ANTOINE T.J.M. JACOBS

GUIDE TO EUROPEAN LABOUR LAW

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Contents

List of Abbreviations

CFREU	Charter of Fundamental Rights of the EU
CJEU	Court of Justice of the EU
CoE	Council of Europe
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECS	European Cooperative Society
ECSR	European Committee on Social Rights
EctHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EED	Equality in Employment Directive
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

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Constitutional Introduction

1.1 Two Europes

The Continent of Europe actually embraces two kinds of "umbrella" institutions: 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:

	Council of Europe (CoE)	European Union (EU)
Membership	ca. 50 Member States	27 Member States
Ambitions	limited	many
Competences	few	large
Institutional strength	low	high

1.2 A Short History of European Labour Law

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

Initially the EEC also 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 1970-2005 the call for more European Labour Law became increasingly louder. It led to social policy agendas of the European Commission, Working Programs of European Social Partners and the first two dozen of EU social legislation.

From around 2005 the call for less European Labour Law has grown in the context of 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". Later followed the financial crisis (2009-2013) which further slowed down the growth of EU labour law, but since about 2015 there has been a revival of European Labour Law, especially after the publication of the European Social Pillar (see chapter 1.9). So the past decade has been very productive for European Labour Law.

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 to regulate them on a national scale.

1.3 The Legal Basis for EU Labour Law

Although the European Union is a stronger institution than most other international institutions, it still is not such a strong entity as a true federal state. 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 legislation. This weakness has partly been remedied in 1991, 1997 and 2009 by changes in the EU Treaties which have provided a more solid basis, which is now laid down in Art. 9 TFEU (the Horizontal Social Clause) and Art. 153 (1) TFEU.

Art. 9 TFEU requires the EU institutions and the Member States to assess all their policies, laws and activities in light of their implications for the achievement of social goals.[1] Art. 153 TFEU provides for a comprehensive legal basis for launching social measures of EU labour law. However, in the subsequent paragraphs of Art. 153 TFEU, this legal basis is clothed in reservations about the interest of small and medium enterprises (Art. 153 (2b) TFEU), an emphasis on non-harmonisation (Art. 153 (2a) TFEU) and financial equilibrium (Art. 153 (4),

1 B. P. Vieille, How the Horizontal Social Clause can be made to Work: The Lessons of Gender Mainstreaming, in N. Bruun a.o., The Lisbon Treaty and Social Europe, Oxford, 2012, p. 151-121.

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 in Protocol 2).[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), has appeared as a not to neglect nuisance in the adoption of a directive on minimum wages (see par. 6.9). 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 competence).[3]

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 been 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 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); if necessary, a so-called **trialogue** is opened between the European Commission, the European Parliament and the Council of Ministers to reach agreement on a common text; and
- Items to be decided by the Council of Ministers with unanimity, in which the European Parliament still has only an advisory role.

2 A.T.J.M. Jacobs, The European Constitution, Nijmegen, p. 79-82; T. Blanke, The Principle of Subsidiarity in the Lisbon Treaty, in N. Bruun a.o., The Lisbon Treaty and Social Europe, Oxford, 2012, p. 235-260.

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

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

The 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).[4]

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[5] 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.

1.6 Preparing and Enforcing EU Labour Law

EU legislation takes place on the basis of proposals from the **European Commission**, which plays a strong role in the process of preparing and negotiating, and afterwards monitoring the implementation of the EU rules by the Member States.

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

5 K. Lörcher, Social Competences, in N. Bruun a.o., The Lisbon Treaty and Social Europe,Oxford, 2012, p 166-234.

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).[6]
- Infraction procedures (Art. 258-259 TFEU).
- Preliminary rulings procedures (Art. 267 TFEU).[7]

1.7 Legal Shape of EU Law

EU labour law is mainly given the form 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 Member States by way of financial crisis interventions.

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

In labour law, however, most 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. In principle, there is no binding and horizontal effect of Directives versus non-state parties. 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 doctrine).[8] Moreover,

6 See Antoine Jacobs, The enforcement structure for EU Labour Law, in Z. Rasnaca a.o., Effective Enforcement of EU Labour Law, Hart, Oxford, 2022, p.13-34.
7 See for instance: CJEU 11 September 2019, Nobel Plastiques Ibérica, C-397/18, ECLI:EU:C:2019:703.
8 CJEU, 19.11.1991, C-6/90 and 9/90 (Francovich and Bonifaci).

there are now several cases, especially discrimination cases[9], in which the CJEU has put aside these general weaknesses of Directives.[10]

1.8 The Role of the Social Partners[11]

For a long time (1957-1985) 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. From time to time, Tripartite Social Summits were organised, in which the European Social Partners, the European Commission and the leaders of the Member States tried to agree a common view on the main economic problems. However, much of these contacts came to a halt during the 1980s, although some revived later. To compensate for this decline 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 formalised 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 also 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)[12].

Until now, this possibility of Euro-agreements has only been used a few times, both at cross-sectoral and on sectoral level (see par. 6.3). For this sake the European Commission has set up several sectoral social dialogue committees.

9 CJEU, 19.04.2016, C-441/14(DI); CJEU, 17.04.2018 C-414/16 (Egenberger).
10 See also CJEU, 15.1.2014, C-176/12 (Association).
11 B. Veneziani, The role of the Social Partners in the Lisbon Treaty, in N. Bruun a.o., The Lisbon Treaty and Social Europe, Oxford, 2012, p. 123-161; Several Chapters in B. ter Haar/A. Kun, EU Collective Labour Law, Elgar, Cheltenham, 2021.
12 CJEU 2 September 2021, C-298/19 (EPSU).

Usually 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"). Nevertheless, the European Commission and the European Parliament[13] are eager to stimulate the European Social Dialogue.

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

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.[14] 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. Since its adoption in 2017 several items in this Social Pillar have been implemented by the adoption of EU Directives and Recommendations. However, by 2024 the geopolitical situation has changed seriously and since then there is no longer an ambitious action program to boost European Labour Law.

There is, however, a new utopia on the horizon: a new optional EU legal framework, referred to as "**the 28th legal regime**", will be proposed by the European Commission late 2025 – early 2026. This new regime will enable innovative startups and scaleups to operate across the EU under a single set of rules, eliminating the need to navigate and comply with different laws of the Member States. The 28th legal regime will aim to simplify applicable rules and reduce the cost of failure for companies, and will include aspects of corporate, insolvency, **labour** and tax law. The regime is envisaged to come into effect sometime in 2026 or 2027. What will be the impact on a Social Europe?

13 See COM/2023/40 final and the EP resolution (2023/2536(RSP) of 1 June 2023 on strengthening the social dialogue.

14 Text in OJC C 428/10 of 13.12.2017.

2
Fundamental Rights

European labour law is based on fundamental rights as they are canonised in a set of charters adopted over a great number of years after the Second World War.[1]

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 Member States = ca. 50 countries)
- Forceful supervising mechanism (ECtHR)
- All EU Member States recognise the supreme authority of the ECtHR
- All EU Member States recognise the right of individual complaints

The ECtHR

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

1 Elena Gerasimova and Elena Sychenko, Council of Europe: European Social Charter and European Convention on Human Rights, in B. ter Haar/A. Kun, EU Collective Labour Law, Elgar, Cheltenham, 2021, p. 102-114.

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 the violation!)
- if the applicant has exhausted all domestic remedies.[2]

For many years the ECtHR has been flooded with cases, in 2010 150.000 were waiting judgement. The CoE has taken measures according to the Brighton Declaration, 2012: Protocols 15 and 16.[3] And actually the waiting list is 65.000.

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.

- 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

2 J. Hendy, Procedure in the European Court of Huan Rights (with a Particular Focus on Cases Concerning Trade Union Rights, in F. Dorssemont a.o, The European Convention on Human Rights and the Employment Relation, Oxford, 2013, p. 61-93.

3 F. Lörcher, The Future oft he European Court of Human Rights in the Light of the Brighton Declaration, in F. Dorssemont a.o, The European Convention on Human Rights and the Employment Relation, Oxford, 2013, p. 93-104.

Prohibition of slavery and forced labour (Art. 4)[4]

This right is not particularly relevant as slavery had disappeared from Europe by (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).[5] The ECtHR pronounced that forced prostitution is a violation of Art. 4 ECHR.[6] Also insufficient protection of migrant workers against human trafficking violates Art. 4.

Freedom of trade union association (Art. 11)[7]

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.

4 ECtHR 7 January 2022, Aff. 20116/12 (Zoletic v. Azarbaijan); see the Guide to Article 4 ECHR, published by the ECtHR, Strasbourg, 2025; V. Mantouvalou, The Prohibition of Slavery, Servitude and Forced and Compulsory Labour under Article 4 ECHR, in F. Dorssemont a.o, The European Convention on Human Rights and the Employment Relation, Oxford, 2013, p. 143-157.

5 ECtHR, 23.11.1983, Aff. 8919/80 (Van der Mussele).

6 ECtHR 25 July 2025, Aff. 63664/19 et. al. (M.A. v. France)

7 See the Guide to Article 11 ECHR, published by the ECtHR, Strasbourg, 2025; I. van Hiel, The Right to Form and Join Trade Unions Protected by Article 11 ECHR, in F. Dorssemont a.o, The European Convention on Human Rights and the Employment Relation, Oxford, 2013, 287-308.

In the broader sense of the concept

This is about questions like

1) Is there a right NOT to be member of a trade union?
   The ECtHR step by step has recognised this right.[8]
2) 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 its case law since 2008/2009
   - Demir case[9] (right to collective bargaining)
   - Enerji case[10] (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, as far as the right to strike is concerned.[11]

Fair trial (Art. 6)[12]

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)[13]

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

8 ECtHR, 11.01.2006, Aff. 52562/99 and 52620/99 (Sorensen and Rasmussen).
9 ECtHR, 12.11.2008, Aff. 34503/97 (Demir & Baycara); A. Jacobs, Art. 11: The Right to Bargain Collectively under Art. 11 ECHR, in F. Dorssemont a.o, The European Convention on Human Rights and the Employment Relation, Oxford, 2013, 309-332.
10 ECtHR 21.04.2009, Aff. 6895/01 (Enerji); F. Dorssemont, The Right to Take Collective Action under Article 11 ECHR, in F. Dorssemont a.o, The European Convention on Human Rights and the Employment Relation, Oxford, 2013, 333-365.
11 See ECtHR 8 April 2014, Aff.N. 31045/10; ECtHR 15 May 2018, Aff.N.2451/16 (Association of Academics); ECtHR 10 June 2021, Aff.N. 45487/17 (Holship).
12 See the Guide to Article 6 ECHR (civil limb), published by the ECtHR, Strasbourg, 2013; S. van Drooghenbroeck, Labour Law Litigation and Fair Trial under Article 6 ECHR, in F. Dorssemont a.o, The European Convention on Human Rights and the Employment Relation, Oxford, 2013, p. 159-182.
13 See the Guide to Article 8 ECHR, published by the ECtHR, Strasbourg, 2022; F. Hendrickx and A. van Bever, Article 8 ECHR: Judicial Patterns of Employment Privacy Protection, in F. Dorssemont a.o, The European Convention on Human Rights and the Employment Relation, Oxford, 2013, p. 183-208.

the collection and storage of personal information in the employment relationship through the use of telephone, e-mail and internet, etc.[14]

Religious freedom (Art. 9)[15]

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[16]), 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)[17]

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).[18]

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 in the respect of his human rights against the other interests of society and third parties and of the employer concerned, on the proper carrying on of a business.

Right to property (First Protocol)[19]

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.[20]

14 ECtHR 5.9.2017, Aff. 61496/08 (Barbulescu).

15 See the Guide to Article 9 ECHR, published by the ECtHR, Strasbourg, 2020; L.Vickers, Freedom of Religion and Belief, Article 9 ECHR and the EU Equality Directive, in F. Dorssemont a.o, The European Convention on Human Rights and the Employment Relation, Oxford, 2013, p. 209-235.

16 ECtHR 15.01.2013, Aff. 48420/10 (Eweida).

17 See the Guide to Article 10 ECHR, published by the ECtHR, Strasbourg, 2022; D. Voorhoof and P. Humblet, The Right to Freedom of Expression in the Workplace under Article 10 ECHR, in F. Dorssemont a.o, The European Convention on Human Rights and the Employment Relation, Oxford, 2013, p. 237-286.

18 ECtHR 12.09.2011, Aff. 28955/06 (Palomo Sanchez).

19 See the Guide to Article 1 of Protocol No. 1 ECHR, published by the ECtHR, Strasbourg, 2025; P. Herzfeld Olsson, Every Natural or Legal Person is Entitled to the Peaceful Enjoyment of His or Her Possessions: Article 1, Protocol 1 to the European Convention on Human Rights, in F. Dorssemont a.o, The European Convention on Human Rights and the Employment Relation, Oxford, 2013, p. 381-429.

20 ECtHR, 12.10.2004, Aff. 60669/00 (Asmudsson).

Non discrimination (Art. 14 + 12th Protocol)[21]

- 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 Member States are slow to ratify this Protocol.[22]

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).[23]

All these developments are often applauded by human rights advocates, 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 proclaim the fundamental social rights. Ratification was slow, but now almost all ca. 50 Member States of the CoE have ratified. Between 1961 and 1996 the ESC was a few times upgraded via Protocols.

In 1996 a Revised European Social Charter was issued, now ratified by ca. 30 Member States of the Council of Europe, among them all 27 Member States of the EU.

21 See the Guide to Article 14 ECHR, published by the ECtHR, Strasbourg, 2025; N. Bruun, Prohibition of Discrimination under Article 14 European Convention on Human Rights, in F. Dorssemont a.o, The European Convention on Human Rights and the Employment Relation, Oxford, 2013, p. 367-379.

22 First Labour Law case; ECtHR 4 Februari 2021, Aff.N.54711/15 (Jurcik v. Croatia).

23 K. Lörcher, The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): The Demir and Baykara Judgment, its Methodology and Follow-up, in F. Dorssemont a.o, The European Convention on Human Rights and the Employment Relation, Oxford, 2013, p. 3-46.

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

The 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 Member State 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 law 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![24]

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

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

According to ECSR this right should also apply to civil servants, save 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 strikes 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[25] and Laval[26] cases). Thus, the influence of the ECSR is still very limited.

However, this influence has been made 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 at 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.[27] 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 these cases in two rounds: In the first round it gives a decision on the admissibility of the complaining party and the complaint.

24 N.Bruun a.o. The European Social Charter and the employment relation, Oxford, 2017.
25 CJEU, 11.12.2007, C-438/05 (Viking).
26 CJEU, 18.12.2007, C-341/05 (Laval).
27 ECSR, Complaint no. 111/2014.

In the second round the ECSR makes 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".[28]

So, in the end all this is still very much soft law. Nobody is bound by 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. It is soft law. 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 Charter on Fundamental Rights of the EU and the ECHR. That is their relevance.[29]

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 Member States. What if EEC law would conflict with fundamental rights as recognised in constitutions of the Member States? A dubious verdict

28 See S. Clauwaert, The Charter's Supervisory Procedures, in N. Bruun a.o., The European Social Charter and The Employment Relation, Hart, Oxford, 2017, p.99-144.

29 N.Bruun a.o., The Potentials for the Charter to be Used, in N Bruun a.o., The European Social Charter and The Employment Relation, Hart, Oxford, 2017, p. 512-516.

of the CJEU (Internationale Handelsgesellschaft case)[30] 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**[31] was adopted at 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 having 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 Member States.

In 2000 a Convention was held to draft the Charter of Fundamental Rights of the EU (CFREU). It was immediately and unanimously adopted at a meeting of the European Council in 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 referendums in the Netherlands and France. **In 2009, finally, 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.[32] Protagonists of human rights pin high hopes on this CFREU which has now a binding character.

30 CJEU 17 December 1970, C-11/70 (Internationale Handelsgesellschaft).
31 9 December 1989, COM(89) 471 final.
32 F. Dorssemont a.o., The Charter of Fundamental Rights of the European Union and the Employment Relation, Oxford, 2019.

There are however two 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).**[33]

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[34] used this Charter as an extra foundation for its decisions, which are also based on other arguments.[35]

The horizontal effect of the Charter has not been fully elaborated.[36]

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.[37]

Negotiations with the CoE on the accession of the EU to the 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 Member States.

33 It follows that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations (CJEU 26 February 2013; C-617/10, EU:C:2013:105 (Åkerberg Fransson); A. Koukiadaki, Application (Article 51) and Limitations (Article 51 (1), in The Charter of Fundamental Rights of the European Union and the Employment Relation, Oxford, 2019, p. 101-134.

34 CJEU 15 January 2014, case C-176-12.

35 CJEU 18 December 2007, case C-341/05, ECLI:EU:C:2007:809; CJEU 15 July 2010, C-71/08, ECLI:EU:C:2010:426 (*Commissie/Duitsland)*; CJEU 24 September 2020, C-223/19, ECLI:EU:C:2020:753 (*YS*); CJEU 10 July 2014, case C-198/13, ECLI:EU:C:2014:2055; CJEU EU 15 July 2021, case C-709/20, ECLI:EU:C:2021:515 (*CG*).

36 CJEU 15 January 2014, case C 176/12 (AMS); E. Muir, The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from Mangold to Bauer, REALaw 2019, Dec. 2019.

37 CJEU 7 March.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, on the one hand the Eweida case[38] of the ECtHR and on the other hand, the Samira Achbita case 53 CJEU 14 March 2017, C-157/15 (Samira Acbita), and the WABE and Müller case[39] of the CJEU. Scholars dispute whether these judgments are fully in harmony with each other (see par. 7.5).

The main chance for diverging judgements seems 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.[40] Solution: social rights in collective agreements are immune to 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.

38 ECtHR15 January 2013, App. No. 48420/10 (Eweida).
39 CJEU 15 July 2021, C 804/18 and C-141/19 (WABE and Müller).
40 CJEU 15 July 1999, C-67/96 (Albany).

2007 – the major clash: right to take collective action versus freedom of establishment/ services (Viking[41] and Laval[42] cases). Solution of the CJEU: proportionality (in these cases: negative for the right to take collective actions). A legislative solution (Monti II-proposal)[43] has been dropped.

2009/2010 – (promotion of) collective bargaining versus public procurement – cases Rüffert[44] and Commission versus Germany.[45] 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).[46]

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. Especially this Article 16 has attracted more attention from employers and their lawyers as a counterweight – since it was mentioned in some judgments of the CJEU.

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 EU Treaties. The debate is about whether a fair balance is struck.

41 CJEU 11 December 2007, C-438/05 (Viking).
42 CJEU 18 December 2007, C-341/05 (Laval).
43 COM (2011) EMPL/093.
44 CJEU 3 April 2008, C-346/06 (Rüffert).
45 CJEU 15 July 2010, C-271/08 (Commission v. Germany).
46 CJEU 4 April 2019, C-699/17 (Allianz).

2.5 The Promotion of Social and Environmental Fundamental Social Rights via the Trade and Commercial Policies of the EU

For a number of years, the EU has attempted to promote the global application of fundamental social rights, also through its trade and commercial policies and by concluding covenants.

The most recent development in this field is the new Directive on Corporate Sustainability Due Diligence (CSDD-Directive).[47]

The idea behind this CSDD-Directive is that large companies shall not disregard actual or potential risks to human rights and the environment in the chain of activities which cover a company's upstream and downstream activities as well as the operations across the company's subsidiaries and value chain. These companies should in their business establish processes to mitigate such risks. They are required to adopt plans to identify and address violations of fundamental human rights and the environment across the supply chain in which they (and their subsidiaries) operate. A few EU Member States, like Germany and France, had already such a type of legislation, others were envisaging it. The EU lawmakers hoped to offer an EU-wide minimum standard for this type of legislation.

According to this Directive, companies are accountable for ensuring that the fundamental values of people, work and the environment are respected in their production chain. It imposes obligations on companies with – globally speaking – 1,000 employees and 450 million euros in turnover, with regard to actual and potential negative impacts on human rights and negative environmental impacts.

They must exercise "risk-based due diligence" in this regard from 2027/2029 onwards in their own activities and those of their subsidiaries and business partners in the activity chains of those companies.

They should do this by preventing, ending and remediating potential negative impacts on human and environmental rights and by working meaningfully with other stakeholders.

47 Directive (EU) 2024/1760 of 13 June 2024 on corporate sustainability due diligence, OJ 2024/1760, 5.7.2024. Earlier the EU lawmakers had already adopted 2022/2464 on corporate sustainability reporting.

The Directive contains provisions on notification mechanisms and complaints procedures, monitoring and communication, accessibility of information, sanctions, civil liability and the right to full compensation.

It is important for our subject that the Directive by means of its Annex has determined the fundamental labour rights that this Directive aims to protect:

Three UN Treaties

- The international Convenant on Civil and Political Rights;
- The international Convenant on Economic, Social and Cultural Rights;
- The Convention on the Rights of the Child.

Moreover a number of the International Labour Organization's core/fundamental conventions:

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87);
- Right to Organise and Collective Bargaining Convention, 1949 (No 98);
- Forced Labour Convention, 1930 (No 29) and its 2014 Protocol;
- Abolition of Forced Labour Convention, 1957 (No 105);
- Minimum Age Convention, 1973 (No 138);
- Worst Forms of Cild Labour Convention, 1999 (No 182);
- Equal Remuneration Convention, 1951 (No 100);
- Discrimination (Employment and Occupation) Convention, 1958 (No 111).

The CSDD-Directive was adopted in June 2024 and must be incorporated into national legislation by 2026.

However, since 2024 the political landscape in the world has changed so much that many people doubt whether this ambition can be maintained in all its consequences. Therefore actually a revision of this CSDD-Directive is discussed.

3
Free Movement (1)

3.1 Introduction

The **free movement of *workers*** was one of the fundamental principles of the European Economic Community 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 States) 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 right to enter, exit and reside. 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 recognised 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 exceed 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, I shall not further indulge in such questions and restrict myself 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 later, by way of **transition periods** on the occasion of several later accessions to the EU.

Legally, a transition period means, that Member States 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 Member 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 fundamentally very similar to the previous ones).

1 CJEU, 15.03.2005, C-209/03 (Bidar).
2 CJEU, 18.11.2008, C-158/09 (Förster).

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 rights to housing**
- **Equal rights 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.

This emphasis on "equality" has caused the CJEU to develop a consistent line of case law on discrimination in this field, now reinforced by Art. 18 TFEU. The main line of this case law is: All **direct discrimination** between the nationals of EU Member States 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 organisations** 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 persons, and 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**

3 CJEU, 18.7.2017, C-566/15 (Erzberger).
4 See for instance CJEU, 13.03.2019, C-437/17 (Gemeinsamer).
5 CJEU, 15.12.1995, C-415/93 (Bosman).
6 CJEU, 16.03.2010, C-325/08 (Olympique Lyonnais/Bernard).

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**
  They 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 through 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 these problems?

Mutual recognition of professional qualifications

Mobility of workers (both employees and independent workers) presupposes less diversity in national qualification requirements. Art. 53 TFEU requires action in this sphere, not only for employees, but also in the context of free movement of services; therefore these EU-rules apply for self-employed and employees alike.

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 and supplemented by Directive 2018/98/ EU. Directive 2013/55/EU, inter alia, laid the basis for the introduction, in 2016, of the **European Professional Card**, an electronic certificate, which, unfortunately, up to now, is only available for 5 professions: general care nurses, physiotherapists, pharmacists, real estate agents, and mountain guards. It is also unfortunate that, notwithstanding the Directives on the general system for the recognition of diplomas, numerous conflicts about access to specialized professions subsist in the EU.

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 European Commission to cooperate. The Commission has set up various coordinating bodies and launched **a network-system (EURES)**, fostering direct exchanges of information between the public employment services of all Member States. 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) harmonising 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 EU 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	Work accidents
Maternity	Death
Disablement	Unemployment
Old age	Family charges
Surviving partners/children	

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** (Arts. 5 and 6)
- **Exportability rule** (Art. 7)
- **The anti-accumulation rule** (Art. 10)
- **Single law rule** (Art. 11)
- T**he lex loci laboris rule** (Art. 11(3)(a))

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

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

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

The single state rule must prevent that a person is simultaneously insured in two Member States 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 Member State A, but **temporarily (= max. 2 years)** employed in Member State B remain subject to the law of Member State A (Art. 12).
- Persons normally employed in several Member States are subject to the law of the Member State of their residence, if they work there substantially (= more than 25% of their working hours), or if they work for various employers in various Member States. 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 was further 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-harmonisation of occupational social security schemes is clearly one of the stumbling 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 harmonisation 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 Member State 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 European countries now)? One may think of family and social ties, language problems, problems with professional qualifications, housing problems, double-earnings families, little coordination of occupational schemes, tax problems, high degree of similarity in welfare levels between Member States, 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 tried to promote further the free movement of persons, notably by

1) Infraction procedures; it steadily opens infraction procedures against Member States because of existing restrictions in the Member States.
2) New rules. The EU, in 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 EU citizens** ("**social tourism**"), **consequently a loss of cultural/national identity** and too much possibility for employers to exploit that ("**social dumping**")!

Some commentators believe that the EU and the governments of the Member States should do more to take the wind out of the sails of the Eurosceptic parties in several Member States, which have increased their seats in the last elections for the European Parliament in 2019 and 2024.

Already for more than 10 years 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) was a battle-ground for improvements in the free movement dossier and could not be completed.

4
Free Movement (2)

4.1 EU Court Competence Rules

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

Of first importance is the question in what court parties in an employment relationship with international dimension can bring labour law litigation? This question is clarified by 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

1) where the employer is domiciled or
2) where or from where the employee habitually carries out his work, or
3) where the employee was engaged (in case 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.[1]

4.2 The EU Law on Conflicts on the Labour Market

Then, the question: Under what legal regime do those persons work? What rules are determining that?

In Chapter 3.2 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 there is no habitually working IN, then working FROM applies (Art. 8(2)).
- In case of no habitually working IN/FROM: then applies the law of 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)).

Indeed, 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, which provides that the judge should always **apply "the overriding mandatory provisions" of the law of the forum (= court)**.

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

The foregoing opens questions, like **what exactly are**

- "Provisions that cannot be derogated from by agreement"?
- "Overriding mandatory provisions"?

The CJEU has already given some interpretations of both concepts.

The term "*provisions that cannot be derogated from by agreement*" covers, certainly in principle, the minimum wage rules.[2]

The term "*overriding mandatory provisions*" covers "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."

Also, the precisions in Art. 8(2) have called for interpretation, 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"

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

4.3 Social Dumping Risks

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

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

2 CJEU 15.7.2021, C-152/20 and C-218/20 (DG&EH/Gruber Logistis).

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**. Instead of a Rotterdam based company recruiting Dutch lorry drivers, it may engage truck drivers in a country like Bulgaria, and then they are under the applicable law in this low wage country. This is what is happening now everywhere in Europe![3]

4.4 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 in this field?

Think of a new school in Milan to be built by a Milanese firm with workers hired from a Romanian temporary agency at Romanian wages and social security. Can a firm with Italian workers do it so cheaply? Is that really possible? What about the rule of equal treatment of workers in the framework of free movement (Art. 45(2) TFEU and Art. 2 (Reg. 492/2011)?

Sure, on the basis of these rules, social dumping would not be possible. However, these rules work only within the context of workers having the same employer. If, however, an employer engages exclusively workers via a temporary work agency or via another company, this equal treatment principle does not 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 apply a "**hard core**" of their own employment rules on such workers, but they should not require more than this "hard core".

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

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 wage 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"**.

As one could imagine, 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 wanted posted workers to be treated like national workers: with 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 Directive has been badly implemented by a number of Member States.

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 on Posted Workers 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, (excluding dismissal rules and occupational pension schemes). Moreover, posted workers are entitled to reimbursement of travel, board, and lodging expenses (Article 3(1)(i)).

Therefore, now there is quasi-full equality to the host country's labour laws, but only for posted workers on assignments exceeding 12 months (or 18 months with reasoned notification). Moreover, these workers are subject to collective agreements or arbitration awards which have been declared generally binding in the sector or apply by force of law.

There are now also special rules on detachment in international road transport (Dir. 2020/157/EU).

Now that "half equality" have turned into almost-full-equality, the question arises whether the problems of posting of workers are under control now? The above mentioned rules are only applicable to 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 4.6.

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[4]. 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 NOT a kind of Labour Inspectorate at European level, because its missions – limited to the EU labour mobility rules – and its tools (mainly coordination, NOT inspection) are limited.

4.6 Third Countries Immigration

Apart from intra-EU migration, the EU has certainly as many migrant workers originating in Third Countries as those of Member States. Does Europe care about these non-EU migrant workers as well?

The **first standards** for migrants in Europe (both from inside EU-countries and non-EU countries) 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 provisions is the right to equal treatment for legally residing migrants. The main reservation is that they give no absolute right to access to jobs.

4 Regulation 2019/1149/EU.

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

In the EU, until the mid-1970s, all policies and laws 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 programmes 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 issue 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 Member State.

The Member States 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, now replaced by Directive 2021/1883/EU, on the access of highly qualified nationals of third countries[5]

In order to make the EU a more interesting place to work for highly qualified third country nationals, this Directive contains 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 6 months, which is marked as "highly qualified" and remunerated by at least a certain salary required in a Member State, he can obtain the blue card for a period of at least 2 years via a glib procedure. The card, which also covers certain family members, gives the person more rights than other third country nationals enjoy in the EU.

Directive 2014/66/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/EU on illegal immigration aims to fix minimum standards for the punishment of employers who engage third country nationals illegally.

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.

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

5 Directive (EU) 2021/1883 of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, *OJ L 382, 28.10.2021, p. 1–38.*

Member States 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.

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

Member States must organise sufficient controls and inspections.

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 Member States can still control this (Essent case).[6]

When considering all these rules on third country migrants, one must take into account that there are third-country migrants with special status.

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

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 kinds 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 of **Turkey**, who enjoy no right to access to work in the EU, but against whom Member States should not 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 a Member State, they and their family members have about the same rights on equal treatment as intra EU-migrants.

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

Then, the nationals of the Maghreb countries (**Morocco, Algeria and Tunisia**). On the basis of Agreements of Cooperation between the CEE and these 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 (Art. VSTV. 1). Presumably the UK in due time will introduce more stringent rules for longer stay and access to its labour market.

4.7 Migration

Since a number of years, the influx into the EU of persons from outside the EU has steadily grown. The Member States have cautiously held this issue under their own sovereignty. In 2016, a first asylum package was launched, but it could not be adopted by then. All the institutions could agree on a new Pact on Migration and Asylum. In this Pact, only in 2023, the time had ripened for more EU intervention. In that year, the European Commission proposed a new operational strategy concerning the return of irregular migrants in the EU. In 2024, the EP and the EU Council could reach an agreement on five regulations in the Pact on Migration and Asylum, comprising a) the Asylum and Migration Regulation (AMMR) – which covers, in particular, solidarity measures by Member States to support countries of first entry and the so-called 'Dublin' rules, b) the Asylum Procedure Regulation (APR) – which organizes the responsibilities of the Member States and creates an asylum procedure at the borders, c) the screening of migrants, d) crisis situations and force majeure and, e) instrumentalization of migration.

As this is a book on labour law, I shall not further indulge in such questions but it is clear that in the future these new policies will have an impact on the employment policies and the labour law of the Member States.

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 and knowledge-based economy in 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 realised?

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, and 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 national reform programmess of the Member States (Art. 148 (5).

And then, the cycle starts all over again!

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

However, all this is: **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 harmonisation** 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

- Exchange of information and best practices
- Provide 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 huge **mountain of papers**, a "Waterfall of Softness". If one would read all these papers, what is its content?

- 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 the rights of disabled persons and elderly workers.

The European institutions frequently set out a number of **typical pathways** to help Member States 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.
- Member States 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 solution 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. 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 monetary and budgetary policies and 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 Globalisation Fund and, recently, the Corona Recovery Fund (called NextGenerationEU).

And finally, there is the European Investment Bank.

In this book I focus on The European Social Fund, The Globalisation Fund and the Corona Recovery 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 Globalisation 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.

In the various TFEU-articles and in the secondary law (Regulations and Directives on the Structural Funds) one finds all criteria, procedures, etc. However, the most crucial element – how much money is there available in these Funds – is hidden in Art. 312 TFEU, the multi-annual budget of the EU.

The Multi-annual Financial Framework (MFF)

The money for the Social Fund, like the money for the other funds, is provided for in the Multiannual Financial Framework (MFF), which is voted by the European Parliament and the Council of Ministers on the basis of unanimity in the Council for **a seven-year cycle** (Art. 312 TFEU). The actual cycle is 2020-2027, while the preparations for the new cycle (2028-2034) have already begun. So, how well filled are the Funds by the MFF?

Many EU political fights are concentrated before the start of this 7-yearly event of fixing the multiannual EU-budget. We have seen this again during 2018-2020 and we see it again today 2025-2026.

The traditional 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 seven-years game, as it requires **unanimity in the Council of Ministers**. Certainly, the EP can refuse to vote for the multiannual 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 is 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).

However, in 2001, on top of the MFF for 2020-2027, the EU agreed to fund a large temporary instrument to overcome the Corona (Covid-19) crisis, referred to as the Corona Recovery Fund (officially called "NextGenerationEU(NGEU)", backed by funds, totalling ca. 650 billion Euro.

a) The European Social Fund

The European Social Fund is one of the first so-called "structural funds", based on Art. 162-164 TFEU.

Of the 1000 billion Euro for the multi-annual EU budget, more than 1/3 (ca. 335 billion) is traditionally spent on agricultural subsidies and another 1/3 (ca. 335 billion) on the Structural Funds (= ca. 335 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 Euros 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, benefitting 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' organisations (Art. 163 TFEU).

The ESF is strongly regionally targeted – **four-fifths 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, there are relatively poor areas. And recently the EU started to spend money even in rich areas like Inner-London!

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

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 categories are: 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, reducing early school leave, etc.

In the 2014-2020 period, ESF support has been focussed at four priorities: sustainable/ qualitative employment and labour mobility, social inclusion and combating discrimination, training and lifelong learning, youth employment initiatives, and in the 2020-2027 it is the same, with digitalisation added.

The ESF is organised into programmes lasting over several years. Member States prepare a single national strategic framework, based on the Commission's guidelines in the European seminar.

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

The range of partners has been broadened to include non-governmental organisations 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 Euros because of wrongful spending, which were finally settled amicably (out of court).

b) The European Globalisation Adjustment Fund

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

In recent years, many people believed 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 the textile industry in the EU by the increase of Chinese textile exports.

All this has led to the establishment of the European Globalisation Adjustment Fund (the EGAF) 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. In 2021, the EGAF was again prolonged until 2027 (Regulation EU 2021/691/EU), now with more structural money: 210 million Euro as a yearly average. This money is now available to a still wider circle of workers made redundant due to globalisation, the Corona-virus crisis, digitalisation, the transition to a low-carbon-industry, etc. The company threshold was again lowered to actually 200 workers involved.

c)The Corona Recovery Fund (the Next GenerationEU)

This Fund was set up in 2021 with some 650 billion Euros in loans and subsidies, to enable Member States to recover from the damages suffered by their economies and societies due to the Corona crisis of the years 2020/2021. The money has to be spent on selective reforms and investments, which the Member States have defined in national Recovery and Resilience Plans (RPP's). These RPPs must be submitted to the European Commission, who will measure them on the priorities set out in Regulation 2021/241/EU on the Recovery and Resilience Facility. According to this Regulation the RPPs must be partly devoted to the green transition, partly to social objectives. The European Commission will monitor this, and only release the money when the spending on the indicated purposes is ensured. In the meantime, the European Court of Auditors, the watchdog for European finance, has said that it is doubtful whether the Member States delivered the promised results in exchange for the money. In several cases, it was impossible to check whether the money from the fund was handed out correctly.

5.3 Employment Services

Then, something about the most classic instrument of state involvement in 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), and in administering the posted workers rules (see par. 3.1 and 4.3).

On the other hand case law of the CJEU in the 1990s has l**imited the monopoly of the public employment services**, (see the Hofner case[1] and the Job Center case).[2]

Moreover, the EU-legislator has even **opened the door for commercial employment agencies**: the Directive on Temporary Employment Agencies.

5.4 The Temporary Employment Agencies Directive

In 2008, the EU adopted Directive (2008/104/EC) on the issue of temporary employment agencies.

It first of all provided that Member States must clear away most restrictions on temporary agency work (Art. 4).

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

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).

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

- Member States shall prohibit restrictions on the conclusion 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 employment agency workers shall have access to facilities like child-care of the user-firm (Art. 6(4)).

However, Member States 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).

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

Still, since 2008, the CJEU has enforced the social face of the Directive somewhat in its case law. It ruled that temporary agency workers are entitled to advantages on the same basis as the workers recruited directly by that user undertaking to occupy the same job for the same period of time[4] and should receive basic working and employment conditions, which

3 CJEU, 17.03.2015, C-533/13 (Shell Aviation Finland).
4 CJEU 14.10.2020, zaak C-681/18 (JH vs. KG); CJEU 22.2.2024, zaak C-649/22 (Randstad Empleo).

are such as to compensate for the difference in treatment they suffer.[5] Temporary work agencies should not abuse the rules of the Directive, but the Directive does not preclude a temporary agency worker from being assigned to a user undertaking to fill a job which is permanent.[6]

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).

In the text of this Directive, like in other Social Policy Directives, initially some freedom was left to the Member States to define the concepts of "worker", "employee", etc. More recently, the CJEU has narrowed this freedom by more standardizing the definition, which is now not far from the definition in the Free Movement Regulations (see par. 3.1).[7]

5 CJEU 12.5.2022, C-426/29 (Luso Temp); CJEU 15.12.2022, C-311/21 (Time Partner).
6 CJEU 17.3.2022, C-232/20 (NP/Daimler AG).
7 CJEU 7.11.2018, C-216/15 (Ruhrlandklinik).

6
Individual Employment Law

6.1 Introduction

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 Member States, 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 a lack of consensus (blockade of M. Thatcher (UK) in 1980s).

However, since in the Treaty of Maastricht (1991) the competences of the EU to legislate on working conditions had been enlarged, the number of EU-directives in this field has steadily increased, notably in the 1990s and later between 2016 and 2026.

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 Member States, 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 Member States 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-Programme, see par. 1.2). However, again 6 years later a different composed 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 should be implemented by the Member States 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 **posting an employee abroad** (Art.7).

Most 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 aspect 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).
- Member States may allow collective agreements, which, while respecting the overall protection of workers, establish arrangements different from those referred to in Arts. 8 to 13 (Art. 14)

The Directive **applies 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.

Although the Directive is said to better protect the workers in the gig-economy, it **still allows Member States to exclude contracts equal to or less than 3 hours a week** (Art. 1(3). They also 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 Member States must offer the employee either favourable presumptions in court or a competent body to receive adequate redress (Art. 15-16).

In addition, workers are protected against **victimisation** (protection against adverse treatment and from dismissal) and the burden of proof shall mainly fall on employers) (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 (due to opposition of some Member States) the European Social Partners in 1996, 1997 and 1999 took the matter into their own hands according to the new procedure in the EEC Treaty (now Arts. 154/155 TFEU, see par. 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 (see par. 1.8), 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) (see par. 6.8).

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), **Inclusive Labour Markets** (2010) and the **Digitalization of Work** (2020).

For these Directives, the social partners did not ask the Council of Ministers to implement them by way of Directives. They should have been implemented according to the "procedures and practices specific to management and labour in the Member States" (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 Member States.

In two cases, they preferred to obtain a Council Directive, but this was refused by the European Commission, which has led to the question: is the Commission obliged to pass this decision to the Council of Ministers. The CJEU answered: No (see EPSU-case).[1]

1 CJEU 2 September 2021, C-298/19 (EPSU).

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 work by **ensuring the application of the principle of non-discrimination**. It will ensure treatment in a "not less favourable manner" than full-time workers (Clauses 1a and 4(1). This is legally-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 (Clause 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 Member States 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 Member States (CJEU in Adelener and Marrosu cases).[5]

Member States **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]

2 CJEU, 15.04.2008, C-268/08 (Impact).
3 CJEU, 10.06.2010, C-395/08 and C-396/08 (Bruno 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).
6 CJEU, 12.10.2004, C-313/02 (Wippel).

The Directive contains the usual "more favourable" and non-regression clauses (Sorge case)[7].

A still actual issue is: What consequences does "equal pay" have for overtime work, which often is rewarded extra in cases of part-time work? (See par. 7.3.)

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 (hypocritical) pronouncement, as nowadays, the conclusion of fixed-term contracts has become dominating the labour market, as far as newly concluded contracts are concerned! The Directive does nothing to stop this trend.

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 treatment in a "not less favourable manner" than permanent workers (Clauses 1a 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 abuse** 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**:

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 its preamble) (see par. 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 Member States.

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 (see par. 1.8)."

The hard content 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 employer's 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 Agreement provides that a refusal to do telework that was not 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 CJEU 4 July 2006, C-212/04 (Adelener).

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 Member States 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 practise, much more soft law, therefore.

The issue Telework has got a boost from the Corona-crisis (2021-2023), which forced employers in various sectors to let their workers do telework. This has prompted the EU Commission to ask the EU social partners to review this Telework Agreement and the Display Screen Directive (see par. 8.1) and to take on board a new topic, viz., a regulation of the right of workers to be disconnected from internet/telephone. The negotiations on these questions are still not finished.[12]

6.7 The Whistleblowers Directive

Whistleblowers are people who bring to light violations of the law in the companies/institutions where they work. 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 whistleblower is revealing violations of EU standards, with exclusion of "employment/social matters" (Art. 1). This is a strange limitation, but it is expected that most Member States, when implementing this Directive, will give much wider coverage to the standards of protection, laid down in the Directive.

6.8 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"

12 European Commission C(2025) 7020 final.

Directive, as it was only about **unpaid** parental leave **during 3 months**. In 2010, this was **amended to 4 months** (Directive 2010/18/EU).

This was not a very much contested item, which provoked only scarce CJEU case law.[13] However, the developments in the various Member States have progressed much further in this century.

For the European Commission, this was reason, first, to propose an improvement of the Pregnancy and Maternity Directive (see par. 8.3), and, when this was not successful, 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 Member States 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).

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).

No payment rules are given for carer's leave and family leave.

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 has come into force by 2 August 2022.

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

6.9 The Directive on Minimum Wages

In 2020 the European Commission put a proposal on the table for an EU directive on minimum wages.[14] After much watering down, finally, Directive 2022/2041 on minimum wages was adopted in 2022 and has to be transposed into national law by 2 December 2026.

The Directive **does NOT aim at establishing a uniform European Minimum Wage**. This would be unrealistic, with a view on the existing discrepancy between national minimum wages in the EU (in 2025, varying from 3,58 to 18,30 Euro an hour). The Directive only requires from the Member States **to maintain a system of "adequate" minimum wages**, that must satisfy a wide range of qualitative criteria (Arts. 5-7) and the effective access of the workers to the minimum wages (Art. 8). The Member States should also promote collective bargaining on wages, by the obligation to maintain a coverage by collective agreements of at least 80% of the labour market (Art. 4). Under these conditions an exception was made for, notably, Sweden, Denmark, and Italy, which do not have a statutory minimum wage, but one that is based on collective agreements.

Apart from discussions on these substantive issues, one of the main points of debate was about the legal basis for such a Directive (see par. 1.4 of this book). The Commission proposed Art. 153(1)(b) TFEU as basis. The problematic side of this proposition, however, was Art. 153(5) TFEU which reads that "the provisions of this Article shall not apply to pay…". The Commission dismissed this objection and so did the European Parliament and the Council of Ministers. Denmark started a review procedure (see par. 1.5), but the CJEU rejected most of the complaints. It only annulled some norms in Art. 5 about the procedure for setting adequate statutory minimum wages.[15]

EU Member States will have until 2 December 2026 to implement the Directive's provisions into their national legislation.

14 COM(2020) 682 final.
15 CJEU 11 November 2025, Case C-19/23 (Denmark v. EP & Council).

6.10 The Directive on Platform Workers[16]

In 2024, the EU Directive on platform workers was adopted. Its aim is to give this group of workers more security and to counter false self-employment at digital labour platforms.

The Directive's most notable innovation is the establishment of a straightforward legal presumption regarding the subordination of workers who operate through digital platforms. This presumption applies when certain indicators are present, such as the worker being subject to the direction and control of the employer, which is exercised by the digital platform. As a result, 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. The platform may rebut the legal presumption that there is an employment at hand, with evidence that there is no employment relationship in the aforementioned sense. Member States need to take additional measures to help make sure the legal presumption is applied correctly. To promote and regulate transparency, fairness, and accountability in the algorithmic management of platform work, the Directive introduces a set of rights and obligations.

The Directive came into force on December 1, 2024, and requires EU Member States to transpose it into national law by December 2, 2026.

16 Directive (EU) 2024/2831 of 23 October 2024 on improving working conditions in platform work, OJ L. 2024/2831, 11.11.2024.

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 EEC (now Art. 157 TFEU) and 1971 judgments of the CJEU on the direct effect of this article (two Defrenne cases).[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 Equality Directive (Directive 2006/54/EC);

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

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

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).

I shall 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) ... in a comparable situation (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 (men are in average longer than women).[2]

2 CJEU 18 Oktober 2017, C-409 (Esoterikon).

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 Member States". 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).[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).

By the way, the European Commission[4] and the EP have pursued the adoption of a more **general EU Directive** prohibiting discrimination on grounds of sex and sexual 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.[5] However, it has been impossible to reach the necessary unanimity in the Council of Ministers on this proposal (Art. 19 TFEU).

3 CJEU 2 June 2022, C-587/20, ECLI:EU:C:2022:419 (*HK/Danmark*); CJEU 12 January 2023, C-356/21, ECLI:EU:C:2023:9 (*JK/TP*).
4 COM (2008) 426 final.
5 COM (2008) 426 final.

In all three Directives we find a provision that the Member States 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 organisations or professions, etc., shall be null and void. (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 three Directives show two approaches to 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. Member States 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 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 shows 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 latter raises the very interesting 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

Affirmative action, or positive discrimination, or positive action is the practice or policy favouring individuals belonging to groups regarded as disadvantaged or subject to discrimination.

In a number of rulings since the 1990s, the CJEU 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).[6] 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 Member States 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 Member State from maintaining or adopting specific measures to prevent or to compensate for disadvantages linked to the grounds of race, age, etc. (Art. 5 RED; Art. 7(1) EED).

In a number of rulings since then, the CJEU has given diverging judgments about various forms of affirmative action.[7]

Various provisions

All three Directives contain the usual "more favourable" and "non-regression" clauses (Art. 6 RED; Art. 8 EED; Art. 27 SED).

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

7 For example CJEU 6 July 2000, C-407/98 (Abrahamssom); CJEU 19.3.2002, C-476/99 (Lommers).

All three Directives are containing articles about dissemination of information: Member States must widely publish the anti-discrimination provisions: Art. 10 RED; Art. 12 EED; Art. 30 SED).

All three Directives contain articles requiring Member States to promote the social dialogue and the dialogue with non-governmental organisations 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 the RED and still more elaborate in the SED.

In all three Directives, we find the rule that Member States must ensure the availability of judicial and administrative procedures **to enforce** the principle of equal treatment. And that also associations defending the interests of discriminated people may start legal proceedings (Art. 7 RED; Art. 9 EED; Art. 17 SED).

An example: the Feryn case[8] (race discrimination), was initiated by the Belgian Centre for equal opportunities and the fight against racism.

In Chapter 1.7 it was said: In principle there is no direct or horizontal 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).[9]

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.

Member States may apply more favourable rules of evidence for plaintiffs (Art. 8 RED; Art. 10 EED; Art. 19 SED).

8 CJEU, 10.07.2008, C-54/07 (Feryn).
9 CJEU, 19.04.2016, C-441/14 (ID); CJEU, 17.04.2018, C-414/16 (Egenberger).

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 Member States 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-victimisation clauses**). (Art. 9 RED; Art. 11 EED; Art.24 SED). This protection extends to supporting colleagues (case Hakelbracht).[10]

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

Equality bodies are public institutions that protect and provide assistance to victims of discrimination. Under the existing EU-law Member States have a wide margin of discretion, leading to significant differences across the EU as regards the competences, independence, resources, accessibility, and effectiveness of such bodies.

In 2024, the EU adopted two Directives on Equality Bodies, one on sex discrimination in matters of employment and occupation[11], the second in other matters of sex discrimination, on race discrimination and on equal treatment in matters of employment and occupation, between persons irrespective of their religion or belief, disability, age or sexual orientation.[12]

These two directives aim at providing minimum conditions for equality bodies in all matters covered by the EU's equality legislation.

The Directives require EU Member States to transpose them into national law by 19 June 2026.

10 CJEU 20.06.2019, C-404/18 (Hakelbracht).

11 Directive (EU) 2024/1500 of 14 May 2024 on standards for equality bodies in the field of equal reatment and equal opportunities between women and men in matters of employment and occupation, OJ L 2024/1500, 29.5.2024 p. 1/14.

12 Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services; OJ L, 2024/1499, 29.5.2024.

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, like the 1975 Equal Pay m/f Directive, the 1976 Equal Treatment m/f Directive, the 1986 Equal Treatment m/f in 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[13] and also requires job classification systems to be free of sex discrimination aspects. There have been numerous CJEU cases over the last 40 years!

All these cases about unequal pay have taught us that there are different sorts of discrimination possible, direct discrimination and indirect. Open, 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 and on hidden forms of 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 showed that it were most women doing part-time work, so it was indirect discrimination. Since the coming into force of the Part-Time Work Directive (see par. 6.4), 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.[14]

A long lasting issue has been: What means "equal pay" for overtime work, which often is extra rewarded, in cases of part-time work? Should a part-time employee, working 20 hours a week, obtain the extra payment as from the 21st hour or as from the 38th hour, as full-time

13 CJEU 6 June 2021, C-624/19 (Tesco).
14 See for instance CJEU, 8.05.2019, C-486/18 (Praxair).

workers do? In the Lengericht/Helmig case[15], 1994, the CJEU decided the last alternative, but in 2024 the court stated unequivocally that part-time workers should be entitled to overtime pay from the first hour they work beyond their contracted hours, and not just after they exceed the full-time employee's hours.[16]

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).[17]

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!

With the new Equal Pay Transparency Directive (EU) 2023/970, the EU lawmakers wanted to arm employees with rights to additional information, coupled with more effective enforcement measures.[18]

Key provisions include employers needing to provide information on starting pay, while prohibiting questions about salary history during hiring (art. 5),

The criteria used to determine workers' pay, pay levels and pay progression must be objective, gender neutral and easily accessible to the worker. However, Member States may exempt employers with fewer than 50 employees from this obligation (art. 6).

The workers or their representatives have an extensive right to information on their individual pay level and the average pay levels, broken down by sex, of workers doing the same work (art. 7-8).

The large employers must report on the gender pay gap annually (to start with employers with 250+ from 2028, while those with 150-249 will report every three years from 2028, and

15 CJEU, 15.12.1994, C-399/29 (Lengericht/Helmig); see also CJEU, 27 May 2004 (Elsner-Lakeberg, C-285/02, EU:C:2004:320; 9JEU, 6.12.2007, C-300/06 (Vosz).

16 CJEU, 19 October 2023, ECLI:EU:C:2023:789 (MK/Lufthansa); CJEU, 29 July 2024, nrs. C-184/22 and C-185/22, ECLI:EU:C:2024:637(IK-CM/KfH Kuratorium).

17 CJEU, 3.10.2006, C-17/05 (Cadman).

18 Directive (EU) 2023/970 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

those with 100-149 employees will report starting in 2031). If pay reporting shows an unjustified gender pay gap of 5% or more, employers must conduct a joint evaluation with workers' representatives and take action to remedy the gap within six months (art. 9-10).

Non-compliance can result in heavy fines and full compensation for the worker (art. 23 and 16).

The Equal Pay Transparency Directive requires EU Member States to transpose it into national law by 19 June 2026.

Equal treatment

Equal treatment in working conditions (Arts. 14-16 SED) covers equal access to jobs at all levels 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 that the CJEU accepted, were the midwifery (Commission vs UK, 1983)[19] and a few specific jobs in the police (Johnston case)[20] and the navy (Sirdar case).[21]

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[22], nor differences in the pensionable age.[23] 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 treatment of a woman related to pregnancy and maternity". CJEU does not allow a refusal to hire or a dismissal because of pregnancy (Dekker case)[24], even not in case the employee was hired on a short-term contract and knew before that she was pregnant (Tele Danmark case).[25]

19 CJEU, 8.11.1983, C-165/82 (Commission vs UK).
20 CJEU, 15.05.1986, C-222/84 (Johnston).
21 CJEU, 26.10.1999, C-273/97 (Sindar).
22 CJEU 11 January 2000, Case C–285/98: (Tanja Kreil).
23 CJEU EU February 2018, nr. C-143/17, ECLI:EU:C:2018:68 (Maturi).
24 CJEU, 8.11.1990, C-177/88 (Dekker).
25 CJEU, 4.10.2001, C-109/00 (TeleDanmark).

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[26]) and underground work in mining (Comm. v. Austria), etc. However, they were no longer accepted by the CJEU, 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 field of pregnancy and maternity protection, in conformity with Art. 28 SED which reads "Without prejudice to provisions, concerning the protection of women, particularly as regards pregnancy and maternity".[27] In this vein 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 on the shape of the measure and the circumstances and was allowed in the Marschall case[28] and the Badeck case[29], but not in the Abrahamsson case[30], the Briheche case[31] and the Alvarez case.[32]

The hottest issue now is: quota for women in top jobs. A proposal for a Directive of the European Commission was already presented in 2012[33], but was blocked in the Council of Ministers for many years. Finally, in October 2022, Directive 2022/2381/EU was adopted[34] to **improve the m/f balance among directors of large listed companies and related measures**. With this new Directive on Gender Balance on Corporate Boards the EU lawmakers wanted to stimulate the nomination of members the "underrepresented sex" in

26 CJEU, 25.07.1991, C-345/89 (Stoeckel).
27 CJEU, 18 November 2020, C-463/19 (Syndicat CFTC).
28 CJEU, 11.11.1997, C-409/95 (Marshall).
29 CJEU, 28.03.2000, C-158/97 (Badeck).
30 CJEU, 06.07.2000, C-407/98 (Abrahamsson).
31 CJEU, 30.09.2004, C-319/03 (Briheche).
32 CJEU, 30 September 2019, case C-104/09, ECLI:EU:C::2010:561 (Alvarez).
33 COM (2012) 0614 final.
34 Directive (EU) 2022/2381 of 23 November 2022 on improving the gender balance among directors of listed companies, *OJ L 315, 7.12.2022, p. 44–59.*

the boards of companies on the stock market, which employ more than 250 persons and have an annual turnover of more than EUR 50 million or an annual balance sheet of total more EUR 43 million. Such companies should aim to have at least 33% of all their director positions, and 40% of their non-executive director positions, being filled by the members of the underrepresented sex. Member States shall ensure that these companies aim to achieve these individual quantitative objectives by 30 June 2026.

In the past, men have not often been successful in equality claims! Not in cases about paternity leave (Hofmann)[35], a required equivalent of a special maternity bonus (Abdoulaye case)[36] and about the enjoyment of child facilities (Lommers case)[37]. Most successful, however, men have been in the Barber-claim, 1990[38], about different pensionable age m/f in occupational pension schemes. Women should not have the right to retire earlier than men! Actually 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 par. 6.8.).

Enforcement

The Sex Equality Directive requires Member States to encourage employers and others to take effective measures to prevent sex discrimination (Art. 26 SED). Art. 18 SED is specifically detailed on the compensation of damages for victims of discrimination. "No fault" excuses were not accepted by the CJEU (Draehmpaehl case).[39]

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 differences 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.)

35 CJEU, 12.07.1984, C-184/83 (Hofmann).
36 CJEU, 19.09.1999, C-218/98 (Abdoulaye).
37 CJEU, 19.03.2002, C-476/99 (Lommers).
38 CJEU, 17.05.1990, C-262/88 (Barber).
39 CJEU, 22.04.1997, C-180/95 (Draehmpaehl).

Until now, there have been hardly any CJEU cases under this Directive. The only one was the Feryn case.[40]

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 organisation (Art. 4(2)) (see the Egenberger case).[41]

Until recently, there was no CJEU case law on matters of discrimination in religion/belief at work (more on that issue in the ECtHR case law (see par. 2:1). 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[42], but the freedom of religion (Art. 10 CFREU) may be balanced against the freedom to conduct a business (Art. 16 CFREU) (Samira Achbita case[43] and the WABE and Müller case[44] and the Ans case[45]). In 2019, there was a ruling about freedom of work and pay for non-Christians on Christian holidays (Achatzi case)[46].

7.6 Discrimination of the Disabled

The EED also prohibits unequal treatment on the grounds of disability. For the application of this norm, it is of course necessary to define the term "disability". It is clear that not every small and temporary ailment is covered by this norm. Originally the CJEU held, that disability is something else than "an illness". It is "a long-term limitation ... etc." (Chacón Navas case).[47] Later, the CJEU widened its definition by dropping the word "long-term" (Ring case).[48] More recently, the CJEU holds that "disability" is a limitation, which results in particular from long-term physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the

40 CJEU, 10.07.2008, C-54/07 (Feryn).
41 CJEU, 17.04.2018, C-414/16 (Egenberger).
42 CJEU, 14 March 2017, case C-188/15, ECLI:EU:C:2017:204 (Bougnaoui and ADDH).
43 CJEU, 14.03.2017, C-157/15 (Samira Achbita).
44 CJEU, 15 July 2021, C-804/18 and C-141/19 (WABE and M.H. Muller).
45 CJEU, 28.11.2023, C-148/22 (Ans).
46 CJEU, 22.01.2019, C-193/17 (Achatzi).
47 CJEU, 11 July 2006, C-13/05 (Chacón Navas).
48 CJEU, 11 April 2013, C-335/11 and C-337/11 (Ring and Werge).

person concerned in professional life on an equal basis with other workers.[49] 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).[50]

The EED basically prohibits unequal treatment on the ground of disability. It makes an exception for essential and determining occupational requirements, but this exception must strictly be interpreted.[51] Moreover, the EED is not only prohibiting unequal treatment on the basis of disability. It also allows affirmative action for disabled workers and 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, unless that measure imposes a disproportionate burden on the employer (Art. 5). This concept may, e.g., imply that – instead of being dismissed – such a persons must be assigned to another position for which he or she has the necessary competence, capability, and availability. [52]

The CJEU also accepts that employees with certain disabilities are conferred specific advance protection in the event of dismissal[53] and does in principle not allow national legislation under which an employer may dismiss a worker on the grounds of his intermittent absences from work caused by[54] sickness attributable to a disability suffered by that worker. Also, other unfavourable measures for disabled persons are not allowed.[55] Neither the Court accepted that a blind person be totally deprived of any possibility of performing the duties of a juror in criminal proceedings.[56]

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

49 CJEU, 1 December 2016, case C-395/15, ECLI:EU:C:2016/917 (Daouidi).
50 CJEU, 17 July 2008, C-303/06 (Coleman).
51 CJEU 11 September 2019 ECLI:EU:C:2019:703 (Nobel Plastics).
52 CJEU 10 February 2022, C-485/20, ECLI:EU:C:2022:85 (HR Rail SA); CJEU 15 July 2021, Case C-795/19 ECLI:EU:C:2021:606 (Tartu Vangla).
53 CJEU 9 March 2017, C-406/15, ECLI:EU:C:2017:198 (Milkova).
54 CJEU 18 January 2018, C-270/16, ECLI:EU:C:2018:17 (Ruiz Conijero).
55 CJEU 19 September 2018, C-312/17, ECLI:EU:C:2018:734 (Singh Bedi).
56 CJEU 21 October 2021, C-824/19, ECLI:EU:C:2021:862 (TC-UB).

they are objectively justified, by a legitimate aim and the means of achieving that aim are appropriate and necessary (Art. 6(1)).

Note that here is no distinction made between direct and indirect discrimination. Many age differentiations can be discredited as age discriminations, but they will seldom be qualified as such by the CJEU.[57] 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)[58], but it was rejected in a few cases (Petersen and Prigge).[59] The CJEU also allowed an upper 30 years limit for the recruitment for fire workers (Wolf case). It also allowed lower working conditions for youngsters if they were justified because of high youth unemployment.[60]

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)[61], and that periods of work fulfilled before a certain age can be ignored by the fixation of specific labour law rights (seniority in the Hütter case[62], the length of a period of notice (Kücükdeveci case)[63] and the entitlement to a severance allowance (DI case).[64] The CJEU did

57 CJEU 20 oktober 2022, C-301/21, ECLI:EU:C:2022:811 (Curtea/YF).
58 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 November 2010, C-250/09 and C-268/09 (Georgiev); CJEU, 21.07.2011, C-159/10 (Fuchs).
59 CJEU, 12 January 2010, C-341/08, ECLI:EU:C:2010:4 (Petersen); CJEU, 13 September 2011, C-447/09, ECLI:EU:C:2011:573 (Prigge).
60 CJEU EU 19 July 2017, C-143/16, ECLI:EU:C:2017:566 (Abercrombie).
61 CJEU, 22.11.2005, C-144/04 (Mangold).
62 CJEU, 18.06.2009, C-88/08 (Hütter).
63 CJEU, 19.01.2010, C-555/07 (Kücükdeveci).
64 CJEU, 19.04.2016, C-441/14 (DI).

also not accept certain seniority scales in a collective agreement as vocational training and years of service were considered to be a more appropriate criterion than age (Hennigs case).[65] A 50-year maximum for new notaries was in principle, not allowed.[66]

Finally, it should be mentioned that equal treatment on the grounds of age is not applicable in the armed forces (Art. 3(4)) and that Member States may allow an exception in occupational social security schemes (Art. 6(2)).[67]

It appears that the EU legislator and the CJEU allow 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).[68]

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)[69] 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: another case was about the "patron" of FC Steaua Bucuresti, who had said: "He would never hire a homosexual player"[70], a third case was about the termination of a works contract with a Polish LHTBPI person.[71]

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

65 CJEU, 8.09.2011, C-297/10 (Hennings).
66 CJEU 3 June 2021 C-914/19, ECLI:EU:C:2021:430 (Ministerio della Giustizia).
67 CJEU 2 June 2022, C-587/20, ECLI:EU:C:2022:419 (HK Danmark and HK Privat).
68 CJEU, 26.2.2015, C-515/13 (Teknik).
69 CJEU, 17.02.1998, C-249/96 (Grant).
70 CJEU, 25.04.2013, C-81/12 (Steaua); CJEU 23 April 2020, C-507/18, ECLI:EU:C:2020:289 (Ass. Avvocatura).
71 CJEU 12 January 2023, C-356/21, ECLI:EU:C:2023:9 (*JK/TP*).

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 at work 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 of the EEC 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 (display screens)
- **The organisation 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
- Health and safety in the mineral-extracting industries
- Health and safety in industries with risks 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 EU Court of Justice.[1] The UK refused to consider "working time" 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 CJEU considered "working time" as an item of "health and safety" in which the EU was competent to legislate and to which the UK was bound (See par. 1.4).

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 modernisation of the protection against the bulk of occupational cancers, was lagging behind. No consensus could be reached about a modernisation of the Maternity Protection Directive (8.3) and the Working Time Directive (8.5).

The reason for this slowdown was the much-criticised bureaucratic nature of all these health and safety rules. They were considered as too cumbersome, especially for SMEs and new-starting-enterprises. In this period the political drive was towards deregulation and new rules only by way of soft law (see par. 1.2).

The adoption of the so-called European Social Pillar, 2017 (See par. 1.9), has given only a small 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). The Asbestos Directive was tightened up in Directive 2023/2668/EU.

1 CJEU 12 November 1996, C-94/84 (UK v. Council).

8.2 Health and Safety at Work

The 1989 Directive on Safety and Health of Workers at Work (Directive 1989/391/EEC) is a kind of Framework Directive, laying down general principles that Member States 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, an EU Health and Safety Committee is set up (Art. 17).

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) say something on this aspect, and the CJEU has given a narrow interpretation on the possibility to limit this civil responsibility.[2]

The many Directives on safety and health have largely contributed to a harmonisation of the various laws of the Member States in this field, almost to unification, as Member States have often literally reproduced the EU rules in their national legislation.

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

By implementing all this, Member States 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. However, at national level, employers and lawmakers often consider more favourable standards than those in the EU labour law as "gold plating", and they push to abolish these extracts.

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 Member States have traditionally entrusted the enforcement of these rules to the Labour Inspectorate. There seems to be a lot to be desired in this area, because the number of labour inspectors has been decreased across Europe in the last decade. 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 Member States, although in some Member States 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-Agreement, which the social partners would like to be converted in a Directive, but the Commission refused (see par. 1.8).

The EU is giving Member States 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 leave within the framework of the Sex Equality Directive (see par. 7.3).

On top of that, the EU launched a special Directive for these employees within 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)[3].

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

So, in 2008, the Commission proposed a modernisation of the Directive, but in the Council of Ministers, several countries (UK, DE, NL, PL) were strongly opposed to these improvements – their main argument was: subsidiarity (see par. 1.3)! Thus, 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. 6.7)

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

8.4 Child Labour and Young Workers' Protection

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 (Directive 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. The 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 two Directives were consolidated into one Directive, which is now the general Working Time regime (Directive 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[4], police[5], or some activities of the civil protection services. However, the CJEU has held that

4 CJEU 15 July 2021, C-742/19, ECLI:EU:C:2021:597 (B.K./Rep. Slovenija).

5 CJEU 30 April 2020, C-211/19, ECLI:EU:C:2020:344 (UO); CJEU 11 April 2 019,C-254/18, ECLI:EU:C:2019:318 *(Syndicat des cadres de la Sécurité intérieure)*.

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[6]).

The Directive requires the Member States to lay down:

- Not more than 48 hours work a week (on average, in a timeframe of 4 or 6 months; including overtime) (Case Syndicat de cadres);
- 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[7];
- 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 wide range of possibilities for 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.

Quite remarkably, even more flexibility can be created at individual level. A very curious provision is Art. 22(1), which 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"/"stand-by-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

6 CJEU, 9.03.2004, C-52/04 (Feuerwehr Hamburg).
7 CJEU 7 July 2022, C-257/21 and 258/21, ECLI:EU:C:2022:529 (Coca Cola).

health care, fire brigades[8] etc.). In the case law of the CJEU, this time was considered to be working time (Simap and Jaeger cases),[9] save when it is not significantly affecting the employer's free time.[10]

Is travel time working time, in the sense of the Working Time Directive? Not in general, but it is so for workers without a fixed or habitual place of work between their homes and the first and last customer of the day.[11]

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 clause, which gives 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.

In those days, most Member States wanted 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 Member States were prepared to renounce the opt-out. Other Member States wanted to keep the opt-out, anyway. The majority of the EU Parliament wanted the opt-out clause to disappear. In return, it was prepared to accept that the 48 hours working week in general be calculated on an annual average. It insisted on maintaining the on-call time as working time.

All this squabbling against the background that many people fear that on-call labour may become too costly if it is seen as working time. Formally, this fear is not well founded because the Directive is, because of limiting working time, NOT about pay.

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

8 CJEU 21 February 2018, C-518/15, ECLI:EU:C:2018:82 (Matzak); CJEU 9 March 2021, C-580/19, ECLI:EU:C:2021:183 RJ); CJEU 11 November 2021, C-214/20, ECLI:EU:C:2021:909 (Dublin City Council).
9 CJEU, 3 October 2000, C-303/98 (Simap); CJEU 9 September 2003, C-151/02 (Jaeger).
10 CJEU 9 March 2021, C-344/19, ECLI:EU:C:2021:182 (Radiotelevizija Slovenija).
11 CJEU, 10 September 2015, C-266/14 (Tyco).

implementation of the Directive, in the Member States and an interpretative Communication on the Directive.

The Working Time Directive does not explicitly contain provisions obliging employers to record the working time. However, in its case law interpreting the Directive the CJEU twice confirmed that employers must establish a system which enables the measurement of the duration of time worked (working time registration).[12]

The provision on four weeks' **paid holiday** a year (Art. 7) has not raised much political upheaval at the EU level but it has provoked a number of CJEU rulings which have upset some national legislation and case law in this field.[13] Notably the CJEU refused to allow Member States to deny or reduce the rights on annual paid holidays of certain, e.g. ill and unemployed workers (cases Bectu, Schultz and Hein).[14]

Art. 7 is sufficiently precise that it can be invoked also in litigation between private parties and ultimately the State may be responsible according to the Francovich method (Dominguez case) (see par. 1.7).[15] The Court also gave clarifications about the concept of remuneration of these holidays (Williams case)[16] and the right on paid holidays for parttime workers.[17] Those strict norms are not applicable on paid holidays that exceed the minimum holidays.[18]

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 than 9 hours a day/56 hours a week/90 hours a fortnight. Famous here is the control mechanism by way of the tachograph.[19]

12 CJEU 14 May 2019, Case C-55/18 (CCOO/Deutsche Bank); CJEU 19 December 2024; Case C-531/23 (Loredas).
13 CJEU 29 November 2017, nr. C-214/16, ECLI:EU:C:2017:914 (Conley King); CJEU 6 November 2018, nr. C-684/16, ECLI:EU:C:2018:872 and nr. C-619/16, ECLI:EU:C:2018:874 (Max-Planck); CJEU 6 November 2018, C-569/16 and 579/16 ECLI:EU:C:2018:871 (Wuppertal); CJEU 13 January 2022,nr. C- 514/20, ECLI:EU:2022:19 (DS/Koch).
14 CJEU, 26.06.2001, C-173/99 (Bectu); CJEU, 20.01.2009, C-520/06 (Schultz); CJEU 13 December 2018, ECLI:EU:C:2018:1018 (*Hein*).
15 CJEU, 24.01.2012, C-282/10 (Dominguez).
16 CJEU, 15.09.2011, C-155/10 (Williams).
17 CJEU 11 November 2015, ECLI:EU:C:2015:745 (*Greenfield*).
18 CJEU, 15 November 1919, ECLI:EU:C:2019:981 (TSN).
19 CJEU 20 December 2017, nr. C-102/16, ECLI:EU:C:2017:1012 Veditrans); CJEU 26 September 2018, nr. C-514/17, ECLI:EU:C:2018:772 (Baumgartner).

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 issue 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 the **General Data Protection Regulation**.[20]

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). This rule dominates now the way in which all employers everywhere in Europe should handle the personal files of their employees; and even the trade unions the data of their members.

20 Regulation 2016/670.

9
Restructuring the Enterprise

9.1 Introduction

After the 'golden sixties', Western Europe experienced stagnation in the 1970s, characterised by unemployment and enterprise restructuring. This led to the introduction of three EEC Directives concerning enterprise restructuring. All three were consolidated in recent years:

Directives on	launched in	consolidated in	amended in
– Collective Redundancies	75/129	98/59	
– Transfer of the undertaking	77/187	2001/23	
– Insolvency	80/987	2008/94	2015/1794

The first two Directives contain rules that affect collective labour law, such as the information and consultation of the workers' representatives. All three Directives contain specific material rules affecting the employment contracts of individual workers, with the last two having the greatest impact..

9.2 Collective Redundancies

The essential contents of the Directive on collective redundancies (Directive 98/59/EC) does not address the financial consequences of collective dismissals.[1] Rather, it focuses on the procedure: in the event of collective redundancies, the employer must inform and consult the workers' representatives, as well as informing public authorities. The employer must wait a month before implementing the decision to make collective redundancies.

In the event of collective redundancies, information and consultation with workers' representatives must be provided in advance and in good time. This information must

1 CJEU 17 March 2021, C-652/19, ECLI:EU:C:2021:208 (Consulmarketing).

include the reasons for the dismissals, the number of workers involved, the selection criteria and the redundancy payments (Art. 2).

According to Art. 2(1), the consultation with the workers' representatives should be conducted with "a view to reaching an agreement". This formula signifies, that there should be serious negotiations about an agreement to avoid redundancies or mitigate their consequences. However, there is no obligation to reach such an agreement. According to the law and practices of Member States, the workers' representatives may be trade unions, and/or works councils.

In the case of companies that are actually daughter companies, the management of the subsidiaries must provide the information and consultation. The management of the daughter company must start the information and consultation process with the workers' representatives as soon as the parent company has identified which daughter company will be affected by collective redundancy, even if, at that moment, not all information is complete. The additional information must then be supplemented later.

Daughter companies cannot escape responsibility for not complying with the obligations of the Directive's by invoking the mother company's non-cooperation. (Akavan case).[2] See now Art. 2(4).

The same information must also be provided to public authorities, along with the results of consultations with workers' representatives (Art. 3(2)).

Thus: Employers must first inform and consult the workers' representatives and then the relevant authority.

Collective redundancies may take effect not earlier than 30 days after notification to the relevant public authority (Art. 4 (1)(2)). This **30-day time lapse** allows the competent public authority to seek solutions (placement of workers, retraining, outplacement, etc). However, the employer may already immediately start giving the workers notice so that the statutory or contractual notice period can begin to run (see case Junk).[3]

When exactly does a collective dismissal occur? According to Art. 1, Member States may choose

2 CJEU, 10.09.2009, C-44/08 (Akavan).
3 CJEU, 27.01.2005, C-188/03 (Junk).

- 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 require clarification, are: What exactly is an "establishment"? Which dismissals count?

Most of these questions are not answered in the Directive itself, but are often addressed in the national legislation of the Member States. Nevertheless, the CJEU has provided several answers.

Regarding the question: What exactly is an establishment? The CJEU has responded as follows:

> "An establishment, in the context of an undertaking, may consist of a distinct entity with a certain degree of permanence and stability. This entity is assigned to perform one or more given tasks and has the workforce, technical means, and organisational structure to accomplish those tasks." (Athinaïki case.)[4]

In answer to the question, What redundancies/dismissals do count? the Directive states that only those redundancies/dismissals which are "not related to the individual worker" count (Art. 1(a). Nevertheless also "terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies) and count, provided that there are at least five redundancies" (Art. 1(b). And although terminations initiated by the worker do not count, terminations because of an employee's refusal of a unilateral and detrimental amendment of conditions of pay by the employer, do count (CJEU case Dansk M/Nielson and case Ciupa).[5]

The Collective Redundancies Directive does not apply to some short-time contracts or bodies of the public administration (Art. 1 (2)).

4 CJEU, 15.02.2007, C- 270-05 (Athinaïki).
5 CJEU, 12.02.1985, C-284/83 (Dansk M/Nielsen; CJEU, 21.9.2017, C-429/16 (Ciupa).

The directive applies to non-profit employers, as well as in cases where the enterprise is terminated by a judicial decision (e.g. bankruptcy). However, Member States may exclude the 30-day time limit in such cases (Article 4(4)).

9.3 Transfer of the Undertaking

Takeovers, mergers of firms, outsourcing of activities, and public procurement are all modern phenomena in the lives of companies in a market economy. The EU's approach to them is half-hearted.

The EU promotes these phenomena to the extent that they may endanger consumers' freedom of choice (monopolies). It, however, offers some protection to workers covered by the Directive of Transfer of Undertakings and the Directive on cross-border mergers of limited companies (zie Chapter 10.6).

The Directive on transfer of undertakings was first adopted in 1977 (Directive 77/187/EEC), now consolidated in Directive 2001/23/EC.

Firstly, this Directive stipulates that both the transferor (i.e. the old employer) and the transferee (i.e. the new employer) must inform and consult the workers' representatives in their respective enterprises regarding the transfer of an undertaking.

Secondly, this Directive obliges the transferee to take over the transferor's existing employment contracts under the same conditions. 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 happens, the worker is considered to still be in the service of the transferor or the transferee (Bork case).[6]

However, this does not offer much protection, as workers may still be dismissed for "economic, technical or organisational reasons". To assess this, all circumstances surrounding the dismissal must be considered.[7]

The automatic transfer of all rights and obligations includes those obligations resulting from a collective agreement in force on the transfer date, but not any later modifications to

6 CJEU, 15.06.1988, C-101/87 (Bork).
7 CJEU 6 April 2017, nr. C-336/15, ECLI:EU:C:2017:276 (Unionen).

the agreement (Werhof case).[8] How long does this continuation of the working conditions endure? This depends on the nature of the rights and obligations. Those deriving solely from individual employment contracts may be changed by the transferee according to the national rules on the modification of employment contracts (usually by mutual consent, but sometimes also unilaterally). Those deriving from a collective agreement may be changed either after the termination or expiration of that agreement, or after another agreement comes into force (Art. 3(3)). Special rules apply to the continuation of the rights and obligations in occupational pension schemes (Art. 3(4)).

In the event of planned transfers, both the transferor and the transferee must provide workers' representatives with information and consultation in good time. This information must include the reasons for the transfer, the number of employees affected, and the social consequences for those employees. Consultation with the workers' representatives should take place "with a view to reaching an agreement" (Art. 7(2) (on this concept see par. 9.2). This agreement should address the mitigation of any adverse consequences for the workers and the future of the workers' representation bodies following the transfer.

According to the law and practices of Member States, "Workers' representatives" may be trade unions, and/or works' councils.

In the case of companies that are, in fact, daughter companies, the information and consultation must be carried out by the management of the daughter companies that are the transferor or the transferee in a transfer case. In fact, the information and consultation of the workers' representatives must already be started by the management of the daughter company as soon as the mother company has identified which daughter company will be concerned by a transfer, even if, at that moment not all information is complete. The additional information must then be supplemented later.

Daughter companies cannot escape responsibility for not complying with the obligations of the Directive by invoking non-cooperation of the mother company.

Problematic cases are the heavy/unfriendly take-over battles and a transfer of an entire division.[9]

8 CJEU, 9.03.2006, C-499/04 (Werhof), but see for a nuance CJEU 27 April 2017, C-680/15 and 681/15 (Asklepios).

9 CJEU 26 March 2020, C-344/18, ECLI:EU:C:2020:239 (ISS).

Then there are the technicalities, which often have a 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).[10] 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 not concerning the information and consultation obligations.

The main technical question is, whether or not there is a transfer, if only a part of an undertaking is transferred. After some judgments of the CJEU had been criticised[11] the Directive (Art. 1(b) and the CJEU (see case Dodic)[12] have now taken as decisive criterion that there is a transfer of an entity (part of the enterprise/entire division) if the entity in question has retained its **identity.**

When does an entity have retained its identity? A main practical 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 often been recognised by the CJEU as "transfers" in the sense of the Directive, but in other cases not:

- "outsourcing" of a part of an enterprise
- and the reverse: bringing the outsourced activities back in-house (Hernandez-case)[13]
- intra-group transfers (Europièces case)[14]

10 CJEU, 5.03.1988, C-144 and 145/87 (Berg/Busschers).
11 CJEU, 14.04.1994, C-392.92 (Schmidt); CJEU, 11.93.1997, C-13/95 (Süzen).
12 CJEU 27 February 2020, c-298/18, ECLI:EU:C:2020:121; (Grafe & Pohle); CJEU 8 May 2019, C-194/18, ECLI:EU:C:2019:385 *Dodić*.
13 CJEU, 10.12.1998, Joined cases C-127/96, C-29/96; C-74/97 (Hernández).
14 CJEU, 12.11.1998, C-399/96 (Europièces).

- in public procurement cases[15] and in a situation in which a public body terminates a subsidy/or a concession to firm A, while firm B takes it over (Redmond case).[16] The same when a private business has replaced a contract for the provision of services concluded with one undertaking by a similar contract with another undertaking.[17]

The Directive applies to both private and public enterprises, whether or not operating for gain. However, the Directive does not apply to administrative re-organisations of public administrative authorities (art. 1(1)(c). The Directive does not apply in bankruptcy cases, unless a Member State provides otherwise. Member States that have not provided otherwise must take measures to prevent abuses. (Art. 5(4). The Directive is applicable in various sorts of pre-bankruptcy proceedings.[18]

The concept of 'employee' is according to national law[19], but Member States 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 the transfer of the user-company. This exception, however, does not cover intra-group posting of workers (Albron case).[20]

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).[21] Anyway, case law has established that the worker cannot be forced to enter into the service of the transferee (Mikkelson case).[22] And what if the worker refuses? Dutch/UK legal opinion says: the employment contract with the transferor is nevertheless terminated automatically by the transfer. Some Member States offer more favourable solutions for such workers.

15 C-550/19, ECLI:EU:C:2021:514.
16 CJEU, 15.05.1992, C-29/91; Sophie Redmond); CJEU 7 August 2018, nr. C-472/16, ECLI:EU:C:2018:646 (Colino Sigüenza).
17 CJEU 11 July 2018, nr. C-60/17, ECLI:EU:C:2018:559 (Somoza Hermo).
18 CJEU 16 may 2016, C-509/17, ECLI:EU:C:2019:424 (Plessers). CJEU 13 June 2019, C-664/17, ECLI:EU:C:2019:496 (Nafpigeia).
19 CJEU 13 June 2019, C-317/18, ECLI:EU:C:2019:499 (Moreira).
20 CJEU, 21.10.2010, C-242/09 (Albron).
21 CJEU, 27.11.2008, C-396/07 (Juuri).
22 CJEU, 11.07.1985, C-105/84 (Mikkelsen).

9.4 The Insolvency of the Employer

One of the negative aspects of the market economy is the bankruptcies.

National legislators have traditionally taken measures to regulate this phenomenon to protect certain general interests. And although the EU has in the past already issued a number of rules to harmonise the law on insolvency (see Regulation 1346/2000/EC) this is apparently not enough and the European Commission frequently wants to intervene in this field of law. See its newest proposal of the European Commission on the harmonisation of certain aspects of insolvency law[23] which does not seem to touch on workers' rights.

Workers are among the most vulnerable creditors in bankruptcies but many national legislators have offered them mostly only a very weak protection.

In par. 9.3 we have already seen, that the EU lawmakers have not so clearly protected the jobs of workers in cases of bankruptcy even if (parts of) the bankrupt firm has been taken over by a new employer. On the other hand we have also seen, that workers are sometimes better protected in pre-bankruptcy proceedings, which has caused such proceedings to be avoided in favour of the bankruptcy proceedings.

In 2019 the EU has adopted Directive (EU) 2019/1023 on preventive restructuring frameworks (restructuring plans) etc. In this Directive Art. 13 provides that Members States shall ensure that individual and collective workers' rights, under Union and national labour law are not affected by the preventive restructuring framework. This concerns notably the right to collective bargaining and industrial action and the right to information and consultation guaranteed by Directives 98/59/EC, 2001/23/EC and 2008/94/EC.

Where the restructuring plan includes measures leading to changes in the work organisation or in contractual relations with workers, those measures shall be approved by those workers, if national law or collective agreements provide for an approval in such cases.

One of the oldest protections that EU labour law has offered to the workers in insolvency cases is in Directive 80/987/EEC, consolidated in Directive 2008/94/EC on Insolvency of the employer and further amended by Directive EU 2015/1794. This Directive imposes on the

23 COM (2022) 702 final.

Member States the obligation to guarantee the payment of outstanding wage claims and severance pay[24] (Art. 3) by guarantee institutions, which have to meet certain criteria listed in the Directive (independence, financing) (Art. 5). Member States must also protect the interests of employees and former employees concerning pension rights.[25]

The Directive offers Member States some flexibility in defining the extent of the wage claims that are guaranteed (Art. 4). The minimum of most options is circa 3 months of wage claims.

Member States may also set limits on such payments, but these limits should not be set too low. Member States may take measures to avoid abuses and to regulate proper cooperation of the workers, for instance by limiting claim periods (cases Pflueck and Visciano[26]). However, a 20% sanction on non-registration as unemployed was rejected (van Ardennen case)[27].

The concept of insolvency is defined in Art. 2(1) and is broader than bankruptcy. For most other concepts (employee[28], pay, etc.) the Directive refers to national law.[29]

In the case of cross-border employment relationships the guarantee institution of the place of work of the employee is competent (art. 9 (1)). Member States 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)). Member States may not exclude part-time workers, fixed-term contract workers and temporary agency workers.

24 CJEU EU 28 June 2018, nr. C-57/17, ECLI:EU:C:2018:512 (Checa Conrado).
25 CJEU EU 6 September 2018, nr. C-17/17, ECLI:EU:C:2018:674 (Hampshire); CJEU 8 September 2020, C-674 en C-675/18, ECLI:EU:C:2020:682 (EM); CJEU 19 December 2019, C-68/18, ECLI:EU:C:2019:1128 (PSV).
26 CJEU, 16.07.2009, C-69/08 (Visciano).
27 CJEU 17.11.2011, C-435/10 (Van Ardennen).
28 CJEU 5 May 2022, C-101/21, ECLI:EU:C:2022:356 (HJ).
29 CJEU 25 November 2020, C-799/19, ECLI:EU:C:2020:960 (NI).

10
Industrial Democracy

10.1 Introduction

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

In the 1960s, calls for industrial democracy spread across Europe, although the methods to achieve this varied greatly. Also in the 1960s, the newly established EEC aimed to harmonise company law (old Art. 53(1) EEC, now Art. 50(2)(g) TFEU).

In this framework the European Commission intended to harmonise national company law through a series of directives. Furthermore, it aimed to establish the legal basis for a cross-border legal entity: the Societas Europaea.

In both projects, the issue of corporate governance had to be addressed, and therefore confrontation with the concept of industrial democracy was unavoidable.

However, there were in the 1960s/1970s very conflicting opinions on this item among employers, trade unions, politicians, scientific persons, with variations in all Member States. 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 Member States with a lower degree of industrial democracy.

On the other hand, the German concepts could not be imposed on the other Member States 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 harmonisation of company law and in the statute for a Societas Europaea. 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 (Art. 28-29)
- The Charter of Fundamental Rights of the EU (Art. 27).

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 in 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 then possible on the Societas Europaea. 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 (Directive 2003/72/EC) and the Directive on cross-border mergers of limited liability companies (Directive 2005/56/EC).

However, the proposed 5th Directive was never finished and has been withdrawn in 2000. The conclusion may be, that Information and Consultation of Employees is now quite generally accepted for EU regulation where it is relevant. Participation or co-determination is still a subject on which only some coordination is possible, no harmonisation (see also the different decision-making procedures for both items in Art. 153 TFEU!) (see par. 1.4).

10.2 Information and Consultation in All Medium and Large Size Companies in the EU

As said before, the EU has already laid down the principle of information and consultation of the workers' representative in the enterprise in its Directives in Collective Redundancies, on Transfer of the enterprise and of Health and Safety. Around 2000 the EU lawmakers had felt the necessity to generalise the principle of information and consultation of workers' representatives in the enterprise to all issues of labour. Notably with a view to the entrance of a number of former Communist countries to the EU, where this practice still was in its infancy.

For this purpose, in 2002 the EU legislator adopted a general framework for the information and consultation of employees in the European Union, Directive 2002/14/EC. It obliges Member States 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 dismissals, 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 organisation and contractual relations within the undertaking or establishment (Art. 4(2)).[1]

1 CJEU 6 July 2023 case C-404/22 (Ethnikos).

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. Member States 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 Member State or 'establishments' employing at least 20 employees in that Member State (Art. 3).

Both public and private undertakings, whether or not operating for gain are covered (Art. 2(a)).[2]

What kind of employees' representatives are to be informed and consulted is left completely to the Member State laws and practices (Art. 2(e)). Most of the time, this will be either the trade unions or the elected workers' representatives. But which of the two? Or both of them? All this is left to the Member States. And the Directive seems not to exclude that the required information and consultation is given to the workers directly. However, there are often difficulties in defining who should enjoy information and consultation rights, the unions or the elected workers' representatives in the enterprises.

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 Member States may implement the Directive not only by statute, but also leave the implementation to the national social partners via collective agreements.

The Directive does not contain many items that were not already practised in most of the old 15 EU Member States (with the UK as a notable exception). No wonder that several Member States, like Austria, Germany and France have not even transposed the Directive, feeling that

2 CJEU 6 July 2023 case C-404/22 (Ethnikos).

the existing domestic measures offer adequate protection. Not always rightly![3] and some years ago, after the European Commission had made a "fitness check" of this Directive it was observed that in some Member States Directive 2002/14/EC is not properly implemented.

The European Commission intended to make an amendment of this Directive and of the information/consultation provisions in the Directives on collective redundancies and transfer of undertakings. For this reason it in 2015 launched a consultation of the EU social partners (in conformity with Art. 154 TFEU), but nothing has come out of this exercise.

10.3 The European Works Councils Directive

In 1994 the strategy of further promoting information and consultation had resulted in the adoption of the European Works' Councils Directive (Dir. 94/45/EEC). This first Directive on European Works Councils (EWC) was "recast" (= amended) in 2009 by Directive 2009/38/EC and actually, in 2026, a new amendment is approaching (and perhaps already published).

The EWC-Directive is characterised 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 "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 groups of multinational companies 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", i.e. companies with at least 1000 workers in at least plants in 2 Member States (including the EEA-countries), where each of these plants has at least 150 workers (art. 2(1) (a) and (c)). These thresholds may be set at a lower level by agreements between management and labour.

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

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).

Not only EU-based multinationals are covered. Also multinational companies which have their headquarters outside the Member State (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 an extra-EU seated multinational company must appoint a representative agent of the top-management residing outside the EU. Having failed to do so the Directive designates as such the management of the establishment employing the greatest number of employees in the Member States 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 European Works Council itself.

The concept of "employee" is largely left to Member State 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.

The Directive does not provide for the inclusion of employees of subsidiaries outside the Member States (and EEA) in its information and consultation structure, although the EWC-Agreement to set up an EWC may do.

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. The Amendment Directive 2026 provides that measures affecting employees in one Member State, which may reasonably be expected to have consequences for employees in at least one other Member State, fall within the scope of consultation with the European Works Council.

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)). The Amendment Directive 2026 elucidates that the consultation process must enable employee representatives to express an opinion. The central management must provide a reasoned written response to this opinion before any decision can be taken on a transnational matter.

In the past, companies were found to impose excessively broad confidentiality obligations that hindered genuine consultation. The Amendment Directive 2026 provides that confidentiality must be justified: invoking confidentiality must be properly substantiated, particularly when sharing information, for example, with the local works councils and employees, is restricted. The Amendment Directive 2026 aim to coordinate information and consultation procedures between EWC and national employee representatives, with concrete arrangements to be set out in EWC agreements.

The employer must bear the costs of the EWC. EWC agreements must specify the financial and material resources to be allocated to EWC. The Amendment Directive 2026 clarifies that the EWC must be provided with the necessary resources to carry out their work. It requires adequate funding for EWCs, including management covering reasonable costs for experts and training for both the EWC and the Special Negotiating Body (SNB).

On the precise shape of the EWC, on its competences and procedures the Directive has chosen a very flexible approach: these issues 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 the first time when there exists not yet an 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 Member States 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 Member State per portion of employees employed in that Member State, amounting to 10%, or a fraction thereof of all employees covered (point 1c). As women are underrepresented in most of the existing European Works Councils the Amendment Directive 2026 provides that – when (re)negotiating an agreement – measures must be taken to ensure a balanced representation of men and women within the European Works Council: 40% of the seats for women and 40% for men.
- The central management must meet the EWC once a year as well as 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 functioning it is up to that EWC to try to obtain further adaptations of that setting-up-agreement later by negotiations with the employer. During its existence the EWC may conclude with the employer further agreements about whatever issues.

Sociologists saw 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 contain much about the enforcement and sanctions! Now the Amendment Directive 2026 enforces the application of EWC's. It provides for timely and active enforcement procedures and remedies, including financial penalties for non-compliance. Member States must notify the Commission of the manner by which rightsholders can initiate judicial and, where relevant, administrative proceedings concerning their rights under the Directive. Member States are also required to establish effective, dissuasive, and proportionate sanctions to enforce the Directive.

Up to now there has been a 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 2025 only ca. 1000 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 on 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 renegotiate them as long as the agreement lasts or is prolonged (art. 13). 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). All this in 2025 concerned ca. 350 of the circa 1000 multinationals that have now established an EWC. These agreements may remain in effect. However, on the basis of the Amendment Directive 2026 employees or employee representatives may request to conclude a new agreement in accordance with the new rules.

Member States have two years to transpose the rules of the Amendment Directive 2026 into their national laws; companies will have one year to comply with the new national laws. Meaning the actual deadline for companies to apply the new rules will likely be in 2029.

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

In the beginning of this paragraph it was said, that already in the 1960s the European Commission had the ambition to establish the legal basis of a cross-border legal person, the Societas Europaea.

However, there had been a three decades long stagnation on this dossier because of the problem of inserting one form of workers' participation or another in the governance of such companies. Finally, 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.

Like in the EWC-Directive, this Directive obliges the management of an European Company to set up an 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 modelled 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 governance 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 an SE is established by transformation.

3) In other cases of establishment 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 an SE. Every company is free to choose the SE-form as legal person or not. If, however, a company opts for the SE-form it must apply the rules on workers' involvement.

In 2024, ca. 1750 SEs 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 was adopted in 2005 and is now incorporated into 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 to those in the SE Directive.

Unfortunately, Labour Law is rarely found on workers' bookshelves in Europe. It certainly is on the desks of trade union officials, HRM staff of the enterprises and of lawyers and judges, but that is French, German, Polish, etc. labour law.
Even among labour law experts, European Labour Law is hardly known. This is not a major issue, as much of Europe's labour law is implemented in domestic law. However, sometimes it is necessary to trace the European origins of domestic laws, for example when there are doubts as to whether domestic law is fully in accordance with European law.

This book aims to educate readers about the European origins of labour law. It is the fruit of lectures that Prof. Antoine Jacobs has given (2012-2019) as a visiting professor at the State University of Milan.

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