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GUIDE TO EUROPEAN LABOUR LAW

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LIST OF ABBREVIATIONS

CFREU	Charter of Fundamental Rights of the EU
CJEU	Court of Justice of the EU
CoE	Council of Europe
EEC	European Economic Community
EED	Equality in Employment Directive
ECB	European Central Bank
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECS	European Cooperative Society
ECSR	European Committee on Social Rights
EEC	European Economic Community
EGAF	European Globalisation and Adaptation Fund
EP	European Parliament
ESC	European Social Charter
ESF	European Social Fund
EU	European Union
EWC	European Works Council
MS	Member State
OMC	Open Method of Coordination
PWD	Posted Workers Directive
RED	Race Equality Directive
SE	Societas Europea
SED	Sex Equality Directive
SME	Small and medium enterprises
SNB	Special Negotiating Body
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the EU

1 CONSTITUTIONAL INTRODUCTION

1.1. Two Europes

The Continent of Europe actually embraces two kinds of "umbrella" organisations: the COUNCIL OF EUROPE (CoE), with headquarters in Strasbourg and the EUROPEAN UNION (EU) (formerly European [Economic] Community) with headquarters in Brussels, Luxembourg and Strasbourg.

There are noticeable differences between these two organisations, in:

	CoE	EU
Membership	ca. 50 MS	27 MS
Ambitions	limited	many
Competences	few	large
Institutional strength	low	high

1.2. History of European labour law

The Council of Europe had little ambitions in the field of labour law. The main exceptions we will encounter are in the Chapters of this book about Fundamental Rights and Free movement.

Initially also the EEC did not have many ambitions in the field of labour law. During the first 15 years of the EEC almost the only rules adopted in the field of labour law were in EU Regulations on the item of Free movement of Workers.

In the years 1970-2000 the call for more European Labour Law became increasingly louder. It led to social policy agenda's of the European Commission, working Programs of European Social Partners and the first two dozens of social legislation.

From 2000 the call for less European Labour Law has been growing in action for "Better Law Making", the "Fitness checks", the Refit-program, the "Cutting Red Tape" campaign and the policy of a "Return of competences to Member States". It is only since about 2015 that there has been a turn towards to more European Labour Law, especially after the publication of the European Social Pillar.(see chapter 1.9)

Nevertheless, a book about the essentials of European Labour Law can be as thin as one quarter of a book about German, Polish or Italian Labour Law. The employment relations in Europe still have mostly a national dimension and politicians and social partners therefore prefer them to regulate on a national scale. Moreover, the legal basis and decision-making procedures for creating EU labour law are not very favourable.

1.3. The legal basis for EU Labour Law

The European Union can only issue legislation when there is a proper legal basis for it in the EU Treaties. Between 1957 and 1991 the EEC Treaty lacked a clear and comprehensive basis for issuing labour and social security law legislation. This has been remedied in 1991 and 1997 by changes in the EU Treaties which have provided such a basis, which is now laid down in Art. 153 (1) TFEU.

However, this comprehensive basis is in the subsequent paragraphs of this article clothed in reservations about the interest of SME's (Art. 153 (2b) TFEU), an emphasis on non-harmonisation (Art. 153 (2a TFEU) and financial equilibrium (Art. 153 (4), the minimum character (Art. 153 2b and 153 (4) TFEU) and a few important exceptions in art. 153(5) TFEU.

Moreover, there is the general reservation of the principle of Subsidiarity (Art. 5 (3) TEU and Protocol 2).

Until recently the EU institutions have not felt embarrassed by these reservations to issue new social measures, but notably the exception of Art. 153(5) may become a serious hurdle in the actual ambition to adopt a directive on minimum wages (see par. 6.8). This has raised the question whether there are more competences in the EU Treaties that can be used to circumvent the reservations of Art. 153 TFEU, such as Arts. 115 TFEU (harmonisation) and 352 TFEU (residual competences).[1]

1.4. Decision-making procedures

Until ca. 1986 all legislative power in the EEC was concentrated in the Council of Ministers, which could only act with unanimity. The European Parliament had only an advisory capacity. Since 1986 (Single European Act) this has changed step by step by more decision-making by qualified majority (= ca. 21/22 of the 27 EU countries) in the Council of Ministers and by more influence of the European Parliament. As far as labour

1. See Monti II proposal on strike law (COM (2011) EMPL/093.

legislation is concerned the provision, Art. 153 (2) TFEU, divides the social area into two segments:

- Items about which it can be decided jointly by the European Parliament (with simple majority) and the Council of Ministers (acting with qualified majority), and
- Items to be decided by the Council of Ministers with unanimity, in which the European Parliament still has only an advisory role.

There is a provision, the so-called passerelle clause (Art. 153 (2, last line TFEU), which allows the transfer of the latter items to the former category, but this clause has not yet been activated.

A problem with all the items mentioned in art. 153 TFEU, is that they are not well defined, which can lead to Court Cases (See UK vs Council, 1996).[2]

1.5. Labour law decision-making based on specific competences and decision procedures

Since the oldest EEC Treaty a number of social measures could be founded on specific competences and decision-making procedures. Actually, they are on:

- Free movement (Art. 46 TFEU): EP + Council with qualified majority
- Company Law (Art. 50(2)(g) TFEU: EP + Council with qualified majority
- Social security (Art. 153 (1) and 21 (3) TFEU): Council with unanimity
- Social security (Art. 48 TFEU): EP + Council with qualified majority but with an "emergency brake"
- Social security (Art. 79(2) TFEU): EP + Council with qualified majority but with an emergency brake 'light"
- Social Fund (Art. 164/177 TFEU): EP + Council with qualified majority, but within overall budget indirectly based on unanimity
- Transport (Art. 95 TFEU): Council with unanimity
- Equality m/f (Art. 157 TFEU): EP + Council with qualified majority.

2. CJEU, 12.11.1996, C-84/94 (UK vs. Commission).

1.6. Preparing and enforcing EU Labour Law

EU legislation takes place on proposals of the European Commission, which plays a strong role in the process of preparation and negotiation and afterwards monitoring the implementation of the EU rules by the Member States.

One of its instruments is the competence of the Commission to bring infraction procedures against the Member States to the Court of Justice of the EU.

The institution of the Court of Justice of the EU (CJEU, in the past called ECJ) - either the Court itself or the General Court or specialised courts (art. 19 TEU) - guarantees the legality and superiority of EU labour law. It does so notably by:

- Review procedures (Art. 263-264 TFEU)[3]
- Infraction procedures (Art. 258-259 TFEU)
- Preliminary rulings procedures (Art. 267 TFEU)

1.7. Legal shape of EU law

EU Labour law is mainly given the shape of Regulations or Directives (Art.288 TFEU). Other instruments are Decisions, Recommendations, as well as Guidelines (art. 148 TFEU). Since the years 2010-2012 we must not neglect that European Institutions may also influence labour law of debtor MS by way of financial crisis interventions.

Regulations are the strongest form of EU legislation, as they are directly binding (= binding even without help of national provisions of the Member States) and in their horizontal effect (binding between private parties like employers and employees).

In Labour law, however, mostly the EU measures have the form of Directives. This form leaves the Member States more liberty in implementation; they may even be implemented by collective agreements (Art. 153(3) TFEU). However, they have the disadvantage that their direct binding force and horizontal effect often is not ensured. However, this disadvantage may sometimes be remedied by a number of doctrines, such as the general principle that national courts must apply national law in loyalty to EU law and the possibility of reparation of damages against the State (Francovich

3. See e.g. CJEU, 8.12.2020, C-628/18 (Poland and Hungary).

doctrine).[4] Moreover, there are now several cases, especially discrimination cases[5], in which the CJEU has put aside these general weaknesses of Directives.[6]

1.8. The role of the social partners

For a long time (1957-1958) the organisations of employers and trade unions, often called "'management and labour", had only a weak advisory role in EU legislation, via the Economic and Social Committee. To compensate this during 1986 and 1993 a so-called informal Social Dialogue was organized by the then President of the European Commission, Jacques Delors. Since 1991 this is formalized in specific Treaty provisions, actually Art. 152,154 and 155 TFEU.

These articles provide in the first place that the social partners must be informed and consulted by the European Commission in two rounds about every legislative initiative it intends to take in the social field.

During these rounds the social partners may indicate that they want to negotiate on the item among themselves. The Commission shall in that case postpone its activities. If the social partners wish to negotiate, they can conclude agreements on the issue.

Those agreements can be confirmed either by a Council decision (the half-autonomous road) or by national social partners procedures (the autonomous road) (art. 155 (2) TFEU)[7].

Until now this possibility of Euro-agreements has only been used a few times. Normally employers are not prepared to conclude such agreements and the trade unions are lacking the muscle to force them to the conclusion of such agreements. At European level they apparently cannot develop their traditional pressure means such as strikes or the support of the legislator ("bargaining in the shadow of the law").

Traditionally considered as representative at cross-sector EU level on the trade union side is the ETUC and Eurocadres/CEC. On employers' side they are BusinessEurope (formerly UNICE), UEAPME and CEEP.

4. CJEU, 19.11.1991, C-6/90 and 9/90 (Francovich and Bonifaci).
5. CJEU 19.04.2016, C-441/14 (DI); CJEU, 17.04.2018, C-414/16 (Egenberger).
6. See also CJEU, 15.01.2014, C-176/12 (Association).
7. Recently has emerged a row on the role of the European Commission in this procedure; first in the Hairdressers' case (not brought to court) and then in the EPSU-case, see CJEU 2 September 1921, C-298/19.

1.9. Prospects

In October 2017 the institutions of the EU Council, Commission and EU Parliament proclaimed an agreement about a document called European Pillar on Social Rights[8]. It contains 20 key principles and rights to support fair and well-functioning labour markets and welfare systems. This Social Pillar is not a legally binding document but "a political commitment", a kind of an action program. Also the actual European Commission feels bound to this political commitment[9]. Since its adoption in 2017 already a handful of items in this Social Pillar have been implemented by the adoption of EU Directives and Recommendations (see for instance in paragraphs 6.2., 6.7. and 4.3). Other items are actually in the pipeline (see paragraphs 6.8 and 7.3.)

8. Text in OJ C 428/10 of 13.12.2017.

9. See the European Pillar of Social Rights Action Program, March 2021.

2 FUNDAMENTAL RIGHTS

2.1. European Convention on Human Rights and Fundamental Freedoms

The first European document on fundamental rights is the European Convention for the Protection of Human rights and Fundamental Freedoms of the Council of Europe.

Until now it is also the main protection for human rights in Europe because:

- Its wide scope (all CoE MS = ca. 50 countries)
- Forceful supervising mechanism (ECtHR)
- All EU MS recognise the ECtHR supreme authority
- All EU MS recognise the right of individual complaint

The ECtHR:

- judges whether there is a violation of the Convention
- may award financial compensation to injured party.

The ECtHR can only be seized:

- if the alleged violation has been committed by a public authority (however see the expedient used to bring employment cases between private parties: to accuse the State of responsibility for violation!)
- if the applicant has exhausted all domestic remedies.

Unfortunately the ECtHR is now flooded with cases: in 2010 150.000 were waiting judgement. The CoE has taken measures according to the Brighton Agreement, 2012: Protocols 15 and 16. Actually the waiting list is 65.000 cases.

The ECHR contains primarily civil/political rights, not the social rights (for those the European Social Charter has been made). Nevertheless, it has relevance for labour law.

2 provisions especially have a labour law flavour:

Art. 4 – the prohibition of slavery and forced labour

Art. 11 – the freedom of trade union association

Several provisions have collateral interest for labour law:

Art. 6 – the right on a fair trial

Art. 8 – the right to privacy and family life

Art. 9 – Religious freedom

Art. 10 - Freedom of expression

Protocol 1 – Right to property

Art. 14 + Protocol 12 – Non discrimination

Prohibition of slavery and forced labour (Art. 4)

This right is not particularly actual as slavery had disappeared from Europe (1945) and some current phenomena of forced labour are excluded in Art. 4(3), e.g. prisoners, military, civil obligations.

Therefore, there are not much chances for complaints (see van der Mussele case, 1983).[1] New complaints are pending about sanctions against unemployed receivers of social security benefits refusing to accept "suitable" work and about Prostitution.

Freedom of trade union association (Art. 11)

In the narrow sense of this concept:

There are decades of ECtHR case law about questions like:

- Are employers' organisations covered? And organisations of independent persons? And works councils?
- May trade unions refuse the entrance of certain members?
- May trade union membership be prohibited incidentally?
- May a trade union be refused legal personality?
- How far are workers protected against anti-trade union behaviour of the employer?
    - In all these cases the line of the case law is: a wide interpretation of the positive rights of the workers; exceptions are strictly construed.
    - However, in cases in which claimants advocated a broad concept of the freedom of association, the ECtHR was more cautious to proceed in that direction.

In the broader sense of the concept:

This is about questions like:

a) Is there a right not to be member of a trade union?
The ECtHR step by step has recognised this right.[2]

1. ECtHR, 23.11.1983, Aff. 8919/80 (Van der Mussele).
2. ECtHR, 11.01.2006, Aff. 52562/99 and 52620/99 (Sorensen and Rasmussen).

b) Does Art. 11 ECHR include the right to collective bargaining and the right to strike? This was rejected by the ECtHR in its 1970s case law and only recognised by this Court in case law since 2008/2009.

- Demir case[3] (right to collective bargaining)
- Enerji case[4] (right to strike)

In its subsequent case law at this point the ECtHR allows a wide margin of appreciation to the national authorities in Western Europe[5].

Fair Trial (Art. 6)

Various aspects of this right are confirmed in a number of cases that have significance for litigation on labour law and social security law matters.

Privacy and Family Life (Art. 8)

This right has already been applied in cases about employment discrimination of homosexuals, a ban on applications for public sector and various private sector posts, on the collection and storage of personal information in the employment relationship through the use of telephone, e-mail and internet, etc.[6]

Religious freedom (Art. 9)

This right has already been applied in cases about the right to take leave on an Islamic holiday, on the right of workers to wear religious symbols at work (Eweida case[7]), the right to refuse certain activities conflicting with the worker's religion, and on dismissals of apostate employees in religious based organisations.

Freedom of expression (Art. 10)

This right has already been applied in a case on the dismissal of unionised workers on account of a vulgar cartoon in their trade union publication (case Palomo Sanchez).[8]

In all these cases on Art. 8/9/10 ECHR, the ECtHR used as an important line of deciding to balance the interest of the worker on the respect of his human right against the

3. ECtHR, 12.11.2008, Aff. 34503/97 (Demir & Baycara).
4. ECtHR 21.04.2009, Aff. 6895/01 (Enerji).
5. See ECtHR 8 April 2014, Aff. N. 31045/10 (NURMT); ECtHR 15 May 2018, Aff. N. 2451/16 (Association of Academics); ECtHR 10 June 2021, Aff. N. 45487/17 (Holship).
6. ECtHR 5.9.2017, Aff. 61496/08 (Barbulescu).
7. ECtHR 15.01.2013, Aff. 48420/10 (Eweida).
8. ECtHR 12.09.2011, Aff. 28955/06 (Palomo Sanchez).

other interest of society and third parties and of the employer concerned on the proper carrying on a business.

Right to property (First protocol)

The Court step by step has recognised various social security benefits as being covered by this protection of property rights. In some countries this is highly actual now that their governments plan to reduce the rights of (future) pensioners.[9]

Non discrimination (Art. 14 + 12th Protocol)

- In principle this right has only a limited relevance, prohibiting only discriminations with regard to the "enjoyment of the rights and freedoms set forth in the ECHR".
- Now there is the 12th Protocol providing that no one shall be discriminated against by any public authority on any ground of sex, race, colour, language, religion etc.

Until now this right is still of little relevance as the CoE MS are slow to ratify this Protocol[10].

Many of these developments have been made possible by the philosophy of the ECtHR to apply the ECHR as a "living instrument" and by the methodology of the ECtHR to take into account for the interpretation of the ECHR other international standards and opinions of other supervisory bodies (see this in the Demir case).

All these developments are often applauded by human rights adepts, but they have also often angered other lawyers and certain political and social forces. This has often caused debate about the role that the ECtHR should play, notably in the UK (which is still bound to the ECHR because Brexit is about abolishing EU membership, not CoE Membership).

2.2. European Social Charter (ESC)

This document was designed in 1961 as a counterpart of the ECHR (comprising notably civil and political rights) to comprise the fundamental social rights. Ratification was slow, but now almost all ca. 50 MS of the CoE have ratified. Between 1961 and 1996 the ESC was a few times upgraded via Protocols.

9. ECtHR, 12.10.2004, Aff. 60669/00 (Asmudsson).
10. First labour law case: ECtHR 4 February.2021 Aff. N. 54711/15 (Jurcik v. Croatia).

In 1996 a Revised European Social Charter was issued, now ratified by ca. 30 CoE MS, among them all EU MS.

The adoption of the Revised Charter did not immediately obliterate the 1961 Charter. This Charter remains binding on all aspects on which MS have not ratified the comparable provisions of the Revised Charter.

Charter and Revised Charter are characterised by a dual structure.

In Part I the fundamental social rights are mentioned in rather inaccurate one-liners.

In Part II these one-liners are stated more precisely in a number of obligations to be undertaken by the ratifying States.

However, there is no obligation to ratify in its totality both the Charter and the Revised Charter. A selective ratification is allowed.

States ("the Contracting Parties") are binding themselves, but – in the eyes of most lawyers – **the Charter does not create rights, which the citizens can invoke in court**.

Indeed, in almost no MS courts have recognised the binding force of the Charter that citizens may invoke. Interesting exception: The Supreme Court of The Netherlands recognised direct applicability (also horizontally) of Art. 6 (4) ESC (right to strike).

Moreover, **there is no international court to supervise the application of the Charter**. As a result, the ESC has remained a somewhat obscure instrument.

Of course, there is a supervisory mechanism, even an elaborate one:

- The European Committee on Social Rights (ECSR, formally called Committee of Independent Experts)
- The Governmental Committee (national top civil servants)
- The Committee of Ministers of the Council of Europe.

Supervision is practised via two-yearly reporting cycles.

The Contents of the Charter.

The 1961 Charter enumerates 19 fundamental social rights The First Protocol of 1988 added 4 more rights. The Revised Charter took over these 23 rights and added 7 more rights.

Most aspects of modern labour are covered by all these rights:

Fair conditions of work, trade union rights, rights of special groups (women/children), non-discrimination, rights of information and consultation, social security, even housing!

One may read the interpretation of all these rights in the two-yearly reports of the ECSR, published on the web-site of the CoE.

Let us, by way of example, pay attention to the right to strike, contained in Art. 6(4) ESR.

According to ECSR this right should also apply to civil servants, safe special categories. However, Germany is persistently refusing to apply this right to about half of its civil servants. On the other hand: The Netherlands courts adapted their case law in matters of strike after criticism of the ECSR.

According to ECSR the right to strike should not be balanced against other rights by means of the principle of proportionality. However, as we shall see, in the EU the CJEU is doing just that (Viking[11] and Laval[12] cases). Thus, the influence of the ECSR is still very limited.

However, this influence has been a bit more increased since the introduction of **the procedure to file collective complaints**. This procedure is only open to the organisations of workers (trade unions) and employers in the various Member States. Since the year 2000 notably trade unions are using this procedure an average of circa 7 times a year.

Let us by way of example look to one of those cases.

A very interesting one is the complaint of a Greek trade union against the austerity measures of the Greek government in the years 2011-2015.[13] The forceful ruling in this case may be compared with the weak ruling of the CJEU in a Portuguese case (see next paragraph).

The ECSR has been given the central role in judging these collective complaints. It handles those cases in two rounds: In the first round it gives a decision on the admissibility of the complaining party and the complaint.

In the second round the ECSR gives a decision on the merits of the complaint. Having done that the decision on the merits goes to the Council of Ministers, which adopts a Resolution on the complaint and the judgment of the ECSR. In this Resolution the Council of Ministers usually decides to publish the case reports and gives its opinion on the judgment of the ECSR which it normally does in very soft language (e.g. asking the Member State to pay attention to the conclusions of the ECSR or "to bring the situation into conformity with the Charter".

11. CJEU, 11.12.2007, C-438/05 (Viking).

12. CJEU, 18.12.2007, C-341/05 (Laval).

13. ECSR, Complaint no. 111/2014.

So, in the end all this is still very much soft law. Nobody is bound to these conclusions. However, it may have a political impact and it gives lawyers the chance to obtain a more precise look on the interpretation of the various provisions of the ESH by the ECSR.

In conclusion:

All this quasi case law of the ECSR and the few resolutions and recommendations of the Committee of Ministers are without binding force. Member States may disregard them. Citizens cannot rely on them in court. However, the protagonists of human rights hope that all this quasi case law will inspire the Court of Justice of the EU and the European Court for Human Rights in their interpretation of the contents of fundamental social rights in the EU laws and the ECHR. That is their relevance.

2.3. Charter of Fundamental Rights of the EU

Initially there was no ambition to protect fundamental rights in the EEC. Thus, the Treaty of Rome did not mention fundamental rights, although later lawyers recognised in some treaty provisions the idea of fundamental rights. For instance, Arts. 7 and 48 EEC (no discrimination on grounds of nationality) and Art. 119 EEC (equal pay).

This lack of protection became problematic in the 1970s, after the CJEU had ruled that EEC law was the supreme law in all EU MS. What if EEC law would conflict with fundamental rights as recognised in constitutions of the MS? A dubious verdict of the CJEU (Internationale Handelsgesellschaft case)[14] and critical rulings by the Constitutional Courts of Italy and Germany, led to a 1977 Joint Declaration of Council of Ministers, European Parliament and Commission embracing Fundamental rights.

In addition, two types of actions were envisaged, but not realised in those years: writing an own EEC Bill of Rights and/or accession by the EEC to the ECHR.

A Community Charter of Fundamental Social Rights for Workers was adopted on a Meeting of the EEC Heads of State and Governments by all members but not by UK Prime Minister Thatcher. So, its legal status has never been clarified. Still the Commission used it as a kind of a social action programme to propose various Directives, many of them have been adopted during the 1990s.

The 1997 Amsterdam Treaty brought a provision (Art. 6 TEU) recognising as general principles of EC/EU law: the ECHR and the constitutional traditions common to the MS.

14. CJEU, 17.12.1970, C-11/70 (Internationale Handelsgesellschaft).

In 2000 a Convention was held to draft the Charter of Fundamental Rights of the EU (CFREU). It was immediately and unanimously adopted on the European Council of Nice, but what was the legal status of this often-called "Charter of Nice"?

In 2002-2005 another Convention was held to prepare a Constitutional Treaty for the EU. Art. 6 TEU was to be maintained and extended with the promise that EU shall accede to the ECHR; the EU Charter of Fundamental Rights (CFREU) was to be inserted in extenso as Part II of the Constitution. In 2006, however, this Constitutional Treaty was rejected. **In 2009, finally, in the Treaty of Lisbon was adopted to change the existing EU Treaties. The Charter was not inserted in extenso in these Treaties. It was sort of "attached" to the Treaties in which it was pronounced, that the CFREU "shall have the same legal value as the Treaties" (Art. 6 TEU).**

The CFREU embraces both civil/political rights and social/economic/cultural rights. Social rights are notably visible in art. 12/15/21-36 CFREU. Protagonists of human rights pin high hopes on this CFREU which has now a binding character.

There are however 2 shadow sides:

- In many respects the Charter shows more modest texts than comparable rights in other charters;
- **The CFREU relates to EU law (and to its implementation in the Member States), but not to mere domestic law, it has no horizontal effects and should be narrowly construed (art. 51/52 CFREU).**

Until now the CJEU in a number of cases in which Member State legislation implementing EU law was tested in relation to the Charter, has already given its first interpretations of the text of the CFREU and used this Charter as an extra foundation for its decisions, which are also based on other arguments.

It was disappointing that the CFREU and CJEU did not play a role in the Financial crisis 2010-2013, during which the so-called Troika (the IMF, the ECB and European Commission) or the ECB alone were pressing governments of debtor states to an increase of the pensionable age and reductions in social security benefits and pensions, flexibilization of the labour market rules, wage freezes, subsidy cuts, higher taxes, etc. Governments curbed strikes opposing this. The CJEU refused to take a position in this conflict.[15]

Negotiations with the CoE on the accession of the EU to ECHR have started, but in 2014 the CJEU rejected the draft agreement on this point. Ultimately for this accession a treaty will be necessary which must be endorsed by all ca. 50 CoE MS.

15. CJEU, 7.03.2013, C-128/12 (Sindicato dos Bancarios).

The main questions in this accession debate are: Which court will be the principal one, the ECtHR or the CJEU? How to avoid diverging judgments of the CJEU and the ECtHR on the comparable fundamental rights?

Is there much chance of diverging judgments of the CJEU and the ECtHR? Let us by way of example look to three comparable judgments in cases of wearing religious symbols on the clothing during employment, the Eweida case[16] of the ECtHR, the Samira Achbita case[17] and the WABE and Müller case[18] of the CJEU. Do you think these judgments are fully in harmony which each other?

The main chance for diverging judgments seem to be in the conflict between fundamental social rights and the economic rights of the market.

2.4. Social Rights versus Laws of the Market

The more the EU has given a prominent place to the fundamental social rights, the more the tension between these rights and the laws of the market came to the fore.

1970s – Herz case - clash between the right to strike and the free movement of workers

1990s – French case – clash between the right to strike and the free movement of goods – Monti-Regulation

1999 – Dutch clash: free collective bargaining versus the EU competition law – Albany case.[19] Solution: social rights in collective agreements are immune for EU competition law.

2006 – clash: free provision of services versus labour laws – Services Directive (Bolkestein). Solution: in the Services Directive exceptions have been made for labour law.

16. ECtHR 15.01.2013, App. No. 48420/10 (Eweida).
17. CJEU, 14.03.2017, C-157/15 (Samira Achbita).
18. CJEU 15.7.2021, C 804/18 and C-141/19 (WABE and M.H. Müller).
19. CJEU, 21.09.1999, C-67/96 (Albany).

2007 – the major clash: right to take collective action versus freedom of establishment/ services (Viking[20] and Laval[21] cases). Solution of the CJEU: proportionality (in these cases: negative for the right to take collective actions). A legislative solution (Monti II-proposal)[22] has been dropped.

2009/2010 – (promotion of) collective bargaining versus public procurement – cases Rüffert[23] and Commission versus Germany.[24] In this case public procurement freedom dominated, but later the social interests were upgraded in new EU rules on public procurement (Directive 2014/28/EU).[25]

There are various provisions in the EU Treaties which highlight the social aspects of the EU: Art. 2 TEU; Art. 3 TEU; Art. 9 TFEU; Art. 67 TFEU. There is the CFREU and the Solemn Declaration of June 18/19, 2009, etc.

However, there are as many provisions in the Treaties which guarantee the Economic Freedoms and requirements of the open market: Art. 3 TEU; Art. 119 TFEU; Protocol nr. 27 to the Lisbon Treaty; Art. 120 TFEU on the Stability Pact; Art. 16 CFREU.

Together they show the Janus-face of the EU!!!

Politicians and Courts must find a balance between the social rights of the CFREU and the economic freedoms of the treaty. The debate is about whether a fair balance is struck.

20. CJEU, 11.12.2007, C-438/05 (Viking).
21. CJEU, 18.12.2007, C-341/05 (Laval).
22. COM (2011) EMPL/093.
23. CJEU, 3.04.2008, C-346/06 (Rüffert).
24. CJEU, 15.07.2010, C-271/08 (Commission vs Germany).
25. CJEU, 4.04.2019, 699/17 (Allianz).

3 FREE MOVEMENT (1)

3.1. Introduction

The **Free movement of *workers*** was one of the fundamental principles of the EEC, together with the free movement of goods, capital and services. It has been **a paramount item in EEC/EU law since 1957.**

Originally (1950/1957) it was only a Free movement of workers (employees), then, in 1973, were added, the independent working persons, and in 1990, students, pensioners, inactive persons. By about 1990 the idea of a European "citizenship" emerged (now Art. 9 TEU/Art. 45 CFREU), so the new concept became: Free movement of Persons.

Thus, since the 1990s the Free movement of workers has developed to the concept of **Free movement of *persons*,** based on the new idea of **European Citizenship.**

A central idea of the "European citizenship" is the **right to entry/residence.** This is now laid down in Directive 2004/38/EC (which replaced Directive 68/360 and a couple of other Directives). It provides for:

Up to 3 months –	almost free access/stay
From 3 months – to 5 years	temporary free access/stay
More than 5 years	permanent free access/stay

However, for persons to be entitled to the temporary residence there are **two fundamental requirements:** they must have sufficient resources of their own and a health cost insurance. And the Member States are not obliged to provide these persons with social assistance.

The Free movement of persons is now enjoyed by all EU citizens (= citizens of Member State) and their family members (even if these are not citizens of Member States). However, who are "family members"? See Art. 2(2) Directive 2004/38/EC, with new questions (also concubines, homosexual couples, etc.?)

All these persons are not only claiming the rights to entrance, exit and residence. They are also claiming the **right to equal treatment** with the nationals of the Member States.

See for instance the right to obtain Student Income Support in another Member State. Originally this right was only recognized for the children of the migrant, working in the Member State. But since "European Citizenship" has become the new basis of free

movement of persons, other claims had to be envisaged. See: CJEU judgments in the Bidar case[1] and the Förster case.[2]

All these questions have nourished a flood of CJEU judgments, which exceeds the field of labour law. They often have to do with the policies and rights on immigration, education, family, etc.

As this is a book on labour law we shall not further indulge in such questions and restrict ourselves to the labour law aspects of the Free movement of persons.

In the 1950s the original 6 EEC Member States were so cautious not to open their labour markets immediately, but only gradually (in 1968 this process was completed). The same caution was repeated by way of **transition periods** on the occasion of several later accessions to the EU.

Legally a transition period means, that MS during a maximum period may maintain existing restrictions (they also may renounce of it!!), but they may not introduce new restrictions. Actually, all transition periods for new accessing EU States are over.

For long years the detailed rules on the free movement of workers have been laid down in the Treaty of the European Economic Union (Art. 48-51 CEE) and in Regulation 1612/68/CEE. They are now in the TEU (Art. 3) and the TFEU (Art. 45-47) and in **Regulation 492/11/EU** (All new texts are very similar to the previous ones).

Regulation 492/11/EU provides for (Art. 1-10):

- **Equal access to jobs**
- **Equal treatment in working conditions**
- **Equal social and tax advantages**
- **Equal access to training**
- **Equal trade unions rights**[3]
- **Equal right to housing**
- **Equal right on education for their children.**

There is much case law on all these aspects.[4]

All this "equality" not only in the laws of the state, but **also in collective agreements, individual contracts of employment, rule books, customs and practices,** etc.

1. CJEU, 15.03.2005, C-209/03 (Bidar).
2. CJEU, 18.11.2008, C-158/09 (Förster).
3. CJEU, 18.7.2017, C-566/15 (Erzberger).
4. See for instance CJEU, 13.03.2019, C-437/17 (Gemeinsamer).

This emphasis on "equality" has caused the CJEU to develop a consistent line of case law on discrimination in this field, now re-enforced by art. 18 TFEU. The main line of this case law is: All **direct discrimination** is prohibited; **indirect discrimination is prohibited unless it can be objectively justified.**

The CJEU has ruled, that the Free Movement rules are applicable **on all economic activities, even on those of non-profit organizations** like churches, social institutions, cultural societies, sport associations, etc.

Especially the last type (sport) has led to highly remarkable involvement of the EU laws with phenomena like the transfer system in football (**Bosman case**)[5], doping rules, youth training compensation (Bernard / Olympic Lyonnais case)[6], etc. The CJEU only allows minor "nationalistic" rules as regards the composition of national teams etc.

There are **two important exceptions** on the free movement of workers, but from the CJEU case law we must learn that they are to be interpreted restrictively.

- **Civil servants** (Art. 45(4) TFEU).
However, the CJEU has ruled that this exception only regards those **exercising public authority or have the responsibility for safeguarding the general interest of the State.** Moreover, once the foreigner has got access to a public job, he may not be treated unequally.

- Criminals and some other persons cannot benefit from the Free Movement regime as this regime is subject to **limitations on the grounds of public policy, public security and public health** (art. 45(3) TFEU and Directive 64/221/EEC which specifies it). Also, the CJEU has contributed to this limitation by ample case law. So, for instance, only people that have committed serious crimes may be expelled.

In reality the free movement of workers is often hampered by **two major problems:**

- The requirement of **professional qualifications** for many jobs, which may easily differ from one Member State to another
- The **limited knowledge in state employment services** of the availability of jobs elsewhere in the EU.

What is the EU doing on those problems?

Mobility of workers (both employees and independent workers) presupposes less diversity in national qualification requirements. Art. 53 TFEU requires action in this

5. CJEU, 15.12.1995, C-415/93 (Bosman).

6. CJEU, 16.03.2010, C-325/08 (Olympique Lyonnais/Bernard).

sphere in the context of free movement of services; these EU-rules have been extended to free movement of employees.

First there was a step-by-step (profession-by-profession) approach to harmonize certificates of qualifications. In the meantime, the CJEU is pushing forward the mutual recognitions of professional qualifications.

Then there was the adoption of Directives on **a general system for the recognition of diplomas.** These Directives have been consolidated in Directive 2005/36/EC, later amended by Directive 2013/55/EU.

Finally, a new gadget has been introduced: **a European Professional Card**, taking the form of an electronic certificate.

Employment Services

In order to promote the intra-EU exchange of workers and jobs Reg. 492/2011 orders the national public employment services and the Commission to cooperate. The Commissions has set up various coordinating bodies and launched **a network-system (EURES)** fostering direct exchanges of information between the public employment services of all MS. Does it work??

3.2. Social Security

In order to promote Free Movement of Workers already in the 1950s the need was felt to eliminate obstacles in the field of social security.

Not by creating an all-European system of social security, not by (step by step) harmonizing the national systems of social security, but by creating **a European system to coordinate the national systems of social security.**

The competence for that was laid down in art. 51 CEE, now art. 48 TFEU.

Successively have been issued:

	Basic Regulation	Technical Regulation
1958	Reg. 3	Reg 4
1971	Reg. 1408/71	Reg. 574/72
2010	**Reg. 883/2004**	Reg. 937/2009

Increasingly the coverage ratione personae of this coordination system has been enlarged. First it covered only employed migrant workers, then also self-employed migrant workers, then also non-migrant EU working persons, then also non-active persons covered by their national systems.

Always together with their families and survivors.

Actually, are covered: **all nationals of EU Member States (plus Norway, Iceland, Liechtenstein and Switzerland) who have been subject of the social security laws of one or more of these states** (art. 2 Reg. 883).

As from January 1st, 2021 persons legally residing in an EU Member State and the **UK are in cross-border situations** no longer subject of the EU Coordination system, but of the Protocol on Social Security Coordination attached to the Trade and Cooperation Agreement between the EU and the UK.[7] This Protocol contains numerous deviations of the rules of the EC coordination system.

The coverage ratione materiae of the EU coordination system has only been moderately increased. Since the beginning were covered schemes on benefits in cases of:

Illness
Maternity
Disablement
Old age
Surviving partners/children
Work accidents
Death
Unemployment
Family charges

In 2010 were added: **paternity benefits and early retirement benefits** (Art. 3 Reg. 883).

Since the beginning **only statutory social security schemes are covered, not occupational schemes and not social assistance schemes.**

For the coordination of all those schemes the Regulation 883 gives a number of general principles (Art. 4-16), a number of norms specific for each branch of Social security (Art. 17-70) and a number of various provisions (Art. 71-91).

In this book we shall only look at the general principles.

General principles (although occasionally subject to exceptions) are:

- **Equal Treatment (Art. 4)**
- **Aggregation of all benefits, incomes, facts, events and periods of insurance (Art. 5 and 6)**
- **Exportability rule (Art. 7)**
- **The anti-accumulation rule (Art. 10)**
- **Single law rule (Art. 11)**
- **The lex loci laboris rule (art. 11(3)(a)**

7. O.J. L 144/14 of 31.12.2020, p. 1162-1276.

The aggregation rule, for instance, says that if in MS A the period of insurance is relevant for the length of the unemployment benefits, then not only this period fulfilled in MS A must be taken into account but also the period fulfilled in MS B.

The anti-accumulation rule must prevent the overlapping of benefits of the same kind of two MS for one and the same period.

The single state rule must prevent that a person is simultaneously insured in two MS or not insured at all.

The main rule on the determination of the applicable law is the **lex loci laboris rule (applicable is the law of the country where a person has worked). On this rule some precisions/deviations are made:**

- Persons normally engaged in MS A but **temporarily (= max. 2 years) employed** in MS B remain subject to the law of MS A (Art. 12).
- Persons normally employed in several MS are subject to the law of the MS of their residence, if they work there substantially (= more than 25%) or if they work for various employers in various MS. If not then they are subject to the law of the residence of the employer (or in case of self-employer: where they have the centre of their activities (Art. 13).

These rules have created a lot of problematic situations and opened the **possibility for social dumping** in various fields like temporary agency work, subcontracting, among self-employed and in the transport sector (see Chapter 4).

As was said before, Reg. 883 is not covering social assistance schemes. However, EU migrant citizens may try to obtain social assistance benefits on the basis of the equal treatment provisions of Reg. 492/2011/EU (art. 7(2) "social advantages", but see the restrictions on that in Directive 2004/38/EC.

As further was said, Reg. 883 is not covering occupational social security schemes (notably occupational pensions). Although EU migrant workers are entitled to the same occupational schemes as national workers (on the basis of the equal treatment provisions of Reg. 492/2011/EU (art. 7(1) "conditions of employment"), this may not always satisfy workers accustomed to better occupational schemes.

As the non-coordination / non-harmonization of occupational social security schemes is clearly one of the stumble stones for the free movement of workers (certainly of the better remunerated ones) the EU Authorities would like to tackle them. However, up until now only one small harmonization Directive in this field could be agreed, Directive 2014/50/EU.

3.3. Impact and problems

Is the Free Movement regime working (well)? See the statistics:

In 2013 only 14 million EU citizens were living in another Member State than the MS of their nationality (= 2,8% of the population; was 1,6% in 2004). In the United States there is much more movement of citizens from one State to another.

What are the reasons for the small extent of intra-EU-migration (apart from Eastern Europe countries now)? One may think of family and social ties, language problems, problems with professional qualification, housing problems, double-earnings families, little coordination of occupational schemes, tax problems, high degree of similarity in welfare levels between MS, the availability of third country immigrants who may be cheaper for employers, etc.

Economists and the European authorities are not satisfied with this state of affairs. They would like to see more free movement of workers/citizens. The European Commission tries to promote further the Free movement of persons, notably by:

a) Infraction procedures; it steadily opens infraction procedures against Member States because of existing restrictions in the Member States.

b) New rules. The EU 2014 issued **a Directive (2014/54/EU) to facilitate the free movement of workers.** This Directive requires the creation of national contact points for migrant workers, appropriate means of redress at national level and group actions in court for trade unions, NGO's etc.

Is that enough to reassure the persons who feel that there is already **too much freedom of movement of the EU citizens ("social tourism"), loss of cultural/national identity)** and too much possibilities for employers to exploit that **("social dumping")**!

Some commentators believe that the EU and the governments of the MS should do more to take the wind out of the sails of the Euro-sceptic parties in several MS, which have increased their seats in the last elections for the European Parliament in 2019.

Actual battle-ground: the proposal on an adaptation of Reg. 883, notably the extension from 3 to 6 months enjoyment of unemployment benefits by migrants (COM (2016) 0815).

4 FREE MOVEMENT (2)

4.1. The EU law on Conflicts on the Labour Market

Now that internationalization and globalisation has increasingly touched the labour market, there is a growing number of employments with an international dimension, certainly also thanks to the EU Free Movement of Persons and other factors.

However, under what legal regime do those persons work? What rules are determining that?

In Chapter 3B we have already seen, that **as regards statutory social security, the EU has fixed the applicable law:** the main rule is: **the lex loci laboris,** although there are precisions/deviations applicable (Art. 11-13 Regulation No. 883/2004/EC).

In this Chapter we consider the rules **with regard to labour law**, which we find in **Regulation No. 593/2008/EC on the law applicable to contractual obligations** (often called the Rome I Regulation, replacing the 1980 Convention of Rome). Here the rule is more nuanced. The EU legislator has preferred to give more weight to "private autonomy" than in statutory social security.

Notably Art. 3 and 8 of Regulation 593/2008/EC provide that only if **no explicit choice** is made, the applicable law is the **lex loci laboris,** the law of the country where the employee habitually carries out his work. Some precisions/deviations are made as regards:

- temporary work abroad (Art. 8(2)
- in case of no habitually working IN, then working FROM (Art. 8(2)
- in case of no habitually working IN/FROM: then the country where the place of business through which the employee was engaged is situated (Art. 8(3)
- all this provided that there is no country more closely connected (Art. 8(4).

However, if **an explicit choice** is made, the applicable law is **the law chosen by the parties** (Art 3). Nevertheless, in these cases **no derogation may be made of "provisions that cannot be derogated from by agreement"** contained in **the law that would be applicable without a choice (**Art. 8(1).

Finally, there is Art. 9 provides that the judge should always **apply "the overriding mandatory provisions" of the law of the forum (= court).**

The foregoing opens questions: **What exactly are:**

- **"**provisions that cannot be derogated from by agreement"
- "overriding mandatory provisions"?

Until now the CJEU has only given an interpretation of the term "overriding mandatory provisions". It is "the provisions the respect for which is regarded as **crucial** by a country **for** safeguarding **its public interests**, such as its political, social or economic organisation, to such an extent that they are applicable to any situation, falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation."

The term "provisions that cannot be derogated from by agreement" (Art. 8(1) must primarily answered by national courts. The CJEU has not pronounced over it until now.

Also, the precisions in (Art. 8(2) have called for interpretations, which have already been given by the CJEU. What exactly is meant by:

- "temporarily employed in another country"?
- "the country "FROM which the employee habitually carries out his work"

So, these complex and often vague rules have created **serious problems in the field of "social dumping".**

4.2. Social Dumping Risks

What is "social dumping"? Social dumping is an unofficial, pejorative expression, often used by trade unions, to denounces employers' practices to safe on labour costs, either by **exporting jobs** from high wage countries to low wage countries, or by **importing workers** from low wage countries in high wage countries.

A vulnerable sector to the first phenomenon is international transport services. The second phenomenon is dangerous in various sectors through the use of temporary work agencies.

First: **International transport**

By a clever application of the rules of Regulation 593/2008/EC (the Rome I – Regulation) employers **can escape wage costs of high wage countries by relocating the operational seat for international road transport to a low wage country.** They may engage truck drivers in such a country and then they are under the applicable law in this low wage country. This is what is happening now everywhere in Europe! [1]

1. CJEU, 1 december 2020, C-815/18 (FNV/Van den Bosch).

4.3. Posted Workers

The second phenomenon of social dumping has appeared in the industry of **Posting of Workers/Secondment.**

Where are the risks of social dumping?

Think of a new school in Milano to be built by a Milanese firm with workers hired from a Bulgarian temporary agency at Bulgarian wages and social security. Can a firm with Italian workers do it so cheaply? But is that really possible? What about the rule of equal treatment workers in the framework of free movement? (Art. 45(2) FTEU and Art. 2 (Reg. 492/2011). Sure, on the basis of these rules social dumping would not be possible. However, these rules work only on the scale of workers having the same employer. If, however an employer engages workers via a temporary work agency or via another company these rules don't work because the leased workers have a different employer (the temporary work agency) than the own workers of this employer. This is the menace of social dumping!

After various conflicts, court cases and much political strife in the 1980s and 1990s the EU legislator moved in with the **Posting of Workers Directive (Directive 96/71/EEC).**

In this Directive Member States were ordered to require **a "hard core"** of their own employment rules on such workers, but they should not require more than this "hard core".

The **result** of this Directive has been, that by **using "posted workers" companies could still import cheap labour** although companies could no longer **go as far down as the very low wages** costs in some Central and Eastern European states. So, the politicians and the CJEU had made a **compromise in the middle of the road, a kind of "half equality".**

This did not prevent several scandals with posted workers on substandard working conditions. Western European trade unions continued to advocate a revision of the Posted Workers Directive. They simply want that posted workers shall be treated like national workers: full equality!

The Commission, however, initially did not support a change in the Directive and in 2012 only tabled a proposal for a **Directive for a better enforcement of the Posted Workers Directive which was adopted in 2014 (Directive 2014/67/EU).**

This Posting of Workers Enforcement Directive contained a number of detailed rules to control abuses in this area. Nevertheless, trade unions were still not satisfied with this Directive. They went on claiming full equal treatment for these workers.

In March 2016 the European Commission came indeed forward with a proposal to further improve the rights of the posted workers. The proposal was adopted in

2018 (Directive 2018/957/EU) to amend Directive 96/71 EEC, which must have been implemented by 30th June, 2020.

The amended Directive 96/71 now provides that posted workers are subject to **all** host country rules on remuneration, working conditions, accommodation conditions and allowances/expenses that apply to local workers. Moreover, posted workers are entitled to reimbursement of travel, board and lodging expenses (Article 3(1)(i)).

Posted workers on assignments exceeding 12 months (or 18 months with reasoned notification) are fully subject to the host country's labour laws (excluding termination rules and occupational pension schemes). Moreover they are subject to collective agreements or arbitration awards which have been declared generally binding in the sector or apply by force of law. Posted temporary agency workers will be subject to the principle of equal treatment as provided for in the Temporary Agency Work Directive.

"Half equality" have now turned into almost-full-equality! Will the problems of posting of workers now be under control? The above mentioned rules are only applicable on workers who are working under a contract of employment. And not on independent persons. Nor on posted workers from Third Countries. The latter are under the rules mentioned in Chapter 6.4.

4.4. EU Court Competence Rules

Important for the question in what court parties on an employment relationship with international dimension can bring labour law litigation is **Regulation 1215/2012/EU on the Jurisdiction and Enforcement in Civil and Commercial Matters** (often called the Brussels I Regulation, replacing Regulation 44/2001/EC that in 2001 replaced the Convention of 1968 on the Jurisdiction and Enforcement in Civil and Commercial Matters).

This Regulation provides that **the employer may be sued** in the courts of the place:

a) where the employer is domiciled or

b) where or from where the employee habitually carries out his work or

c) where the employee was engaged (if the employee does/did not habitually carry out his work in any one country). (Art. 21).

The employee may be sued only in the courts of the place where the employee is domiciled (Art. 22).

There are two deviations of these rules possible (Art. 23).

For a nice case to illustrate the application of these rules see the Ryanair case.[2]

4.5. The European Labour Authority

Recently the European Labour Authority was established to enhance the enforcement of European labour and social security law in a cross-border context, notably in a situation of posted workers[3]. This institution should i.a. support compliance and cooperation between Member States in the application and enforcement of the Union law related to labour mobility across the Union. The actual scope of action of this European Labour Authority is a minimal political compromise; it could have much wider powers.

In Brief: this is a kind of a Labour Inspectorate at European level, but its missions, (limited to the EU labour mobility rules) and its tools (mainly coordination) do not look much promising.

4.6. Third Countries Immigration

Apart from intra-EU migration, the EU has certainly as many migrant workers originating in Third Countries.

Does Europe care also about these non-EU migrant workers?

The first standards for migrant workers in Europe have been issued under the Council of Europe by way of Arts. 18/19 of the (Revised) European Social Charter:

Art. 18 – The right to engage in a gainful occupation in the territory of other parties

Art. 19 – The right of migrant workers and their families to protection and assistance.

The main content of these provision is the Right to equal treatment for legally residing migrants. The main reservation is that they give no absolute right to access to jobs.

It was also the Council of Europe which in 1977 issued the European Convention on the legal status of migrant workers. This Convention concerns the principal aspects of the legal situation of migrant workers, e.g. recruitment, work and residence permits, working conditions, dismissals and social security.

Up to now it obtained only 11 ratifications (under which Italy, France, Netherlands, Albania and Turkey, not the UK). The Convention grants its rights only to nationals of

2. CJEU, 14.9.2017, C-168/16 (Ryanair).

3. Regulation 2019/1149/EU.

other signatory states on a reciprocity basis. So, they are of no avail for nationals of CoE MS which did not ratify nor to nationals of non-CoE countries.

In the EU until mid-1970s all policies and law in this field were left to the Member States. Then a specific action programme was adopted favouring migrant workers and their families, and applicable to both intra-EU and third country migrants.

This and several succeeding "soft law" documents notably contained condemnation of xenophobia and racism and financial support by the European Social Fund for national programs to improve the living and working conditions of these persons. No "hard law" in this field.

After 1992 followed an intensification, notably because since 1992 (Maastricht Treaty) the EU had a much more extensive ambition than to be only an economic union. The issues of asylum policies and immigration policies, notably illegal immigration, residence and labour were termed as matters of common interest on which the EU may issue Directives by unanimity vote in the Council of Ministers.

In the Treaty of Amsterdam 1997 this was turned into qualified majority vote. Moreover, this Treaty of Amsterdam provided for more vigorous action against racial and ethnic discrimination (I shall deal with that last in Chapter 7).

Outside labour law **a few "hard law"** measures were taken: In 2003 Directive 2003/16/EC on the right to family unification of third country nationals; in 2003 a Regulation to apply in principle the rules of Social Security Regulation 1408/71 also to subjects of third countries who are covered in the social security schemes of the MS.

The MS remained reluctant to adopt EU rules on the admission of third country nationals to residence and to engage in jobs. A comprehensive Commission proposal on the conditions of entry and residence was rejected in 2001. In 2005 the Commission did new attempts to move on in this field in its Policy Plan on legal immigration containing a package of 5 proposals for Directives. It resulted in a number of Directives on very precise points.

Directive 2009/50/EC on the access of high qualified nationals of third countries.

In order to make the EU a more interesting place to work for highly qualified third country nationals this Directive launched the concept of a European **"blue card"** (equivalent of the US "green card") allowing third country nationals the access to high qualified jobs.

If such a person has been offered a job of at least 1,5 times the average salary in a Member State he can obtain the blue card for a 1 to 4 years period via a glib procedure. The card, which also covers family members, gives the person more rights than other third country nationals enjoy in the EU. Directive 2016/807/EU on researchers, trainees, volunteers etc. and au pairs.

Directive 2016/44/EU on the Intra Corporate Transfers is about the conditions of entry and residence of third-country nationals in the framework of an **intra-corporate transfer**.

Directive 2014/36/EU is to give **seasonal workers from third countries** in agriculture and tourism a claim to stay a period of between 5 and 9 months in any 12-month period. The Commission expected that with such a guarantee the seasonal workers may be more inclined to return each time to their countries. Until then, they often used to stay illegally.

Directive 2009/52 on illegal immigration aims to fix minimum standards for obligations on employers to renounce of engaging illegal third country nationals and for sanctions against violations.

Member States must oblige employers to require non-EU-nationals to show them their residence permits, to keep copies ready for inspection and to notify the engagement of such nationals to the competent authorities

MS must ensure effective, proportional and deterrent pecuniary sanctions and demand the employer to pay the costs of return and outstanding wage claims of the worker for at least 3 months. However, MS may fix lower financial sanctions for illegally working domestic workers in private households.

MS must also fix other sanctions such as the exclusion of governmental orders and subsidies to employers violating these rules and the liability of contractors for their subcontractors.

MS must offer the illegal workers suitable instruments for complaints and occasionally reward them with a temporary residence permit.

MS must organise sufficient controls and inspections.

In considering all these rules on third country one has to take into account that there are third country migrants with a special status.

First those from the EEA-countries **(Norway, Iceland and Liechtenstein) and Switzerland,** to whom the EU Free Movement Regime is in all aspects applicable.

Secondly the nationals of **Eastern European countries** like Serbia, Macedonia, Albania, Ukraine etc. and other Eastern European countries like Russia, Moldavia, etc. with which the EU has concluded Association Agreements or Treaties of Partnership and Cooperation.

Both kind of treaties do not contain a right to free and equal access to the labour markets of the EU MS and vice versa. They only pledge equal treatment for workers, legally residing and working in the other states.

Thirdly the nationals with **Turkey** who enjoy no right to access to work in the EU, but against whom MS cannot introduce new restrictions on their access to their labour market and have to recognise after one year of work step by step the right to stay on their labour market, and, being legally on the labour market of MS, they and their family members have about the same rights on equal treatment as intra EU-migrants.

Then the nationals of the Magreb countries **(Morocco, Algeria and Tunisia)**. On the basis of Agreements of Cooperation between the CEE and the countries there is the pledge to equal treatment of persons legally working in the EU and vice versa but no promises on free and equal access.

As from January 1st, 2021 the EU rules on Free movement of persons are no longer applicable on citizens moving from the **UK** to the EU and vice-versa. In the Trade and Cooperation Agreement between the EU and the UK only a visa-free travel for short-time has been agreed. Presumably the UK in due time will introduce more stringent rules for longer stay and access to its labour market.

In all these documents on employment relations with third countries one must not only pay attention to the access to work of employees but also to the question whether those documents are allowing third country nationals to freely work as **independent persons**. If this is so, then this would enable third country nationals to work in quasi-independent relationships. It is questionable how much MS can still control this (Essent case).[4]

4. CJEU, 11.09.2014, C-91/13 (Essent).

5 EMPLOYMENT POLICIES

5.1. General

In the modern western countries Employment policies are one of the most important tasks for governments! Is employment also a task of the EU? Yes! See the aims of the EU Treaties: **Art. 3(3) TEU - full employment; Art. 9 /Art. 147 (2) TFEU– a high level of employment.**

And the ambitions were high:

In the European Employment Strategy, part of the so-called Lisbon-Agenda 2000, it was said: *To make Europe in 2010 the most dynamic knowledge-based economy of the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.* In 2010 it appeared that this goal was not reached! So the ambition for the year 2020 was somewhat tempered: *Europe 2020 Strategy for smart, sustainable and inclusive growth.* Has it been realized?

It certainly makes sense that the EU feels responsible for the employment situation, if only because – as a result of the very existence of the EU - Member States have lost many of the traditional instruments for employment policies. There is no more room for national customs policies, monetary policies (currency rates and interest rates), State aid and subsidies, etc. Is this loss of competences of the Member States compensated by forceful EU competences on employment policies?

Let us look into the Treaties, notably in the Chapter on Employment policies in the TFEU, Art. 145-150 TFEU, in then more especially in art. 148 TFEU.

Art. 148 TFEU provides for a yearly cycle (in Brussels' speak called: **the European semester)**, which starts with the Council of Ministers adopting an annual report written by the Commission on the employment situation in the EU (art. 148(1).

On this basis the Council of Ministers shall draw up "Guidelines", in accordance with its economic policy (art. 148(2).

Then the Member States must write yearly national reports about their progress in implementing the Guidelines (art. 148 (3).

On this basis the Council of Ministers may issue Recommendations to the Member States (art. 148(4), the so-called Country-Specific Recommendations, which have become standard nowadays.

Also, on this basis the Commission and the Council of Ministers annually publish the Joint Employment Report, assessing the EU situation as well as the MS's national reform programmes (art. 148 (5).

And then the cycle starts all over again!

So, it is a very bureaucratic process in which the clue words are: **"Guidelines" and "Recommendations".**

However, this is all: **soft law** (no hard law, like Regulations and Directives).

Often the Guidelines and Recommendations contain a high degree of authoritarian language. Member States must do this…and must do that.

However, they are devoid of any binding force! Member States most of the time find polite excuses why they have not or only slightly or unsuccessfully followed the Guidelines and Recommendations.

Certainly, the EP and the Council may adopt **"incentive measures".** However: these measures **shall not include harmonization** of the laws and regulations of the Member States!!!!! (art. 149 TFEU).

What then can these measures include?

- Encourage cooperation between the Member States
- Support their actions
- Exchanges information and best practices
- Providing comparative analyses
- Evaluation experiences, i.a. by recourse to pilot projects (Art. 149)

All this is called, again, in Brussels-speak: the **Open Method of Coordination (OMC).**

The EU Employment Policy is in fact largely a high **mountain of papers,** a "Waterfall of Softness". If one would read all these papers, what is its contents?

- Raising the employment rate.
- Promoting "green" sustainable investments.
- Promoting more investment in education, training, research and development.
- Strategies to achieve a better balance of work, private and family life.
- Highlighting the benefits of diversity and combating gender and racial discrimination and inequality as well as fostering rights of disabled persons and elderly workers.

The European institutions frequently set out a number of **typical pathways** to help MS draw up their own national strategies and learn from each other's experiences and best practices.

In recent years one of those pathways was: **flexicurity**

- The flexicurity strategy will promote more and better jobs by combining flexibility for the companies and security for the workers.
- Often **the Danish example** of loose dismissal protection, high unemployment benefits and active labour market policies are advertised.
- MS should **encourage employment security rather than job security.**
- Emphasis should be laid on in-company training, lifelong learning programmes and promoting entrepreneurship.

There are good reasons why lawyers (advocates/judges) are not much interested in this entire OMC process. To them, hard law is more challenging. One can start a lawsuit if somebody has been dismissed because of his age. (there is hard EU law on that, see Chapter 7)

But what can you do as a lawyer if a Member State has not successfully fostered the rights of elderly people? (soft law)

However, for politicians, scholars, journalists and the legal advisors of administrations, trade unions etc., the whole paper mountain of OMC can be worthwhile. Because, indeed, it may contain interesting information for the solutions of problems. Lawyers and court cases do rarely solve social problems! They illustrate their existence. Social problems are often very complex. Member States that have struggled with such problems, can be seen as "social laboratories". Their experiences may help others. That can be the added value of OMC.

Perhaps some added value may also come in through the **money** that the EU itself is spending on the employment policies. Because indeed the only forceful instruments in employment policies of market economies are in their financial side:

In the EU this is notably the **European Social Fund** (now Art. 162-164 TFEU), but how forceful is the financial side of the EU employment policies and is it working?

5.2. Financial instruments

For EU action in the area of employment policies there are some indirect instruments feasible to influence the employment situation, such as the monetary and budgetary policies and the commercial (external trade) policies. We shall not discuss them in this book.

Still, the most direct instrument is: the money. With money you still can create jobs or stimulate the creation of jobs. But what are the money-instruments of the EU? And how much money is there? On what items can it be spent? What are the procedures?

The EU has a number of Funds available, notably the Social Fund, the Regional Fund, the Cohesion Fund, the Agricultural Fund, the Maritime/Fishery Fund, the Globalization Fund and, recently, the Corona Recovery Fund (called NextGenerationEU).

And finally, there is the European Investment Bank.

In this book we focus on The European Social Fund and The Globalization Fund, although other funds do have their impact on employment policies as well. That is exactly the reason why the various funds are coordinated as "Structural Funds". Therefore, we should not ignore the other instruments than the European Social Fund and the Globalization Fund for the sake of Employment policies. For instance, in 2005 the social consequences of the downfall of the MG Rover car manufacturer were compensated with money of the Regional Fund destined for the West Midlands region in the UK.

The European Social Fund is based on art. 162-164 TFEU.

In these articles and in the secondary law (Regulations and Directives on the Structural Funds in general and on the ESF in particular) one finds all criteria, procedures, etc. However, the most crucial element - **how much money is there available in the Fund** - is hidden in Art. 312 TFEU.

The money for the Social Fund, like the money for the other Funds, is provided for in the **Multi-annual Financial Framework (MFF),** which is voted by the EP and the Council of Ministers on the basis of unanimity in the Council **for a 7-year cycle** (art. 312 TFEU). The actual cycle is 2020-2027. So how well filled are the Funds?

Many EU political fights are concentrated at the start of this 7-yearly event of fixing the multi-annual EU-budget. We have seen this again during 2018-2020.

The pattern is: Most members of the EP want more money; most poor Member States want more money; most rich Member States do not want to spend more money (because they pay most of it!) and they can block all decisions in this 7-years game, as it requires **unanimity in the Council of Ministers.** Certainly, the EP can refuse to vote for

the multi-annual EU budget if the money is not enough. Then there is a deadlock and the EU is without money! So, compromises are necessary.

The total EU budget during the cycle of 2007-2013 and again during the cycle 2014-2020 was about 1000 billion Euro and it still will be the same during the cycle 2020-2027. So, for each year there is ca. 150 billion Euro (compare: this is ca. ¼ of the national budget of Italy).

The new thing for 2020-2027 is, that there is now an additional ca. 800 billion Euro for the Corona Recovery Fund.

Of the 1000 billion Euro for the multi-annual EU budget more than 1/3 is traditionally spent on agricultural subsidies and another 1/3 on the Structural Funds (= ca. 50 billion yearly).

From the money for the Structural Funds traditionally ca. 1/3 is given to the European Social Fund, thus ca. 10% of the total EU budget or ca. 15 billion Euro yearly.

To resume in round Euro-figures:

All EU money for 7 years	1000 billion.
So all EU money yearly	150 billion
For all traditional Structural Funds yearly	50 billion
For the EU Social Fund yearly	**15 billion**

What can you do with 15 billion yearly? How many people benefit from this yearly ESF money? Each year ca. 10 million of the 250 million EU workforce is in one way or another benefiting from this money.

The way how the money of the ESF is to be spent and divided is laid down in **yearly decisions of the EP and the Council of Ministers, taken by qualified majority (art. 164 TFEU).**

These decisions contain the criteria and the procedures for spending the ESF money.

Subsequently **it is the European Commission that takes the decisions about individual cases** of spending, applying these criteria. For this task the European Commission is assisted by a Committee composed of representatives of governments, trade unions and employers' organizations (art. 163 TFEU).

The ESF is strongly regionally targeted – **four-fifth of its money is directed towards the poor areas of the EU.** However, what are the poor areas? Actually, the EU thinks this is a relative notion. Entire Member States are poor in respect to other Member States. But also, in rich Member States you have relatively poor areas. And recently the EU started to spent money even in rich areas like Inner-London!

An interesting debate has emerged whether rich MS should also obtain money from the Fund. **Why not only the poor MS?**

The argument against giving money to the rich states is, that this unnecessarily increases the money-streams via Brussels and entails Brussels bureaucracy.

The argument in favour of giving money to rich states as well is, that inside rich states there are pockets of poverty too and it is wise to show the people there that Europe feels solidarity with them.

The classic ESF-spending category is: vocational training and retraining (art. 162 TFEU). Today this includes lifelong learning, forecasting skills needs, helping people who are made redundant to find new jobs, improving the employability of the disabled, boosting labour market institutions such as job centres, helping business start-ups, reduce early school leave, etc.

In the 2014-2020 period, ESF support has been focused at four priorities: sustainable/ qualitative employment and labour mobility, social inclusion and combating discrimination, training and lifelong learning, youth employment initiatives.

The ESF is organized into programmes lasting over several years. MS prepare a single national strategic framework, based on the Commission's guidelines.

The costs of the funding are to be shared between the EU and the national governments.

The range of partners have been broadened to include non-governmental organizations active in civil society, the environment and gender.

If the money has not been spent by the Member State according to the rules, the Commission may start proceedings against the Member State to reclaim the money. The Netherlands ca. 2000 have been confronted with strong requests for restitution of millions of Euro's because of wrongful spending, which were finally settled amicably (out of court).

The second fund that deserves our attention is **The European Globalization Adjustment Fund (EGAF).**

Many people believe that **the bad unemployment situation** of the EU is caused by the EU itself, notably by the extension of the EU to poorer countries and to the "free trade" policies of the EU towards third countries: e.g. the relocation of production-lines from Western European countries to Central and Eastern European countries and the recent sudden hit of textile industry in the EU by the increase of Chinese textile exports.

All this has led to the establishment of the European Globalization Adjustment Fund in 2006. Originally this Fund was seen as only a temporary measure without structural

money and with narrow criteria: Assistance **was given only in the case of large-scale redundancies** (more than 1000 workers involved) **by company failures in a climate of changing global patterns in their sectors.**

However, in the wake of the banking crisis (2009) the Fund was **also opened to help workers that had become unemployed as a result of this banking crisis.** Subsequently the EU decided **to extend the life of the EGAF to 2020, to lower the threshold (now at 500 workers** involved) and to make some structural money available.

And now the newest fund, the **Corona Recovery Fund** with its 800 billion Euro for the next 7 years. What will be its contribution to the EU Employment Policies? Will not most of it be wasted on inefficient projects under corrupt governments in Southern and East-European countries, as the populists predict and the governments of the most contributing countries are fearing?

5.3. Employment Services

Then something about the most classic instrument of state involvement on the labour market: **the public employment services.**

After (or even before) the First World War public employment services have been established in all EU countries. In the 1930s they were even given a monopoly position (= no commercial private employment services allowed). After the Second World War and notably since the 1970s various Member States have step by step opened the door for private employment services which are considered by many economists as more efficient.

Ever since one can notice **an ambiguous policy of the EU as regards the public employment services.**

On the one hand the EU is supporting the Member States in improving and extending the public employment service. It needs those services for its ambitious employment policies, in promoting inter-EU exchange of job-information via EURES), etc.

On the other hand: case law of the ECJ in the 1990s has **limited the monopoly of the public employment services,** (see the Hofner case[1] and the Job Centre case).[2] Moreover, the EU-legislator has even **opened the door for commercial employment agencies:** the Directive on Temporary Employment Agencies.

1. CJEU, 23-4-1991, C-41/90 (Höfner).
2. CJEU, 11-12-1997, C-55/96 (Job Centre).

5.4. The Temporary Employment Agencies Directive

In 2008 the EU adopted Directive (2008/104/EC) on the Issue of Temporary Employment Agencies.

If first of all provided that Member States must clear away most restrictions on temporary agency work (Art. 4). Only allowed are restrictions justifiable by:

- General interests relating in particular to the protection of temporary agency workers
- Health and safety at work
- The proper functioning of the labour market
- The prevention of abuses.

(See CJEU case Shell Aviation Finland).[3]

As the other side of the coin this Directive also intended to strengthen the legal position of the workers concerned, by providing that temporary workers should have the same basic working conditions as the workers of the user-firm. This regards: Working time, holidays, etc, pay, maternity and youth protection and non-discrimination (Art. 1(f) and 5(1).

However, MS may make exceptions for temporary agency workers on a continuous agreement with the Agency and allow the application of a different collective agreement or of another set of arrangements, provided this does not lead to misuses (art. 5(2)(3)(4)(5).

Therefore, the Directive offers the temporary agency workers only "half-equality" and certainly no full equality with comparable workers of the user firm.

In order to further protect temporary agency workers, the Directive provides:

- MS shall prohibit restrictions on the conclusions of a contract between the employee and the user-firm (Art. 6(2).
- Temporary employment agencies shall not charge the workers any fees (Art. 6(3).
- Temporary agency workers shall have access to facilities like child-care of the user-firm (Art. 6(4).

Finally, the Directive contains some rules concerning the workers' representation rights of temporary agency workers, and the information and consultation of their representatives (Art. 7 and 8).

3. CJEU, 17.03.2015, C-533/13 Shell Aviation Finland).

6 INDIVIDUAL EMPLOYMENT LAW

6.1. General

Since the 1970s there has been an increasing contractual variety on the labour markets in Europe by the entrance of more women on the labour market and by the appearance of new forms of employment, such as part-time work, temporary agency work, self-employed in subcontracting, modern varieties of casual work, homework in the new form of telework, etc.

As in all MS there was a lot of confusion on the legal aspects of these new developments, EU politicians thought that they could bring some order with EU Directives in this field. In the 1980s proposals were launched concerning part-time work, temporary agency work and fixed-term contracts, but they all ended up in a deadlock.

From the first Chapter it can be remembered the causes for this unhappy fate: poverty on competencies in the EU Treaty until 1992 and, more important: no political will and consensus (blockade of M. Thatcher /UK in 1980s).

6.2. The Transparency Directive (ex-Written Information Directive)

The first proposal to be successful was perhaps the least ambitious one, **the 1991 Directive on an employer's obligation to inform employees of the conditions applicable to the contract or the employment relationship Directive 91/533/EEC).**

In all MS traditionally the contract of employment can be concluded either in an oral way, or in a written form. But even if it is in writing, the document not necessarily contains all desired information about the rights and obligations of the worker.

Because of the increase in the number of types of employment certain MS had made employment relationships subject to formal requirements.

However, this variety of national rules could have a negative effect on the operation of the Common Market, so the EU considered it necessary to issue a Directive on this point.

Roughly 20 years later, around 2011, the European Commission questioned whether this Written Information Directive should be maintained (REFIT-program, see paragraph 1.2). However, again 6 years later another European Commission proposed, not just

to abolish this Directive but to replace it by a more forceful **Directive on Transparent and Predictable Working Conditions.** The Directive was adopted in 2019 **(Directive 2019/1152/EU)** and must be implemented by the MS by 1 August 2022 (Art. 21).

The new Directive, like its predecessor, does **NOT require the contract of employment to be in writing** (see Art. 6, first indent).

The Directive obliges the employer to give his employees information on paper or in electronic form on a number of essential aspects of his contract (art. 3).

Note the subtle, but important difference! This written information is a one-sided signed document, a written contract is a two-sided signed document!

The Directive then lists **the essential aspects, e.g.**

- **The identity of the parties**
- **Place and nature of the work**
- **Duration of the contract and notice period**
- **Training entitlement**
- **Wages, paid leave, etc.**
- **Working times, overtime,**
- **Applicability of a collective agreement, etc.**
- **Social security (Art. 4)**

Moreover, there are a number of additional obligations **in case of the posting abroad** of the employee (Art.7).

Most of the items must already be given **within 1 week** after the start of employment, the other items within 1 month (Art. 5(1).

Any change in these essential aspects of the contract must be communicated at the earliest opportunity and at the latest on the day on which it takes effect (Art. 6).

The said information may be provided by the employer **in "one or more documents"** (Art. 5(1). This can be collective agreements, company handbooks, etc. Many employers will for the sake of simplicity refer to such documents, which will then as a consequence have been **incorporated** in the contract. This is an important asset of the Directive as it can promote the binding force of such documents, which is not always ensured.

Member States may develop **models/templates** (Art 5(2) and must ensure that information about applicable **law, binding collective agreements** etc. is easily provided on websites etc. (Art. 5(3).

In addition, the New Directive of 2018 contains provisions about:

- The maximum duration of any probationary period (Art. 8)
- Parallel employment (Art. 9)
- Minimum predictability of work (Art.10)
- Complimentary measures for on demand contracts (Art. 11)
- Transition to another form of employment (art. 12)
- Mandatory training (Art. 13)
- MS may allow collective agreements which, while respecting the overall protection of workers, establish arrangements different from those referred to in Art. 8 to 13 (Art. 14).

The Directive **is applicable to all sorts of "contracts of employment" or "employment relationships"** (Art. 1(2). The last addition opens **the possibility to give a broad application** to the Directive, also covering the increasing number of contracts to work in the various Member States that are not called "contracts of employment". Genuine independent workers, however, are not covered.

Moreover, Member States may exclude contracts equal to or less than 3 hours a week (Art. 1(3), and they may exclude some of the Directive's provisions in contracts with personnel in the public service, in households as well as seamen and fishermen (Art. 1(6)-1(8).

Nevertheless, one of the main assets of this new Directive is, that it may help in clarifying the legal status of bogus-independent workers, posted-workers, etc. and in the fight against the black labour market of migrants and other disadvantaged categories of workers.

The 1991 Directive was weakly sanctioned, but the new Directive has given stronger rules on **penalties** (Art. 19).

For cases of infringements on workers' rights under the Directive the MS must offer the employee either favourable presumptions in court or a competent body to receive adequate address (Art. 15-16).

In addition, workers are protected against **victimization** (protection against adverse treatment and consequences and from dismissal and burden of proof (Art. 17-18).

6.3. European Social Partners Directives

As the work on proposals on Directives on Parental Leave, Part-time Work and Fixed-Term Contracts did not proceed ((because of opposition of some MS) the European Social Partners in 1996, 1997 and 1999 took the matter in their own hands according to the new procedure in the EEC Treaty (now art. 154/155 TFEU, see paragraph 1.8).

The European Social Partners concluded **three Agreements, on the subjects Parental Leave, Part-time Work and Fixed-Term Contracts.**

Subsequently they **asked the Council of Ministers to implement these Agreements according to the second method provided for in art. 155 TFEU,** which was done by way of Directives.

The Parental Leave Directive has been replaced in 2019 by the Work-Life Balance Directive (which is not a Social Partners Directive).

It makes sense to pay attention to the different structures of – on the one hand – the traditional Directive – and - on the other hand – the Directives based on Agreements of the Social Partners.

In these "Social Partners Directives" the material norms are not in the act of the Council of Ministers (containing only a few formal articles), but in the various "clauses" of the Agreement between the European Social Partners, which is in the Annex to the Directive.

However, these are only externals. The binding force of both types of Directives is the same (see par. 1.8).

Moreover, the European social partners have concluded **Agreements on Telework (2002), Stress (2007), Violence/Mobbing (2008) and Inclusive Labour Markets (2010).**

For these Directives the social partners did **not ask the Council of Ministers to implement them** by way of Directives. They should be been implemented according to the "procedures and practices specific to management and labour in the MS" (Art. 155(2) TFEU.

Besides these cross-sector agreements, the European social partners may also conclude sector agreements. They have done so in various sectors, such as transport, maritime, hairdressers, civil servants, etc.

In a number of these cases the sectoral European social partners have obtained a Council Directive to implement them.

In other cases, they relied for the implementation on the procedures and practices of management and labour in the MS.

In two cases they preferred to obtain a Council Directive but this was refused by the Commission (see EPSU-case).[1]

6.4. The Directive on Part-Time Work

The Directive on Part-Time Work (97/81/EC) intends to improve the quality of part-time by **ensuring the application of the principle of non-discrimination.** It will ensure a treatment in a not "less favourable manner" than full-time workers (Clauses 1a and 4(1). This is legal-technically done by some provisions on the "comparable worker" (Clause 3(2).

The equality principle is applicable to all employment and working conditions in laws and collective agreements, also concerning occupational pensions (Impact[2] and Bruno[3] cases). The principle of equality allows for the application of the pro rata temporis principle (Clauses 4(2). From the principle of equality may be deviated if it can be justified on objective grounds (Clauses 4(1). The principle of equality is so unequivocal that it has direct binding effect (Impact case).

Because in various countries trade unions are afraid, that employers may abuse part-time work by imposing it on their employees, the Directive stresses that part-time work shall be **on a "voluntary" basis** (Clause 1(b). A worker's refusal to transfer from full-time to part-time or vice-versa shall not be a valid reason for dismissal (Clause 5(2).

It is rather the inverse: Employers should consider requests by workers to transfer from full-time to part-time work or vice versa (Clause 5(3). The Part-time work Directive calls on MS and national social partners **to remove obstacles for part-time work** (Clause 5) (Michaeler case).[4] The Directive contains a clause on information and employment opportunities (clause 5).

The Directive is also applicable in the public service of the MS (Adelener and Marrosu cases).[5]

1. CJEU 2 September 2021, C-928/19P (EPSU).
2. CJEU, 15.04.2008, C-268/08 (Impact).
3. CJEU, 10.06.2010, C-395/08 and C-396/08 (Buno and Pettini).
4. CJEU, 24.04.2008, C-55/07 and C-56/07 (Michaeler).
5. CJEU, 4.07.2006, C-212/04 (Adelener); CJEU, 7.09.2006, C-53/04 (Marrosu).

MS **may exclude part-time workers working on a casual basis** from the coverage of the Directive (Clause 2(2), but this is not to say that the Directive precludes so-called labour-on-call contracts (Wippel case).[6] The Directive contains the usual "more favourable" and non-regression clauses (Sorge case).[7]

6.5. Directive on Fixed-term contracts

The Directive on Fixed-term contracts (1999/70/EC) stresses that contracts of an indefinite time are and will continue to be the general form of employment relationships (2nd line of the preamble).

This is a remarkable (hypocrite) pronouncement, as nowadays the conclusion of fixed-term contracts has become dominating the labour market, as far as newly concluded contracts are concerned!

The Fixed-term contracts Directive **intends to** improve the quality of fixed-term contract workers by **ensuring the application of the principle of non-discrimination.** It will ensure a treatment in a not "less favourable manner" than permanent workers (Clauses 1(a) and 4(1) and this is, like in the Part-time Work Directive, done by some provisions on the "comparable worker" (Clause 3(2).

The equality principle is applicable to all employment and working conditions in laws and collective agreements, also concerning occupational pensions.

The principle of equality is so unequivocal that it has **direct binding effect.**

Further it should be stressed that **the Directive does not abolish the most important inequality between fixed-term workers and workers with open-ended contracts: the protection against dismissal!** For most fixed-term workers this protection is inherently much lower than for workers on open-ended contracts! (Cobra case).[8]

The Directive has further been inspired by the purpose **to prevent abuses** arising from the use of successive fixed-term contracts (Clause 1(b) (see case Ministerio).[9] By requiring the prevention of abuses the Directive gives Member States – if there are no alternatives – **three options:**

6. CJEU, 12.10.2004, C-313/02 (Wippel).
7. CJEU, 24.06.10, C-98/09 (Sorge).
8. CJEU, 11.04.2019, C-29/18 (Cobra).
9. CJEU, 8.05.2019, C-494/17 (Ministerio).

1) Either **to require "objective reasons" for the renewal** (Adelener and Mangold cases)
2) or to establish **a maximum total duration** of a chain of fixed-term contracts
3) or to prescribe **a maximum number of renewals** of fixed-term contracts.

NB: The Directive does not require "objective reasons" for the first fixed-term contract (Angelidaki case).[10]

The Directive has excluded from its coverage the Temporary Agency work (see preamble and also paragraph 5.4); Member States may exclude training/apprenticeship agreements (Clause 2).

Like the Part-time Directive this Directive also contains the usual "more favourable"[11] and non-regression clauses and clauses on information and employment opportunities (clause 6).

Also, this Directive is applicable in the public service of the MS.

6.6. The Telework Agreement

Having studied these two Directives/Agreements it is good to look at the second category of Social Partners Agreements, those which are not supported by a Decision of the Council, but must be implemented "in accordance with the procedures and practices specific to management and labour and the Member States."

The hard contents of the Telework Agreement is the same as that of the Agreements on Part-time work and Fixed-term contracts: equality. It must ensure the teleworker the application of the same rights as comparable workers at the employers' premises have.

The equality principle is applicable to all employment and working conditions in the law and collective agreements, although some specific conditions may be agreed (point 4).

In addition, the Telework Agreements provides that a refusal to do telework that not was agreed cannot justify a dismissal. Later decisions to pass to telework are reversible (point 3).

The employer in principle must bear the special costs of IT-materials (point 7). Moreover, privacy and data protection must be ensured (points 6 and 5) etc.

10. CJEU, 23.04.2009, C-378/07 (Angelidaki).

11. ECJ 4 July 2006, case C-212/04 (Adelener); ECJ 22 November 2005, C-144/04 (Mangold).

Although the Telework Agreement dates back to 2002, it may have become extremely relevant in the actual times with the Covid-19 Crisis. Therefore, the question is urgent: how is this Agreement implemented in the various countries?

From a study of the European Commission, a few years ago, it appeared that the Telework agreement has been implemented in the various MS in very diverse ways, ranging:

- from Belgium where it has been implemented by way of a national cross-industry collective agreement, with binding force for all employers and workers able of being monitored by the Labour Inspectorate and enforced with criminal sanctions, hard law therefore;
- to the UK, where it was only implemented by way of a code of practice, much more soft law therefore.

6.7. The Work-Life Balance Directive

As said before, in 1996 the European Social Partners had concluded an Agreement on Parental leave, which was turned into Directive 96/34/EC. It was a relatively "cheap" Directive as it was only about **unpaid parental leave during** 3 months. In 2010 this was amended to **4 months (Directive 2010/18/EU).** It is not a very contested item, which provoked only scarce CJEU case law.[12] However the developments in the various MS have progressed much further in this century.

For the European Commission this was reason to propose a new Directive (no longer of a Social Partners making!), replacing the Parental Leave Directive, with a wider scope under a new title: **Directive on Work-Life Balance for Parents and Carers (Directive 2019/1158/EU).**

The Directive provides that MS shall ensure all the workers on contracts of employment (Art. 2) at least:

- 4 months **parental leave** (including adoption leave) (Art. 4)
- 10 days **paternity leave** (Art 5)
- 5 days **carer's leave** a year for workers **caring** for serious ill or dependent relatives (Art 6)
- An unspecified number of days a year **leave for urgent family reasons** of illness/accident (Art 7)

12. See for instance CJEU, 8.05.2019, C-486/18 (Praxair).

Paternity leave and parental leave are to be paid by wage payments or (social security) allowances. Paternity leave must be at least at the level of sick pay, parental leave at such a level "as to facilitate the take up" (Art 8).

Parents with children up to at least 8 years and carers shall have the right to flexible work arrangements with their employer (Art. 9).

In exercising all these rights, the workers concerned must be protected in their employment rights (Art. 10) and against discrimination (Art. 11) and dismissal (Art. 12).

This Directive will only come in force by 2 August 2022.

6.8. A Directive on minimum wages?

In October 2020 the European Commission put a Proposal on the table for a Directive on minimum wages[13]. **The proposal does not intend to establish a uniform European Minimum Wage.** This would be unrealistic with a view on the discrepancy between national minimum wages in the EU (varying from 3 to 13 Euro an hour). Therefore, the proposal does not mention any amount for a minimum wage. The Commission proposes only to impose on the Member States **the obligation to maintain a system of adequate minimum wages,** that must satisfy to a wide range of qualitative criteria (Art 5-7) and the effective access of the workers to the minimum wages (Art. 8). The Member States are also obliged to promote collective bargaining on wages (Art. 4).

Apart from discussions on these substantive issues, one of the main points of debate is about the legal basis for such a Directive (see paragraph 1.4 of this book). The Commission proposes Art. 153(1)(b) TFEU as basis. The problematic side of this proposition, however, is Art. 153(5) TFEU which reads that "the provisions of this Article shall not apply to pay…". The Commission dismisses this objection, referring to CJEU case law, in which the Court has legitimized EU rules about pay when they are only indirectly affecting pay. The legal and political debate is now very much focused on this question. Is the Commissions' view sustainable? Is there a proper alternative legal basis? Is the proposal not contrary to the subsidiarity-principle, etc. Nevertheless, the European Parliament and the Council of Ministers in 2021 already accepted the basics of the Commission proposal for the Directive, so that it may be adopted with some minor corrections in 2022.

13. COM (2020) 682 def.

6.9. A Directive on platform workers?

On 9 December 2021 the European Commission presented a proposal for a new Directive, aimed at countering false self-employment at digital labour platforms[14]. It proposes to give this group of workers more security. Under certain conditions, platform workers will be classified as employees, which then would entitle them to regular working conditions, like a minimum wage, continued payment during illness, and holidays. In addition the Directive intends to offer all platform workers protection against "algorithmic management".

6.10. The Wistleblowers Directive

Wistleblowers are persons who bring violations of the law in the companies/institutions where they work to the open. The European Union wants to protect them against all sorts of retaliation to which they are often exposed by their employers. With Directive 2019/1937/EU they are now protected but only in as far as the Wistleblower is revealing violations of EU standards, with exclusion of "employment/social matters (Art. 1). These are strange limitations, but it is expected that most Member States, when implementing this Directive will give a much more coverage to the standards of protection, laid down in the Directive.

14. COM (2021) 762 final.

equality

7 EQUALITY AND NON-DISCRIMINATION

7.1. Introduction

Apart from the concept of non-discrimination in the Free movement area (see Chapter 3) the genesis of EU-involvement in the non-discrimination area dates back to 1957: art. 119 CEE (now art. 157 TFEU) and 1971, judgments of the ECJ on the direct effect of this article (Defrenne 2 case).[1] However, the text of art. 119 EEC was limited. It mentioned only equal pay between men and women for equal work.

Therefore, numerous Directives after 1971 were adopted to broaden the EC/EU involvement:

1975* Directive on equal pay m/f

1976* Directive on equal treatment m/f

1979 Directive on equal treatment in statutory social security

1986* Directive on equal treatment in occupational social security

1986** Directive on equal treatment self-employed

1997* Directive on the burden of proof

The *Directives have been repealed and consolidated in the 2006 Sex Discrimination Directive;

The **Directive was replaced by the 2010 Sex Discrimination Directive for the self-employed.

As many old directives have been repealed (the contents of the repealed Directives are incorporated in the new ones; still important is the old case law) the focus in this book is on three remaining Directives:

- the Sex Equality Directive (SED)
- the Race Equality Directive (RED)
- the Equality in Employment Directive (Directive 2000/78/EC), in this book abbreviated as EED), which has established a general framework for equal treatment in employment and occupation and which is about discrimination on the grounds of religion or belief, disability, age or sexual orientation (Art. 1).

1. CJEU 25.05.1971, C-80/70 (Defrenne 1); CJEU 8.04.1976, C43/75 (Defrenne 2).

We will start with concepts and items that the three Directives have more or less in common. Later come the specific aspects of these directives.

7.2. Concepts and items in common

Definitions

The principle of equal treatment means that there shall be no discrimination on grounds of…… (sex, race, age, etc.) …. either directly or indirectly (art. 2(1) EED; art 2(1) RED).

***Direct discrimination** shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on grounds of… (sex, race, age, etc) ... (Art. 2(2)(a) EED; Art. 2(2)(a) RED; art. 2(1)(a) SED).

***Indirect discrimination** shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of…. (one sex, a racial origin…. etc.) ….at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary (Art. 2(2)(b) EED; Art. 2(2)(b) RED; art. 2(1)(b) SED).

Example of indirect discrimination: to take the minimal length of a person as a criterion for recruitment.

The concept of discrimination includes:

- **instructions** to discriminate against persons on grounds of sex, race, age, etc. (Art. 2(4) RED; art. 2(4) EED; art. 2(2)(b) SED.
- **harassment** (art. 2(3) RED: art. 2(3) EED; art. 2(1)(c) SED.
- *Harassment has been defined as "where unwanted conduct related to … (the sex/racial origin….) occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment."
- Note two differences: In both the RED and the EED it is added "In this context, the concept of harassment may be defined in accordance with the national laws and practices of the MS". Not so in the SED, because in the SED there is a special definition of sexual harassment.
- "**sexual harassment**" means "unwanted conduct" as "any form of unwanted verbal, non-verbal or physical conduct of a sexual nature."

Scope

The three Directives largely have the same scope.

The EED is only concerned with non-discrimination **"as regards employment and occupation"** (Art. 1 + Art. 3). State social security is especially excluded (Art. 3(3). About the same is the scope of the SED (Art. 1). The RED, however, has a somewhat more extensive scope. Apart from matters of employment and occupation it is also dealing with state social security, education, housing, etc. (see Art. 3).

NB: EP and Commission have pursued the adoption of a more **general EU Directive** prohibiting discrimination on grounds of sex (ual orientation), race and religion in various matters outside employment, such as social security and health care, education, access to and supply of goods and commercial services such as housing and transport.[2] However it has been impossible to reach the necessary unanimity in the Council of Ministers (art. 19 TFEU).

In all three Directives we find a provision that the MS must ensure the abolishment of all discriminatory provisions in laws, regulations and administrative provisions, and that all such provisions in individual and collective contracts, company rules, rules of organizations or professions, etc., shall be null and void. (art. 14 RED; art. 16 EED; art. 23 SED).

In all three Directives we find a provision that the Directive is:

- applicable on both the public and the private sector;
- it also concerns the access to self-employment and occupation.

  (art. 3(1) RED; art. 3(1) EED; art. 14(1) SED).

Exceptions

The 3 Directives show two approaches on Exceptions. In matters of race and sex discrimination the Directives are offering a closed system of exceptions in the field of direct discrimination. In the matters covered by the EED the Directive offers an open system of exceptions (art. 3) to both direct and indirect discrimination.

In RED and EED we find an important **exception** made as to prohibition of discrimination. MS may provide that a difference of treatment based on sex, race, religion, etc., shall not constitute a discrimination if it constitutes "a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement

2. COM (2008) 426 final.

is proportionate." (art. 4 RED; art. 4(1) EED). The same exception is allowed in SED, but only as regards access to employment including the training leading thereto (art. 14(2 SED).

Also, the case law of the CJEU show two approaches on exceptions. In sex discrimination law the CJEU is requiring that a measure is necessary, because of all imaginable alternatives it is the least infringing on the right to equal treatment. In matters of age discrimination, the CJEU allows national legislation and social partners more room to come up with objective justifications. The last line raises the very interested question of conflict between the fundamental right of equal treatment and the fundamental right of free collective bargaining. It seems that in sex/race discrimination cases the social partners have much less room for deviations than in age discrimination matters.

Positive action/affirmative action/positive discrimination

In a number of rulings since the 1990s the ECJ has given judgment about various forms of affirmative action. It first ruled against such a phenomenon in a m/f discrimination case (Kalanke case, 1995).[3] This caused much anger and the matter was explicitly included in the EC Treaty by the Amsterdam Treaty (see now Art. Art. 19(4) and 157(4) TFEU). Now art. 3 SED allows MS to maintain or adopt measures to ensuring full equality in practice between men and women in working life. Also, in RED and EED we now find that the principle of equal treatment shall not prevent any MS from maintaining or adopting specific measures to prevent or to compensate for advantages linked to the grounds of race, age, etc. (art. 5 RED; art. 7(1) EED). In a number of rulings since then the Court has given judgment about various forms of affirmative action[4].

Various provisions

All three Directives contain the usual "more favourable" and "non-regression clauses (art. 6 RED; art. 8 EED; art. 27 SED)". All three Directives are containing articles about dissemination of information: MS must widely publish the anti-discrimination provisions (art. 10 RED; art. 12 EED; art. 30 SED).

All three Directives contain articles requiring MS **to promote the social dialogue and the dialogue with non-governmental organizations** to foster equal treatment (Art. 11/12 RED; art. 13/14 EED; art. 21/22 SED). However, the article on social dialogue is more extensive in the EED than in RED and still more elaborate in the SED.

3. CJEU 17.10.1995, C-450/93 (Kalanke).

4. For example ECJ 6 July 2000, C-407/98 (Abrahamssom).

In all three Directives we find the rule that MS must ensure the availability of judicial and administrative procedures **to enforce** the principle of equal treatment. And that also associations defending the interest of discriminated people may start legal proceedings (art. 7 RED; art. 9 EED; art. 17 SED). An example: the Feryn case[5] (race discrimination), was initiated by the Belgian Centre for equal opportunities and the fight against racism.

In Chapter 1D it was said: In principle there is no binding effect of Directives versus non-state parties. In several equality and discrimination cases the CJEU has made important exceptions to this principle. It requires national courts in such disputes between two individuals to guarantee the full effectiveness of Art. 21 and 47 CFREU (see the ID and Egenberger cases)[6].

In all three Directives we find an article on the **burden of proof.** When plaintiffs in court establish facts from which it may be assumed that there has been discrimination, it shall be for the respondent to prove that there has not been discrimination. This shall not apply in criminal procedures and to procedures in which it is for the court to investigate the facts of the case. MS may apply more favourable rules of evidence for plaintiffs (art. 8 RED; art. 10 EED; art. 19 SED).

Sanctions and penalties

In all three Directives we find the rule that MS must establish **"effective, proportionate and dissuasive" sanctions** (art. 15 RED; art.19 EED; art. 25 SED). All three Directives are requiring MS to take measures against dismissal or other adverse treatment of employees who have taken their employer to court in a discrimination case (so-called **anti-victimization clauses**) (art. 9 RED; art. 11 EED; art.24 SED). This protection extends to supporting colleagues (case Hakelbracht).[7]

Only in the RED and the SED we find provisions, that MS shall designate **special Equality bodies** for the promotion, analysis, monitoring and support anti-discrimination (art. 13 RED; art 20 SED).

7.3. Sex Discrimination

The SED is much more elaborate than RED and EED because it has incorporated all the more detailed rules contained in the earlier Directives, such as the 1975 Equal Pay m/f Directive, the 1976 Equal Treatment m/f Directive, the 1986 Equal Treatment m/f in

5. CJEU, 10.07.2008, C-54/07 (Feryn).
6. CJEU, 19.04.2016, C-441/14 (ID); CJEU, 17.04.2018, C-414/16 (Egenberger).
7. CJEU 20.06.2019, C-404/18 (Hakelbracht).

occupational social security schemes Directive and the 1997 Directive on the burden of proof. See notably (art. 4-16 SED).

In this book I shall focus on Equal pay and Equal Treatment and pay no attention to (occupational social security, Art. 5-13 SED), the Directive on equal treatment m/f in statutory social security and the Directive on equal treatment m/f of the self-employed.

Equal pay m/f (Art. 4)

The right to equal pay m/f not only regards the same work, but also for work to which equal value is attributed[8] and also requires job classification systems to be free of sex discrimination aspects. There have been numerous ECJ cases over the last 40 years!

Notwithstanding 50 years of laws (both EU and national) against unequal pay m/f, in all Member States statistically women's pay is on average 17% under men's pay (it varies between 28 and 5%). How come? Entire bookshelves can be filled with books on this theme! In view of the continued existence of this "gender pay gap", in March 2021 the European Commission has presented a proposal for a Directive to strengthen the application of the principle of equal pay m/f.[9]

With this newly proposed Directive the EU Commission will arm employees with information, which will be coupled with effective enforcement measures.

The new Directive should require the Member States to give rules:

a. on pay information in vacancies
b. on an individual right to pay information during employment
c. on gender pay gap reporting for employers with over 250 employees
d. on joint pay assessments
e. on enforcement of these rules.

Many cases about unequal pay have taught us, that there are different sorts of discrimination possible, direct discrimination and indirect. Direct discrimination m/f seems actually less a problem than in the past, because the awareness of the prohibition of sex discrimination has grown. So, the focus is actually more on indirect discrimination.

In the past it has been notably part-timers who complained about discrimination in pay and other working conditions. Initially it was necessary that part-timers show that it was most women doing part-time work so it was indirect discrimination. Since the coming

8. CJEU 6 June 2021, C-624/19 (Tesco).
9. COM (2021) 93 final.

into force of the Part-time Work Directive (see Chapter 6) this detour is no longer needed. However, there are still cases about unequal pay of part-time workers brought under sex discrimination, as art. 157 TFEU guarantees direct and horizontal effect.[10]

A still actual issue is: what means "equal pay" for overtime work, which often is extra rewarded, in cases of part-time work? Should an employee, working 20 hours a week obtain the extra payment as from the 21st hour or as from the 40th hour, as full-time workers do? In the Lengericht/Helmig case[11], 1994, the ECJ decided the last alternative, but in the Vosz-case[12], 2007, it seems to have nuanced its opinion.

Other forms of indirect m/f discrimination, such as by references to the status of a person (married/unmarried) and the use of the concept of breadwinner, have consequently been refused by the CJEU to justify such discriminations. However: references to seniority may justify indirect m/f pay discrimination (Cadman case).[13]

Equal Treatment

Equal Treatment in working conditions (art. 14-16 SED) covers equal access to jobs at all level of the professional hierarchy, promotion, all types of training, all employment and working conditions, including dismissal.

How hard is this rule? Are exceptions possible? Indeed, exceptions are possible for occupational characteristics - activities for which sex is the determining factor (Art. 14(2) SED).

However, in most sex discrimination cases such exceptions are nowadays refused by the courts. Among the few cases the CJEU accepted, were the midwifery (Commission vs UK, 1983)[14] and a few specific jobs in the police (Johnston case)[15] and the navy (Sirdar case)[16] However, the CJEU did not accept different recruitment systems used in the French prisons and national police force, nor the general exclusion of women from the German army.

What about different treatment of women because they are pregnant or on maternity leave? See: Art. 2(2) SED, stating that discrimination also includes "Any less favourable

10. See for instance CJEU, 8.05.2019, C-486/18 (Praxair).
11. CJEU, 15.12.1994, C-399/29 (Lengericht/Helmig).
12. CJEU, 6.12.2007, C-300/06 (Vosz).
13. CJEU, 3.10.2006, C-17/05 (Cadman).
14. CJEU, 8.11.1983, C-165/82 (Commission vs UK).
15. CJEU, 15.05.1986, C-222/84 (Johnston).
16. CJEU, 26.10.1999, C-273/97 (Sindar).

treatment of a women related to pregnancy and maternity". CJEU does not allow a refusal to hire or a dismissal because of pregnancy (Dekker case)[17], even not in case the employee was hired on a short-term contract and knew before that she was pregnant (Tele Danmark case).[18]

Are exceptions possible for the protection of women? In the past many of such protections were inserted in national labour law, often based on ILO Conventions such as on the prohibitions of industrial night work (Stoeckel case[19]) and underground work in mining (Comm. v. Austria), etc.

They were no longer accepted by the ECJ as they were seen as standing in the way for women to get access to these jobs. The CJEU only accepts protective rules for women in the area of pregnancy and maternity protection in conformity with Art. 28 SED with reads "without prejudice to provisions, concerning the protection of women, particularly as regards pregnancy and maternity".[20] In this vain the SED offers the women coming from maternity leave a right to return to their old job or to an equivalent post (art. 15).

Positive action/affirmative action/positive discrimination m.f.

After a negative ruling of the CJEU (Kalanke case, 1995), positive action/affirmative action m/f in 1997 was explicitly included in the EC Treaty by the Amsterdam Treaty (see now Art.157(4) TFEU) and is now also mentioned in Art. 3 SED. However, although positive/affirmative action is in principle possible, the CJEU still does not accept every form of affirmative action. It depends of the shape of the measure and the circumstances and was allowed in the Marschall case[21] and the Badeck case[22], but not in the Abrahamsson case[23] and the Briheche case[24].

The hottest issue now is: should there be a quota for women in top jobs? A proposal for a Directive of the European Commission was already presented in 2012[25], but was blocked in the Council of Ministers. The European Commission desires to unblock this,

17. CJEU, 8.11.1990, C-177/88 (Dekker).
18. CJEU, 4.10.2001, C-109/00 (TeleDanmark).
19. CJEU, 25.07.1991, C-345/89 (Stoeckel).
20. CJEU, 18 November 2020, C-463/19 (Syndicat CFTC).
21. CJEU, 11.11.1997, C-409/95 (Marshall).
22. CJEU, 28.03.2000, C-158/97 (Badeck).
23. CJEU, 06.07.2000, C-407/98 (Abrahamsson).
24. CJEU, 30.09.2004, C-319/03 (Briheche).
25. COM (2012) 0614 final.

now that a larger part of MS came to legislate on this issue (most recently, January 2020, Germany and The Netherlands, 2021).

Until now men have not often been successful in equality claims! Not in cases about paternity leave (Hofmann)[26], a required equivalent of a special maternity bonus (Abdoulaye case)[27] and about the enjoyment of child facilities (Lommers case)[28]. Most successful, however, men have been in the Barber-claim, 1990[29], about different pensionable age m/f in occupational pension schemes. Women should not have the right to retire earlier than men! Now the SED offers both men and women discrimination protection in case of paternity leave and adoption leave (art. 16 SED), (see also the Work-Life Balance Directive, see paragraph 6.7).

Enforcement

The Directive requires Member States to encourage employers and others to take effective measures to prevent sex discrimination (Art. 26 SED). Art. 18 SED is special detailed on the compensation of damages of the victims of discrimination. "No fault" excuses were not accepted by CJEU (Draehmpaehl case).[30]

7.4. Race Discrimination

A special Directive, nr. 2000/43/EC, concerns the equal treatment of persons irrespective of racial or ethnic origin (abbreviated RED). The Directive does not cover difference of treatment based on nationality or the legal status of third-country nationals and stateless persons (RED (Art. 3(2) also in EED (art. 3(2), not in SED).

Until now there have been hardly any CJEU cases under this Directive. The only one was the Feryn case.[31]

26. CJEU, 12.07.1984, C-184/83 (Hofmann).
27. CJEU, 19.09.1999, C-218/98 (Abdoulaye).
28. CJEU, 19.03.2002, C-476/99 (Lommers).
29. CJEU, 17.05.1990, C-262/88 (Barber).
30. CJEU, 22.04.1997, C-180/95 (Draehmpaehl).
31. CJEU, 10.07.2008, C-54/07 (Feryn).

7.5. Religious Discrimination

First of all, the EED prohibits discrimination on the grounds of religion or belief (Art.1). It allows, however, a difference of treatment because of occupational requirements (Art. 4(1) and because of the "ethos" of a church or an organization (Art. 4(2) (see the Egenberger case).[32]

Until recently there was no CJEU case law on matters of discrimination in religion/belief at work (much on that issue in the ECtHR case law!). In 2017 there were two CJEU judgments on the subject of prohibitions to wear the Muslim headscarf at work. The CJEU ruled that a random prohibition is not allowed, but the freedom of religion (Art. 10 CFREU) may be balanced against the freedom to conduct a business (Art. 16 CFREU) (Samira Achbita case[33], the WABE and Müller case[34]). In 2019 there was a ruling about freedom of work and pay for non-Christians on Christian holidays (Achatzi case).[35]

7.6. Discrimination of the disabled

The EED is also prohibiting unequal treatment on the ground of disability. What is disability? Originally the CJEU hold, that disability is something else than an "illness". It is "a long-term limitation…. etc" (Chacón Navas case).[36] Recently the CJEU widened its definition, dropping the word "long term" (Ring case).[37] The protection of the Directive may also be invoked by a person who is not him/herself disabled, but has the main care for a disabled child (Coleman case).[38]

EED is not only prohibiting unequal treatment on the basis of disability. It also establishes two specific more positive obligations on the employer. The employer is obliged to take appropriate measures in order to eliminate disadvantages (art. 2(2)(ii) and to ensure "reasonable accommodation" for disabled persons (art. 5).

32. CJEU, 17.04.2018, C-414/16 (Egenberger).
33. CJEU, 14.03.2017, C-157/15 (Samira Achbita).
34. CJEU, 15 July 2021, C 804/18 and C-141/19 (WABE and M.H. Müller).
35. CJEU, 22.01.2019, C-193/17 (Achatzi).
36. CJEU, 11.07.2006, C-13/05 (Chacón Navas).
37. CJEU, 11.04.2013, C-335/11 and C-337/11 (Ring and Werge).
38. CJEU, 17.07.2008, C-303/06 (Coleman).

7.7. Age Discrimination

In addition, the EED in principle prohibits differences of treatment on grounds of age, but allows such differences if they are based on occupational requirements (Art. 4.1), provided they are objectively justified, by a legitimate aim and the means of achieving that aim are appropriate and necessary (art. 6(1).

Nota bene, that here is no distinction made between direct and indirect discrimination. All age discrimination may be justified!!!!! Also, direct age discrimination. EED even gives three examples of differentiations on the ground of age, that may be justified:

- lower and upper age limits on the access to employment and training, including dismissal and remuneration for young people, older workers and persons with caring responsibilities (art. 6(1)(a)
- the fixing of minimum conditions of age, professional experience or seniority (art. 6(1)(b)
- the fixing of a minimum age for recruitment (art. 6(1)(c)

There are already a number of CJEU cases about the automatic termination when the official pensionable age is reached. This is allowed by the CJEU in most of these cases (Palacios, Age Concern, Rosenbladt, Georgiev and Fuchs)[39], but it was rejected in a few cases (Petersen and Prigge).[40] The CJEU also allowed an upper 30 years limit for the recruitment for fire workers (Wolf case).

In other types of cases the CJEU is much more critical. The CJEU was not prepared to allow an unlimited number of fixed term contracts for persons over the age of 52 years (Mangold case)[41] and that periods of work fulfilled before a certain age can be ignored by the fixation specific labour law rights (seniority in the Hütter case[42], the length of a period of notice (Kücükdeveci case)[43] and the entitlement to a severance allowance (DI case).[44] The CJEU did also not accept certain seniority scales in a collective agreement

39. CJEU, 16.10.2007, C-411/05 (Palacios); CJEU, 5.03.2009. C-388/07 (Age Concern); CJEU, 12.10.2010, C-45/09 (Rosenblatt); CJEU, 18.11……, C-250/09 and C-268/09 (Georgiev); CJEU, 21.07.2011, C-159/10 (Fuchs).

40. CJEU, ….01.2010, C-341/08 (Petersen); CJEU, …..09.2011, C-447/09 (Prigge).

41. CJEU, 22.11.2005, C-144/04 (Mangold).

42. CJEU, 18.06.2009, C-88/08 (Hütter).

43. CJEU, 19.01.2010, C-555/07 (Kücükdeveci).

44. CJEU, 19.04.2016, C-441/14 (DI).

as vocational training and years of service were considered to be a more appropriate criterion than age (Hennigs case).[45]

Finally, it should be mentioned that equal treatment on the grounds of age is not applicable on the armed forces (art. 3(4) and that MS may allow an exception in occupational social security schemes (art. 6(2).

It appears that the EU legislator and the CJEU allows national legislators, authorities and social partners a broader margin of appreciation (and thus more room for maintaining age distinctions) than for instance in sex and race discrimination cases.

In sex discrimination law the CJEU is requiring that a measure is necessary, because of all imaginable alternatives it is the least infringing on the right to equal treatment.

In matters of age discrimination, the CJEU allows national legislation and social partners more room to come up with objective justifications. It often leaves the appreciation of these justifications to the national courts (Tekniq case).[46]

7.8. Sexual Orientation

Before 1997 EU discrimination as regards sexual orientation was not covered under EU law; one such case, based on sex discrimination (Grant case)[47] was dismissed. In 1997 the Treaty of Amsterdam inserted this ground in the EU Treaties (now in Art. 19 TFEU) and it is now also in EED.

Until now there have been few CJEU cases in this area. One was about homosexual partners who were wrongly refused an occupational widowers' pension: and a case about the "patron" of FC Steaua Bucuresti, who had said: "He would never hire a homosexual player".[48]

NB. Unequal treatment of transsexuals is covered by the concept of sex discrimination.

45. CJEU, 8.09.2011, C-297/10 (Hennings).
46. CJEU, 26.2.2015, C-515/13 (Teknik)
47. CJEU, 17.02.1998, C-249/96 (Grant).
48. CJEU, 25.04.2013, C-81/12 (Steaua).

The Working Time Directive

8 WORKING ENVIRONMENT

8.1. General

Right from its start in the 1950s the European Communities were already actively involved in the business of working environment, especially as regards the health and safety problems, and notably in the fields of coal and steel (ECSC) and nuclear energy (EURATOM).

Within the ambit of the EEC, however the 1960s and 1970s passed with only a few recommendations in the field of health and safety and working hours, apart from a binding Regulation on working time in the sphere of road transport, 1969.

As a result of the First Social Action Programme between 1977 and 1988 a handful Directives were adopted. Regulatory work in this area was further accelerated by the Single European Act, 1986, which for the first time in EU labour law gave the Council of Ministers a special competence (Art. 118a EEC) to legislate with qualified majority on "improvement in particular of the working environment to protect workers' health and safety". This competence is now part of Art. 153 (1)(a) TFEU. The Commission quickly acted to launch a series of proposals for Directives: one framework Directive and quite a number of specific (daughter) Directives, most of them have been effectively adopted in the following years.

Directives on:

- Health and safety requirements at the workplace
- Health and safety requirements for the use of work equipment
- Health and safety by personal protective equipment
- Handling heavy loads
- Visual display units
- **The organization of working time**
- Health and safety for temporary workers
- **The protection of pregnancy and maternity**
- **The protection of young workers**
- Health and safety on medical treatment on board ships
- Health and safety on temporary mobile workshops
- In mineral-extracting industries
- In industries with risk from explosive atmospheres

The first handful of Directives had not encountered much political resistance, but the Working Time Directive held explosive material. The UK, where until then working time had not received general statutory regulation, opposed it fiercely and in the end challenged its legality before the Court of Justice. The UK refused to consider "working times" as an item within the definition of health and safety, which could bind the UK to decisions taken in the Council with qualified majority (old art. 118a EEC). The UK lost this "cause célèbre": the Court considered "working time" as an item of "health and safety" to which the UK was bound.

But then much of the momentum was lost in the first decades of the 21st century. Several existing directives were slightly amended and only some new directives of minor importance could be adopted. More important items, such as a modernization of the protection against the bulk of occupational cancers was lagging behind. Also, no consensus could be reached about a modernization of the Maternity Protection Directive and the Working Time Directive. The reason for this relaxation was much criticism on the bureaucratic nature of all these health and safety rules. They were considered as too cumbersome especially for SME and new-starting-enterprises. In this period the political drive was towards deregulation and new rules only as soft law (see paragraph 1.2).

The adoption of the so-called European Social Pillar, 2017, may have given a new boost to legislative activities in this area. See the extension of the Carcinogens Directive (2004/37/EC) to another 13 cancer-causing substances (Directive 2019/130/EU).

8.2. Health and safety at work

The 1989 Directive on Safety and Health of workers at work (89/391/EEC) is a kind of a Framework directive, laying down general principles that MS have to take into account in issuing, maintaining and enforcing all measures on health and safety (Art. 1(2)).

The general principles are about items like:

- The employers' obligations (Art. 5, 6 and 9)
- The workers' obligations (Art. 13)
- Protective and preventive services (Art. 7 and 8)
- Worker information, consultation and participation (Art. 10 and 11)
- Training of Workers (Art. 12)
- Health surveillance (art. 14)
- Risk groups (Art. 15)

Finally, a Health and Safety Committee is set up (Art. 17).

The employers' obligations are quite extensive. They embrace obligations:

- to ensure the safety and health of workers in every aspect related to work (Art. 5 (1))
- to make a written risk assessment (Art. 9)
- to prevent risks by e.g. combating the risk at source (Art. 6(2)(c)), alleviating monotonous work (Art. 6(2)(d)) and replacing the dangerous by the non-dangerous or the less dangerous (Art. 6(2)(g))

Such heavy statements of obligations have also financial consequences for the insurances of employers against civil responsibility for health and safety. Art. 5(3) and 5(4) says something on this aspect, and the CJEU has given a narrow interpretation on the possibility to limit this civil responsibility.[1]

The many Directives on safety and health have largely contributed to a harmonization of the various laws of the MS in this field, often almost to unification as MS have often literally reproduced the EU rules in their national legislation. By implementing all this, MS sometimes have abolished existing rules which contained more favourable standards for the workers. Formally this is not OK, as the EU-rules always are meant as "minimum rules" and contain the "more favourable" clause. Sometimes also irritation has emerged about too much "Brussels" regulatory meddlesomeness. See e.g. in 2005 a proposed rule about protection against sun radiation (the naked breast of the construction worker), which subsequently has been withdrawn! In general, the criticism on too much Brussels rules has led the Commission to a shift to non-legislative measures to improve health and safety.

Most MS have traditionally entrusted the enforcement of these rules to the Labour Inspectorate. There seems to be a lot to be desired in this area. Nevertheless, the EU authorities are predominantly satisfied with the results obtained over the last decades. According to statistics the number of victims of work accidents has constantly decreased in all MS, although in some MS more than in others. Also, classic occupational diseases have been on the retreat, but modern occupational diseases have emerged, certainly in the field of psychic diseases, related to stress etc. because of work but also because of the necessity to combine work and family responsibilities.

The last topics were addressed by the European Social Partners when they concluded two Agreements, one on stress, the other on Violence/Mobbing. However, these Agreements are not converted into Directives but are to be implemented "in accordance with the procedures and practices specific to management and labour and the Member States" (so very much soft law!). At sectoral level there is now the Hairdressers-

1. See ECJ 14 June 2007, C 127/05 (Commission v. UK).

Agreement, which the social partners would like to be converted in a Directive, but the Commission refused (see paragraph 1.8).

The EU is giving MS assistance in the formulation and evaluation of measures in the field of health and safety by the European Agency for safety and health, seated in Bilbao. It also is charged with the cooperation in monitoring the application of all these measures.

8.3. Pregnancy and Maternity

We have already seen the protection of employees in case of pregnancy and maternity within the framework of the Sex Discrimination Act (see paragraph 7.3). On top of that the EU launched a special Directive for these employees in the framework of its programme to improve the working environment, Directive 92/85/EEC.

This Directive provides for:

- A right to maternity leave of 14 weeks, including at least two weeks to be taken before the expected date of confinement
- A right to maternity pay during this period at least at the equivalent level as sick pay
- Paid leave for antenatal medal examination
- A right to have working conditions and hours of pregnant women to be adapted.

The Directive has provoked a number of case-law of the CJEU on rather legal-technical questions, e.g. about the concept of remuneration during maternity leave (Gassmayr and Parviainen cases)[2].

Of more structural importance is the question of the modernization of the Directive. Some standards of the Directive are quite modest compared to those in various Member States. In several MS paid maternity leave is already at the level of 18 weeks (Denmark) or even 28 weeks (Czech Republic). In various MS 100% continuation of payment is provided. In some MS there is also paternity leave, adoption leave etc. So, the Commission in 2008 proposed a modernization of the Directive, providing:

- Extension of the minimum period of leave to 18 weeks
- More freedom for the employee to choose when to take up these weeks
- 100% continuation of pay in this period
- Improvement of dismissal protection

2. CJEU, 1.07.2010, C-194/08 (Gassmayr); CJEU, 1.07.2010, C-471/08 (Parviainen).

- A conditional right to part-time work after return from maternity leave
- An extension of this right to independent working persons.

The EP even proposed further modifications by extending the minimum period to 20 weeks and providing for some days of paternity leave. In the Council of Ministers several countries (UK, DE, NL, PL) were strongly opposed to these improvements – main argument: subsidiarity! So, no changes in the existing Directive could be reached. In the drive for less hard law the Commission in 2015 withdrew its proposal.

Instead, the European Commission put its stakes on a more comprehensive approach in its proposal for a Work-Life Balance Directive, which we have discussed in par. 6.5.

8.4. Child labour and young workers

Also, within the framework of an improvement of the working environment the EU in 1994 adopted a Directive on the protection of young people at work (94/33/EEC).

The Directive:

- Prohibits in principle work done by children beneath the age of 15, but it allows a number of exceptions for light work of children below this age.
- Prohibits in principle night work done by adolescents (15-18 years)
- Imposes a limit on working-time for adolescents still in full-time education
- Imposes minimum rest periods for children and adolescents.

The Directive on the protection of young workers has not provoked any CJEU case law as yet. The problem here seems to be: enforcement. Research indicates that there are many violations of the rules on child labour in the EU but they are difficult to stamp out as children and their parents are often eager to earn some money. The national Labour Inspectorates do not have enough staff to control all this.

8.5. Working Time

The EU launched an ambitious Working Time Directive in 1993. A new Directive was adopted in 2000 in order to cover some categories (e.g. doctors in training) that were excluded from the 1993 Directive. In 2003 these both Directives were consolidated into one Directive, which is now the general Working Time regime (2003/88/EC).

The Working Time Directive (2003/88/EC) covers all private and public sectors of the labour market, although there are some sectors for which there still are special EU Working Time regimes in force (notably in transport). There is a limited exception for

certain public service activities, such as the armed forces, police or some activities of the civil protection services. However, the CJEU has held that this derogation must be limited to exceptional contexts, such as disasters, and that the normal activities of such workers are covered by the Directive (Feuerwehr Hamburg case[3]).

The Directive requires the MS to lay down:

- Not more than 48 hours a week (on average in a time frame of 4 or 6 months; including overtime) (case Syndicat de cadres)[4]
- At least 35 hours uninterrupted weekly rest
- At least 11 consecutive hours rest for each 24-hour working period
- An average of no more than 8 hours night work in any 24-hour period
- A rest break where the working day is more than 6 hours
- Yearly 4 weeks of paid annual leave.

The Working Time Directive offers a huge range of possibilities for the Member States to deviate from a number of the general standards with respect to certain economic or professional categories (Art. 17). Collective agreements too may provide for flexibility (Art. 18), for instance by allowing weekly working time to be averaged over periods up to 12 months. See about the requirement to record the working time case CCOO/Deutsche Bank.[5]

Quite remarkably even more flexibility can be created at individual level. A very curious provision is Art. 22(1) that allows MS to provide that the maximum 48 hours working week standard needs not to apply if the worker agrees with non-application (**the so-called opt-out clause**). Originally this article was inserted as a concession to the UK, but in recent years it has been used by 15 more Member States in order to solve the problems of workers with "on-call time".

What is **the "on call time"- problem**? According to the Directive any period has to be considered as to be either working time or rest period. There is no in-between category. This has led to grave difficulties with regard to time during which workers must be "available" at their place of work, but most of the time not actually working (which often occurs in health care, fire brigades etc.). In the case law of the CJEU this time was

3. CJEU, 9.03.2004, C-52/04 (Feuerwehr Hamburg.
4. CJEU, 11.04.2019, C-254/18 (Syndicat de cadres).
5. CJEU, 14.05.2019, C-55/18 (CCOO/Deutsche Bank).

considered to be working time (Simap and Jaeger cases),[6] which has caused much grumble.

Besides this, there are several other criticisms on the Directive. Employers claim that the Working Time Directive is lagging behind rapid changes in working patterns and so is causing too much inflexibility on the labour market. The trade unions were pointing at the opt-out clauses, which give too much room for deviations of the general standards.

So, the time seemed ripe for substantial changes in the Directive. The Commission in 2003-2005 has presented proposals in that direction, but it was impossible to attain the necessary consensus on changes. In March 2010 the Commission launched a new review of the Directive, until now equally without success. Most MS want the problem of on-call-time solved by bringing the time in which effectively no work has been done outside the concept of working time. In that case a number of those MS are prepared to renounce from the opt-out. Other MS want to keep the opt-out anyway. The majority of the EP Parliament wants the opt-out clause to disappear. In return it is prepared to accept, that the 48 hours working week be calculated on an annual average. It insists on maintaining the on-call time as working time. The European Social Pillar has not given the Commission much stimulus to come forward with new proposals in this field. In 2017 the Commission limited itself to a report on the implementation of the Directive in the Member States and an interpretative Communication on the Directive.

The provision on 4 weeks paid holidays a year (Art. 7) has not raised much political upheaval at EU level but it has provoked a number of Court rulings which have upset some national legislations and case law in this field. Notably the Court refused to allow MS to deny or reduce the rights on annual paid holidays of certain workers (Bectu)[7], e.g. ill workers (Schultz)[8]. Art. 7 is sufficiently precise that it can be invoked following the Francovich method (Dominguez case).[9] The Court also gave clarifications about the concept of remuneration of these holidays (Williams case).[10]

Special working time regimes have been laid down for the transport industry. In road transport the regime dates back already to 1969 and is most recently laid down in a Regulation of 2006 (561/2006/EC). The working time on the road should not be more

6. CJEU, 3.10.2000, C-303/98 (Simap); CJEU 9.09.2003, C-151/02 (Jaeger).
7. CJEU, 26.06.2001, C-173/99 (Bectu).
8. CJEU, 20.01.2009, C-520/06 (Schultz).
9. CJEU, 24.01.2012, C-282/10 (Dominguez).
10. CJEU, 15.09.2011, C-155/10 (Williams).

than 9 hours a day/56 hours a week/90 hours a fortnight. Famous is here the control mechanism by way of the tachograph.

The European Social Partners in recent years have concluded Agreements ex art. 155 TFEU with regard to working hours in the Maritime industry, in Civil Aviation (cabin crew), in Cross-border railway services, in Inland Waterway Transport and in the Fishing sector. All these Agreements have been implemented by way of Council Directives apart from the last one.

8.6. Privacy

Privacy has become an important item also within the context of employment. It is mentioned in various European charters of fundamental rights, such as Art. 8 ECHR (see paragraph 2.1) and Art. 8 CFREU (see par. 2.3). There is however not much secondary EU law in this field. The most important one is de General Data Protection Regulation.[11]

This Regulation in its core provision provides that personal data must be processed fairly for specific purposes, on the basis of the consent of the person concerned or some other legitimate basis laid down by the law (Art. 8).

11. Regulation 2016/679/EU.

9 RESTRUCTURING THE ENTERPRISE

9.1. Introduction

In Western Europe, after the "golden sixties", followed stagnation in the 1970s: unemployment, restructuring of enterprises. This generated three EEC Directives concerning the restructuring of enterprises. All three were consolidated in recent years:

Directives on	launched in	consolidated in
- Collective Redundancies	75/129	98/59
- Transfer of the undertaking	77/187	2001/23
- Insolvency	80/987	2008/94

All three Directives contain specific material rules with an impact on the contracts of employment of the individual workers. The first two Directives also contain rules with an impact on collective labour law: information and consultation of the workers' representatives.

9.2. Collective Redundancies

The essential contents of the Directive on collective redundancies (Directive 98/59/EC) are, that in case of collective redundancies the employer must inform and consult the workers' representatives and inform the public authorities. He must wait a month before effectuating the decision of collective redundancies. Information and consultation of workers' representatives in case of collective redundancies must be delivered beforehand, in good time and contain reasons for the dismissals, indication of the number of workers involved as well as the selection criteria and redundancy payments (Art. 2).

The consultation with the workers' representatives should be done with "a view to reaching an agreement" (Art. 2(1) The agreement should be about avoiding redundancies or mitigating the consequences. However, no agreement is also OK, but then unions may call a strike!!!! Workers' representatives, according to the law and practices of MS, may be trade unions, or/and works' councils.

The same information must also be provided to public authorities as well as the results of the consultation of the workers' representatives (Art. 3(2). Thus: Employers must first inform and consult the workers' representatives and then the competent authority.

Collective redundancies may take effect not earlier than 30 days after notification to the competent public authority (Art. 4 (1)(2). This **30 days' time lapse** is there to allow the competent public authority to seek solutions (placement of workers, retraining, outplacement, etc.). Employers may only notice the termination of the contract of employment to the workers concerned and start the period of notice after having noticed the competent authorities (case Junk)[1]. So, there is no simultaneity between the period of notice and the period of contact with the workers' representatives, but there may be simultaneity of the period of notice and the 30 days waiting period.

When exactly is there a collective dismissal? According to Art. 1, MS may choose:

- either, over a period of 30 days, dismissal of at least 10 workers in establishments with 21-99 workers, at least 10% workers in establishments with 100-299 workers and at least 30 workers in establishments > 300 workers
- or, over a period of 90 days, dismissal of at least 20 workers irrespective of the number of workers in an establishment.

In these formulas the concepts, that need qualification, are: What exactly is an "establishment"? What dismissals do count? Most of these questions have not been answered in the Directive itself, but are often answered in national law of the Member States. Nevertheless, the CJEU has given a number of answers.

On the question - What exactly is an establishment? The CJEU has answered:

> "An establishment, in the context of an undertaking, may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks, and which has a workforce, technical means and a certain organizational structure allowing for the accomplishments of those tasks." (Athinaïki case)[2]

On the question - What dismissals do count? The Directive answers: only dismissals which are "not related to the individual worker" (Art. 1(a) but yes, also "terminations of an employment contract which occur on the employer's initiative…. shall be assimilated to redundancies, provided that there are at least 5 redundancies" (Art. 1(b). (so also "negotiated dismissals"). And the CJEU has ruled: terminations on the initiative of the workers do not count (see CJEU case Dansk M/Nielson).[3]

The Collective Redundancies Directive is not applicable (Art. 1(2) on some short-time contracts and on bodies of the public administration. The Directive is applicable on non-

1. CJEU, 27.01.2005, C-188/03 (Junk).
2. CJEU, 15.02.2007, C- 270-05 (Athinaïki).
3. CJEU, 12.02.1985, C-284/83 (Dansk M/Nielsen).

profit employers and also in cases of termination of the enterprise by judicial decision (bankruptcy!), but MS may exclude the 30 days' time lapse in that case (art. 4(4). Daughter companies cannot escape responsibility for not complying with the obligations of the Directive by invoking non-cooperation of the mother company (Akavan case).[4] See now Art. 2(4). This, however, does not solve a crucial question: in cases of (multinational) concerns: at what moment to initiate the process of information and consultation of the workers' representatives? The formal decision making at establishment level, is often preceded by material decision making at the level of the concern-top.

9.3. Transfer of the Undertaking

Take-overs, mergers of firms, outsourcing of activities, public procurement are all modern phenomena in the lives of companies in a market economy. The EU is half-hearted vis-à-vis them. The EU promotes these phenomena until the point that they may endanger free choices of consumers (monopolies). And it offers some protection to the workers concerned by the Directive of Transfer of Undertakings and the Directive on cross-border mergers of limited companies (zie Chapter 10.7).

The Directive on transfer of undertakings was first adopted in 1977 (Directive 77/187/EEC), now consolidated in Directive 2001/23/EC. This Directive provides for an obligation to a take-over of the contracts of employment existing with the transferor under the existing conditions of employment and obligation to information and consultation of workers' representatives in cases of a transfer of a (part of an) undertaking.

The first obligation reads in the language of the Directive: "The transferor's rights and obligations arising from a contract of employment …. shall by reason of such transfer, be transferred to the transferee" (Art. 3(1). The transferor is the "former employer"; the "transferee" is the new employer.

Neither the transferor (before the transfer) nor the transferee (after the transfer) may dismiss a worker on the grounds of the transfer (Art. 4(1). If this has happened the worker is considered to be still in the service of the transferor c.q. the transferee (Bork case).[5] However, the worker may nevertheless be dismissed for "economic, technical or organizational reasons". To assess this all circumstances of the dismissal must be taken into account.

4. CJEU, 10.09.2009, C-44/08 (Akavan).

5. CJEU, 15.06.1988, C-101/87 (Bork).

The automatic transfer of all rights and obligations includes rights and obligations resulting from a collective agreement in force at the date of the transfer (not the later modifications in the collective agreement (Werhof case).[6]

How long endures this continuation? This depends of the character of the rights and obligations. Those solely deriving from the individual contracts of employment may be changed by the transferee according to the national rules on modification of the contract of employment (mostly only by mutual consent, sometimes also unilateral). Those deriving from a collective agreement may be changed either after the date of termination/ expiration of that collective agreement or after the coming into force of another collective agreement (Art. 3(3)). Special rules apply to the continuation of the rights and obligations in occupational pension schemes (art. 3(4)).

Information and consultation of workers' representatives in case of planned transfers must be delivered by both transferor and transferee beforehand, in good time and contain the reasons for the transfer, an indication of the number of workers involved and the social consequences for the workers.

Consultation with the workers' representatives should take place "with a view to reaching an agreement" (art. 7(2)). The agreement should be about mitigating disadvantageous consequences for the workers and the fate of workers' representation bodies after the transfer. "Workers' representatives" according to the law and practices of MS may be trade unions, or/and works' councils.

Problematic cases are:

- The (multinational) concerns: at what moment to initiate the process of information and consultation of the workers' representatives??? The formal decision-making at establishment level is often preceded by material decision making at the level of the concern-top.
- The heavy/unfriendly take-over battles.

Then the technicalities with often huge economic impact. When is there a **transfer** in the sense of the Directive? A first key element of the answer lies in the fact, whether the employees are confronted with a new legal employer or not (Berg/Busschers case)[7]. If not (for instance if there is only the acquisition of shares by another company, whereas the legal person of the employer remains unchanged) there is no application of the directive. This is justified as far as the personal aspects of the Directive are concerned, but what about the information and consultation rights?

6. CJEU, 9.03.2006, C-499/04 (Werhof).

7. CJEU, 5.03.1988, C-144 and 145/87 (Berg/Busschers).

A second key question is, whether or not there is a transfer, if only a part of an undertaking is transferred. In the 1990s a Court-ruling in the Schmidt case[8] caused a row. Then there was the Süzen case[9]. Now there is Art. 1(b): the entity in question must have retained its **identity** (See case Dodic).[10]

When does an entity have retained its identity? A main rule of thumb is:

- Where a business is labour-intensive the key focus should be on the workforce and on whether or not they had been transferred to the new contractor.
- Where a business depends heavily on assets the focus would be on whether or not the assets had been transferred.

Unfortunately, this rule does not solve all cases! Various doubtful cases of "transfer" have been recognized by the CJEU as "transfers" in the sense of the Directive:

- "outsourcing" of a part of an enterprise
- and the reverse: bringing the outsourced activities back in-house (Hernandez-case)[11]
- intra-group transfers (Europièces case)[12]
- a situation in which a public body terminates a subsidy/or a concession to firm A, while firm B takes it over (Redmond case).[13]

The Directive applies to both private and public enterprises, whether or not operating for gain. However, the Directive does not apply to (art. 1(3)):

- Administrative reorganizations of public administrative authorities (art. 1(1)(c))
- transfers from a bankrupt company, unless a MS provide otherwise. MS that have not provided otherwise must take measures to prevent abuses (art. 5(4)).

The concept of 'employee' is according to national law, but MS may not along this way exclude groups of workers from the application of the Directive, such as part-time workers and fixed-term contract workers. Temporary agency workers are covered by the Directive if the formal employer (the agency) is transferred, but they are left out of

8. CJEU, 14.04.1994, C-392.92 (Schmidt).
9. CJEU, 11.93.1997, C-13/95 (Süzen).
10. CJEU, 8.05.18, C-194/18 (Dodic).
11. CJEU, 10.12.1998, Joined cases C-127/96, C-29/96; C-74/97 (Hernández)
12. CJEU, 12.11.1998, C-399/96 (Europièces).
13. CJEU, 15.05.1992, C-29/91 (Sophie Redmond).

the transfer of the user-company. This exception, however, does not cover intra-group posting of workers (Albron case).[14]

What if the worker doubts whether to agree with a transfer, for instance out of a fear that the transferee is not as solvent as his actual employer? Or out of unwillingness to have to relocate or to switch to a less attractive job. Art. 4(2) may help (but not too much, see Juuri-case).[15] Anyway, case law has established that the worker cannot be forced to enter into the service of the transferee (Mikkelson case).[16] But what if he refuses? Dutch/UK legal opinion says: the contract with the transferor is nevertheless terminated automatically. That is not always the solution in other MS.

9.4. The Insolvency of the employer

One of the negative aspects of the market economy are the bankruptcies. National legislators have traditionally taken measures to regulate this phenomenon to protect certain general interests. The EU has done the same in Regulation 1346/2000/EC.

Workers are among the most vulnerable creditors in bankruptcies but many national legislators have offered them mostly only a very weak protection. The EU issued Directive 80/987/EEC, now consolidated in Directive 2008/94/EC on Insolvency of the employer. This Directive imposes on the MS the obligation to guarantee the payment of outstanding wage claims (Art. 3) by guarantee institutions, which have to meet certain criteria listed in the Directive (independence, financing) (Art. 5).

The Directive offers MS some options in defining the extent of the wage claims that are guaranteed (Art. 4). The minima of most options are circa 3 months of wage claims. MS may also set ceilings to such payments but those ceilings should not be at a too low level. MS may take measures to avoid abuses and to regulate proper cooperation of the workers, for instance by limiting claim periods (cases Pflueck and Visciano).[17] However a 20% sanction on not registration as unemployed was rejected (van Ardennen case).[18]

The concept of insolvency is defined in Art. 2(1) and is broader than bankruptcy. For most other concepts (employee, pay, etc.), the Directive refers to national law.

14. CJEU, 21.10.2010, C-242/09 (Albron).
15. CJEU, 27.11.2008, C-396/07 (Juuri).
16. CJEU, 11.07.1985, C-105/84 (Mikkelsen).
17. CJEU, 16.07.2009, C-69/08 (Visciano).
18. CJEU 17.11.2011, C-435/10 (Van Ardennen).

In the case of cross-border employment relationships the guarantee institution of the place of work of the employee is competent (art. 9 (1)).

MS may exclude domestic personal of private persons, fishermen and other categories of workers if there are equivalent alternatives available for these workers (Art. 1 (2)). MS may not exclude part-time workers, fixed-term contract workers and temporary agency workers.

10 INDUSTRIAL DEMOCRACY

10.1. Introduction

Industrial democracy – the influence of the workers in the enterprise – became an interesting subject of labour law after the Second World War. Notably in Germany it was introduced in company law in the 1950s as a part of the building of a new democratic state based on checks and balances in law and society (to prevent the recurrence of dictatorship).

In the 1960s the call for industrial democracy spread over Europe, although the methods to realize it were highly divergent. Also, in the 1960s the newly established EEC had as one of its ambitions the harmonization of company law (old Art. 53(1) EEC, now Art. 50(2)(g) TFEU).

In this framework the European Commission had the intention to harmonize national company law by a series of Directives. Moreover, it wanted to establish the legal basis for a cross-border legal person, the Societas Europea. In both projects the governance of the company had to be tackled and therefore a confrontation with the item of industrial democracy could not be avoided.

However, there were in the 1960s/1970s very conflicting opinions on this item among employers, trade unions, politicians, scientific persons, with variations in all MS. So there emerged an almost insurmountable dilemma. On the one hand the already established German concepts of industrial democracy had to be respected, as otherwise Germany would be confronted with an exodus of its companies, going to MS with a lower degree of industrial democracy. On the other hand, the German concepts could not be imposed on the other MS in which there was such a variety of legal situations and political opinions on the subject. This entire problem caused the European Commission to propose complicated solutions in both its proposals on the so-called 5th Directive on the harmonization of company law and in the statute for a Societas Europea. The 1970s and 1980s were passed by seeking a solution but all proposals were unsuccessful.

In the meantime, progress in the field of industrial democracy had been made on two dossiers we have seen already in Chapter 9:

- the Directive on collective redundancies and
- the Directive on transfer of undertakings.

They both contain articles on the information and consultation of workers' representatives.

In Chapter 8 we have seen that in 1989 the same approach was applied for the item on safety and health at work (art. 10 and 11 Directive 89/31/EEC).

By the end of the 1990s the item of "information and consultation of the employees in the enterprise" obtained for the first time the status of a fundamental social right in:

- The European Social Charter of the Council of Europe
- The Charter of Fundamental Rights of the EU

These "successes" caused the European Commission to accelerate its strategy of further promoting information and consultation.

Observing the relative success of this alternative road to industrial democracy the Commission in the 1990s changed its strategies. It put the idea of promoting workers' **participation (or co-determination)** in the governance of the enterprise on the second place. It gave priority to the promotion of the idea of **information and consultation** of the workers' representatives in the large multinational companies and in all other medium and large size companies in the EU. This strategy of further promoting information and consultation resulted in 1994 in the adoption of the European Works' Councils Directive (Dir. 94/45/EEC) and in the general framework Directive for informing and consulting employees in the European Union (Directive 2002/14/EC).

Subsequently a breakthrough was now possible on the Societas Europea. New rules could be adopted in 2001 (Directive. 2001/86/EC) and this approach has been continued with regard to the statute for a European Cooperative Society (Dir. 2003/72/EC) and the Directive on cross-border mergers of limited liability companies (Dir. 2005/56/EC).

However, the proposed 5th Directive is still on ice! The conclusion may be, that Information and Consultation of employees is now quite general accepted for EU regulation where it is relevant. Participation or co-determination is still a subject on which only some coordination is possible, no harmonization (see also the different decision-making procedures for both items in art. 153 TFEU!).

10.2. The European Works Councils Directive

The first Directive on European Works Councils dates back to 1994 (Directive 94/45/EC), but was "recast" in 2009 (Directive 2009/38/EC). The Directive is characterized by a large amount of flexibility, attained by quite original and interesting legal constructions.

Despite its popular name the Directive does not exactly require the multinationals to set up a genuine European Works Council. Such undertakings have got as an alternative option: to set up "a procedure for the purposes of informing and consulting employees."

(Art. 1(5)). However, in most cases a genuine body has been chosen, the European Works Council.

The Directive focuses especially on multinational companies. The obligation for information and consultation in multinational companies was seen by the EU-legislator as a main target for EU-legislation, as it is notably within the scope of multinationals that the national rules on this item are defective.

This brings us to the concept of multinational companies in this Directive. Covered by the Directive are "community-scale undertakings", viz. companies with at least 1000 workers in at least plants in 2 MS (including the EEA-countries), where each of these plants have at least 150 workers (Art. 2(1) (a) and (c)). The first Directive on European Works Councils dates back to 1994 (Directive 94/45/EC), but was "recast" in 2009 (Directive 2009/38/EC). The Directive is characterised by a large amount of flexibility, attained by quite original and interesting legal constructions. These thresholds may be put on a lower level by MS law or by agreements between management and labour.

The Directive is not only covering single Community-scale undertakings, but also Community-scale groups of undertakings. For that purpose, the concept of "group" (German: Konzern) has received an EU-definition. A "group of undertakings" comprises a number of "controlled" undertakings dominated by a "controlling undertaking" under a central management (Art. 2(1)(b)(e) and 3). The Directive does not provide for the inclusion of employees of subsidiaries outside the MS (and EEA) in its information and consultation structure , although the EWC-agreement of such a company may do. However, company agreements may do. Not only EU based multinationals are covered. Also, multinational companies which have their headquarters outside the MS (and the EEA countries) but which meet the threshold provisions of the Directive are covered. For the sake of the application of the Directive, the central management of such extra-EU seated multinational companies must appoint a representative agent of the top-management residing outside the EU. Having failed to do so the Directive designates the management of the establishment employing the greatest number of employees in the MS as the representative agent (Art. 4(2)). Clearly a "next best" solution: in such a situation there is no direct contact between the top management of the multinational and the EWC.

The concept of "employee" is largely left to MS definitions (Art. 2(1)(d)), but the Directive provides that fixed-time contract workers are counted like permanent workers. However, there is a special calculation rule for part-time workers (Art. 2(2)). It also is understood, that leased (temporary agency) workers are not counted as employees of user-firms.

What exactly is the main function/competence of the EWC? The EWC is entitled to receive information and to be consulted on the principal items of the social and economic

situation and the transnational issues at stake in the multinational companies. Especially the recast Directive of 2009 has better than the Directive of 1994 given definitions of information (art. 2(1)(f), consultation (art. 2(1)(g) and transnational issues (art. 1(3) and 1(4)).

On the precise shape of the EWC, on its competences and procedures the Directive has chosen a very flexible approach: all this must be specified in an agreement between management and labour at the level of each multinational company (Art. 5(3)).

How is the EWC-agreement at company level concluded for a first time when there exists not yet a EWC? This must happen in negotiations between the central management of the multinational company and a **"special negotiating body"** (SNB) of workers' representatives. The Directive gives some provisions about the composition of such a SNB and has charged the MS to specify them further (Art. 5). For the concept of "workers' representatives" the Directive refers to national legislations (art. 2(1)(d)). In practice these are either representatives of trade unions or works councils, or both.

A SNB must be established as soon as it is initiated by the central management or requested by at least 100 employees in the plants of a multinational in at least two MS (and EEA-countries (Art. 10(1)).

The SNB must reach an agreement with the central management within 3 years (Art. 7(1)). However, if such an agreement cannot be concluded then automatically enters into force an EWC set up according to the terms contained in the Annex of the Directive (Art. 7) unless the SNB by 2/3 majority decides to renounce of establishing an EWC (Art. 5(5)).

These terms in the Annex ("subsidiary requirements") concern notably the competences of the EWC, the composition of the EWC and its meeting-frequency. They provide:

- Information and consultation must contain several specific socio-economic data, developments and proposed managerial decisions (point 1a);
- 1 seat in each MS per portion of employees employed in that MS, amounting to 10%, or a fraction thereof of all employees covered (point 1c);
- The central management must meet the EWC once a year and in exceptional circumstances (points 2-3).

This flexible approach has in reality not led to large-scale deviations from the terms in the Annex. Most company agreements about the establishment of the EWC are very similar with the terms of the Annex on the items of the competences of the EWC, its composition and the meeting-frequency. The specific aspects of the company agreements are notably in the fields of the allocation of seats to the various subsidiaries, the way of proposing the candidates for and electing the members of the EWC and the facilities of the EWC.

Once an EWC is established and functions it is up to that EWC to try to obtain further adaptations of that agreement later by negotiations with the employer. During its existence the EWC may conclude with the employer further agreements about whatever issues.

Sociologists see already the dawn of a "European level of collective bargaining." Labour law specialists have already started to think about technical questions such as the law applicable to such agreements, the competent judge, the possible sanctions on violations and so on.

These legal questions are all the more important as the Directive does not have much to say about the enforcement and sanctions! This may at least partially explain the large degree of disregard of the EWC-rules. Although it has been calculated that 2250 groups should be covered by an EWC, in reality by 2015 only 1071 of such EWC's have been established. This raises the question: why? Are employees not really interested in the EWC as this is only a weak construction? There is indeed no substantive influence of the workers at the most crucial managerial decisions.

Finally, it should be recalled that there is a special position for enterprises which had already concluded company agreements on the issue before 22 September 1997. Those companies can stick to their agreed system and need not to renegotiate them as long as the agreement lasts or is prolonged (Art. 13). This in 2015 concerned ca. 400 of the circa 1000 multinationals that have now established an EWC. Something similar applies as regards the changes that the Recast Directive has made in the Directive. There is no need to adapt company agreements concluded before 2011 to these changes (Art. 14).

10.3. Information and consultation in all medium and large size companies in the EU

In 2002 the EU legislator went further on the path of industrial democracy by launching a general framework for informing and consulting employees in the European Union, Directive 2002/14/EC. It obliges MS to make practical arrangements for information and consultation in all medium and large sized companies. The Directive lays down a much broader number of topics on which there should be information and consultation of the employees than just collective dismissal, transfer of the enterprise and health and safety. Employees must be informed and consulted about the economic situation and its developments, the employment situation and development as well as planned changes in work organization and contractual relations within the undertaking or establishment. (Art. 4(2)).

The Directive gives a number of rules on how and when this information must be given (Art. 4(3) and this consultation must take place (Art. 4(4)). However, all this is only a minimum. MS may apply rules more favourable to the employees (art. 4(1)). As to the aspect of the scope, the Directive leaves the Member States a choice between either 'undertakings' employing at least 50 employees in that MS or 'establishments' employing at least 20 employees in that MS (Art. 3). Both public and private undertakings, whether or not operating for gain are covered (Art. 2(a)).

What kind of employees' representatives are to be informed and consulted is left completely to the MS laws and practices (art. 2(e)? Most of the times this will be either the trade unions or the elected workers' representatives. But which of the two? Or both of them? The Directive seems not to exclude that the required information and consultation is given to the workers directly.

Moreover, the Directive lays down some rules about confidential information (art. 6), the protection of the employees' representatives (art. 7) and the enforcement of its provisions (art. 8). The Directive also provides that it is without prejudice to the comparable provisions in the Directives on Collective Redundancies, Transfer of Undertakings and European Works Councils (art. 9).

Like all labour law Directives MS may implement the Directive not only by statutes, but also leave the implementation to the national social partners via collective agreements. The Directive does not contain much items that were not already practiced in most of the old 15 MS (with the UK as notable exception). It seems that the Directive has been especially launched to extend the practice of information and consultation of the workers at enterprise level to the new MS, mostly former Communist countries where this practiced still was in its infancy.

Some years ago, the European Commission made a "fitness check" of this Directive and of the information/consultation provisions in the Directives on collective redundancies and transfer of undertakings. It was observed that in some MS Directive 2002/14/EC is not properly implemented. Austria, Germany and France have not even transposed the Directive, feeling that the existing domestic measures offer adequate protection. Not always rightly![1] Moreover, there are often difficulties in defining who should enjoy information and consultation rights, the unions or the elected workers' representatives in the enterprises. Also, enforcement is still an issue. The European Commission intends to make a "recast" of this Directive and of the information/consultation provisions in the Directives on collective redundancies and transfer of undertakings. For this reason, it

1. See case CJEU 15.1.2014, C-176/12 (Association).

in 2015 launched a consultation of the EU social partners (in conformity with Art. 154 TFEU).

10.4. Workers' involvement in the European Company ("Societas Europea")

After there has been a three decades long stagnation on the dossier of inserting one form of workers' participation or another in the governance of companies, a first success could be booked in 2001, when the EU-legislator adopted a Regulation on the Statute for a European company (SE), which was supplemented by a Directive with regard to the involvement of employees (Directive 2001/86/EC). The set-up of this Directive had been inspired by the successful set-up of the European Works Council Directive.

The Directive obliges the management to set up a SNB (special negotiating body) of employees' representatives and to charge it with the obligation to negotiate with it a tailor-made structure of employees' involvement in the SE. If management and SNB cannot agree, then automatic standard rules, laid down in the Annex of the Directive, will apply. These standard rules in the Annex provide notably for two items: the creation of a body representative of the employees and Employee participation in the governance of the SE. The standard rules of the body representative of the employees are very much modeled after the standard rules for the European Works Council, as regards the composition, the meeting-frequency and the competences of the SE-EWC.

On the employee participation in the governance of the SE, the standard rules provide as follows:

1) No employee participation in the government of the SE is required if none of the participating companies was governed by participation rules before registration of the SE.
2) All aspects of employee participation shall continue to apply if a SE is established by transformation.
3) In other cases of establishing of a SE, employee participation shall be according to the highest proportion in force in the participating companies concerned before registration of the SE.

Finally, the Directive on employee involvement in the SE lays down some rules about confidential information (art. 8), the protection of the employees' representatives (art. 10) and the enforcement of its provisions (art. 12). It is also provided that the Directive is without prejudice to the comparable provisions in the Directives on Collective Redundancies, Transfer of Undertakings and European Works Councils (art. 13). There is no obligation to set up a SE. Every company is free to choose the SE as legal person

or not. If, however, a company opts for the legal person of the SE it must apply the rules on worker's involvement. In 2014 ca. 1100 SE had been set up, but most of them under the threshold for workers' involvement.

10.5. Workers' involvement in the European Cooperative Society (ECS)

In 2003 a Regulation was launched on the establishment of a European Cooperative Society. Also, this Regulation was supplemented by a Directive with regard to the involvement of employees (Directive 2003/72/EC). This Directive is a genuine copy of the Directive supplementing the Statute for the SE. It provides for a Special Negotiating Body which may negotiate a tailor-made agreement on information and consultation and on employee participation in the governance of the ECS. If such an agreement cannot be concluded this means the automatic coming into force of the standard rules, laid down in the Annex, which are very much the same as for the SE.

10.6. Cross-border mergers of limited companies

In 2005 Directive 2005/56/EC on cross-border mergers of limited companies could be adopted, which is now incorporated in Directive 2017/1132/EU (Art. 133).

Art. 133 of this Directive contains a complicated set of rules on employee participation in the merged company, which is quite comparable with those in the SE Directive.

10.7. The 5th Directive on the harmonization of company law

Finally, the 5th Directive on the harmonization of company law, with which it all begun in the 1960s!! It should harmonize the national rules on the governance of limited companies. The preparatory works on this Directive are still not finished. Will it ever be finished?

BIBLIOGRAPHY

For further reading on the subjects of this book we advise from

T. Jaspers/F. Pennings/S. Peters
EUROPEAN LABOUR LAW
Intersentia, Antwerp, 2019

For
"the GUIDE"

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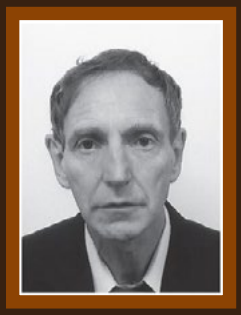

Unfortunately, labour law is very seldom on the bookshelves of the workers in Europe. It certainly is on the desks of trade union officials, of HRM staff of the enterprises and of lawyers and judges, but that is French, German, Polish, etc. labour law. European Labour Law is hardly known even among labour law experts. That is of no great matter as much of the labour law of Europe is, like a sponge absorbs the water, implemented in domestic law. Sometimes, however, one needs to trace the European origins of domestic laws, for example when there are doubts whether domestic law is fully in accordance with European law.

This book has the ambition to put the reader wise about the European origins on Labour Law. It is the fruit of lectures that Prof. Antoine Jacobs has given (2012-2019) as visiting professor at the State University of Milano.

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