles of free movement, but this is doubtful.

¹⁶³ It must be recognized that, at this moment in time, one cannot predict whether this catalogue of fundamental rights will be included in any constitutional treaty or in a European Constitution. In some member states, there are voices being raised to delete this section in order to break the deadlock over the Constitution.

¹⁶⁴ Of December 2000.

¹⁶⁵ See fn. 143.

¹⁶⁶ Article 2 of the Regulation 2679/98/EG, OJ L 337, 12.12.1998. The article also includes collective actions other than strikes under this provision. For more on this Regulation in connection with this topic, see: Giovanni Orlandini, *The Free Movement of Goods as a Possible 'Community' Limitation on Industrial Conflict*, *ELJ*, 6, 4 (2000), pp. 341–362.

¹⁶⁷ Directive 2006/123/EC, OJ L 376, 27 December 2006, p. 36–68.

7.2.3. *The lesson learned from Schmidberger*

The issue in the Schmidberger case was a potential conflict between a fundamental freedom of the European Community and a fundamental right. A demonstration consisting of blocking the passes between Austria and Italy for a limited period, which was used to express concern about the environment, without doubt constituted an obstruction to the free movement of goods. The question there was whether an objective justification for this had to be introduced, which would override a member state's treaty obligation to safeguard free movement effectively. As justification, Austria put forward that it had to respect the fundamental rights of demonstrators: freedom of speech and freedom of assembly, which are laid down in the Austrian Constitution and in the ECHR to which Austria is bound. Austria implicitly placed this fundamental right—in the given circumstances—above the fundamental principle of free movement enshrined in the Convention. The Court repeated its view that "fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories".¹⁶⁸ Within the Community, no measures have to be taken (for performing obligations arising from the Convention) which "are not compatible with the respect of recognised human rights." That is why the protection of these rights is a legitimate interest, which "in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods".¹⁶⁹

Claiming such a fundamental right is not without restrictions.¹⁷⁰ Public-interest objectives can justify a restriction. But then only subject to the conditions that the curtailment must be provided for by law, must be dictated by one or more legitimate objectives and must be necessary in a democratic society. The last-mentioned is an issue if the restrictions are justified by an imperative social need and they are commensurate with the legitimate goal being targeted.¹⁷¹ That is the case if the

¹⁶⁸ EHI 12 June 2003. Case C-112/00, Para. 71. That is the Court's consistent case law. The Court then referred to the ECHR in particular. But there is no reason to assume that typical catalogues of fundamental socio-legal rights cannot and must not be included in this category.

¹⁶⁹ Para. 74.

¹⁷⁰ That is in conformity with the basic principle in international law. See in this area Article 11 ECHR, Article 6 in conjunction with 31 ESC (Article G RESC), Article 22 ICCPR and Article 8 ICESCR.

¹⁷¹ The court referred to its own case law: EHI 26 June 1997. C-368/95, *Jur.* I-3689 and EHI 11 July 2002. C-60/00, *Jur.* I-6279. And to ECHR 23 September 1998, *Recueil des arrêts et décisions 1998* – VII, § 101. Also see, focussing on the right to strike: A.Ph.C.M. Jaspers, *Nederlands stakingsrecht*, *op. cit.*, para. 4.2.1.1.

restrictions actually correspond to public-interest objectives – and the goal that is targeted by such restrictions taken into consideration – and do not have to be regarded as a disproportionate and intolerable intervention through which the protected rights are affected in their core.¹⁷² That implies a weighing of interests: a 'just balance between the interests' must be found and respected. Following on from its own jurisprudence and from the case law of the European Court of Human Rights, the Court recognizes that member states have a wide margin of discretion, a wide 'margin of appreciation'. In the particular case, this had to be considered. The factors that the Court mentioned in this case and which can be used for the assessment are interesting for collective actions. In national case law, one also encounters aspects that have to do with an appreciation of the acceptability of collective actions. Thus it is a factor whether accompanying measures are taken (in order to steer the actions in the right direction, including information to the general public that are or will be affected by the action) and what the frequency and duration of the actions are. This is about whether the government 'could reasonably be of the opinion' that the legitimate objective aimed at by the actions could not also, or just as well, be achieved by means that are less far-reaching.¹⁷³

If one applies the Schmidberger formula to collective actions that have an cross-border impact, then, if one follows the Court's line of reasoning, it would have to be assessed whether the authorities would have to intervene when collective actions hinder free movement (too much or disproportionately). If one acknowledges the wide margin of discretion that must be left to the member state, then it is a matter of assessing whether the government should have considered measures that effectively put an end to the violation of free movement through taking collective actions. Does this mean that the State either has to break the collective actions by a ban or by police intervention to guarantee free movement? Or does a court that is applied to by the injured parties have to ban the actions?

Although the comparison does not fully apply, because in the cases at hand, Viking and Laval, the right to collective action is at issue, a right that is recognized in international conventions, explicitly in the (R)ESC and the ICESCR, and implicitly in the ILO conventions, nos. 87 and 98, this Austrian case could easily be used for the assessment in both strike cases.

¹⁷² Cf. an identical wording has been used in the EU Constitution: Article II-112: "respect the essence of those rights and freedoms".

¹⁷³ In this case restrict intracommunity trade less.

7.2.4. Possible solutions

For the issues in the Viking and Laval cases that were submitted to the EC Court for settlement, several solutions can be considered.¹⁷⁴ If one acknowledges the primacy of the fundamental social right to take collective action in the case of a conflict of interests over the Community principle of free movement, then a hindrance of free movement, which is the unequivocal consequence of a collective action, cannot create a barrier to exercising that fundamental social right. A potential violation of free movement cannot negate the right to take collective action. The latter is hierarchically superior to free movement. This still does not mean by any means that every collective action in an international situation or with transnational impact is allowed. Here the restrictions, the norms in particular, which have been developed by the committees of independent experts in the context of the ILO and Council of Europe, could be adopted as assessment criteria. If the EC Court were summoned to pronounce a judgment on transnational collective action, then it would be able to and would also have to decide according to these criteria. Recent case law of the European Court of Justice has provided fuel for doing so. From the decisions in the Mangold¹⁷⁵, Sonia Navas¹⁷⁶ and Portugaia Construções¹⁷⁷ cases one could conclude that the Court is inclined to elevate fundamental (social) rights to independent universal principles of Community law that the Court has to ensure. With that, the primacy of the right to take collective action is not yet definitively established or secured, but as can be inferred from the Court's case law, one could argue that these fundamental rights also prevail against conflicting rules of Community law.¹⁷⁸ However, that also does not mean that no restrictions can be imposed on collective actions. These restrictions have been reviewed in section 6 of this contribution. For the interpretation and application of the right to take collective action, the EC Court should refer to the case law as it was shaped at the international level. Therefore, the Community principle of free movement does not impose any additional restrictions.

Although less far-reaching, another solution could be to establish that the free movement restrictions of the EC Treaty cannot be invoked directly against the trade unions that organise actions. There can be and are varying opinions with regard to the question of direct horizontal effect, submitted to the Court in Luxembourg by the English court. In the submissions by the various Member States, the European Commission and the EFTA Surveillance Authority, these different opinions are tersely

¹⁷⁴ Dorsemont and myself have developed four ways of providing possible solutions in *Collectieve actie en vrij verkeer* (Collective action and free movement), *NJW* 2007, no. 154, pp. 2–14.

¹⁷⁵ ECJ 22 November 2005, C-144/04.

¹⁷⁶ ECJ 11 July 2006, C-13/05.

¹⁷⁷ ECJ 24 January 2002, C-164/99.

¹⁷⁸ Cf. the case law of the ECJ in the cases of Albany and Van der Woude, cited above.

expressed.¹⁷⁹ Against the position that Articles 43 and 49 EC can be immediately invoked against trade unions taking action, there are the opinions of others who, on the basis of the same case law of the Court, argue to the contrary.¹⁸⁰ The Court's decisions in the cases *Walrave*, *Bosman* and *Angonese*¹⁸¹ give direct horizontal effect to the free movement provisions. Supporters of the direct horizontal effect approach feel that trade unions and private organizations are also committed thereto. The others assert that the situation in the three cases mentioned essentially differs from the one under discussion regarding collective actions by trade unions with cross-border impact. In the three aforementioned cases, it involved the rights of individuals¹⁸² who through regulations (not of the state but) of social organizations were curtailed if not denied. The decision of the Court will have to clarify this. The consequences of the decision are not insignificant because courts in member states can (and must) assess collective actions by trade unions and labour disputes as a violation, more precisely a hindering of the free movement of goods and services and of the freedom of establishment by these collective actions. The permissibility of such actions must then be assessed under the exceptions of the Community rule securing free movement. These may be so restrictive that the trade union actions will be slow to comply. If the Court follows the other interpretation, then transnational collective actions are not yet 'saved' from restrictions.

A third way would be that in cases regarding transnational collective action the argumentation is an analogy to the *Albany* case law.¹⁸³ That means that immunity is granted to transnational collective actions for violations of the free movement principles of EC law.¹⁸⁴ By placing collective labour agreements outside the sphere of application of competition law, this problem of potential conflict is solved. In the problem at stake, as a rule there is no doubt that collective actions do have social objectives in mind. After all, they will always concern employment and employment conditions. Another point in favour of this approach is that if no immunity is granted to such collective actions, the *Albany* exception in collective negotiations resulting in collective labour agreements will miss its useful effect (its 'effet utile'). Collective

negotiations, the conclusion of collective labour agreements and collective actions are directly, even inseparably, connected with one another. Without the latter, the system of labour relations, as it exists and functions in our countries, will be amputated. The hands of one of the parties are then tied.¹⁸⁵

Just as there was no basis to be found in the Treaty provisions for granting immunity to collective labour agreements, that is also the case for this immunity. The Court can once again refer to Article 3, paragraph 1, sub. g and j, EC Treaty¹⁸⁶ and to Articles 136–143 EC Treaty in which social objectives and their effect are laid down.

The analogous application of the exception to competition law does indeed have a consequence. The immunity applies in situations in which the concluding of collective labour agreements aims to improve employment and employment conditions. That should imply that, by way of analogy, collective actions that do not target this objective may not and cannot rely on immunity. It is then obvious that the Court's case law will be followed on the point as to what has to be understood under improvement of employment and employment conditions. In its case law the Court applies a rather broad interpretation.¹⁸⁷

To conclude, the route to be taken has to be the balance model following the example of the *Schmidberger* case.¹⁸⁸ By analogy with the Court in this case¹⁸⁹ it can be argued that the protection of fundamental employee rights and interests is a legitimate public interest objective¹⁹⁰ for the government which justifies that it does not intervene in the case of a violation of the principle of free movement by taking collective action. In that case, there is a ready justification for the authorities to sit still and not to intervene. Therefore that should mean that it cannot be required that the government or a court should prohibit the actions by a decree or a court order.¹⁹¹

¹⁷⁹ In his foreword Bercusson also draws attention to this point. From a point of view of European Community law the decision of the court could have an important impact.

¹⁸⁰ More in particular the submissions of Belgium, France and Germany are explicit on this point.

¹⁸¹ ECJ 12 December 1974. Case 36/74 (*Walrave*); resp. ECJ 15 December 1995. C-415-93 (*Bosman*) and ECJ 6 June 2000. C-281/98 (*Angonese*).

¹⁸² Both Member States argued that here the working conditions or the access to employment were at stake which is completely different from the collective action case.

¹⁸³ EHJ 21 September 1999. Zaak C-67/96, Jur. 1999, I-05751 (*Albany*), EHJ 21 September 1999, C-115/97 tot C-117/97, Jur. 1999, I-06025 (*Brentjes & Drijvende Bokken*) and ECJ 21 September 2000, C-222/98, I-07111 (*Van der Woude*).

¹⁸⁴ The English Court of Appeal expressly submitted this potential solution to the Court. Advocate General Poiras Maduro has rejected this 'solution', however; see C-438/05, para 26/27.

¹⁸⁵ Industrial and sociological authors in the field of labour relations are unanimous, except for one exception. Likewise, the international organizations such as the ILO, the UN, the Council of Europe and the European Union use this as a basis.

¹⁸⁶ At the time Article 3, sub. g and i EC Treaty.

¹⁸⁷ See the case law mentioned in the note. Also see Monica Wirtz, *Collisie tussen CAO's en mededingingsrecht* (Collision between collective labour agreements and competition law), Kluwer, 2006, pp. 197–214.

¹⁸⁸ This has also been expressly submitted to the EC Court.

¹⁸⁹ By analogy with the grounds for decision 66 of the EHJ 12 June 2003. Case C-112/00.

¹⁹⁰ That can fit into the policy with regard to the responsibility of social partners and give form and adhere to the system of labour relations in a member State. The subsidiarity principle that is paramount in the EU supports this national policy.

¹⁹¹ Unless essential services are not ensured. See above sections 6.2 and 6.3.

If the collective actions of the trade unions are placed alongside the rules that the Court developed in its Schmidberger judgment, that means an assessment based on the proportionality criterion. The actions are then assessed on the basis of criteria such as: have flanking measures been taken (in order to lead the actions in the right direction, to prevent violence and to announce them in time so that all interested parties have been warned)? What are the frequency and duration of the actions? With the proportionality test, the final judgment must be pronounced: can the trade unions 'reasonably be of the opinion that the legitimate objective aimed for by the actions cannot be reached by means that are less restrictive for intra-Community trade'.¹⁹² In these sorts of cases, the parties using the means of action have to be allowed a certain 'margin of appreciation', a considerable room for their own assessment and policy.¹⁹³ The criteria usually used in international collective action law can guide us here.¹⁹⁴ The case law shows that if a fundamental right wants to be effective in this type of dispute, restraint has to be present. When, as in this case, it concerns employment conditions, when the actions are limited in time, properly announced, do not present any danger to public order and public health, do not infringe the rights of third parties and do not lead to the breakdown of vital and essential services, then such actions are legitimate and lawful.¹⁹⁵ This approach also applies to secondary actions, such as in cases of transnational conflicts, certainly when such secondary actions are conducted in support of primary actions. A potential problem can arise when, as in the Laval case, the actions have far-reaching financial consequences. That may well result in disproportionality.¹⁹⁶

8. CONCLUSION

As Bercusson has pointed out in the preface to this study, the decision of the Court of Justice of the EC in the pending cases of Laval and Viking is likely to be of high importance for the development of a kind of a Europe-wide recognition of the right to transnational collective action. Not surprisingly, this study shows a great diversity

¹⁹² EHJ 12 June 2003. Case C-112/00, para. 93.

¹⁹³ Also see the Court in the Schmidberger case: para. 82.

¹⁹⁴ The committees in the context of the ILO: Committee on the Freedom of Association (CFA) and Committee of Experts on the Application of Conventions and Recommendations (CEACR) as well as the European Committee of Social Rights (Council of Europe) have both developed an extensive case law on this subject. See extensively on this issue: Tonia Novitz, *International and European Protection of the Right to Strike*, Oxford, 2003; and A.Ph.C.M. Jaspers, *Nederlands stakingsrecht op een nieuw spoor?*, Deventer 2004.

¹⁹⁵ In addition both countries, Sweden and Finland, recognise and guarantee the right to take collective action in their constitutions.

¹⁹⁶ The duration of the actions, possibly leading to the bankruptcy of the enterprise, can become decisive.

in the way national law approaches this phenomenon. The assessment of the legality of such actions is therefore dependent on the national laws of the various countries where the collective action is assessed. The complexity of this issue is becoming even greater due to the private international law aspects of a transnational collective action, as Aukje van Hoek demonstrates clearly in her comparative analysis based on the national reports. That does not contribute to more transparency for the workers or even for the trade unions faced with this problem. It is very hard if not impossible to know beforehand or even to judge the chances as to whether a cross border collective action is legal and therefore not blocked by the law. The conclusions of both Advocates General in the Laval and Viking cases seem to tend towards further restriction of the right to collective action with a cross-border impact affecting the fundamental freedoms of the common market. The submissions of the Member States to the ECJ in those two cases clearly show the diversity of opinions within the European Union.

For that reason it is a legitimate question whether we need in Europe a specific 'European' law on (transnational) collective action. The practice in the EC used in various directives in the field of labour law and social policy could perhaps guide us. Although the issue of collective action is explicitly excluded from the legislative competence of the European Community, arguments for a certain approximation of the law on collective action Europe wide could be derived from some instruments used in the past for issues as sensitive as the current one. In cases where the differences between the Member States are too big and continue to exist, a certain approximation of the differing laws is to be considered as an appropriate means. When the 'transnationalisation' raises problems with regard to the legislation applicable to the (social) issue at stake, the Community could intervene but by taking into account the subsidiarity and proportionality principle. That implies that European law may not go beyond minimum requirements applicable throughout the Community.¹⁹⁷

As I have shown in my analysis, the common minimum requirements to be applied generally within the EU and its Member States in order to guarantee that equal application of the criteria (on that level) can be found in case law developed by the supervisory committees of the ILO and the Council of Europe. In EC employment law, these sources are considered as guidelines or even principles to be taken into

¹⁹⁷ These are the considerations used in various directives on which EC interventions in the labour law field are based. See the directive of 10 February 1975 on equal pay for men and women (75/117/EEC); the directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (2000/78/EC); the directive of 23 November 1993 concerning certain aspects of the organization of working time (93/104/EC); the directive of 20 July 1998 on collective redundancies (98/59/EC); the directive of 12 March 2001 on transfer of undertakings (2001/13/EC).

account by phrasing European law in this field. If these rules are applied by the EC Court of Justice and by national courts, a certain unity of the application of the rules governing the exercise of the right to take collective action can be achieved. By adopting a Charter of fundamental rights either as part of a 'European Constitution', what is not very likely at present, or as a legally binding instrument by granting the Charter of Nice the status of European Union law, including a provision on collective action as part of the system of industrial relations¹⁹⁸, a greater uniformity of the right to collective action can be secured. The practice of forum shopping can be restricted. Such a charter will empower the ECJ to some sort of harmonisation of the law in this field. However, that does not guarantee the (exercise of the) right to collective action with a transnational impact. The potential collision between this fundamental right and the fundamental freedoms of the EC still has to be solved. Some suggestions have been made how to solve this problem. We have to wait for an answer from the 'oracle of Luxembourg'.

¹⁹⁸ As part of what is called the 'European Social Model', which is considered and generally supported as a characteristic of the European Union.

TRANSNATIONAL COLLECTIVE ACTION – ALREADY A REALITY?

W. WARNECK

1. INTRODUCTION

Given the difficulties and the very controversial views on the topic of transnational collective bargaining launched by the European Commission in February 2005 in the Social Agenda¹ – transnational collective action as a topic, taking the issue even a step further, might seem to some to be totally utopian. Nevertheless, this article argues that transnational collective action is today already a reality – to some extent, at least. Moreover, collective action is inseparable from collective bargaining. When discussing one the other must equally be looked at, as collective bargaining without the possibility to exert pressure through collective action is totally nonsensical.

In the context of globalisation we see capital increasingly moving across borders. In the European Union industry is taking advantage of the possibilities brought about by the internal market. Transnational transactions are occurring every day.

When the European trade union movement wants to take up the challenge of mobility, of movement of services and production in the internal market the obvious answer in the case of labour disputes is to take collective action across the border.

Today, collective action is an area which is evidently linked to the very specific national industrial relations systems and is therefore nearly exclusively regulated by national rules (legislation, collective agreements and case law²).

Therefore, the first step by trade unions in Europe is to act within the national "legislative" boundaries, but to coordinate those national actions so that they are transformed to a European scale. This will remain so until the day when the European political climate will finally be favourable to the long-standing demands of the European trade union movement: to have transnational trade union and workers'

¹ COM(2005) 33 final, 9 February 2005, http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0033en01.pdf.

² S. Clauwaert, "International / Transnational primary and secondary collective action", Brussels: ETUI 2002; J. Aaltonen "International Secondary Industrial Action in the EU Member States", EMIRE, 1999: http://www.eurofound.eu.int/servlet/emire_search_results.php.

FINAL DECISION IN THE LAVAL CASE

BIRGITTA NYSTRÖM*

Keywords: damages; industrial action; *Laval* case; Swedish Labour Court

The Swedish Labour Court (AD) has, on 2 December 2009, made the final decision in the famous Laval case.¹ After the European Court of Justice's (ECJ) decision in December 2007 there was not very much left for the Swedish court to decide about. It was primarily a question about damages – a question that turned out to be rather complicated.

It is not difficult to understand that the Laval case has been heavily discussed in Sweden. The ECJ's decision hits some of the very fundamental aspects of Swedish labour law and industrial relations. But the Laval case has attracted much interest also from other countries within the EU, and also – perhaps more surprisingly – from lawyers outside the Union. Nevertheless, it is probably appropriate to give a short introduction to the case.

The dispute in the *Laval* case originated from industrial action taken 2005 by the Swedish Construction Workers' Union after they had demanded a collective agreement with the Latvian undertaking Laval, which had posted building workers to Sweden. The Swedish unions used the usual procedure in Sweden in order to try and get employers to conclude a collective agreement: The local section of the Swedish Building Workers' Union contacted Laval with a view to conclude a collective agreement, negotiations began, but the parties were unable to reach an agreement. (Instead Laval signed a collective agreement with the Latvian building sector's trade union.) In November 2004 the Swedish Building Workers' Union initiated industrial action, including a ban on all building and installation work on Laval's workplaces. In December 2004 the Electricians' Union initiated sympathy (secondary) action in support of the Building Workers' Union. In December 2004 Laval commenced proceedings before the Swedish Labour Court claiming that the Court should declare the industrial action illegal and order that the action should cease. The Labour Court dismissed Laval's application for an interim order on 22 December 2004², and decided

in March 2005³ to submit questions to the ECJ for a preliminary ruling before it could make its final decision. In its preliminary ruling the ECJ on 18 December 2007⁴ stated that Community law does not allow the kind of requirement for an agreement involved in this case in conjunction with the industrial action taken in circumstances where the Posting of Workers Directive had been implemented in the way it had in Sweden. The Swedish Posting of Workers Act had no provision regarding minimum wages, because Sweden does not have any statutory provisions on minimum rates of pay, nor any system for declaring a collective agreement to be universally applicable. The ECJ concluded that the kind of industrial action in question constituted a restriction on the freedom to perform services in this case. Industrial action with the aim of establishing a collective agreement where the conditions lie outside the "hard core" of the minimum protection contained in the Directive, or where the minimum rates of pay are not sufficiently precise and accessible, are not allowed. The industrial action in question was in breach of Article 49 EC and the freedom to provide services and Article 3 of the Posting of Workers Directive. Further, the so called "Lex Britannia" provisions, meaning that Swedish collective agreements gives priority before "foreign" collective agreements, were directly discriminatory in relation to providers of services from other Member States.

The Swedish Government's Inquiry dealing with the consequences of the Laval case⁵ suggested in December 2008 several changes to the Co-determination Act (1976:580) and the Posting of Workers Act (1999:678) which now has – with a few amendments – resulted in a Government Bill⁶ that, if it is approved by the Swedish Parliament (Riksdag) will enter into force 1 April 2010. The proposal is built on the traditional Swedish autonomous collective bargaining model instead of minimum wage legislation or extension of collective agreements, but the consequences of the proposed changes will nevertheless lead to restrictions in the autonomous collective bargaining system.

The most important of the changes suggested in the Bill is that the scope for industrial action will be diminished. It will be unlawful to use industrial action towards a foreign service provider that post workers in Sweden and who can show that the employees have at least the working conditions that lay within the minimum levels in the hard core of the Posting of Workers Act. Regarding pay clearly defined minimum rates of pay in collective agreements concluded by organizations at central level and generally applied throughout Sweden to corresponding workers within the sector will be used. It will be left to the Swedish labour market parties to determine in collective agreements in detail what is to be deemed to constitute such minimum rates of pay that should be applied for posted workers. Further, in relation to other

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¹ Swedish Labour Court judgment AD 2009 No. 89. See www.arbetsdomstolen.se.

² AD 2004 No. 111.

³ AD 2005 No. 49.

⁴ Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* and others.

⁵ SOU 2008:123.

⁶ Proposition 2009/10:48.

EEA countries the so called *Lex Britannia* provisions in the Co-determination Act will not be used. That means that it will not be possible for a Swedish trade union to legally take industrial action against an employer from the EEA-area who is bound by a collective agreement from his country of origin in order to force him to conclude a Swedish collective agreement.

The Government Bill is heavily criticized from mainly the trade unions, and is planned to be discussed in the Swedish Parliament (Riksdagen) in February 2010. The socialist parties intend to try and stop the proposal, but most probably it will be approved.

As mentioned above, the final judgment by the Swedish Labour Court (which is the last instance in labour law disputes) in December 2009 was merely about damages. Laval made claims for financial damages and punitive damages for the breach of EU law that the industrial action taken by the Swedish unions constituted. The Labour Court concluded that the trade unions could be responsible for breach of Article 49 EC, because the Article has direct horizontal effect between the trade unions and Laval. Regarding the obligation of the trade unions to pay damages in a situation like this there is no explicit legal base to be found in any Swedish statutory act or case law; even with an interpretation in conformity with the Treaty. Such an obligation has according to the Labour Court to be based on EU law, and its general principles of loyalty, solidarity, efficiency and effective enforcement. With reference to ECJ's case law concerning damages and the principle of equality the Labour Court applied the rules on economic and punitive damages in Sections 54 and 55 in the Co-determination Act. The rules about damages in the Co-determination Act are *inter alia* applicable to illegal strikes and could be applied analogously. Further, the ECJ has declared the *Britannia* provisions discriminatory, and therefore they should not be applied. Instead the main rule that it is in principle prohibited to take industrial action for the purpose of circumventing a collective agreement already in existence should apply, and the rules about damages in the Co-determination Act was thereby applicable. Regarding the claim for financial damages the Labour Court found that Laval had not succeeded in providing evidence of financial loss, and this claim could not be approved. However, the Labour Court ordered the trade unions to pay punitive damages of approximately 55,000 Euro (approx. 20,000 Euro for the Swedish Building Workers' Union, approx. 20,000 Euro for its local branch, and approx. 15,000 Euro for the Swedish Electrician's Trade Union). The trade unions were also ordered to pay the majority of Laval's costs of litigation (over 200,000 Euro).

The judgment was not unanimous. On the contrary, three (out of seven) judges presented dissenting opinions, two of them arguing that no punitive damages at all should be paid, and one arguing that the punitive damages should be reduced to two thirds of what was decided by the majority. The reason behind two of the dissenting opinions is in main that it was very difficult to ascertain the right interpretation of relevant EU law. The judge who wanted to reduce the punitive damages argues that

EU law not requires that punitive damages should be paid for breach of Article 49 EC.

The judgment has been criticized, especially from the trade union side. The trade unions have in this case followed Swedish legislation and long established practice in the labour market. The Swedish Labour Court did not find any reason in its interim decision in 2004 to order the industrial action to cease. The Advocate General was in his opinion 23 May 2007 of a rather different view than the ECJ in its decision in December the same year. It could then be argued that it was impossible to know that the actions in question not were allowed before the ECJ's decision in December 2007. The trade unions (private national subjects) followed national law, but were nonetheless liable for damages because the Swedish state have failed to implemented EU law in a correct way. It has also been questioned why the majority in the Swedish Labour Court not made use of the possibility in the Co-determination Act to reduce damages or even set damages to null when such is reasonable.

The judgment reveals the fact that it is possible to be liable to damages also in a situation where a private subject has followed clear national legislation, and this legislation later is found not to be in conformity with EU law although relevant EU law not is easily interpreted. It is doubtful if this gives satisfactory predictability in the legal system.

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Chapter 1

Introduction: Why is Coordination Necessary?

1.1. General

From its very creation in 1957, promotion of the freedom of movement of workers has been one of the European Economic Community's (EEC) pillars. Freedom of movement is seen as favourable for the economic development of the Member States as they can benefit from the effects of the optimal allocation of labour. 74

Ensuring the freedom of movement of workers across national borders requires active measures. An important part of these measures will have to be in the field of social security, since workers cannot be expected to go abroad if doing so has negative effects on their benefit rights. Without interference by international legislation, such negative effects are unavoidable since national social security legislation often makes a distinction between claimants on grounds of nationality. Only those who are nationals of the country in question may be eligible for the benefit. 44 R.M. 44

Another rule found in many national systems and disadvantageous to migrants, is that which provides that benefits are paid only to persons residing in that country. Migrants, who often go or return to foreign countries, do not receive such benefits. A third category of provisions causing problems to migrants arises where a country makes the acquisition or calculation of benefit conditional upon the completion of periods of insurance, employment or residence, where only periods completed under the legislation of that country are taken into account. In such a system, a migrant worker may not be entitled to benefit or may receive a smaller benefit than he¹ would have, had he stayed in his native country. 44 1) Cata

The effect of cross border movement on social security had already become a subject of concern by the beginning of the 20th Century, when employees' insurance schemes were first established. Such problems arose, for instance, for employees who worked in a State other than the State of residence and who claimed an occupational accidents benefit. In such a case, it was possible that an employee was insured for occupational accidents benefits in both States, or

¹ Where the pronoun 'he' or 'his' is used, the reader is asked to read, where relevant, also 'she' or 'her'.

in no State at all. Such problems had to be solved and therefore coordination provisions were inserted into bilateral trade treaties. This location of coordination provisions in trade treaties reflected the fact that such rules were seen, in particular, as necessary in order to avoid unfair competition; it was necessary to prevent a situation whereby one State had to pay for gaps in an insurance record of workers, whereas other States would not have such costs. Without such regulation, there would be a distortion of competition. It was agreed in the treaties that nationals of a State which had signed the treaty had to be given the same advantages as those applying to the nationals of the State where the advantage is required. This provision is sometimes called the 'reciprocity condition'.

In the case of national rules disadvantageous for cross border movement, international social security rules have been adopted. These rules are based on the assumption that a worker will not be prepared to go abroad if this would have negative effects on his right to benefit. To a certain extent, this assumption is of an abstract character; often workers will not be conscious of the negative effects until they are actually affected. In making their decision to go to work abroad, they will usually not consider social security differences. Coordination problems with, for instance, old age pension schemes will not be apparent until after retirement. However, this is no excuse for not removing the causes of loss of benefit rights as a result of a change of country of employment. Having heard of bad experiences, future generations are likely to take such effects into account. Moreover, it is difficult to conceive of an alternative approach to removing these impediments to the freedom of movement. Hence social security coordination rules are directed at national regulations in order to remove social security problems for migrants. In addition, employers and employees are often concerned about the level of social security contributions they have to pay if an employee has to work in another Member State. Differences in contribution levels certainly have impact on the free movement of workers.

This argument draws a direct link between the freedom of movement of workers and social security and, as a result, the protection of workers who change their country of employment is an important part of European social security. So when the EEC was founded, there was a great need for a rapid formulation of coordination rules.

1.2. The Territoriality Principle

It is a general phenomenon that a State restricts its responsibility in the area of social security to its own territory and/or its own nationals. The linking of the social security system to the territory of a State is called the territoriality principle. This principle is no legal principle, but a term which explains some phenomena. According to this principle, social security law applies only to events

which happen within the national borders of the State in question. An example of the effect of this principle is the condition that a person is entitled only to benefit if the risk materialised in the territory of that State. Another example is the condition that a person must have worked or lived for specified periods in the territory of a State in order to be entitled to benefit. A third example is the condition that benefits are paid only in the territory of the State where the right to the benefit was acquired. In other words, a relationship is made between, on the one hand, the territory of the State and, on the other hand, the group of persons, contributions, benefits and/or risks that are governed by the legislation of that State.

The territoriality principle is an impediment to the realisation of free movement of workers. When each country uses territorial criteria to define the field of application of its social security system, this leads to problems in relation to the cross border movement of workers. The criteria which States use to define the field of application of their social security systems are called the national rules of conflict. One rule of conflict is when only 'persons residing in the territory of the State' are insured. Another rule is where 'all persons employed in the territory of the State' are insured. Rules of conflict define the persons or facts to which a national legal system is confined. In social security law the following criteria related to the territoriality principle may be chosen as rules of conflict: the place where the worker works, where he resides, or where the employer has his registered office or place of business, or, for seamen, the flag under which he sails.

Rules of conflict of public law, to which social security law belongs, are of a one-sided character. This is because public law is not concerned with relationships between individuals, but with relationships between States. The logical consequence is that a national government cannot decide that its legislation is also applicable outside of its territory. Belgium, for instance, cannot decide that a person is entitled to a German passport or to German unemployment benefit. The importance of the (unilaterality of conflict of public law) is shown, for instance, in situations where rules of conflict of one State are contrary to those of another State. This may happen, because, as is mentioned above, national legal systems do not always use the same (territorial) criteria in their rules of conflict: e.g. a State may use the criterion of the residence of the worker for the applicability of its law, another State may use the criterion of the place of work, while a third State uses the criterion of the place of business of the employer.

As rules of conflict of public law have a unilateral character, a State can decide only whether or not to adopt rules on a particular subject, but cannot adopt a regulation in which the exact role of foreign and national law is set out. As a result, it is possible, for example, that a person working in a State other than the one in which he lives, will fall under two legal systems at the same time, or under none at all. For instance, State x provides that people who work in its

Rules of conflict of public (soc. sec. right) law = unilateral character
Rules of substance = multilateral character

territory are insured for old-age pensions and State y provides that residence is the decisive criterion. In the case of a person who works in State x and resides in State y, he is covered in two countries; if he resides in State x and works in State y he is insured in neither State. In other words, when a State applies criteria different from those of another State, *conflicts of law* are likely to occur.

When a migrant worker falls under the social security provisions of more than one country at the same time, this is called a *positive conflict of laws*; when a migrant falls under no system at all, this is called a *negative conflict of laws*.

These conflicts can, precisely because of the unilateral character of the national rules of conflict, only be solved by a *supranational coordination regulation*.

The effects of the territoriality principle can also be seen in *rules of substance*. Rules of substance concern the conditions and provisions of a national scheme which determine which facts lying outside the territory of a State are relevant to its own benefit rules. For instance, a national scheme may provide that periods of residence abroad are taken into account for the acquisition of a right to benefit in the host country. A provision that persons of a State which signed a *reciprocity agreement* are treated in the same way as the State's own nationals is an example of a rule of substance. Rules of substance can, unlike rules of conflict, have a multilateral character, as they can refer to facts occurring in other countries.

Differences in national rules of substance can also lead to conflict. This may be the case when a person receives benefit from country x and country y. Country x may be inclined to deduct the benefit of country y from its own benefit. But country y will also do so. These discrepancies make clear the need for a common regulation, for *coordination*.

1.3. A Definition of Coordination

In the previous section the term 'coordination' was used. Here we will give a definition of this term.

Definition: *Coordination rules* are rules of international social security law, intended to adjust social security schemes in relation to each other (as well as to those of other international regulations), for the purpose of regulating transnational questions, with the objective of protecting the social security position of migrant workers, the members of their families and similar groups of persons.

The definition mentions not only the adjustment of national social security rules, but also involves adjustment to international regulations. Coordination must pertain to the coordination of international treaties, since, for instance, in addition to the *EU coordination regulations*, the *European Interim Agreements*, *ILO*

Conventions and bilateral treaties (see Chapter 2) may contain coordination rules applicable to the same persons.

In particular, the definition of the term 'coordination' is important, where the question arises whether a particular measure is a *coordinating* or a *harmonising* one. We will discuss harmonisation in Part II.

Definition: *Harmonisation* is the sum of international provisions directed at States which have the objective or obligation that these States adjust their national law to the requirements of the harmonisation provisions.

Coordination leaves the rules of national schemes intact, which implies that the differences between the national schemes remain. It supersedes, however, those national rules, and only those, which are *disadvantageous* for migrant workers and self-employed persons. *Harmonisation* involves changes to national legislation for all employees (sometimes for all residents), not only for migrants.

An example to illustrate the difference between coordination and harmonisation: an important objective of coordination rules is to determine which national social security scheme is applicable. In addition, coordination rules have to ensure that periods abroad count to satisfy the conditions of the scheme assigned as applicable. Coordination rules *override* national provisions which are contrary to them. Despite such coordination rules, a migrant worker may have no right to a particular benefit, under the scheme assigned applicable, since he does not meet the conditions of that scheme (even if the periods fulfilled abroad are aggregated). Or, under the scheme assigned, a particular contingency may not be covered. It may be that in the State of origin this person would have been entitled to benefit or to a higher benefit; coordination does not remove such differences between States. Harmonisation would, on the contrary, have the effect of removing differences.

As regards EU law, neither the coordination regulation (see Chapter 3) nor the EC Treaty provide a definition of coordination. Nor has the Court of Justice given such a definition in any of its rulings. In several decisions the Court held that the Regulation leaves the Member States the powers to determine the type, and the content, of the provisions of their benefit schemes.² When discussing the scope of coordination, the Court even uses this concept in a negative sense: 'coordination does not preclude the powers of the Member States to determine the benefit conditions and the type of benefits, nor does it forbid differences between Member States'.³

On the other hand it should be remembered that the Court is not concerned with discussions on coordination in general, but with coordination as it is made

² For example in Case 41/84, *Pinna*, [1986] ECR I.

³ Case 22/77, *First Mura judgment*, [1977] ECR 169

possible by Article 51 EC Treaty (at present, Article 42 EC)⁴ and Regulation 1408/71. Thus, in some decisions, the Court speaks of 'the mere coordination at present practised'.⁵ Therefore, it is an open question what the approach of the Court would be if the Community legislator introduced a Treaty or regulation with a broader coordination objective.⁶

As will be discussed in Chapter 3 and the following chapters, the Court interprets Article 42 EC in the sense that coordination is aimed at promoting the free movement of workers. This interpretation gives a special meaning to the concept of coordination.

1.4. Tasks of a Coordination Regulation

Protection of social security rights of migrant workers implies that at least the following essential problems have to be solved:

1. conflicts of law have to be prevented;
2. unequal treatment on grounds of nationality must be forbidden;
3. breaks in the career of a worker resulting from cross border movement, which are disadvantageous to the fulfilment of the conditions for benefit and/or the calculation of the amount of benefit, have to be repaired;
4. territorial requirements for payment of benefit rights have to be removed.

These issues are discussed in the following sections.

1.4.1. Solving Conflicts of Law

If an employee goes to work in another State, it must be clear which social security system is applicable to him. There are, in theory, several different ways for the international legislator to determine the criteria for deciding the law applicable. The first way is to offer employers and employees a choice as to which scheme is applicable. In such a system, employers and employees are free to designate a national legal system as applicable to their situation. Under this option, it is also conceivable that parties could designate the law of a third country. Such options exist, for instance, in civil law. If such an option exists, regulations have to be made for the case where parties have not designated a particular legal system in their contract. This approach does not prevent provisions requiring that at least rules of public order of the State of work (e.g. rules on

⁴ Article 42 EC is the basis for the coordination regulation, see Chapter 3. In this book we shall use the article numbers applicable after the Treaty of Amsterdam came into force.

⁵ See Mura judgment, note 3.

⁶ In Chapter 21 we will go on to discuss the concept of coordination as practised by the Court, having discussed Regulation 1408/71 in the following chapters.

minimum wages) are always applicable, even if parties have designated the law of another State (with no minimum wage).

A system giving the possibility of opting for a particular national system seems less obvious for coordination of social security than for civil law. This is because a third party, not the employer or the employee, but the State would be responsible for the expenses of the designated social security scheme. Freedom of choice would cause problems, especially when a national system is not cost-effective and receives State subsidies.

A second system for drafting the rules for determining the law applicable could be that persons who lived or worked in two or more countries are entitled to the most favourable solution. Compared to the first approach, this system does not provide the same opportunity of choice. Instead, binding coordination rules determine the outcome. Suppose that a person worked for ten years in country x, ten years in country y, and twenty years in country z. In this system, the law of the State where forty years of work results in (for instance) the largest old age pension would be designated. However, if there were large differences between national schemes, this method would result in disproportionate benefit charges for the country with the most favourable scheme. In addition, improper use would be possible: workers would try to spend at least a short period in the most favourable country. Another problem which might arise stems from the difficulty in determining which scheme is the most favourable. What should be done when, for example, country x has the most attractive disability benefit, whereas country y has the most advantageous old age benefit system?

In comparison to the coordination treaties preceding the present EU coordination regulation, the present system marks a development in coordination. Initially, bilateral coordination conventions contained the possibility of the option between either separate application of national legislation and the application of the system of coordinated assimilation of pensions. In a later stage, multilateral treaties abandoned this option.

Currently the rules of conflict given in international conventions do not give freedom of choice and are binding. This is at present the most obvious method in relation to social security and this is the method followed in the EU Regulation on the coordination of social security.

1.4.2. Unequal Treatment on the Basis of Nationality

Equal treatment of migrant workers and nationals is fundamental for each coordination scheme. An important distinction is that between direct discrimination and indirect discrimination.

Direct discrimination means a situation where a distinction is made between persons on the basis of a forbidden criterion, e.g. nationality.

We describe a rule as *indirectly discriminating* if it, although not containing a forbidden criterion, leads to disadvantageous effects for specific categories of persons who can be defined by the forbidden criterion (such as 'migrant workers'). It is much more difficult to prove indirect discrimination than direct discrimination, because the forbidden criterion is not explicitly mentioned.

A case of indirect discrimination starts with the suspicion that a rule is indirectly discriminatory. This is the case if the rule predominantly affects a particular category, such as migrant workers. It is not relevant whether the author of the rule had the intention to discriminate against this group. An example of rules which raise the suspicion of being indirectly discriminating are residence requirements. A scheme can require, for instance, that only periods fulfilled in State x count towards satisfying the conditions for benefit payable under that scheme. Although this condition applies to both national and foreign workers, the latter group is disproportionately affected by this condition, as foreign workers are more likely to have fulfilled periods of insurance in another State.

Sometimes the suspicion of indirect discrimination has to be supported by statistical data. This does not always have to be the case, *see Commission v. Belgium*.⁷ In this case, the Belgian government stated that the Commission had not proved that the regulation in question affected a relatively higher percentage of persons with the nationality of a Member State other than Belgium. The Court answered that a provision of national law must be considered indirectly discriminating if it affects *by its nature* migrant workers more than national employees and threatens to affect the former group negatively. Consequently, statistical proof is not required. It is sufficient that it can be determined that the contested provision can have the effect of indirect discrimination.

If there is an alleged case of indirect discrimination, the person or organisation who made the rule or who applies it, has the opportunity to show grounds of justification, which must not relate to discrimination. If the person or organisation succeeds in proving such grounds, there is no indirect discrimination. This approach means that the person accused of indirect discrimination has to prove that he is innocent; this is a reversal of the burden of proof.

In general, it is difficult to say whether a particular provision can serve as an objective ground of justification. *See*, for the case law, Section 10.3 and, for indirect discrimination on the basis of sex, Chapter 25.

1.4.3. Territorial Requirements for Acquiring Benefit Rights

Some national schemes provide that a person is entitled to benefit only if he or his family members live in that State. This is a clear elaboration of the territorial

⁷ Case 278/94, [1996] ECR I-4307.

principle. Another example is where a scheme makes the receipt of an industrial accident benefit conditional on the fact that the accident happened on the territory of that State. The right to certain types of benefits is often subject to the condition that the person in question completed periods of residence, periods of contributions or periods of work. When periods completed in other Member States do not count for the fulfilment of such conditions, cross border movement leads to serious problems. Without further rules, it may be the case that a worker does not satisfy such conditions and will not receive benefit.

It may also happen that, although an employee succeeds in satisfying the benefit conditions, the periods completed in a foreign country do not count in the calculation of the amount of benefit. This worker receives a lower benefit than he would if these periods were aggregated. Therefore, an important objective of coordination is to ensure that migrant workers who have been insured in more than one State, do not suffer the disadvantages caused by breaks in their career as a result of cross border movement. It is important that the periods completed in a foreign country and those completed under the regulation of the State where benefit is applied for, are aggregated.

This requirement does not mean that all periods of insurance of migrants must be assimilated. It requires, however, the possibility of aggregating these periods. Aggregation needs coordination and hence rules for assimilation have to be given. This is because national schemes vary to a large extent. There are, for instance, systems in which the right to benefit is conditional on the periods in which contributions were paid; other systems require periods of residence. Other systems do not have requirements on periods of residence or work, but only demand that a person resides on the territory of the State in question at the moment the risk occurs for the first time. Aggregation of periods completed under such different types is not a *sine cure* and neither is it clear at first sight how such aggregation is to be effected: how can periods completed abroad be 'translated' into those periods required by the schemes of another State? Coordination regulations have to solve these problems.

1.4.4. Territorial Requirements for Payment of Benefit

Some national regulations require that a person who applies for benefit (or the person on behalf of whom the claim is made) resides in that country. This is, of course, a problem for the free movement of workers, as a worker who has acquired a right to benefit will be disinclined to go abroad. Therefore, a coordination regulation must make it possible for migrant workers to receive the benefits they are entitled to, regardless of the fact that they no longer reside in the territory of the country which is due to pay these benefits. Often workers will return to their State of origin in case of serious disablement or retirement.

✓ In these cases, the principle of equal treatment does not require the payment of benefits under all circumstances, as the scheme in question may provide the same for its own nationals. Hence, a separate principle of coordination is to be invoked which requires that territorial requirements, with regard to payment of benefit, are removed. This is an essential coordination principle.

Chapter 2

A Brief Overview of Non-EU Coordination Instruments

2.1. Treaties of the International Labour Organisation

Aside from the EU coordination regulation, there are other supranational coordination schemes. These are discussed in this chapter.

An organisation which has made a global coordination scheme is the International Labour Organisation (ILO). Among other things, the ILO, which was created after the First World War, is responsible for preparing and adopting treaties and recommendations as well as supervising the observance of existing international labour standards. Besides representatives of the governments of Member States, representatives from employers' organisations and trade unions sit on every board. The creation of this organisation brought about an institutional framework which has the powers and the authority to draw up coordination and harmonisation treaties.¹

A limited number of ILO Treaties are specifically devoted to the coordination of the social security schemes of signatory States. Furthermore, a number of ILO Conventions contain coordination rules alongside other provisions. Coordination under the ILO progresses with difficulty and, as a result, it is still in a rudimentary stage. The reason is that world-wide conventions with extensive coordination rules run the risk of being ratified by only a small number of countries. Hence it is natural that the Convention holding the largest number of ratifications (Convention 118) contains only one rule, prohibiting discrimination ✓ on the ground of nationality.

ILO Convention 48 is specifically devoted to coordination. This Convention ✓ provides extensive rules for the maintenance of rights in the course of acquisition

¹ For a historical overview of the ILO, see G. Tamburi, 'L'Organisation internationale du Travail et l'évolution des assurances sociales dans le monde', in: P. Köhler en H. Zacher, *Beiträge zu Geschichte und aktueller Situation der Sozialversicherung*, Berlin 1983, p. 647; and G. Perrin, 'De aktie van de internationale arbeidsorganisatie ten gunste van de coördineren en van de harmonisering van de wetgevingen betreffende de sociale zekerheid', *BTSZ* 1969, p. 1165-1253. For the texts of ILO Treaties relevant to social security, see F. Pennings, 'Codex', in: R. Blanpain (ed.), *International Encyclopedia of Laws, Social Security Law* (looseleaf). The texts on the web site of the ILO, see <http://ilolex.ilo.ch:1567/public/english/50normes/infleg/iloeng/index.htm>.

and acquired rights under invalidity, old-age and widows' and orphans' insurance schemes.² This Convention has a limited significance, however, as it has been ratified by only a small number of States.³ Generally, the Convention was considered to be too detailed and too inflexible. Therefore, negotiations were opened for a new Convention, Convention 157, which is eventually to replace Convention 48.⁴

Now that the EU coordination rules have gained in importance (being binding on all Member States and some associated States), the ILO coordination rules have faded to the background. Yet, the ILO was able to offer considerable technical support in drawing up EU coordination rules.⁵

2.2. Conventions of the Council of Europe

While the First World War led to the foundation of the ILO, the Second World War resulted in the *Congress of Europe*, organised in The Hague in May 1948. During this Congress, propositions were made for a Unified Europe with freedom of movement of persons, of opinions and of goods, as well as a Human Rights Convention and a Court of Justice for Human Rights. This resulted in the Statute of the Council of Europe, which was signed on 5 May 1949. Currently, all West European States and some Central and East European States are members of this organisation. The aim of the Council of Europe, as laid down in its Statute, is to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which form their 'common heritage' and of facilitating their economic and social progress. This also includes social justice and the promotion of the freedom of movement of workers.⁶

From an institutional point of view, the Council of Europe is not strong. The Council of Europe is an organisation of a purely intergovernmental character, based on voluntary co-operation between States unwilling to give up their sovereign power.⁷ These characteristics of the Council of Europe place it in a

position somewhere between the EU and the ILO and its importance with respect to international social policy initiatives has decreased in the past decades.

The current low-key position in the field of social security contrasts with the early days of the Council of Europe. During this stage, the Council started with great élan to prepare conventions to promote social progress. These activities fitted in well with the above mentioned general objectives of the Council; these objectives implied the task and objective of coordination and harmonisation of social security law of the Member States. In order to encourage the freedom of movement of workers, two Interim Agreements on social security were signed in 1953.⁸ These agreements were meant to be a temporary provision for the period until the European Convention on Social Security of the Council of Europe had been signed and ratified by the Member States. The latter Convention was signed in 1972.⁹ This Convention was aimed at the multilateral coordination of the social security systems of the Member States. Due to the small number of ratifications of this Convention, however, this objective was not achieved.¹⁰

In addition to the Interim Agreements, the European Convention on Social and Medical Assistance was signed in Paris on 11 December 1953. This is the only multilateral Convention on public assistance and this Convention received many ratifications, viz. sixteen Member States of the Council of Europe. It has taken over the role of the earlier bilateral treaties on public assistance.

Article 1 of this Convention provides that the contracting parties undertake to ensure that nationals of the other signatory States who are lawfully resident in the territory of one of the States, and who are without sufficient resources, are entitled like the own nationals to social and medical assistance, and on the same conditions as those provided by the legislation in force in that part of the territory. The Convention provides that the costs of assistance to a national of a contracting party are borne by the State that has granted the assistance.¹¹ It can be seen that this Convention does not require States to refund the costs to the State where the benefit has been granted to their nationals, as is the case in

² Convention of 22 June 1935.

³ After cancellation by the Netherlands, Hungary, Spain, Poland and Czechoslovakia, this Treaty only holds for Israel, Italy and successor States of Yugoslavia.

⁴ Convention of 23 June 1982. It has so far been ratified by Spain, Sweden and the Philippines.

⁵ See G. Perrin, 'De aktie van de internationale arbeidsorganisatie ten gunste van de coördinering en van de harmonisering van de wetgevingen betreffende de sociale zekerheid', *BTSZ* 1969, p. 1165-1253.

⁶ For the case law of the court, see <http://www.echr.coe.int> and for the web site of the Council of Europe, <http://www.coe.fr/index.asp>.

⁷ See, for the Council of Europe, H. Wiebringhaus, 'Die Sozialversicherung im Rahmen der Funktionen, der Möglichkeiten und der sozialpolitischen Vorhaben des Europarats', in: Köhler en Zacher 1983, p. 507. The Council of Europe also established the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is relevant to social security (as Article 6 requires due process, which is relevant to social security adjudication).

⁸ European Interim Agreement on social security schemes relating to old age, invalidity and survivors; European Interim Agreement on social security other than schemes for old age, invalidity and survivors; signed at Paris, 11 December 1953.

⁹ Convention on Social Security of 14 December 1972.

¹⁰ See, for the coordination rules of this Convention, H. Urbanetz, 'Modaliteiten voor het behoud van de rechten en de berekening van de prestaties in het Europees Verdrag inzake sociale zekerheid en andere samenorderingsinstrumenten', *BTSZ* 1991, p. 359.

¹¹ See Article 4 of this Convention.

some other bilateral agreements. The second basic principle of this Convention is that a national of a signatory State who is lawfully resident in the territory of another signatory State, shall not be repatriated on the sole ground that he is in need of assistance.¹² In Chapter 22 we shall discuss some of the harmonisation instruments of the Council of Europe.

¹² Article 6 of the Convention. More extensively on this Convention, G. Vonk, *De coördinatie van bestaansminimumuitkeringen in de Europese Gemeenschap*, Deventer 1991.

Chapter 3

The European Union and the European Economic Area

3.1. General

Currently, the European Union is of the most direct importance to the coordination and harmonisation of social security in Europe. Primarily, the EC, the predecessor of the EU, was designed for economic purposes, but, from the very beginning, social justice was indirectly one of its objectives. An important aspect of European integration is the promotion of economic and social progress and the continuous improvement of living and working conditions. This is expressed in Article 2 EC.

3.2. Some institutional aspects of the EU

Since this book is mainly concerned with EU regulations, it is useful to mention some important institutional aspects of the EU.

The EC Treaty mentions, among other things, the powers of the bodies mentioned in the Treaty. We could call this the 'Constitution' of the EC. This Treaty was signed in 1957. The signing parties were Germany, Belgium, France, Italy, Luxembourg and the Netherlands. On 1 January 1973, the United Kingdom, Denmark and Ireland joined the Community. On 1 January 1981, Greece became a Member State; on 1 January 1986, Portugal and Spain did so; and on 1 January 1995, Austria, Finland and Sweden joined.¹

In the decision-making structure of the EU, as recorded in this Treaty, national governments play an important role. This is because legislative power is given not to the European Parliament, but rather to the Council of Ministers, which consists of government representatives.² Furthermore, the Council can only make decisions on the initiative of the European Commission. Since the

¹ For an interesting discussion of the problems with the accession of these States, see Y. Jorens and B. Schulte (eds), *Coordination of Social Security Schemes in connection with the accession of Central and Eastern European States - "The Riga Conference"*, Brussels 1999, p. 83 ff.

² Article 203 EC.