A KEY TO COMPARATIVE LABOUR LAW IN EUROPE

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OPEN PRESS TiU

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ISBN: 9789462406919 (Paperback)
ISBN: 9789462406926 (Interactive PDF)

Published by: Open Press TiU
Contact details: info@openpresstiu.edu
https://www.openpresstiu.org/

Layout Design by: Wolf Publishers, Claudia Tofan & KaftWerk/Janine Hendriks

OPEN PRESS Tilburg University 2021

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1. INTRODUCTION

The aim of this coursebook is to present a satellite view on labour law in Europe, notably of the Member States of the European Union (EU) and the United Kingdom.

In the United States the most important labour laws have an all USA-character. New York, California, Florida etc. have their own labour laws. However, the basic labour and social security law is overwhelmingly uniform from the Atlantic to the Pacific coast. Things are different in Europe.

Presumably at least 80% of labour law in Europe is determined by the various States. As a consequence there are still numerous differences between the labour laws of the various countries in Europe. And it is bound to stay so for several more decades, as the EU does not have the ambition to bring about full scale harmonization of labour law in its Member States.

However, I believe that – even if harmonization of labour law is not the deliberate objective of the EU – the legal systems of the European countries are in fact getting closer to each other. The countries are looking beyond their national fences and they are often voluntarily adapting their systems to those of their neighboring countries. It is therefore tempting and challenging to study the labour law of the countries in Europe from a comparative perspective.

1.1. The history of labour law in Europe

Obviously, the history of labour law in Europe is very old. Already the Romans and the Germans had their own labour laws.

However, one may say that MODERN labour law took off some two centuries ago, around 1800.

It was the era that the philosophies of the Enlightenment about freedom of contract, as well as the English ideas about freedom of trade, had spread over Europe by the French Revolution (1789). As a consequence of these philosophies most of the old labour laws had been abolished. Consequently there was almost no labour law in Europe during most of the 19th century!

It was only in the last quarter of the 19th century that modern labour law started very slowly. It then grew seriously after the first World War and it expanded enormously after the Second World War to reach its peak in the 1960s and 1970s. Since then there is stagnation.

The last 40 years few really new labour law was created. There was and is reform, transformation of the existing labour law to adapt it to the new realities of this age.

This transformation is pushed forward by quite a number of factors.

There were new ideological ideas like deregulation, privatization, flexibility and an ever greater emphasis on equality and less on imposed solidarity.

Demographic factors, such as an aging population, more female participation and migrants on the labour markets, the increase in the number of divorces and single-parent families, have challenged traditional social security arrangements. This effect was reinforced by the idea of equal treatment of men and women and the decline of the single-breadwinner model. The economies in Europe are evolving from an agrarian or an industrial into a services economy, which in its actual phase is dominated by digitalization and robotization (the gig-economy).

The single European Market was completed in 1992 and a single currency, the Euro was introduced in 2001. Trade barriers were lowered worldwide, and markets and enterprises increasingly operate on a global scale (globalization), dominated by multinational companies.

New forms of employment have emerged – part-time work, freelance work, labour-on-call, outsourcing, temporary agency work, teleworking, work on platforms, such as riders. A complete 'New World of Work' has emerged.

The influx of women on the labour market has stimulated the demand for childcare facilities and regulations which enable parents to reconcile paid labour and family responsibilities.

Labour law in all European countries has entered a situation of permanent transformation. Contractual and industrial relations in the labour market must be adapted to a post-industrial knowledge-based economy. Labour law has to deal with this new socio-economic environment, characterized by globalization and a new world of work. That is the present challenge in all European countries.

Scholars argued that modern labour law is the product of a rather uniform system of production ('Fordism') in a rather monolithic kind of society (based on breadwinner families). Those times are definitively over. Europe is heading in the direction of a varied offer of products and services ('post-Fordism') in a society of a rich plurality of living patterns. This requires a different kind of labour law.

The question is: what different kind exactly? One sees already new forms of labour on the horizon, like those for the gig-economy and for a robotized labour market. The Coronavirus crisis presumably will have modified the labour market permanently.

However, whatever shape future changes will take, it is not likely to entail a much lower level of labour law, as all surveys indicate that the peoples in Europe do not favour a strong decrease in the protection of their welfare.

1.2. Unity and diversity in labour law

In a not so distant past there were different socio-economic systems in Europe. Between 1945 and 1990 communism ruled in Eastern Europe, and Spain, Portugal and Greece once had fascist governments. Under these regimes, labour law had a different character from the law we know today.

However, when these regimes disappeared, so did their specific versions of labour law. So today throughout Europe, and notably since the fall of the Berlin Wall, 1989, the economic system in all European countries is essentially a

capitalist one. However, the harshest consequences of capitalism have been softened by a multitude of rules and facilities protecting the weakest members of society. This brand of capitalism is generally referred to as a 'social market economy'. Labour law is one of the pillars of this 'social market economy'. And this is today the unitary background of labour law all over Europe.

However, this is not to say that the social market economies of the various European countries have the same flavour. There are differences. In the 1990s scholars identified several social market economy models in Europe. In their studies, they compared the Anglo-Saxon model (Great Britain and Ireland), the Rhineland model (Germany, France, the Benelux, Austria and Italy), the Nordic model (Sweden, Denmark, Finland, Norway, Island), the Mediterranean model (Spain, Portugal, Greece, Malta, Cyprus), and the Central European model (Poland, Hungary, Romania, etc).

In the Anglo-Saxon model the emphasis is on a proper functioning of the laws of the market; the protection of and the care for the entire population, including employees, is at a relatively low level, leaving much to individuals to personally improve their situation.

In the Rhineland model the statutory protection of and the care for the population is on a higher level, notably where employees are concerned.

In the Nordic model the protection of and the care for the entire population is on a high level as well, but at the same time the system is geared towards a high degree of participation on the labour market.

In the Mediterranean model the Rhineland model is followed in a poorer economy riddled with clientelism and even corruption.

In the Central European model the relative poverty under the former communist systems has not yet been pushed back conclusively, industrial relations are still immature and unbalanced situations of wild capitalism may persist. All post-communist welfare systems now represent a very special mixture of conservative corporatist and liberal regimes with a hint of limited universalistic elements as well.

Of course, these are generalizations and as such they cannot fully account for the situation in even one country. However, models are helpful to reduce complexity.

The fact that labour law operates in a capitalist society makes that it is very sensitive to ups and downs in the economic cycle. In an economic boom, unemployment is low and workers may easily press for better conditions of employment and social security than in slack periods. This may cause inflation with all its problems. If the economy is in dire straits as it came recently due to the Coronavirus, unemployment is high and workers have difficulty in maintaining their rights.

In Europe as a whole, the levels of unemployment and economic growth among the various countries are widely divergent. In the countries around the North Sea, unemployment is moderate. In Southern Europe and Central Europe unemployment levels are often higher. Many of these differences are linked to the economic growth rates, the resources and the economic histories of the various countries. Another important factor is demographics: age structure of the population, levels of education, work ethic, etc. Religion may also be a factor: the famous sociologist Max Weber concluded that Protestantism was more conducive to capitalism than Catholicism. In some countries, for instance Great Britain, class consciousness is more persistent than in, for instance, the Netherlands.

Even within the countries of Europe differences may be considerable and varied. Look, for example, at the regional differences between Northern and Southern Italy, or the differences between economic sectors (e.g., the conditions of employment in the textile industry and in aircraft construction). All this influences labour law. Labour law also reflects political values and political situations. They are the results of social policy initiatives. Generally speaking, socialists and populist movements are more inclined to expand labour law than conservatives and liberals. Christian democrats take up an intermediate position. They tend to favour labour law created by employers and trade unions themselves over government-enacted legislation (so-called Neo-Corporatism (see par. 7.1). In other words, the political situation in a specific country may lead to substantial differences in labour law.

Also, it is interesting to see that in small countries (e.g., the Netherlands, Belgium, Austria, the Nordic countries and Ireland) the various political parties and the social partners are more willing to work out a compromise than are

their counterparts in large countries (e.g., Germany, Great Britain, France and Italy), where the socio-political relations are generally more hostile and combative.

Many commentaries on labour law make us aware of all these differences as explanations for differences in labour law. Sometimes rightly so, sometimes they are exaggerations. Differences may also have irrational or fortuitous causes.

1.3. The functions of labour law

The classic function of labour is: the protection of workers, in German: *Schutzfunktion*. In the Netherlands labour lawyers call it: *ongelijkheidscompensatie,* compensation for inequality). Individual workers are considered to be too weak to protect themselves against the risks they run on the labour market – low wages, long working days, unsafe working conditions, etc. It are generally the employers who have the upper hand. So it is up to the law to compensate workers for this structural inequality by creating mandatory rules.

However, we must be weary not to exaggerate this function. In recent years many people have come to realize that protection can go too far. If they force up labour costs too high, employers will be tempted to cut jobs. Protection may then turn against the working class and people may start to demand more flexibility.

There is a second function for labour law. In addition to protecting workers, labour law also serves to create a predictable and orderly allocation of rights, obligations and responsibilities to all parties on the labour market. If you go out driving your car it is nice to know that all cars on the European continent are driving on the right side of the streets.

This particular function should not be underestimated, given the high levels of interdependence in modern society. The arrangements for health and safety at work benefit everybody, whether weak or strong. In the Corona-time this has become very clear. So it is important to know who is responsible for the errors made by employees and what is the scope of employers' unilateral powers to organize work.

This function is called the organizational or structuring function of labour law (in German: *Ordnungsfunktion*). It explains why employers too need labour law.

1.4. Fundamental rights in labour law

In recent decades, most European countries labour law has been influenced by fundamental rights, if to different extents. Germany and Italy were forerunners in this development, which is easy to understand against the background of Nazism and Fascism respectively, under which fundamental rights were grossly violated. After World War II, the new democratic constitutions of these countries included a catalogue of fundamental rights, which have not left labour law untouched.

In the 1960s, American trends took root in Europe, such as the fundamental rights to non-discrimination, privacy, freedom of expression, etc. As a growing number of European countries have enshrined fundamental rights in their constitutions, international organizations such as the UN, the Council of Europe and the EU have become increasingly interested in formulating charters of fundamental rights. However, national constitutions and international charters often differ greatly in how they formulate these fundamental rights, and this causes great variation in their applicability.

Another problem is the issue of the direct and horizontal effect of fundamental rights.

The direct effect of fundamental rights concerns the question whether citizens can invoke such rights in court proceedings.

The horizontal effect concerns the question whether workers can invoke these rights in their employment relationships with private employers.

It took time before such technical legal issues were resolved by the national courts in Europa. Solutions thus arrived can differ from country to country and even the decisions of the Court of Justice of the EU (CJEU) are not observed unconditionally by all EU Member States.

Matters become even more complicated (and unclear) when fundamental rights clash. Can they be balanced and if not, which right has priority?

Fundamental rights primarily serve the interests of workers, but sometimes employers may also invoke them, such as the right on property and the right of freedom of enterprise.

1.5. The sources of labour law

All over Europe labour law can be found in multiple sources of law – a multi-layered system (in French: *pluralisme juridique*). This very much complicates the determination of rights and obligations of a specific person in a specific job, but apparently it cannot be made more simple.

a. The contract of employment

In all European countries the basic source of every individual employment relationship is the contract of employment. To know the rights and obligations of the parties, it is indispensable to note the contents of the contract of employment. However, the parties to a contract of employment – the worker and the employer – most of the time have no equal power to negotiate. Mostly the employer has the upper hand.

For this reason in all European countries the freedom of the parties to the contract of employment has been limited. This notably has been done by legislation and collective agreements.

They contain numerous mandatory provisions which set aside contrary dispositions in individual contracts of employment.

b. Legislation

In all European countries a major source of labour law is legislation (i.e., acts of parliament or statutory law). Often such legislation only gives basic regulatory principles. It leaves concretization to Royal Orders, Ministerial Decrees, Ministerial Circulars, etc.

In most countries of Europe, labour law as set out in formal legislation, is framed at the national level, even in so-called federal states (as in Germany, Austria and Belgium). Provinces and municipalities have little to say on labour law.

Only a few countries, notably France and the Czech Republic, can boast orderly codifications of labour law. Elsewhere labour regulations are scattered throughout the statute books.

In most cases, the desire to amend or renew legislation comes from the government or parliament (inspired by the aspirations of society). In many

countries, legislative proposals in the field of labour law are primarily submitted by the government to the employer's associations and the trade unions to hear their opinions (another aspect of Neo-corporatism).

c. Collective agreements

In all European countries the collective agreements are a very important instrument governing the working conditions. These are contracts, concluded by employers and trade unions to determine key labour conditions like wages, working time and so on.

However, there is a great variety as regards the practice, the scope and the binding force of collective agreements. These differences will be dealt with extensively in chapters 3 and 8.

d. Other documents

In all European countries, large enterprises traditionally use internal documents containing a number of norms on employment relations. In France and Belgium these are called *réglements*; in Germany, *Allgemeine Arbeitsbedingungen* and *Betriebsvereinbarungen*. etc.; in Great Britain, *staff guides*; in the Netherlands, *personeelsgidsen*.

National labour laws vary enormously as regards such questions as what norms can be laid down in such documents, what is the procedure to issue and to amend those norms, what is their binding force, etc. This topic will be addressed in chapter 3.

e. Managerial prerogatives

In all European States, the employer is still the big boss. Everywhere his authority to unilaterally issue work rules is recognized, but those rules and orders should remain within the limits drawn by higher sources such as statutes and the collective agreements (further in chapter 5.4).

f. Custom and practices

In the past across Europe customs and practices used to be important sources of rights and obligations on the labour market. However, as the other sources

have grown in importance, customs and practices have been marginalized nowadays.

g. The judgments of the courts

Everywhere in Europe case law of the courts is an important source of labour law. In many countries labour law disputes are dealt with by specialized courts (see section 5.14).

h. Constitutions

The constitutions of a number of European States contain provisions that are relevant to labour law. These constitutions often regulate legislative powers, the applicability of international norms, the duties of the administration and of the judiciary, as well as the way in which statutes are created and enforced. They sometimes also enumerate a number of fundamental rights.

In several European States, constitutional clauses may overrule contrary statutes; however, to what extend do they govern private labour relations?

i. International law

There are 3 global international organizations that may influence labour law:

- the United Nations (UN) in New York
- the International Labour Organization (ILO) in Geneva
- the Organization of Economic Cooperation and Development

The main European organizations are:

- the Council of Europe (CoE)
- the European Union (EC/EU)

Just a few examples of labour standards produced by these international organizations:

- the UN Covenant on Economic, Social and Cultural Rights
- ILO Convention Nr 87 on the freedom of association of trade unions
- the OECD Code for Multinational Enterprises
- the European Social Charter (ESC)
- the EU Regulation on Free Movement of workers

The impact of these international and European norms and sources on national labour law in the European States varies.

Rules and norms emitted by the UN, the ILO, the OECD, and the CoE (save for the ECHR) have an indirect and voluntary impact. The states in Europe are free to either ratify or refuse to ratify these rules and norms. All European countries have ratified many rules and norms set by the UN, the ILO and the CoE. However, they have also refused to ratify several other rules and norms set by these international organizations.

Many of the standards set by the European Union have an immediate and mandatory effect in all Member States. This concerns notably the Regulations and Directives and some provisions of the Charter of Fundamental Rights of the EU. The EU Member States no longer have the freedom to choose whether to follow or reject mandatory norms emanated from the EU. They have to implement these norms scrupulously. When the norms of the EU are not applied in the way the European Commission (EC) considers it right, the European Commission may bring the case before the Court of Justice of the EU.

That court will then give a decision that is binding on the Member States (Art. 259 TFEU).

There is only one document of the Council of Europe which has a comparable strong immediate and mandatory effect on national law as EU laws. That is the European Convention of Human Rights ECHR. All Member States of the Council of Europe (47 countries) (safe Russia) have bound themselves to respect the standards in this Convention and the rulings of the European Court of Human Rights in Strasbourg. However, the ECHR only contains few standards with effect on labour law.

From the aforementioned considerations we may infer that international and European norms may have a certain harmonizing effect on national labour law in the countries of Europe. However, this harmonization should not be overestimated. Most of the international and European rules are minimum standards. Countries remain free to maintain standards that are more favourable to workers. And indeed, in the wealthier countries of the EU the actual level of labour law and social security law is often considerably above the minimum standards.

Finally some *words about soft law*

Traditionally, international institutions are seldom producing binding standards. Much more often they are adopting resolutions, recommendations, codes of good practice, etc. This types of documents are regarded as 'soft law' as opposed to the 'hard law' in standards which are legally binding. They are produced by the conferences of international organizations, which could not reach agreements about more binding standards, in order to show their good will. Better something than nothing. Later it sometimes appears that some 'soft law' has nevertheless influenced realities considerably, while some 'hard' law standards have remained a 'dead letter'.

1.6. The hierarchy of sources in labour law

Given that many sources of labour law, the question raises: what is the hierarchy between these sources? Which source prevails when the contents of the various sources is conflicting?

In labour law the main rule is, that the higher source takes priority over lower sources. And that means, that comes first: (1) Acts of Parliament /statutes as well as their concretization in Royal Orders, Ministerial Decrees, Ministerial Circulars, etc., (2) then collective agreements (3), then the contract of employment.

Even so, in the labour law of European countries this hierarchy of sources is often overturned by the principle of the most favourable law: the rules contained in a lower source of law may derogate from the rules contained in a higher source if this is favourable to workers (we call that: a derogation *in melius*). For instance, a paid holiday of five weeks a year laid down in an individual contract of employment has priority over a provision in a collective

agreement or in a statute that stipulates an annual entitlement to four weeks of paid vacation.

Higher sources of labour law mostly express the principle of the most favourable law by using such words like 'at least'. But even when such words are lacking, courts may conclude that the principle of the most favourable law applies.

Finally, there may be an exception on this exception.

It sometimes happen, that lower sources are NOT allowed to deviate in melius from statutory law, if important public policy aspects are at stake, for instance a governmental incomes policy (see par. 8.4). It also may occur that a higher source explicitly allows a lower source to derogate to the detriment of the worker (we call that: derogation *in peius*).

For example, there is in many countries a growing number of labour law rules in the legislation which allows such deviations in peius if they are contained in the collective agreement.

In France such provisions are called *clauses* or *accords dérogatoires*; In Germany such deviations are called *dispositives Recht;* in the Netherlands *driekwart dwingend recht,* in English *waiver-clauses/waivers*.

The idea is that as the parties to the collective agreement are equal, these parties can be allowed to deviate *in peius* from statutory law without fear of undermining the position of workers.

Having said all that, I might wish that I have explained sufficiently the hierarchy of sources in labour law. Alas, there are still a lot of problems left.

What exactly is the place in this hierarchy of customs and practices, the staff guides and the covenants with the works council? Or that of national constitutions, international law and fundamental rights? And there is sometimes the problem: what is more/less favourable to a worker? Sure, 15 Euros wage an hour is more favourable than 10 Euros wage an hour. However, is a working day of 8 hours more favourable than a working day of 9 hours if the 9th hour is double paid?

All these puzzles will pass in revue in the coming lectures so we'll leave them for this moment.

2

2. THE CONTRACT OF EMPLOYMENT

2.1. Introduction

In all countries of Europe work can be done in many forms: salaried employment, self-employment, volunteer work, training etc. Most economically active people are salaried people, working on a contract of employment. How would we define a contract of employment?

Most European countries use roughly the same definition of a contract of employment.

A contract of employment is a contract whereby one party (the employee) undertakes the obligation to perform work against remuneration under the authority / in subordination of the other party (the employer).

This definition specifies at least three key elements: (1) work; (2) remuneration; and (3) under authority / in subordination.

Of these characteristics work and remuneration (pay) are often clear and most discussion is about the element of under authority / in subordination.

The reason is that work and pay are also present among the independent workers / self-employed workers, who work on a contract for services (in German: *freier Dienstvertrag,* in Dutch: *opdracht*); Fr: *contrat de prestation de service*). In the definition of this contract formally the element "authority / subordination" seems lacking.

2.2.The qualification-problem

Therefore, to discern a contract of employment from a contract for services (self-employment) in first instance one should perform the 'control'-test. Who is in control of the working person. Who gives instructions/directives? He himself or another person?

However, often in the contracts for services as well, there may be elements of "directives" given by the other contracting party.

Thus, the criteria "under authority / in subordination" is a weak tool to distinguish the contract of employment from the contract for services.

And that is a nasty conclusion, because we need a sharp distinction of the two types of contract, because in principle, the contracts with self-employed are not governed by most labour laws.

In all European countries the identification of a contract as a contract of employment is the key to the applicability of labour law as well as large parts of social security law. Many rights and obligations are attached to the formal existence of a contract of employment, much more than to other forms of work.

There clearly is a "twilight-zone" between employees and self-employed workers, which in no European country could be solved entirely satisfactorily. Apparently the 'control test' is not enough. In all European countries the courts have therefore moved to a more complex test, the so-called multiple or mixed test, in which a multiplicity of factors are taken in consideration, none of which is necessarily decisive.

The starting point of this approach is still to ask whether the work is carried out according to the instructions and under control of another party. Subsequently the courts take into account a whole range of circumstances that taken together should indicate whether or not a working person works in an employment relationship.

- Is he free to refuse or to accept the concerned work?
- Does he has the freedom to organize working time?
- Who bears the entrepreneurial risk?
- Who pays his tools and materials? etc

The courts are supposed to consider all aspects of the relationship, no single feature being in itself decisive and each of which may vary in weight and direction. Indeed, much depends upon the weight which is given to a particular factor.

So the judgments of the courts may differ from case to case, even if there is a large similarity between cases (no two cases are 100% identical!!!!). And there may be differences between labour courts, social security courts and tax courts.

Therefore, the mixed-test too is not sufficient to cope with that new reality that has come up: the quasi-independency, the bogus self-employed. (DE: *Scheinselbständigen,* NL/BE*: schijnzelfstandigen*), notably if it concerns workers without employees (DE *Solo-Selbständigen*, NL: *ZZP-ers*).

In the realities of life relatively few cases come to court. Millions of situations simply exist for many years without a proper clarification of their character. No wonder that some scholars have questioned whether terms like "control", "subordination" are still a useful criterion to draw the line. But: are there alternatives?

In the literature alternative criteria have been proposed like:

- the measure in which the worker forms an integral part of the business of the party requesting the work,
- or the concept of 'economic dependence'.

However, the courts in Europe are reluctant to follow these suggestions, as that would create new borderline questions. Also according to liberals, it would extend the dominion of labour law too far into the world of self-employment.

Instead of adopting such a wholesale approach, more moderate steps have been taken by the lawmakers and the courts.

A few European States have adopted straightforward provisions to ensure that labour law protection cannot be circumvented by 'sham' civil law contracts.

Other states adopted statutory provisions which give a rebuttable presumption of the existence of a contract of employment.

Sometimes the dominion of labour law and social security law is slightly expanded through 'assimilation', that is: widening the scope of legal rules on certain categories of workers, who might fall outside the category of "employee", by simply equalizing their jobs with an employment contract for the application of a certain statute.

Sometimes in this way an intermediate category may arise, which does not expand the scope of labour law as a whole, but only of a number of labour law rules: IT: *parasubordinati;* UK*: worker,* DE: *arbeitnehmerähnliche Personen.*

This issue is the subject of serious debate, which touches the very core of the future of labour law, because the number of self-employed people is increasing. Should such persons be brought within the dominion of labour law or should labour law accept that its dominion is gradually shrinking?

Or should an in-between category be created?

Actually, in various courts in Europe judges are wrestling with the classification of Ueber drivers and Deliveroo drivers (platform work).

Are people taking a job of a digital platform like Deliveroo employees or are they self-employed persons?

2.3. No uniform labour law

At the end of the 19th century many people advocated a different labour law for household staff, agricultural labourers, miners, blue collar workers and white-collars, etc. Indeed, many countries in Europe have created a lot of

differentiations in labour law to serve the particularities of the various groups on the labour market.

Many countries have longtime distinguished between manual workers (blue-collar, in DE: *Arbeiter*) and white-collar workers (employees, in DE: *Angestellte*), giving a qualitative greater protection to the latter category. However, in the last decades the relevance of this distinction has diminished. This was the result of a comprehensive equalization of these two groups of employees in law and practice. For that reason, this differentiation has almost disappeared, although some European countries (AT, BE, DK, GR, and IT) still differentiate in such matters as the period of notice or the compensation in dismissal cases.

A more recent development is, that some countries (BE, DE, FR) have in recent years created a specific set of labour law rules to serve the leading personnel (in DE: *Leitende Angestellten*, in FR: *cadres,* in IT*: 'quadri'*), a group of superior workers who are usually very close to the management in the role as employer.

They have to be distinguished from the top managers (in IT: '*dirigenti*').

In most other countries leading personnel, supervisors (cadres) are still under the application of labour law, although sometimes special provisions may be applicable to them.

Public servants

In most European countries as well as at EU level there is one significant group that already more than a century ago, has managed to acquire an exceptional position: public service personnel. From the outset public servants have been exempted from the statutory rules on the contract of employment. They generally have a *status aparte*, often better than that of workers in the private sector. However, some countries (IT, SE, NL) have abolished most differences between workers in the private sector and the public sector.

Thresholds

The uniformity of labour law is also disrupted by a variety of thresholds that increasingly appear in the rules of labour law:

- Thresholds regarding the size of the firm, with the result that workers in small firms have fewer labour rights than workers in large companies – a differentiation that is sometimes motivated by the desire to

encourage the increase of employment in small and medium-sized businesses.

- Thresholds in terms of salary, which sometimes result in higher-paid workers having fewer labour rights than lower-paid workers (which is not entirely illogical given the role of labour law), but sometimes also reduces the labour rights of lower-paid workers (e.g., in DE, workers who earn less than EUR 450 do not qualify for several social security schemes: (*Geringfügige Arbeit*).
- Seniority thresholds, which result in junior employees having fewer labour rights than those with more years of service, for example because there are thresholds regarding the minimum duration of a contract, often manifest in the law on dismissal (e.g., UK) and in social security law it is even a general feature. In some countries there are now derogations of common labour law in *peius* made for working pensioners.

An often raised question is whether such thresholds are compatible with the prohibition of discrimination (see par. 4.5).

2.4. Special categories of workers

Even strong movements to create a uniform labour law have nowhere in Europe succeeded completely. Today many categories of workers can be identified that are often covered by special arrangements: disabled persons, children, foreigners, commercial agents and commercial representatives, clergymen and other employees of religious or ideologically oriented organizations, longshoremen; seamen, workers in domestic households, home workers/ distant work/telework sanitary services, sportsmen, managing directors (ceo's), media staff, artists, students, apprentices, trainees, convicts, barristers, workers in cooperatives, etc.

Of all these special categories I will focus at three groups which all over Europe have obtained special provisions in Labour law.

a. Persons with disabilities

In many countries the labour law contains many specific provisions on the work of disabled persons. Such provisions may provide for shortened working hours, limited night work and overtime work, additional rest periods and

holiday rights, vocational courses and training, adjustments of workplaces, extra dismissal protection, etc.

b. Child labour

In all European countries prohibitions on child labour were effected well over a century ago. Today in the EU they have been largely harmonized by the EU Directive 94/33/EEC on the protection of young people at work.

This Directive which prohibits child labour under the age of, broadly speaking, 15-16 years of age or the year of ending the compulsory attendance at school.

However, these provisions do not prohibit children from performing some kinds of work. In general they allow various types of light work to be done by children over the age of 12-15/16 outside school hours.

For children between 15 and 18 years of age restrictions apply on certain types of work, such as lower maximum working hours, prohibitions on night work, etc.

c. Foreigners / migrants

Everywhere in Europe public opinion has traditionally been suspicious of giving foreign nationals access to the domestic labour market. When labour is in short supply, foreigners are generally welcome, but when demand for labour is low and supply is high the unlimited influx of foreigners is not appreciated.

All European countries have therefore issued laws that govern access to employment for foreign workers. Their influx is often controlled through a system of work permits. Permits are issued only if certain criteria are met.

In all countries this legislation is enforced under criminal law, although the penalties - mainly on the employer of such foreigners - are never very high (fines of up to several thousand euros per violation) while enforcement is often weak.

In many European countries there is much illegal hiring of foreigners.

It this respect it is relevant that nowadays EU-rules (Dir. 2009/52/EC) obliges EU Member States to a more tough enforcement.

The main exception in all such laws concerns workers who are nationals of another EU country. Under EU law all EU citizens must be freely admitted to employment in any EU country.

This Regulation 593/2008/EC not only entitles workers from one EU Member States to enter another Member State and to engage in remunerated work there, it also requires that migrant workers not be treated differently in respect of any conditions of employment and work from national workers by reason of their nationality.

However, for so-called Posted Workers (see par. 5.15) from other EU-countries there are specific rules (Dir. 96/71/EC and Dir. 2118/957/EU) and also for workers from EEA-countries, Switzerland and Turkey.

2.5. Non-standard forms of employment

In Europe, in the period following the Second World War, by far the most contracts of employment, were contracts for an indefinite time, for full-time work and concluded between real employers and employees. They were seen as the standard, the typical contracts of employment although alternative forms of work (homework, casual work, etc) had never disappeared from the labour markets in Europe.

However, since the 1980s the labour markets are flooded with an increasing number of non-standard labour contracts, atypical contracts, precarious contracts. Statistics show that in most European countries these old and new forms of employment have absorbed an ever increasing part of the labour market. They have emerged as response to various new developments in society, such as increasing mobility and female participation on the labour market, the advance of ICT-technology, Internet-services, the need for flexibility among employers and employees and certainly also by the wish on the employers-side to save labour costs.

Especially this last aspect is responsible for the differences between the various countries in Europe in the size of non-standard employment and in the rules governing them. As a rule of thump one may say that the more national labour law is accumulating stringent obligations on the employers of standard labour contracts, the more they will take refuge on non-standard forms of employment if they can in that way diminish labour costs.

There is continuous pressure of employers, economists and right-wing politicians to maintain and to open the access to the non-standard forms of employment. And this meets with continuous resistance of trade unions, sociologists, lawyers and left-wing politicians. The actual situation in most of the European countries is that of a compromise. The access to these non-standard employment contracts has largely been maintained or even widened, but the protection of those working under such contracts has to a certain extent been clarified or improved over the last three decades. However, this process is never in a standstill. As a result of the continuous tug-of-war in this area, the preponderance is shifting, sometimes to more flexibility, sometimes to less.

What are these types of non-standard labour contracts, atypical contracts, precarious contracts?

The most important categories of non-standard employment are undoubtedly fixed-term employment contracts, part-time work and temporary agency work.

Other examples of non-standard employment relations are: casual work (labour on call, zero-hours contracts, minimum/maximum contracts), job-sharing, employee-sharing, telework, ICT-based mobile work, portfolio-work, crowd employment, collaborative employment, voucher-based work, platform work, work by rotation, interim management, work performed within the framework of active employment policy programs, etc.

Let us look to some of the most numerous kinds of non-standard labour contract.

a. Fixed-term contracts of employment

Everywhere in Europe the fixed-term contracts are on the increase. In 1999 the EU has ruled that workers on fixed-term contracts of employment should be treated equally with the workers on open-ended contracts, safe situations in which differentiations are necessary and objectively justified (Dir.1999/70/EC).

However, one immense differentiation remains: in the law of dismissals. Safe during the agreed fixed period, it generally is easier to shed fixed-term workers than permanent workers. That is the attractiveness for employers (see par. 6.5).

b. Part-time work

In Europe full-time work implies more or less 8 hours a day/40 hours a week. Under the formula of Part-time work there is nowadays a growing number of workers which are working substantially less than 40 hours a week, be it on an open-ended or a fixed-term contract of employment.

This phenomenon is very unevenly spread across Europe. The Netherlands beats all other European countries with 50%. In Latvia only 7% of the workers are on part-time. Many part-time workers do it voluntarily, but there are also numerous persons which must contre-coeur accept only part-time work, because there is no full-time job available.

In 1999 the EU has ruled that workers on part-time contracts of employment should be treated (at least proportional) equally with the workers on full-time contracts, safe situations in which differentiations are necessary and objectively justified (Dir. 97/81/EEC). In a number of countries, the law has given workers a right to ask their employer the modification of their employment contract from full-time work into part-time work and v.v. (see par. 4.2).

c. Temporary agency workers

In many countries in Europe the phenomenon of temporary agency work has significantly increased during the last fifty years.

Temporary agency work is a triangular relationship of the workers with the agency and the leasing firm (user). The relationship between the worker and the temporary employment agency is now mostly seen as a contract of employment, although in the UK there is still much confusion about the legal status of this relationship. The relationship between the worker and the user is widely considered to be a *de facto* relationship (with only few rights and obligations), not as a contract of employment. The relationship between the user and the temporary agency is a normal commercial contract.

The EU Directive on Temporary Work Agencies (Dir. 2008/104/EC) provides that in most of the core working conditions temporary agency workers should not be treated less favorable than the regular employees of the leasing firm, but it allows the Member State important derogations.

2.6.The notion of employer

Compared to the employee side of the contract of employment, the employer side is relatively underexposed. The employer is rarely defined. Everyone assumes him to be the counterpart of the worker in the contract of employment. Nowadays, that party usually is a legal person.

Legal persons are increasingly part of a tangle of dependent legal entities, a group (in DE: *Konzern*), or of a network of subcontracting or cooperating independent enterprises (for instance in the construction industry).

However, a group or a network rarely acts as an employer. When it does, it mostly does so in the context of the law on industrial democracy (see Chapter 10). In some other cases statutory law has aggregated 'successor employers' or 'associated employers', for instance in the rules on chain-responsibility for the payment of wages (see par. 3.3.b).

More problems are looming here because of the increasing use of temporary agency work, outsourcing, transfer of enterprises, etc.

Outsourcing is the practice of employers to have certain activities in their companies (e.g. the catering or the security) done by external firms.

There is a transfer of enterprise, when employers are transferring entire parts of their enterprise of even the complete enterprise to another company.

2.7. The transfer of the enterprise

Both the practice of outsourcing and the transfer of enterprises are subject to the rules of Directive 2001/23/EC. These EU rules are prohibiting the old employer (transferor) and the new employer (transferee) to dismiss employees on the grounds of the transfer itself. The new employer (transferee) must in principle take over all the workers of the old employer (transferor) on the same conditions they had agreed with their old employer.

However, these rules allow for exceptions, limitations and variations in the law of the Member States. For instance: Member States may exclude transfers in bankruptcy situations.

2.8. Employment services

Throughout the EU millions of contracts of employment are concluded every year without the interference of a third party. Most employers and employees find their way on the labour market without any help. Even so, demand and supply on the labour market often do not match.

To achieve a better match all countries in Europe have now a network of regional labour offices in place to administer state employment policies at regional level. They offer the unemployed, vocational training, job selection information, subsidies and tax cuts, sheltered employment, additional employment and subsidized jobs.

The expenditure for running these services and activities is quite differently organized from country to country.

In many European States employment exchanges were initially undertaken by private persons, which led to abuses. Several European countries imposed a complete ban on commercial private employment services. Other countries witnessed the rise of new forms of private employment exchanges: temporary work agencies, pay-rolling firms, football agents, outplacement services, etc.

The degree of legal acceptance of these new forms differ from country to country. EU Directive 2008/104/EC ordered that restrictions and prohibitions on the use of temporary agency workers are only justified on very limited grounds. So, most European countries have nowadays private employment services, but some of them require the commercial agencies to be licensed or registered.

3

3. CONTENTS OF THE CONTRACT OF EMPLOYMENT / WAGES

3.1. Introduction

In all European countries contracts of employment are essentially contracts. As such they are to a certain extent subject to the general principles of the law on contracts as far as labour law is not deviating from those principles.

In most European countries the courts will apply a number of basic concepts of the general civil law (or common law) on the contracts of employment, such as rules on the legal capacity to conclude a contract of employment, the necessity of a free will of both parties to such a contract (see par. 5.9), etc.

Sometimes that may entail the nullity of the contract in case these rules are violated.

As regards the legal capacity to conclude a contract of employment some countries operate special rules, deviating from common/civil law.

One of the common/civil law principles states that the rights and obligations of parties are primarily determined by what the parties themselves have agreed on this. In practice the parties to a contract of employment have quite often not very much agreed explicitly.

They often confine themselves to agreeing explicitly on:

- the date of commencement of the employment contract,
- the parties' names,
- the name of the job,
- working hours,
- and the initial salary.

Sometimes, especially in small enterprises and informal jobs, the parties have not even done that, at least not in writing.

In all European countries in principle the form of the contract of employment is free, so parties can reach an agreement both verbally and in writing. However, since several years an EU Directive (Dir. 91/533/EEC, as from 1.8.2022 to replace by Dir. 2019/1152/EU) requires that the employer confirms the essentials of the contract of employment - job, salary, working hours, contract duration, etc. - in writing. This Directive also stipulates that this information not necessarily must be written down by the parties to the individual contract of employment themselves. This information may be included in a document to which the individual contract of employment refers. Often this happens in practice by a clause in the contract which refers to the collective agreement, or a staff guide/ company handbook). We call those clauses: *incorporation clauses*.

In virtue of such an incorporation clause, the collective agreement or staff guide / company handbook becomes binding to the parties of the individual contract of employment and therefore legally enforceable. So, let us look more closely to the binding force of collective agreements and of staff guides/ company handbooks.

3.2. The binding force of collective agreements, staff guides, etc.

a. The binding effect of collective agreements

The collective agreement is a special phenomenon in labour law. Its first and foremost role is to regulate the individual contract of employment. It is concluded between employers and trade unions. That are private persons so these agreements are no part of public law. However, in reality the collective agreements exercise much normative influence on the various individual

contracts of employment. They have a hybrid character. The Italian lawyer Carnelutti once said: “they have the body of a contract and the soul of the law.”

This “soul of the law” implies that the collective agreement rules the contract of employment. Its clauses push aside contrary clauses in contracts of employment, that are less favourable to the workers. And they supplement the contracts of employment on issues where this contract is silent. Provisions in the individual employment contract which are more favorable to the worker than the collective agreement, however, remain in force. It may be, that in some European countries collective agreements can set standards that are both minimum ad maximum, but this is exceptional. For this strong impact of the collective agreement on their individual contract of employment no expression of the will of the parties to the individual employment contract is needed.

Most European countries have issued Acts of Parliament or cross-sector collective agreements to make them indisputable, with UK and IT as remarkable exceptions (see par. 8.3).

It is clear that not every collective agreement has this major binding effect on every contract of employment. That leads me to the complicated issue of the applicability of the collective agreements.

The Collective agreement is applicable to ALL employees working within the scope of the collective agreement working in service of an employer who is bound to the collective agreement because (a) he himself has signed it or (b) he is member of an employers’ association that has signed it.

Thus, in most European countries Parliaments have basically limited the binding force of the collective agreement to the workers of the companies, whose employer is bound to the collective agreement.

In many European countries the question whether the worker is a member of the trade union is not important. However, in some European countries (DE, NL, DK) it strictly legally speaking is relevant, but in practice it is not.

All this are no small limitations. Because it means that every employer who does not like to be bound to a collective agreement can easily avoid the binding force of such a collective agreement (a) by not signing or (b) by canceling his membership of an employers association! And in that case the collective agreement is NOT applicable to the employment contracts of his staff, unless they are bound by an incorporation clause in the individual contracts of

employment, as sketched before. That is the Achilles' heel of this construction of the binding force by Acts of Parliament. In all European countries there are numerous employers who frequently make use of this freedom not to be bound.

However, the creativity of minds has invented a tool to cover up this Achilles-heel. And that is the *extension erga omnes*. In many European countries the government can give the collective agreement binding force *erga omnes*. If this has happened it means that the collective agreement is applicable on ALL employees of ALL employers in the relevant sector of the economy. All workers, who are falling within the scope of a collective agreement itself and within the scope of the governmental decision to extend erga omnes, are covered by that collective agreement. No more an employer can shirk from the binding force of a collective agreement by not signing it or by canceling his membership of the employer's organization. The procedure of extension erga omnes now exists in the majority of European countries (e.g., BE, CZ, DE, ES, FR, FI, GR, LU, NL, PO, SI, LV, SL). However, it does not exist in several other important European countries like the UK, SE, DK, IT!!!!! And in the countries in which it exists, the instrument of extension erga omnes is very unevenly used. In some countries it is widely used, in others scarcely. All-in-all this is a very complicated picture in Europe.

And this total picture produces a very uneven situation in the various countries of Europe as regards the percentage of workers covered by a collective agreement. There are countries were almost 100% of the workers are covered by a collective agreement, and countries were only 20 or 30% is covered.

b. Staff guides, company rules, company books and agreements with works councils

In many countries in Europe there exists this types of documents under very different names:

- France and Belgium: *reglement;*
- Nederlands: *personeelsgids;*
- German: *Algemeine Arbeitsbedingungen, Betriebsvereinbarung,* etc.

What is their binding force? Given the wide variety of legal systems in the countries of Europe it is not possible to give a general impression of the status of these documents. A general rule of thumb is that if a written contract of

employment expressly refers to staff guides, company rules etc. (again: by way of an incorporation clause) these type of documents will have a binding force on that contract of employment.

If not, or if its contents is contrary to the explicit contents of the contract of employment it's binding force is doubtful. And certainly this binding effect will be of lower order than that of statutory law and collective agreements. If company rules or staff guides contain provisions that are contrary to statutory law or the collective agreement, the latter two sources undoubtedly will prevail. The reason for this is that such documents often have been drafted unilaterally by the employer. And even if they have been agreed by a works council (such as in DE the *Betriebsvereinbarung*), courts will be reluctant to recognize the binding force of such a document because they consider the works councils as a weaker institution than trade unions (see par. 10.2).

3.3. Wages

a. The definition of wages

No European country has a uniform concept of wages/pay/remuneration throughout its legislation. The precise meaning of the words "wage/pay/remuneration" generally varies with the Act in which it is used. Nevertheless, all countries in Europe have a vague definition of "wage/pay/remuneration" in common:

- wage is the *quid pro quo* which the employer owes to the employee for the work the employee has performed.

However, is this *quid pro quo* the nett wage or the gross wage? Does it include overtime work? Can it be only in money or also in nature? Etc. We can only answer such questions when we look to the specific definition of "wage" in every specific Act of Parliament or collective agreement.

b. The legal protection of wages

In spite of this vagueness, the wages are a vital interest for the workers. Therefore, since more than 100 years lawmakers have intervened to protect the payment of wages. A necessity, as the non-payment of wages is one of the oldest abuses in the labour market.

Employees were not paid in time, employers made deductions from the salaries or forced their employees to spend their wages in a certain way, e.g., in shops owned by the employers (the truck system), etc.

As early as the mid-19th century, legislators opposed these practices, first in Great Britain with the Truck Acts. Similar provisions have since then become a permanent feature of labour law in most European countries. These items include, apart from a prohibition of the truck system, obligations with regard to time, place and form of wage payment, the right to receive an itemized payslip, the admissibility of deductions from the wage, the prescription of wage claims, etc.

In most European countries wage claims have acquired a certain priority in case of bankruptcy of the employer. And EU law requires all EU Member States to establish guarantee institutions to cover at least a portion of the wage claims in case of insolvency of the employer (Directive 2008/94/EEC).

What about a wage claim in case of non-fulfillment of the obligation to work? In most European countries the law divides such situations into causes due to the employee, for instance an unauthorized absence, then there is no right to payment of the wage. And in situations that can be attributed to the employer, for instance, lack of materials or tools due to forgetfulness of the employer, then the wage payment must be continued.

What, however, if the work cannot be performed because of *force majeure* (e.g., an earthquake or – recently most actual - the Corona-virus?

The very American solution of simply sending workers home without pay is not followed in Europe. In many European countries this problem is handled in a more social way, such as subsidizing the employers to continue the payment of the wages, and/or to give workers exceptional unemployment benefits (short-time working/NL: *werktijdverkorting;* German: *Kurzarbeit*). Governmental agencies, social partners, works councils and social security institutions may be involved in implementing such schemes.

c. The amount of wages

In all European countries the determination of the amount of the wage is basically left to the parties to the individual contract of employment and to the parties to the collective agreement. In many cases it is the collective agreement that sets pay scales which contain a minimum level. The parties to

the individual contract of employment may deviate from these pay scales *in melius*, in favour of the employee.

And, obviously the employer is always free to unilaterally pay the worker more than the agreed wage (e.g., gratifications, bonus), but can he later stop such extra payment unilaterally? In some countries (DE, IT, NL) the employer has lost some of his freedom to discontinue such payments at random. The courts will under certain circumstances protect the legitimate expectations of the employee against a brutal halt to such payments.

In some European countries the government has from time to time intervened in wage levels out of a concern for the economic situation.

See this at the end of the 8th chapter.

More structural interventions has been made concerning the minimum wage and equal pay.

3.4. Minimum wage

Already before the Second World War the idea of a statutory minimum wage for workers was promoted, and in the United States it was made Federal law in 1938. In Europe the process of setting statutory minimum wages took off in France in 1950. There was introduced a statutory minimum wage, uniform for most industries, called the SMIC.

Most European States nowadays have a statutory minimum wages. Only six EU Member States have no national statutory minimum wage: Austria, Italy, Cyprus, Denmark, Sweden and Finland.

In the countries which do have a statutory minimum wage the amount of the minimum wage varies considerably. Between some 12 Euro an hour in Luxembourg and 4 Euro in Bulgaria.

In a number of countries (NL, UK, BE, IR) young workers are entitled only to a reduced minimum wage; not so in Southern Europe.

Also the procedure of regularly adaptation varies considerably from country to country. Actually, the EU is considering a new Directive in order to guarantee all workers a right on a decent minimum wage without establishing the amount of that wage.

Many people see a decent wage as a fundamental right. Still, the Minimum Wage has always been controversial among economists, politicians and employers. These forces traditionally exert pressure to abolish the statutory minimum wage, to lower it or to raise it less. Their main argument is: global competition. Employment would be negatively affected by wage levels that are too high in relation to the wage levels in other countries. It is precisely with regard to this argument that sometimes alternatives are put forward. An alternative may be a lower taxation and social security contributions for workers in the lowest wage scales. Such an alternative would have less adverse economic effects and was in the recent past implemented in the Netherlands and France.

3.5. Equal pay for equal work between men and women

Across Europe, men and women should be rewarded equally. This standard norm was laid down in the 1960s and 1970s both in national law of a number of European countries and in EU law (now Art. 157 TFEU and Dir. 2006/54/EC).

According to the EU standard, equal pay will be given to men and women, not only for performing equal work, but also for work of equal value.

In practice, the concrete realization of equal pay is fraught with problems, partly because it is difficult for workers to know their rights and to fight unequal pay.

National legislators have taken various measures to deal with these problems:

- The establishment of easily accessible agencies where employees can obtain a first opinion;
- A division of the burden of proof in court cases in this field;
- Options for trade unions and interest groups to bring legal action (see par. 5.5);
- Protection against victimization (see par. 5.5) ;
- Public law enforcement (see par. 6.13);
- Works councils' involvement in monitoring compliance (see par. 10.4.b).

All these legal measures and contributions of collective parties have resulted in narrowing the gap between pay for men and women. Around 1960 this gap was approximately 50%, currently the EU average is on 16%. As this figure since 2000 had not been much further improved, the European institutions pressed for measures to further reduce the so-called Gender Pay Gap.

Several European countries (AT 2011, BE 2014, DE 2017, IC 2017, UK 2017) have meanwhile brought new laws to their statute books and also the EU is considering a new Directive in order to reduce the Gender Pay Gap, by forcing companies to publish their actual state of affairs in this field.

3.6. Intellectual property

Are employees entitled to the benefits of the inventions and of creative work of art, information or entertainment that are made in the course of their employment? The answer is in the Acts on patents and copyrights in the various countries of Europe.

These laws are far from uniform on the aspect of employee's ownership or compensation. The most one summarily can say is, that the law in some European countries is more tilted to the employer's side than in others. And that most rules are "default measures". "Default measures" are statutory rules which apply only if the parties themselves have not regulated a certain issue.

In several European countries (e.g. CZ, DK, ES, FR, GR, IT) inventions that are the result of the pursuance of an employment, the royalties deriving from the invention belong to the employer. Sometimes the employee may have the right to be acknowledged as the author of the invention. In some countries the employer is obliged to pay the employee fair compensation for the inventive result attained. However, the various legal regimes vary in the specification of this compensation.

In other countries, like Sweden, in principle the invention belongs to the author, but in certain situations the employer is entitled to either the full right of the inventor or has a priority right to use the invention.

As far as cultural, information or entertainment productions are concerned, in most countries the law recognizes that in principle the ownership on such productions remain with the author. In special cases this may be different and the employer may exploit these productions if they are created during employment.

4

4. WORKING HOURS, HEALTH AND SAFETY AND EQUALITY (NON-DISCRIMINATION)

4.1. Introduction

In Europe working hours and health and safety at work are among the first issues to have been regulated by labour law. Here were the great social evils of the 19th century: very long working days and weeks, hardly any rest periods, dangerous working conditions, as a result of which many workers suffered serious accidents and contracted incurable occupational diseases. Here the lawmakers had to intervene.

In all countries, lawmakers indeed have become very active in these areas. In the 1990s, this historical development was overtaken by European law. In 1993 the EU issued an important Directive on working time (Dir. 2003/88/EC). Moreover, some 20 Directives have been issued on health and safety. All Member States of the EU have had to adapt their legislation to implement these EU Directives.

4.2. Working Times

The French Revolution (1789) had largely wiped out the then current regulation of employment conditions in most European states. In the 19th century this led to the gruesome exploitation of the working class, not least in the area of working hours. The call for legislation in this field became stronger. It was notably championed by the socialist movement. Its motto was: an eight-hour workday. For that purpose it rallied in large demonstrations (1 May).

Initially, lawmakers reluctantly responded to that movement with laws that brought some, but not many, restrictions. The end of World War I was accompanied by great social turbulence in Europe. The lawmakers adopted new and more comprehensive legislation to limit working hours. It brought the eight-hour workday. This, however, amounted to a 48-hour working week, given the then usual six-day working week. Finally it should be noted that these laws in general restricted the work of women more than that of men.

In the turbulent political and social 1930s (high unemployment and the rise of dictatorships) working time rules were revised. The 'golden' 1960s brought prosperity in Western Europe. The free Saturday and a reduction of the average working week to 40 hours arrived. However, that development came about almost everywhere through collective agreements and did not have an impact on the legal provisions on working time.

In the 1970s and 1980s unemployment was high. Politicians hoped to increase employment rates by reducing working hours. Notably France reduced the statutory standard working time to 39 hours. Germany and the Netherlands experienced a similar reduction in the standard working time. However, this result was not laid down in Acts of Parliament, but only in the collective agreements.

Everywhere in Europe the old statutory standards were increasingly regarded as inflexible in regulating intervals, weekend work, shift work and night work. Moreover, various remaining restrictions on women's work (such as the prohibition of night work) were considered discriminatory. All these developments triggered a crisis in working time regulations. This necessitated an overhaul of the existing rules.

This took place everywhere in Europe in the 1990s and 2000s.

In 1993 this process was stimulated by the EU Directive on the Organization of Working Time, slightly updated in 2003.

Many countries in their legislation have a 48-hour maximum a week, several other countries have 40 hours maximum a week. This difference is due to the different function of the maximum time standard in the various countries of Europe. In some countries, such as DE and NL and at EU level, the lawmakers only want to serve the interest of health and safety with 48 hours maximum.

In other countries, such as FR and BE, the lawmakers want to express with a 35- or 40-hours week the interest of employment and pay standards.

This difference has consequences for the way overtime is regulated. This is very different in the various countries of Europe as well.

In all countries the law is not only regulating the maximum working hours a week. The working time laws also give standards for several other subjects.

In many countries the standard for the length of the working day is still in the classic formula of 8 hours a day. However, many countries allow nowadays a higher maximum to even 13 hours a day, when it is still down to an average of 8 hours measures in a wider reference period. Also common in all this rules are: minimum intervals / day breaks, and periods of rest between two days and between two weeks, etc. Moreover night work and shift work is limited and sometimes its extra reward is regulated. In several countries this protection has been weakened in recent years. Several countries have special rules on Sunday working which has also been weakened in recent years.

As regards these standards all EU Member states have now to live up to the EU Working Time Directive with e.g. a maximum of 13 hours a day and 48 hours a week. However, on these points there is much differentiation possible between the Member States, also because the EU-rules are allowing standards which are more favourable for workers and because the EU-rules leave room for deviating provisions, made in collective regulations between employers and trade unions and works councils, even if they deviate *in peius*.

Many European countries have specific working hours regulations in force for sectors like the shops, road transport, maritime marine etc. On some of such sectors also the EU has issued specific binding rules.

The Netherlands was innovative in 1990 with explicitly giving the workers the right to opt for changes, from full time in part-time and vice versa. The employer may only refuse that on “weighty grounds” under control of the courts. The EU Work-Life Balance Directive (Dr. 2019/1158/EU provides for a right to flexible work arrangements for workers with children as from 1.8.2022. In 2015 The Netherlands extended this workers’ right to any wish of the workers concerning work schedules.

France in 2017 was innovative with a provision which recognized the right of workers not to be connected with the company outside working hours.

4.3. Holidays with pay and leave arrangements

About 100 years ago a right to paid holidays or leave did not exist. An unpaid day off on Sunday and on many, mostly religious, holidays was usually all that employees could expect. Only in the early 20th century some employers started to give workers the opportunity to recover from the loss of strength by years of labour.

Originally, paid holidays were only laid down in collective agreements and were thus far from general. In France in 1936 the first statutory holiday entitlement was created and this example was quickly followed in Belgium. After World War II this gradual development of holiday rights in collective agreements continued. And in the 1960s a minimum entitlement to paid holidays was laid down in statutory law in the Netherlands and Germany.

A relevant legislation then offered a minimum entitlement to two weeks paid vacation per year. In subsequent decades, the right to paid holiday leave in most Western European states has expanded. At present most employees are entitled under individual or collective contracts to five or more weeks of paid vacation a year in these countries. National legislators also followed this trend by raising the legal minimum.

In the 1993 Directive on the Organization of Working Time the EU prescribes a minimum of four weeks of vacation with pay. This is now the standard in most European countries. In a few countries the statutory minimum is already higher. And in many countries for a great deal of the workers a higher number of paid holidays is secured by collective agreements.

Most European countries with elaborate Acts of Parliament in this field, have their general scope in common. They, for instance, have given rules who has the right to determine the period in which the employee may take the leave. The EU Directive is poor on the modalities of granting the annual leave. It only provides that the minimum period of annual leave may not be replaced by a payment in lieu, except when the workers' employment is terminated. The CJEU has already issued several rulings in this field such as holidays and illness and how to calculate pay during holidays. As a result, all national rules on paid holidays are now under the scrutiny of the CJEU!!!

In addition to holidays with pay most countries in Europe know several public holidays (Bank holidays). Which days are bank holidays and whether they are

paid is regulated, sometimes in statutes, sometimes in collective agreements or in accordance with customs and practices. There is no EU rule on this item.

Weeks on holidays are costing the workers more money than weeks at work. Therefore, in several European countries an additional payment is established, either by statute or by collective agreement: the holiday allowance. Often this holiday allowance amounts to a month's salary. There is no EU rule on this item.

Other forms of paid and unpaid leave

In recent decades besides holidays with pay various other forms of leave were developed.

Examples of these forms of leave include:

- Maternity leave
- Parental leave
- Paternity leave
- Adoption leave
- Nursing care/Care taker's leave
- Political Leave
- Trade Union Leave
- Educational Leave
- Sabbatical Leave
- Casual leave for personal reasons (marriage, funerals, etc.)
- Leave for works councils or safety and health committees
- Leave for military service
- Leave to look for another job or to take exams.

Sometimes the entitlement to such forms of leave is laid down in legislation, sometimes in collective agreements. In national statutes and collective agreements these regulations vary a lot, first on the aspects of duration (one week, 3 months, one year, etc.) and certainly also on pay.

In some cases it is the employer who continues to provide income during these leave periods. in other cases there is no wage payment as the contract is suspended, in some of those cases the social security authorities provide benefits.

The EU in the 1990s the Directive on paid maternity leave (Dir. 92/95/EEC) and, more recently, in the Directive on Work-Life Balance Dir. 2019/1158/EU, replacing by 1.8.2023 Dir. 2010/18/EU) on parental leave/paternal leave/ adoption leave / care takers' leave has set minimum standards in this field. These standards are often already over-classed by national regulations.

They all express the growing involvement of lawmakers and social partners to better enable workers to reconcile work with private life.

And that concern also serves the desire to increase the participation on the labour market, notably of women.

4.4. Health and safety at work

In most countries of Europe the legal rules concerning safety of workers at work are among the oldest labour laws. When the 19th century progressed and industrialization continued to spread, working conditions became increasingly unsafe and unhealthy. These conditions were vehemently criticized in the writings of philosophers (Marx and Engels) and authors (Zola). They were examined by committees of inquiry and they were the subject of much agitation. Labour leaders found doctors and enlightened employers at their side in their fight for improvements in this area. Even military leaders, who noticed the poor conditions of their recruits, joined in!

Legislation on safety and health has made numerous steps forward ever since. It has expanded in size and intensity, a continuous process throughout the 20th century, simply because the advancement of technologies and health science had to be followed.

In all European States this was done through Acts of Parliament, stimulated by ILO Conventions. Individual and collective agreements were virtually insignificant in this area.

In the 1960s it was believed that employers should be more involved in the safety policies of the enterprise through their occupational health and safety experts and employees should be involved through their representatives, trade unions and works councils.

In line with another trend, originating in Scandinavia, it was felt that legislation should do more than just take care of health and safety. It should also improve

wellbeing at work – less drudgery for example, improved ergonomics, etc. (humanization of working life).

However, this trend was overtaken in the 1980s and 1990s which saw the rise of trends like deregulation and decentralization, as well as consolidation and streamlining of the many regulatory acts which had been adopted in this area.

Also the EU became strongly involved in this area. Even employers were enthusiast for this involvement, as the multitude of different national rules proved very awkward for the industry. They preferred more EU harmonization in this field in view of the introduction of the single market in 1992. The basis for the EU-rules has been laid down in a Framework Directive of 1989 (Dir. 89/391/EEC). It brands health and safety of its workers as one of the main duties of the employer. He should promote this by systematic health and safety training to his workers. And he should involve his workers by applying and enforcing all its rules on health and safety.

On their part the workers are on a permanent obligation to follow the safety regulations and to use safety equipment.

On the Basis of this EU Framework Directive more than 20 specific EU Directives have been launched in this field.

The focus of these directives is on the prevention of work accidents and occupational diseases.

In the 1990s these developments and trends prompted many national governments to overhaul their national laws regarding health and safety at the workplace. All the beautiful phrases and detailed prescriptions of the EU-rules have been taken over in the national provisions on health and safety in the EU Member States.

On this part of labour law the law of the EU Member States is now largely harmonized.

However, one has critically to ask whether the law, both at EU level and at national level, is still up to the aspirations of the people. They want to be better protected against all technological developments and the recognition of its risks by the advancement of science. And this not only in the field of protection against work accidents and occupational deceases. It embraces also the protection against psychical illnesses (burn-out) and unpleasant situations on the shop-floor. This already has led to recent improvements in the law on

health and safety and wellbeing at the workplace concerning stress, smoking, violence, mobbing and sexual harassment.

New developments include health dangers because of recent discovered dangerous "agentia" (Chrome-X, pfos, etc.), psychic diseases like drugs addictions, stress, etc. To many people these improvements have not gone far enough.

So we see a widening of the concept of health and safety towards concepts like he wellbeing and dignity of the workers.

Consequently this relates this topic very much to social security items in the branch of illness and disability allowances and the item of employers monetary responsibility for health and safety of the workers.

In most European countries the violations of the provisions on health and safety can be punished under special provisions of Criminal law. More efficient seem to be the imposition of administrative fines against violations. In most countries of Europe the enforcement of health and safety rules is primarily in the hands of a public Labour Inspectorate (see par. 5.12). Also the trade unions and the works councils are often involved. In Sweden, for example, the worker representative for safety in the company has the right to order operations to be discontinued if the work entails immediate and serious danger to the workers' life or health. Moreover several European countries have a civil rule obliging the employer to adopt the measures that are necessary to protect the physical and moral integrity of his employees.

Such provisions may give rise to the duty to compensate the harm caused to health at work, but they must be understood in relation to the social security rules on occupational accidents and diseases.

These provisions are nowadays increasingly used to claim damages for such items as asbestos, stress, moral harassment, mobbing/bullying, passive smoking, etc.

In some EU Member States such claims may be based on the recognition in constitutional and/or public law of the right of employees to health and hygienic conditions of work.

This as a sequel of the idea of the protection of the "dignity" of the worker/"the right to decent work".

4.5. Equality and Non-Discrimination

Since the 1960s the principle of non-discrimination or equal treatment has significantly penetrated labour law in Europe. It was inspired by US law and encouraged by the doctrine of fundamental rights. Equality and discrimination is nowadays considered as a fundamental right – by many people even as a meta-norm. And it has been laid down in numerous constitutional, European and international texts, with often direct/horizontal application.

All European countries have adopted specific legislation on equality on the labour market. It has affected their labour laws with regard to the selection phase, working conditions, termination of the employment relationship as well as to social security law.

In the EU initially the value of equality was focused on the equal treatment of EU-nationals working in another EU Member State (see par. 2.4.c). Next came the unequal treatment of men and women (Dir. 2006/54/EC) and on race discrimination (Dir. 2000/43/EC). Later more general legislation was adopted, which also banned discrimination based on religion and belief, disability, age and sexual orientation (Dir. 2000/78/EC).

Some countries have gone one step further by prohibiting different treatment on any ground whatsoever if there is no reasonable and objective justification for it.

In most EU Member States the EU legislation has necessitated adjustments in existing national anti-discrimination legislation. And the interpretation of these national laws on non-discrimination is strongly influenced by the decisions of the CJEU.

This for example in the distinction between direct discrimination and indirect discrimination.

Direct discrimination occurs when someone is treated less favourably than another person because of sex, race, religion, etc.

Indirect discrimination is defined as a situation where an apparently neutral provision, criterion or practice would put persons of one sex, race, religion, etc. at a particular disadvantage compared with persons of the other sex, race, religion, etc.

The CJEU has further developed concepts which are crucial for the application of anti-discrimination rules. For instance it classified pregnancy, harassment and intimidation under direct discriminations.

It ruled on permissible justifications for applying unequal treatment.

Under EU law and thus in all EU Member States, direct discrimination based on *sex and race* is generally only allowed in a few exceptional cases, explicitly mentioned in the statutes. And indirect discrimination on these grounds is only allowed if there is an objective justification by a legitimate aim and the means of achieving that aim are appropriate and necessary.

In situations of unequal treatment on grounds of *religion, sexual orientation, age and disability,* both direct and indirect discrimination are allowed if there is an objective justification for it.

Also the concept of Affirmative Action came under the scrutiny of the CJEU. Many people believe that certain discriminations cannot be stamped out with merely equal treatment rules, because certain groups have been disadvantaged over a long period of time. That should require affirmative action. However, then persons who are disadvantaged by preferential treatment of other groups may lodge a complaint with the courts, invoking the anti-discrimination rules! The CJEU considers preferential treatment of certain groups only permissible within certain limits.

Let us now look to the various grounds of discrimination which are prohibited.

The prohibition of *sex* discrimination is covering not only equal pay. All conditions of employment like selection arrangements, job offers, promotion, training, dismissals etc. must be without discrimination.

Because of this prohibition most old labour law provisions for the protection of women, such as the ban on night work for women in industry, were no longer acceptable and have been repealed.

Pregnancy and maternity may not be grounds for unfavourable treatment of women. Still, allowed are the maintenance of special benefits (e.g. paid maternity leave) and the special protection against excessive or unhealthy labour as well as against dismissal.

Many European countries run special action programmes for equal opportunities for women. Still, they try to promote m/f equality by obliging

companies to publish statistics and to draw up plans to improve m/f equality at work.

Although EU law permits affirmative action for women given the structural disadvantage of these groups on the labour market, only in some EU Member States sometimes outright priority is given to women above men.

Actually there is a debate about quota for women in leading positions. Such laws have been adopted in NO 2006, IC, BE 2011, DE 2017, AT 2017, but were rejected in SE, 2017.

Under the prohibition of discrimination based on *race* most countries understand also color but not nationality. *Several European* countries run special action programmes for equal opportunities for ethnic minorities. Although EU law permits affirmative action for ethnic minorities, not many European Countries have adopted outright affirmative action in favour of ethnic minorities.

As far as discrimination on the base of *religion and belief* is concerned, there is the obvious exception for clerical personnel and the controversial exception in religious education. An actual issue are dress codes in general and especially the cases of wearing religious symbols or clothes according to religious believes.

It accentuates the possible clash between business interests and the freedom of religion and the right to equal treatment and non-discrimination.

As far as *disability* is concerned: in many European countries after World War II, preferential treatment was accorded to the disabled by obliging employers to maintain a certain quorum of people with handicaps in their workforce.

This kind of legislation is still maintained in several European countries. In other countries it was weakened; in a few countries it was further strengthened and modernized in recent years.

In other countries a new type of anti-discrimination provisions and affirmative action for disabled people have been enacted. According to this kind of legislation, employers should, if necessary, adapt the job to the needs of the disabled workers (compare, e.g., US legislation on 'reasonable accommodation' of the disabled).

The prohibition of *age* discrimination in Europe is – different from the US – protecting people of all ages.

The EU Directive is already showing quite a number of exceptions. The pensionable age is a hot issue.

Legal protection against discrimination on the ground of *sexual orientation* is a relative newcomer in Europe. We do not yet know what justifications are allowed.

Non-discrimination law may be difficult to enforce. All EU Member States have implemented EU law which imposes a shared burden of proof in discrimination cases on both the employer and the employee.

EU law also prohibits dismissal or other adverse treatment on the ground that the employee has invoked his rights to non-discrimination (victimization).

EU Member States must provide for additional tools to promote this standard through the creation of special bodies ('Equality Board', 'Equal Treatment Authority', 'Equal Treatment Commission' or 'Equal Opportunities Ombudsman').

In some countries trade unions and other interest groups have been accorded the right to take legal action against discrimination in their own name.

In most European countries employers who violate the anti-discrimination rules have to pay compensation to the offended persons, often to larger amounts than for other violations of labour law. This must discourage infringements.

However, in no county an applicant wrongly disfavoured can claim engagement. In some European countries companies that discriminate or insufficiently apply anti-discrimination policies are punished by sanctions in public procurement (=exclusion from government orders, concessions and subsidies).

5

5. OTHER CONDITIONS OF EMPLOYMENT AND THE ENFORCEMENT OF LABOUR LAW

5.1. Introduction

For most workers pay, reasonable working times, holidays, leave and health and safety and equality and non-discrimination are certainly the top issues of their jobs. However, in this era of respect for the "dignity" of the worker/"the right to decent work" there are more rights that employers should respect. At the same time there are also rights of the employers, that works should respect.

The rights of the workers are the duties of the employers. The rights of the employers are the duties of the workers.

What are the rights of the workers and thus the duties of the employer?

- a duty to care for the employee;
- a duty to respect the privacy of the employees;
- a duty to protect the personality of the employee;
- a duty to respect employees' constitutional rights;
- a duty to provide work;
- a duty to improve the professional qualifications of the worker;
- a duty to make the employee aware of contingent benefits;
- a duty to maintain trust and confidence; etc.

What are the rights of the employers and thus the duties of the employees?

- the management right of the employer/the managerial prerogative, which give the employer a right to adapt the work of the employee.
- the employee owes the employer a certain amount of loyalty as well as the duty of confidence.
- and a duty of care towards the possessions of the employer.

Especially in the Eastern European countries the rights and duties of both the employee and the employer are abundantly described in statutory law - a legacy of the communist era.

In the countries in Western Europe this is less the case. In several countries the gaps in the legal rules are often filled by the general principle of *bona fides* and of *reasonableness and fairness* which is also the ultimate value in the execution of a contract of employment.

And this bona fides and reasonableness and fairness not only during the duration of the contract, but already before the contract of employment is concluded and after the contract of employment has been terminated.

Some countries (NL, FI, GR) go quite far in the application of these principles. In other European countries there is also some skepticism against a too extensive use of the bona fides as stop gap in the law of employment contracts. Germany and the UK are good examples of a more reserved preparedness to rely on the bona fides principle.

Obviously, all those rights and duties may be violated which raises the question how can they be enforced?

Therefore, at the end of this chapter we will pay attention to the Labour Inspectorate, the courts and alternative conflict resolution as well as to private international law.

5.2. Privacy

In some international treaties and in a number of EU Member States the right to privacy has been recognized as a fundamental right.

Until now there is some case law of international courts, notably of the ECtHR. More specifically, there are European standards on data protection (General

Data Protection Regulation 2016/679/EU), which are directly applicable in all EU Member States. As a consequence there has been growing interest in the theme of privacy in employment relations.

On the one hand, employers – also because of stringent labour law and private liability law – need to select their employees better and monitor their behaviour. While on the other hand, employees are increasingly reluctant to tolerate employers infringing on their privacy.

Contentious issues include alcohol and drug inspections, monitoring computer usage (e.g., visiting 'adult' sites or social network sites), electronics to measure job performance, body searches, medical examinations, certain bans from employment, etc.

Various European countries (e.g. Italy) have created statutory regulation in this area. In many European countries most norms have been developed in court cases. The courts must balance the protection of the workers' privacy rights against the legitimate interests of employers, businesses and society. In Austria, Germany and the Netherlands work councils also play a role in this area.

5.3. The right to work/the freedom to choose an occupation/the duty to provide work

The right to work was claimed by the working class already back to the 18th and 19th centuries.

After World War II, this idea was enshrined in the constitutions of the Communists states in Europe and also in the Constitutions of France, Spain, Italy, etc.

However, in a capitalist market economy a legal obligation on the State and on the employers for the realization of a right to work is impossible. The only thing that can be promised is, that governments will do their utmost to promote adequate employment. They can do so by its monetary and economic policy, by investments and subsidies and by providing a public employment services. In this field, however, EU Member States are restricted by the EU rules of the free market.

Even in the micro cosmos of the individual employment relationship courts are reluctant to recognize an obligation on the employer to provide their

employees effectively with work. They only seem prepared to recognize such a duty in specific situations. For instance, workers on tip pay, or workers, like dancers and football stars, who need to maintain their professionalism.

More easily for the State to guarantee in the surrounding of a market economy is the fundamental right on work freely entered upon, which includes a prohibition of slavery and forced labour. This fundamental right is included in various international Charters and Constitutions.

5.4. The management right of the employer/the managerial prerogative

In all European countries the employee is in the execution of his tasks usually under the obligation to obey the directives and orders given by the employer.

The right of the employer to issue directives to the employee on the performance of the work is regarded as an implied term of the contract (see par. 2.2). In some countries it is recognized in Acts of Parliament, in other countries it is only expressed in the rulings of the courts.

In all European countries the employee is bound to observe his employer's orders. Such orders should remain within the limits of the law and the employment contract, and often also within limits contained in the collective agreement.

It also may be subject to the powers of the works council and should stay within the limits of the principles of reasonableness and fairness (bona fides) (see par. 5.1).

Obviously the employee's duty of obey should only extend to work-related issues.

It is clear that in a ever changing world the work of the employee may constantly be adapted to upcoming new requirements of the company. The managerial right of the employer allows him to order these adaptations. Does this right goes as far as unilaterally modifying the contract of employment, as it was once concluded between the employer and the employee (see par. 5.5)? And does this include the right to punish the employee if he has been disobedient (par. 5.6)?

5.5. Modification of the content of a contract of employment

Especially in contracts of employment that had a long duration, the contents of the job may have been changed over the years. Generally this has happened without the originally signed contract is formally adapted. Sometimes employers deem it necessary to alter the terms of conditions of the contracts of employment which they had once concluded with their employees, e.g., because of a change of shifts, or a relocation of the company, because of poor business or the introduction of new technologies. Also because the employer may believe that an employee functions better in another job.

To a certain extent parties may have seen this reality as a consequence of the management right (see par. 5.4) which gives employers the right to direct and distribute work. However, when such changes are affecting the employee adversely, the question can arise whether the employer may unilaterally implement any such changes or whether he needs the workers' consent. For instance: does this managerial prerogative include the right to transfer the employee to another place of work and to another job?

All over Europa the contract of employment is a two-sided agreement. So in principle it cannot be changed unilaterally. However, management may to a certain extent use its management right to impose alterations.

In all countries there is law concerning the extent that management may use this right. It depends on many factors, including the text of individual contracts and collective agreements, the nature of the work and established customs and practices.

In general, it can be argued that in no country changes in the essence of the contract (*essentialia negotii*) are allowed. This concerns the remuneration, working times, character of the job, etc. – exact definitions differ from country to country.

In reality there is the connection with the law of dismissal: Employees may feel forced to accept changes by fear of a termination of the contract (see Chapter 6).

5.6. A duty of fidelity/a duty of loyalty/a duty of confidentiality/a duty of secrecy/the freedom of expression

Among the duties of employees, regularly mentioned in the various European countries in their laws and judgments on the contract of employment, are: the duty of fidelity, the duty of loyalty, the duty of confidentiality and the duty of secrecy.

A duty of confidentiality or secrecy means that a worker must not disclose the employers trade secrets to a third party or misuse them for personnel reasons.

On the other hand, employees nowadays increasingly insist on a right to freedom of expression in the workplace, which courts must balance against the duties of fidelity, loyalty, confidentiality etc. In recent times in several European countries an exception on these duties have been made for so-called "whistleblowers". These are employees who disclose a misconduct in the company of their employer of such a nature that it ought in the public interest to be disclosed to others.

5.7. Disciplinary action

In all European countries it is recognized that employers are entitled to enforce their managerial prerogative and the duty of the employee to obey to their orders is considered as an implied aspect of the subordination that characterizes the contract of employment.

Employers may enforce their authority by a number of measures. The most important and most powerful disciplinary measure employers can take against their employees is to *dismiss* them (see Chapter 6).

In addition, employers may have other sanctions short of dismissal at their disposal: reprimands, fines, suspension, demotion.

However, the use of such sanctions must remain within the limits imposed by legislation, the contract and case law.

In all European countries this has been regulated in different ways. In some countries, the legislator, case law or collective agreements have specified clear requirements regarding the procedure for disciplinary action against the employer.

5.8. Employer liability for faults of their employees

From a classical point of view the employee is also under a duty to practice reasonable skill and care in the performing of his work. Nevertheless, the legislators in all the European countries have taken a lot of this responsibility from the shoulders of the employee and switched it to the employer.

The main rule is: not the employee but the employer is usually liable for damages resulting from mistakes made by his employees in the course of their work for the employer. This is not illogic. The worker should not bear all the damages for the mistakes he makes in his work. After all it is the employer who has the profits of this work. Therefore, there remains only a residual liability for the employee who has demonstrated an unacceptable measure of negligence or even an intent to do damages. However, what is an unacceptable measure of negligence? And what is "in the course of his work?" Examples: should the boss pay the traffic fines that his employee has incurred during a business trip? can an employer be liable for damages when his worker in his free hours has abused children? There are no EU-rules in this area. The limitations and the exceptions vary from one country to the other!

5.9. The selection phase

In all EU Member States the principle of freedom of contract – albeit greatly mitigated by labour law – is still the starting point for engaging in an employment relationship. Consequently, in all countries the selection phase is still the domain in which the supremacy of the employer is most articulate.

This supremacy is supported by those who swear by free enterprise and is challenged by the more socially minded. Nowadays the freedom of the employer in the selection phase is limited by the fundamental right to equal treatment (see par. 4.5). Most employers nowadays pledge that they welcome "diversity", nevertheless some are accused of racial or sexual bias.

Moreover the fundamental right to privacy (see section 5.2) is important in the selection phase.

A apart from the effects of these fundamental rights, however, in all EU Member States the selection phase is still largely free from regulation.

From the workers' perspective: his freedom of contract in the selection phase is taken for granted. It is supported by the fundamental right to freely choose one's occupation, which was already mentioned (see par. 5.3).

In some EU Member States (DE, NL), the courts recognize the impact in the selection phase of the civil law doctrine of *culpa in contrahendo*: if during the selection phase firm promises are made, reneging on these promises can be an unlawful act. In practice, however, this doctrine is seldom useful.

Moreover there is the aspect of the so-called vitiated consent: coercion, error and deceit may destroy the binding force of a contract, also of a contract of employment.

5.10. Non-competition clauses

Traditionally employers may try to prevent employees from seeking employment elsewhere by including in the contract of employment a clause of non-competition. As such clauses are a restriction of the fundamental right to work and the freedom of occupation (see par. 5.3), they have been subject to limitations in various countries of Europe.

A number of national parliaments have submitted such terms to more or less stringent rules. Although the rules limiting the application of such clauses differ from one European State to the other, they also have much in common. The employer must prove in court that such terms are justified. If the motive of competition is considered unjustified (as regards the time frame or the geographical or professional area), the court may adjust or even set aside the clause. Other factors that may have an impact on the freedom to conclude or to apply non-competition clauses are: the age of the worker (minors!), a wrongful dismissal by the employer, transfer of enterprise; etc. Sometimes the worker is entitled to compensation for the duress caused by this clause.

5.11. References

In most European countries employers are obliged to provide a former employee with a reference, certificate or testimonial, either spontaneously or upon request.

The certificate should specify the dates of his employment and the nature of the work done, without containing anything unfavourable to the worker concerned.

If such a reference is false, the employer may be liable for a number of possible legal wrongs, such as defamation, deceit or negligent misstatement.

5.12. Criminal/administrative sanctions and the Labour Inspectorate

In all European countries the labour laws are sanctioned by criminal law and/or by administrative and civil law. In most European countries the duty to monitor the implementation of a number of labour laws has been assigned to a special branch of the police, the Labour Inspectorate. Such Inspectorates primarily enforce the parts of labour law that are under criminal sanctions, notably violations on health and safety and working times. The same often goes for other parts of statutory labour law, such as minimum wages, child labour and work performed by foreigners. In Belgium and France even the terms of generally binding collective agreements are sanctioned under criminal law.

In some countries controls by the inspection of the Labour Inspectorate is rather frequent, in other countries the companies are very seldom visited by the Labour Inspectorate. Moreover there are some differences between the countries of Europe as regards the severity of criminal sanctions and the powers of supervision. In practice, only serious violations or violations with severe consequences are criminally prosecuted. In many countries of Europe nowadays most violations are dealt with by means of administrative fines. In their work, labour inspectors may cooperate with trade unions, employer organizations, self-governing staff bodies, works councils, the state administration and local authorities.

Those parts of labour law that are neither criminally sanctioned nor monitored by the Labour Inspectorate must be enforced in courts of law by the parties to a contract of employment or their mandatories themselves.

5.13. Labour Courts

The various rights and obligations of Labour Law require a well functioning Court system.

In many European countries (UK, DE, FR, BE) employment cases are dealt with by a special branch of the judiciary, at least in the first instance. In a number of other EU Member States (e.g. GR, IT, CZ, LV, NL) there are no special courts to hear labour law cases. Other countries have a mixed system of specific labour courts and ordinary courts to deal with labour law cases.

In some countries constitutional (DE, IT, ES, FR) courts may be involved in labour law cases.

Whether a country has special courts for employment matters or not, it is important to take into account whether there are enough facilities for workers if they go to court to invoke their rights.

One of the aspects is whether in these countries specific procedural arrangements have been made for a quick and fair hearing of labour law cases. Other aspects are whether the proceedings for the workers are free of charge or at least not too costly. In many countries (DE, DK, NL, SE) legal assistance is available to employees with low incomes for litigation purposes.

In most European countries trade unions may act in court on behalf of all employees or at least on behalf of their own members or they may at least assist employees. In some countries the trade unions have access to the courts in their own name.

5.14. Alternative dispute resolution (ARD)

Employees generally do not relish the prospect of having to sue their employers. Therefore, employment cases are rarely brought by workers who still have an employment contract. Most labour cases are related to dismissal. For that reason less adversarial forms of dispute resolution have long been tried and tested in labour law.

For instance, grievances procedures within the company, collective dispute committees of the parties to the collective agreement, or mediation and arbitration bodies such as an easily accessible equal treatment body (see par. 4.5).

In several countries (NL, PO) there are almost no official permanent ARD mechanisms in force, while out of court mechanisms of dispute settlement, not provided by the law, are of relatively small importance in labour law.

5.15. Private International Law in employment matters

Nowadays courts are increasingly confronted with questions like: what is the applicable law, when e.g. a worker lives in Germany and works normally in France. Or what is the applicable labour law for a worker who is a Belgian truck driver and works all over Europe for a Dutch firm? Private international law in employment matters must provide the answer.

All EU Member States now have largely the same rules of international private law in individual labour law cases: EU Regulation 593/2008/EC, which contains some special rules regarding the contract of employment. In at least 90% of the contracts of employment the parties did not explicitly choose. For those cases the Regulation gives the solution: In our examples: For the German that French labour law is applicable (habitual working site of the employee). For the Belgian truck driver that Dutch law is applicable (site of the employer in cases of multi-country work). If the parties to a contract of employment don't like that then they must explicitly choose the applicable law, Luxembourg law, Chinese law or whatever. The Regulation allows such choices, but in that case, the parties must nevertheless apply the minimum mandatory labour law rules of the country whose law would apply if they had not chosen the applicable law.

So, in our above mentioned examples, the German and his employer may choose German law, or Chinese law, whatever they want, but they must also apply French mandatory law.

The Belgian truck driver may agree on the application of Belgian law or Tunisian law, or whatever they want, but they must also apply the mandatory provisions of Dutch law.

This last condition is made to avoid that (specially employers) would explicitly force the workers to accept a less costly labour law regime. Obviously employers want the widest possible freedom to conclude contracts under the law that suits them best, while unions are afraid that this will open the door to less protective foreign labour law (they call that: social dumping). There are a few more rules but these are the main rules. However, several of these

provisions are not very clear (what exactly are “mandatory provisions) or they can be used for circumvention and so allow social dumping.

As this threat was present especially in temporary jobs and by temporary agency firms. Therefore, the EU adopted in 1996 the Posting of Workers Directive (see par. 2.4). This Directive 96/71/EC amended by Dir. 2018/957/EU coordinates national legislations so as to provide a core of rules on minimum protection to be observed. These rules now provide, *inter alia*, that when a company from one Member State assigns workers to work in another Member State, it must apply almost all the mandatory labour laws of the place of work to these so-called Posted Workers.

Finally there is the question of court jurisdiction: in which EU Member State is a court competent to hear an international labour case. This issue is addressed by EU Regulation 44/2001/EC.

If the parties have not chosen a competent judge themselves, the Regulation offers two alternatives. Employers may be summoned to appear before a court either in the country where they are domiciled or in the country where the employee carries out his work.

6

6. DISMISSAL LAW

6.1. Introduction

In all European countries dismissal law is at the heart of labour law. It is here that contrary interests collide head-on. The employer has a legitimate interest in running a profitable business, which should enable him to terminate employment relationships if sales decline or if employees under perform. Employees have a right to work (see par. 5.3) and should be protected in case they claim their rights in the employment relationship. It is within the framework of dismissal control that other grievances can be addressed, such as insufficient wage payment and poor working conditions.

6.1.a. History

All along the 19th century each party was free to terminate an employment relationship, even if it was for the "most capricious and indecent reason", as an English court ruled in 1898. And of course this was a freedom which primarily benefited employers. Around 1900 this situation was beginning to change. Some countries (DE, NL) led the way by obliging the parties to an open-ended contract of employment to respect minimum periods of notice, except when a summary dismissal was justified.

It was only in the 1950s and 1960s that more aspects were added to the dismissal protection of workers, such as a control on the "valid reasons" and the award of a compensation.

In the 1980s and 1990s many observers started to wonder whether this accumulation of dismissal protection had not gone too far. A too strict

dismissal law may deter employers from hiring staff. Employers may well opt for more flexible working relationships, which allow them to circumvent the strict dismissal regime.

6.1.b. The philosophical background of dismissals law

In the 19th century the leading concept of freedom of contract meant: both parties could terminate the employment contract at will: that means at any time for any reason.

In the 20th century: the idea of the Welfare State meant that more emphasis on job protection should be laid.

In recent years a new philosophic creed favours a shift from job protection to employment protection ('employability').

In Europe national dismissal law shows a differentiated picture: BE, DK, UK embrace the first and the third orientation. DE, NL are overwhelmingly inspired by the second orientation. Several countries have a mixture of these philosophical orientations. However, although nowhere in reality employment protection has increased, nevertheless job protection has diminished everywhere!

In several Western and Southern European countries this happened during the first two decades of this century either by:

(a) an outright widening of the possibilities for dismissals and a reduction of its costs or,
(b) by inserting more possibilities to derogate from the common rules of dismissal or,
(c) by expanding the possibilities to circumvent these provisions by flexible forms of contract.

This last phenomenon was also apparent in Eastern Europe, where the disappearance of communist rule has opened the door for a diminishing of the existing strong job protection, although this development went only slow and gradual.

All these developments have resulted in a law on dismissals, which varies enormously from one country to another, although certainly some common ground can be discerned.

Dominant on that common ground is certainly the fact that all European countries now are characterized by a strongly divided labour market. On the part where open-ended contracts of employment prevail, there is still a substantial job protection. On the other part of the labour market, where all sorts of flexible labour relations prevail, job protection is poor. Some countries like NL are now obsessed by attempts to secure a proper balance between flexibility and security on the labour market.

6.2. Dismissal law in international and EU law

Until now and across Europe, dismissal law has been dominated by national rules of the various countries. The result is that the picture varies dramatically from one European country to the other with the consequence that dismissal law is by no means homogeneous across Europe.

International sources contain some standards which may contribute towards the gradual harmonization of dismissal law in the various countries of Europe.

Looking at the developments within the EU, it is clear that no full-scale harmonization of dismissal law has ever been undertaken. Instead, the Union has inched forward by piecemeal harmonization via a number of Regulations and Directive that we have already discussed. The most extensive involvement of the EU in dismissal law is in the area of discrimination. EU law squarely forbids dismissal on discriminatory grounds. The EU Regulations and Directives not only prohibit direct discrimination, but also unjustifiable indirect discrimination as well as victimization (see par. 4.5). They support court claims about discrimination in dismissals, in which the employer must prove that there has been no breach of the principle of equal treatment. Over the last three decades there has been a steady rise in dismissal cases before the CJEU with respect to these rules.

Even so, it is safe to conclude that currently EU rules are not applicable to the overwhelming majority of the many dismissal cases in the EU Member States. These are settled entirely on the basis of national law.

6.3. Sources and general lines of dismissal law

In most European countries the law on dismissals and redundancies is laid down in specific statutory provisions which progressively have reduced the influence of general civil law over the time. Collective agreements play

a secondary role in this field. By contrast, there is a growing impact of constitutional provisions.

Contracts of employment, like every contract, may be terminated in agreement between both parties (see par. 6.4).

If there is not such an agreement then open-ended contracts of employment may only end if there is a valid reason for termination connected with the capacity or conduct of the worker or based on the operational requirements of the enterprise. Therefore, all European countries now have a form of judicial control of dismissals. Most countries only have a control after the event (*a posteriori* control, see par.6.7), a few countries also have a control before the event (*a priori* control, see par. 6.6).

However, the contract of employment may come to an end by other ways as well, such as by operation of the law (see par. 6.5).

Finally, in no European country dismissal law is universally applicable to all workers. All countries have special provisions as regards pregnant workers, employee representatives, civil servants, disabled persons, domestic servants, sailors and ferrymen, seasonal workers, etc.

In addition there are often important "thresholds" (see par. 2.3) concerning the size of the firm, age, salary and employment record of the workers.

6.4. Termination by mutual consent

In all European countries it is possible to terminate any contract of employment at any time, for any reason and on any terms if such is agreed by both parties to the contract. Termination by mutual consent is even the habitual way of termination by the employee. Employers realize that they cannot reasonably oppose the resignation of an employee and put up with it, provided the employee observes the statutory or contractual period of notice (see par. 6.15).

This is less self-evident with terminations initiated by the employer. The employee may chose to oppose it because he loves his job, and/or fears the loss of income as a result of the dismissal. In several countries the employee, by consenting to the termination could lose wholly or in part his entitlement to unemployment benefits,to severance payments and to company pension rights. He may also lose the right to challenge the dismissal in court.

Nevertheless, the employer may try to entice the employee for a mutual termination by offering a compensation for his consent to such a termination that cancels out these disadvantages.

Sometimes the dismissal, resignation or termination may take the form of a written 'contract of termination' by which the parties release each other from their mutual obligations; sometimes the consent may have been given orally and sometimes courts may conclude from the facts that the parties effectively consented to, or at least acquiesced in, a dismissal, resignation or termination.

In some countries a mutual agreement on the termination of an employment contract must, as a general rule or in specific cases, be in writing, otherwise the agreement is void.

In some countries in some cases of mutual termination the trade unions or the works council must be notified.

The employee may nevertheless go to court arguing that he did not consent to the termination or that he consented under duress or other vitiating factors. Often courts will then require proof that the consent was given freely and intentionally, especially in view of the grave financial consequences for the employee involved in a contract termination by mutual consent.

All this is case law which does not differ very much from one country to the other, but the allocation of the burden of proof (to the employer or the employee) as well as the consequences (nullity/compensation) may vary.

In recent years several European countries (DE, NL) have reformed their labour law in such a way as to encourage this termination by mutual consent, at the same time somewhat securing this method against misuses.

6.5. Termination by operation of the law (ipso jure)

In all European States there are a number of possibilities that the contracts are terminated by operation of the law.

Termination by operation of the law in most European countries means that the contract of employment is terminated automatically. No notice of termination needs to be given (see par. 6.10), there is no control of a valid reason (see par. 6.7), no obligation to pay severance payment (see par. 6.8).

In all countries in Europe the most important way of termination by operation of the law is in the use of fixed-term or fixed-task contracts. In such contracts both parties are bound to each other during the entire period as agreed – premature termination of fixed-term and fixed-task contracts is very limited – but after its duration the fixed-term contract is automatically terminated which gives notably the employer a large freedom. Employers may exploit this by engaging employees in a chain of fixed-term contracts.

In the period following World War II lawmakers in Europe were averse from fixed-term contracts as it hampered the continuity of employment and deprived the employee of the protection accorded under indefinite employment contracts. Therefore, in most countries rules limiting the attractiveness of fixed-term contracts abounded.

However, in the 1980s, when unemployment had returned to several countries in Europe, the new mantra was: Better a fixed-term contract than no contract at all! Successively a lot of restrictions on the conclusion of fixed-term contracts have been repealed, be it sometimes with a concomitant improvement of the legal position of fixed-term contract workers. This policy of giving way to fixed time contracts by at the same time improving the position of fixed-term workers was called with a new buzz-word: *flexicurity*.

In this vein in 1999 an important development was made by EU Directive 99/70/EC, which brought the standard that there shall be equality in the conditions of employment for fixed-term workers and permanent staff. Moreover – to counteract abusive practices – the Directive stipulated that Member States may restrict the use of fixed-term contracts by requiring objective reasons for the conclusion of such contracts or by limiting the number of contract renewals or the total duration of successive fixed-term contracts. The Member States have implemented these various options in very different way.

Outside the field of fixed-term contracts of employment, contracts of employment can only exceptionally be terminated by operation of the law. The most common exceptions are:

- Death of the employee or the employer;
- Nullity of the contract e.g., due to vitiating factors;
- Bankruptcy;
- Long-term disablement of the employee;
- Some cases of long term imprisonment;
- Etc.

In some countries where such grounds are not explicitly qualified for an automatic termination it may happen that such grounds may qualify under general terms like force majeure/Act of God or "frustration". However, there are also countries such grounds may not qualify for automatic termination, notably in causes like long term illness of employee, bankruptcy, death of the employer, etc.

In a number of countries reaching the retirement age is still accepted as a justified reason for termination by operation of the law, but often in these countries there are changes in the air.

Sometimes the parties to a contract of employment write into the contract specific conditions so that, in case these conditions are fulfilled, the contract will automatically end without the necessity of a period of notice, compensation, external authorization, etc.

Such clauses can quickly degenerate into a method to intentionally circumvent dismissal law, for instance a clause which provides for an automatic dismissal in case of illness, marriage or pregnancy.

In all countries the last type of clause is illegal, but some others types of clauses may exceptionally be allowed if they are reasonable and functional, for instance a clause that stipulates that the contract will end automatically, if the employee has not within a set period finished his studies as a medical doctor or obtained his driving license.

6.6. Dismissal under *a priori* control

There are not many countries in Europe which are protecting their employees by a system in which the employer needs a kind of authorization before he legally may dismiss a worker. To most legislators this is too large an encroachment on the employers managerial freedom.

Obviously an *a priori* control of dismissals can be more effective than an *a posteriori* control, as it may prevent the dismissal to take place. However, it has the disadvantage that it is prone to bureaucracy.

In Europe the Netherlands has the most distinct form of an *a priori* dismissal control via system of permits and judicial rescissions. In few other countries the trade unions (CZ) or the works councils (DE) exerts *a priori* control.

In many European countries a court or another public authority has to formally approve the dismissal in advance in many of the cases in which special dismissal protections apply (see par. 6.9).

6.7. Dismissal under *a posteriori* control

The *a posteriori* dismissal control refers to the possibility, especially for the employee, to appeal to a court to challenge a dismissal that has already been effectuated.

Nowadays, almost all European countries have such a form of dismissal control in place. For EU Member States this is obligatory, given Art. 30 of the EU Charter on Fundamental Rights.

The main statutory criterion for this form of dismissal control is expressed in different, but quite comparable terms.

In order for the court to intervene, the dismissal must be qualified by the court as *socially unacceptable* or *unjustified* (Austria, Germany), *unfair* (DK, PT, UK), *arbitrary* or an *abuse of right* (Belgium). Or it must lack a proper and *weighty* reason (Finland), a *real and serious* cause (France, Luxembourg), a *just* cause (Italy), an *objective* ground (Spain, Sweden), an *important* reason (Greece) or a *valid* reason (Slovenia, the Netherlands, CFREU).

Valid etc. reasons are generally divided into two groups: economic circumstances of the enterprise or personal circumstances related to the employee.

Some countries use an exhaustive statutory list of valid reasons. This means that the dismissal shall only be deemed valid if it results wholly or mainly from one of more point of this list.

In most countries case law has provided some standardization of valid reasons.

In some countries, like France and Poland, the courts will fully ad hoc examine whether the termination is justified, lawful, valid, etc. balancing the legitimate interests of the employer and the employee.

No country requires that the dismissal of the worker must be *ultima ratio*. However, in many countries, in deciding whether there are valid grounds, consideration may be given as to whether the employer has sought alternative solutions (training, another job, etc), even if that must lead to a modification of the contract of employment.

In all European countries it is up to the employer to prove the existence of a valid reason for the dismissal. He must not only prove the facts but also the importance for the company to have the employment contract terminated.

This a posteriori control, however, is not always available for all employees. In various countries a substantial number of employees, working on an open-ended contract of employment, are excluded from this *a posteriori* control. This because of the thresholds, mentioned in par. 2.3).

Also the use of a trial period (probationary periods or clauses) in the employment contract may make dismissal protection during such a period obsolete. That is the reason why in most countries the use of such clauses/ periods are severely limited.

Finally, it should not be overlooked that in number of European countries, workers, before having access to an a posteriori dismissals control, must first use a grievance procedure (see par. 5.14, 6.11 and 6.16).

6.7.a. Pre-indicated unfair grounds

All European countries have by statute already very clearly defined a certain number of grounds which certainly cannot be regarded as valid reasons/which must be regarded as abusive reasons to dismiss an employee. For instance in the UK the Act contains a list of 'automatically unfair dismissals'. They are called that way, because they are dismissals in circumstances such that the lawmakers have decreed that the ordinary considerations of fairness are over-ridden and thus do not arise.

In all European countries such reasons are:

- discriminatory grounds, notably dismissals based on sex, race and religion; very uncertain are still dismissal cases based on age (see par. 5.5) and disability (see par. 5.5, 6.5 and 6.9),
- dismissal because of marriage,
- dismissal founded on victimization (see par. 5.5),
- dismissal as a result of a company takeover (see par. 2.7),
- dismissal because of lawfully exercising the right to strike (see par. 9.4.c),
- dismissal after filing a grievance,
- dismissal because of criminal convictions (even if they have no connection with the employee's professional activity).

In some European countries also:

- dismissal after asking for rise in wages,
- or due to disappointing behaviour of the employee.

Sometimes there are exceptions applicable on such rather absolute types of protection.

Moreover, there are certain categories of workers identified, which are better protected than the common employee on an open-ended contract (see par. 6.9).

6.8. Remedies

If no prove can be given of a valid, fair, serious, non-abusive justifying reason for an already effectuated dismissal, the question of remedies becomes important.

All European countries are offering a variety of remedies for invalid dismissals. In all European countries most of the times dismissal protection is only sanctioned by civil law type remedies, not by criminal/penal sanctions.

The usual remedies come in two main categories.

The first category is that of reinstatement and re-engagement.

Reinstatement means that if the dismissal cannot be justified, the employer is required to take back the employee and treat him/her in all respects as if he had not been dismissed (reinstatement in the former job; back-pay of salary, other employment benefits and social security contributions from the day of dismissal to the day of reinstatement).

Re-engagement means that the employee may be reengaged in a different job from that which he formerly held, provided that the new job is comparable to the old or is otherwise suitable employment.

All this according to UK definitions. Definitions in the various European countries and languages show small differences.

The second category of remedies is that of money: damages, compensation and severance pay.

The differences between these three money remedies are not clear-cut. Unfortunately, in the various European countries, these terms are not consequently used, and not so in scholarly writing.

For the sake of this comparative book I give my own definitions:

Damages reflect with a high degree of precision the disadvantages of the dismissal for the worker.

Compensation refers to a certain standardized amount of money awarded to an unjustified dismissed employee, largely irrespective of the disadvantages actually suffered by the employee as a result of the dismissal.

Severance pay is the amount of money a worker receives even though the dismissal is justified.

Some countries are "punishing" violations of procedural rules (e.g. no written notice) with a lower compensation than violations of substantial rules (cases in which no valid reason is proved).

What is actually the situation with these remedies in the various European countries?

6.8.a. Reinstatement/re-engagement

Most European countries have reinstatement available as a possible remedy in case of unjustified dismissal, although in some European countries it is absent or only reserved for a small number of dismissal cases.

Nowhere in Europe the remedy of reinstatement/re-engagement can be imposed on the employee if he does not want it. And in most of the European countries reinstatement and re-engagement also cannot be imposed (nor effectuated) without the employer's consent. In such cases the court may put the damages and/or compensation on a higher level if the reinstatement is justifiable and wanted by the employee but refused by the employer.

It is often the small size of the firm, and the relatively close personal contact between management and the dismissed worker that leads employees and employers to express a wish against reinstatement or re-engagement.

6.8.b. Damages and compensation

All European countries have systems of damages and compensation for the cases in which a dismissal has been found unjustified. However, the amounts of damages and compensation show broad discrepancies among the countries. The differences are also dependent of the degree of the blame that can be laid on the parties for the reason of the termination.

In some countries in which the employees have a right to claim damages, they are also under a duty to mitigate the amount due by their earlier employer, by taking reasonable steps to find alternative employment.

6.8.c. Severance pay

In many European countries, over the last fifty years, systems of severance payments have been created by the law, by collective agreements or by the courts. In these countries severance pay is regularly due in cases of collective dismissals (see par. 6.13) and in cases of individual dismissals based on economic reasons of workers employed on open-ended contracts. In most countries the severance pay may be received together with unemployment benefits.

The most lavish systems of severance pay are in some Eastern European countries, in France, Luxembourg, the Netherlands and Sweden. In a number of countries, most dismissed workers are entitled to this payment, with the most frequent exception of those summarily dismissed.

In some countries severance pay is also due in case of an automatic end to the contract of employment, notably the fixed-term contracts.

A number of countries have no general system of severance payments. In those countries such payments may only be due in a very limited number of cases.

In recent years the systems of severance payments has often been criticized for being too costly, hindering labour mobility, being awarded in a discretionary way, etc. For these reasons, in Austria and Italy severance payments have wholly or in part been replaced by a system under which every year a certain amount of wages (roughly a month) is set aside to be paid upon each type of termination of the contract of employment.

6.9. Special dismissal protection

In most European countries the legislature has singled out specific groups and specific situations for enhanced dismissal protection. The specific situations have already been discussed in par. 6.7. What groups enjoy special dismissal protection?

Civil servants were among the first to benefit from this protection. In most countries they traditionally enjoy stronger protection against dismissal than workers in private business. In a few European countries (SE, NL) this starker

protection has recently been repealed by the idea of equality between the public and private sector (see par. 1.2).

Other groups that are more strongly protected than others in several countries are:

- seriously disabled workers in general,
- workers victim of an employment injury or occupational disease,
- sick workers,
- employee/union representatives, members of works council, health and safety councilors,
- members of a trade union,
- conscript workers (military service),
- women during pregnancy and maternity,
- etc.

These enhanced protections may result in a straightforward prohibition of the dismissal, which is legally regarded as void, so that the worker must be reinstated or may obtain – if re-instatement is refused - higher or more easily awarded compensation.

Alternatively for (some of) such groups or situations *a priori* instead of *a posteriori* control may be used.

6.10. Periods of notice

As mentioned before, the oldest form of employment protection in all European countries are periods of notice that the parties must observe. Usually this is expressed in a number of weeks or months, depending on the duration of employment.

In many European countries minimum periods of notice are laid down in statutory law; more favourable periods often in collective agreements. In other countries statutory terms are lacking, so any protection must come from collective agreements.

[In this paragraph only the periods of notice to be observed by employers are discussed. Those for the employees in par. 6.15].

There is quite a variety in the length of the standard statutory periods of notice between the various countries in Europe. Long periods are prescribed

in Sweden, medium ones in Germany and the Netherlands, short ones in Great Britain.

The statutory periods of notice are minimum periods. Parties to the individual contract of employment or the collective agreement may agree that the employer must observe longer periods. Lawmakers sometimes have, exceptionally, allowed employers to apply shorter periods of notice than the statutory minimum ones, but usually only if agreed by collective agreement.

In some countries the law provides that the notice can only take effect at the end of a certain period (week/month/quarter/calender-year).

In some countries there is substantial variation in the period of notice for various groups on the labour market and notably for some special groups (civil service, seafarers, employees in agriculture and in private employment (Denmark).

During the period of notice, the employment contract remains in force, but in some countries the law provides that the employee has a right to some hours' paid absence for searching new employment.

In a number countries the employer may decide to skip the period of notice but then he has to pay the worker a compensation that equals the gross salary that the employee should have earned during the notice period. In some countries it is increasingly common for employees during the notice period not to be put to work but only remunerated (e.g. out of fear for retaliation).

Traditionally notice periods were characteristic for open-ended contracts of employment. No notice termination needed to be given to fixed-term contracts. Actually in a few countries this is changing.

6.11. Summary dismissal

In most countries unilateral termination of the contract of employment without notice is ordinarily a breach of contract unless there are grounds which the law regards as sufficient to justify termination without notice: summary dismissal.

This form of dismissal notably occurs when one party has been guilty of such serious misconduct or neglect of duty that the other party cannot be expected to continue the employment relationship any longer.

In all European countries summary dismissal court cases are highly casuistic, depending very much on the circumstances of the case, and, in several countries (FR, BE, NL) also on such factors like the family situation of the employee, his working period within the enterprise and his behaviour in the past. Therefore, it often may be unpredictable whether there are sufficient grounds to justify a summary dismissal.

It is safe to say, though, that the more serious the misconduct, the likelier it is that a court will regard it as justifying a summary dismissal. The more trivial the misconduct, the less likely a court is to uphold a summary dismissal.

In other countries like Slovenia, the legitimate grounds for a summary dismissal are fixed by law, sometimes exhaustively (AT, ES), sometimes by way of example (NL, PO).

Usually, in case of summary dismissal, not only the periods of notice need not to be observed but also other forms of protection (*a priori* dismissal control, special dismissal protection, etc.) need not be respected. In most countries, there is in general no involvement of public authorities or employee representatives in this type of dismissals, but in other countries there is.

In case of a summary dismissal the employer must notify the ground, mostly in writing, otherwise the dismissal is void.

Courts will require that the summary dismissal was granted without delay or within a reasonable period. In some countries the law may sometimes require that the employer's termination has been preceded by a previous warning.

If the employee's misconduct is not considered to be a sufficient justification for a summary dismissal, in Germany and the Netherlands the consequence is that the dismissal is invalid: the employment relationship has not been discontinued and the employee is entitled to continued payment of the wages.

In other countries, on the other hand, the consequence is not that the dismissal is void or that the worker must be re-instated, but only that the employer still has to pay the wages over the period of notice.

If the court finds that reasons were serious enough for a summary dismissal, the employee not only has lost pay during the notice period. He mostly also does not have a right to compensation or severance pay. Perhaps he himself must pay damages to his former employer and he may be punished by such sanctions as losing rights to unemployment benefits for a certain time.

6.12. Formal requirements

In most European countries statutory law has put strict formal conditions on the termination of a contract of employment. This termination often must be done – under pain of nullity or by damages/fines – individually and in writing. In most countries the ground for a dismissal must be given and often this must be done in writing as well.

In several countries normally there must have been a warning before a dismissal on disciplinary grounds. In various countries the law requires that an employee must have had the opportunity to be heard on the dismissal. The employee must have the right to defend himself and may be assisted by his trade union. If the employer fails to follow the procedures, often laid down in company procedures, this may have an effect on the amount of compensation. In some countries worker's representatives (trade unions or workers councils) must be notified.

6.13. Dismissal for economic reasons (redundancy) and especially collective dismissals

The capitalist economic order makes it inevitable that companies may go through difficult times and have to shed workers on merely economic grounds. In such circumstances often large numbers of workers are losing their jobs. Sometimes major plant closures can upset entire regions where large sections of the population are dependent of the jobs in the industry concerned.

Therefore, in the 1960, some European countries have adopted specific rules to alert the public authorities and the workers' representatives when collective redundancies are looming. The EU has followed this trend by adopting a Directive on Collective Dismissals. This Directive 98/59/EC requires that a collective dismissal must be reported to the competent public authority, while the employee representatives are to be informed and consulted in good time with a view to reaching an agreement.

The Directive contains specific rules as regards the precise information and consultation to be given to the authorities and the workers' representatives. For this procedure to be honored it is prescribed that projected collective redundancies will take effect not earlier than thirty days after the notification. This waiting period must enable the authorities to take flanking measures for

income support, outplacement and retraining of the redundant workers and to allow the workers' representatives to cope with these events.

Usually the workers' representatives may then seek arrangements dealing with the social consequences of the dismissal (who has to leave, who can stay, what compensation is offered, etc.).

This has, in most Member States, stimulated the negotiation of a '*social plan*' aimed at mitigating and regulating the economic disadvantages that workers would suffer as a result of a company crisis.

The Directive leaves the Member States a certain discretion with regard to the definition of collective redundancy and the indication of the public authorities and the workers' representatives that have to be involved in the processes of information and consultation.

Finally, the EU Directive requires the EU Member States to adopt sanctions if these requirements are disregarded.

In many countries, statutory rules or rules in collective agreements have been made about the criteria for selection of the workers concerned by a collective dismissal that is not a total closure of a firm. A contentious point in this is the usual rule: last-in/first out!

6.14. Company insolvency

Some European countries have adopted special rules to give management more space for reorganization in case of a life-threatening crisis of the company. Certainly when that is an option to prevent bankruptcy. In such cases the employer may deviate from the ordinary rules of dismissal law. Some countries do such also by waiving the rules of transfer of the enterprise (see par. 2.7).

If it comes to a bankruptcy in all European countries often workers are losing their jobs, although the precise rules are a bit different from country to country.

In some countries the order of a court for compulsory liquidation will automatically result in the termination of the contracts of employment of the employees of the company concerned (see par. 6.7.a). In other countries such an order does not automatically terminate existing contracts of employment, but the law allows the liquidator to terminate the contracts of employment more quickly and more cheaply than under the normal procedures.

6.15. Resignation (termination on the initiative of the employee)

Well into the 19th century, resignation by the employee contrary to the stipulations in the contract of employment was deemed a criminal act in many European countries. That is no longer the case. Employers can no longer thwart their employees in any way when the latter want to resign. Courts will not impose an obligation to continue to work (under penalty), as this would violate the fundamental right of freedom of work (art. 4 ECHR, see par. 5.3).

However, if the employee prematurely terminates a fixed-term contract or does not respect the notice period of an open-ended contract, he is liable to pay the employer damages or compensation, often equal to the pay due to the employee until the date of expiry or the end of the notice period.

In most European countries minimum terms of notice to be taken into account by the employee are fixed either by statute or in collective agreements. In general these terms are shorter than those applicable to a dismissal by the employer.

In the majority of the countries no ground is required for resignation by the employee, but in some countries notice of resignation must be given in writing.

In all countries resignation without notice is possible if the employer has seriously neglected his duties or behaved improperly like with assault or insulting treatment, non-payment of wages or violence/harassment by other employees. In a few countries the law contains a non-exhaustive list of justifiable causes, which may be claimed by the employee.

Several countries are aware of the fact that resignations may conceal a dismissal (contrived resignations or, in the UK, *constructive dismissal*) – the employer has made life so hard for the employee that he/she can do not otherwise than to resign.

In those countries the employer may have to pay compensation if the employee resigns for proper cause arising from the employer's misbehavior.

Also the burden of proof is reversed in some countries, where employees who resigned may in some case be treated in court as if they had been dismissed.

In all countries the employment relationship is terminated as a consequence of resignation.

Nevertheless in a number of countries courts will recognize that there may be one exception to this rule such as in case of an immature employee or decisions taken in the heat of the moment.

Only a few countries recognize the option that employees who resign may in some cases be entitled to severance pay.

6.16. Court proceedings/injunctions / mediation and conciliation

In many European countries the statute of limitations in dismissal cases is very strict. Court cases are always time consuming – it used to be extreme so in Italy! – but in some countries the court must give priority treatment to dismissal cases. In many countries the employee may be served by obtaining an injunction or interim relief. In various countries there exist external procedures for mediation and conciliation in dismissal cases, before cases are heard by the courts. Sometimes such procedures are optional, sometimes they are mandatory.

6.17. Evaluation

Obviously, where dismissal protection is strong, employers seek legal constructions to circumvent it. Since the 1980 most European countries have seen an increase in the so-called a typical employment relationships. The legal concepts which employers like to use for reasons of flexibility include:

- contract termination by mutual consent (see par. 6.4),
- fixed-term employment (see par. 6.5) and casual work contracts,
- contractual trial periods (see par. 6.5).

To prevent the operation of cumbersome dismissal protection rules employers have also the options of:

- hiring workers from temporary work agencies (see par. 2.5),
- engaging independent workers (work on contracts for services, see par. 2.1) or,
- work done by (personnel from) other companies (outsourcing) (see par. 2.6).

In all European countries the lawmakers and courts try to strike a balance between maintaining the availability of these opportunities to ensure a flexible

labour market and preventing abuse of these constructions. We have seen this all over these chapters.

These efforts to shift the balance in the law of dismissals is going to stay with us for much more years.

In some countries lawmakers have been slow in the flexibilisation of the labour market; in other countries they have been so energetic that there, actually the majority of new hirings are for fixed-term or under atypical contracts (see par. 2.5).

Therefore, in subsequent years in various countries the lawmakers kept on modifying the law of fixed term contracts of employment in order to find a better balance between the requirement of employers for flexibility and the need for more security on the employees' side.

Over the years in all European countries dismissal law has become increasingly complicated and very costly for employers. It is not easy to compare the costs of dismissal law, although the OECD has attempted to do so. In many European countries procedures are costly, time-consuming and insufficiently effective in protecting workers. That is why employers, often supported by researchers and institutions such as the OECD or the EU, press for a relaxation in this field of the law. Often Danish law is propagated as a model to follow.

7

7. THE SYSTEM OF INDUSTRIAL RELATIONS/THE SOCIAL PARTNERS

We started this book with Individual labour law. Now it is the turn of Collective Labour Law. Collective labour law is the law relating to trade unions and employers' associations, collective bargaining, strikes and democracy in the enterprise. Some lawyers may call it: the social constitution; sociologists use the expression: the system of industrial relations. In no European country the legislator, the government and parliament may assume that they alone can establish labour law and social security law. The state must recognize a significant role of the social partners: employers' organizations and trade unions. However, this has not always been so.

7.1. History

This influential role for employers and unions has a long history of struggle – after all, these are power relationships. Already in the Middle Ages, masters and servants organized in guilds and associations of journeymen. And the earliest strikes on record were mentioned in the 12th century. Eventually, the guilds and the associations of journeymen became so powerful and they so much impeded the course of trade that they fell into disgrace.

Around 1800, they were deprived of their economic power and even prohibited under criminal law (*Loi Le Chapelier*, 1791) in France, and also in the Benelux, in Italy and parts of Germany. Something similar happened in Great Britain through the Combination Acts of 1800. Thus began an era of *repression* of the intermediate powers in socio-economic life, which lasted until after the middle of the 19th century. The advancing industrialization, which led to great social evils, forced the workers to close ranks to

defend their interests. These early trade unions, which first emerged around 1820 in Great Britain (where industrialization was already in progress) were immediately hit by the Combination ban. The first trade union leaders ended up in jail.

After a few decades, however, governments began to grasp that if workers were allowed to close ranks, they themselves could contribute to improving the plight of the working class (the idea of self-help). Everywhere in Europe combination/coalition bans were repealed during the last quarter of the 19th century.

Thus began an era of *tolerance* that lasted until about the First World War. Employees were now free to form trade unions. And in the last decades of the 19th century collective agreements emerged. However, union membership was a hazardous affair. Many employers were opposed to trade unions and many workers lost their jobs or were not even engaged because of trade union membership. Strikes were broken in numerous ways. By means of civil law (strikers were dismissed because of breach of contract and unions were held liable for the damage) or even by means of criminal law and through the intervention of police and the military. Because of these limitations, the unions were not really satisfied with their legal protection and campaigned for more recognition. In civilian circles too, it was increasingly understood that trade unions should actively participate in the organization of the working life, especially now that Christian social doctrine was promoting moderate unions as well. In a few countries like Denmark, Sweden and Greece already around 1900/1910 the trade unions acquired a substantive role in the social-economic governance. This heralded an era of *recognition* in this entire process.

However, in the largest European states like Great Britain, France and Germany it was only at the outbreak of World War I that the unions got ample space as the belligerent governments needed their active participation in the war industry. The social turmoil at the end of World War I concluded this process from tolerance to recognition. The era of recognition lasted until World War II. In this phase, the most controversial forms of violation of trade union freedoms were removed and sometimes the freedom of association of trade unions was recognized as a fundamental right. In many countries Acts of Parliament were adopted to support collective agreements.

However, this democratic process of recognition of the social partners was upset by a new wave of *repression* as a consequence of the rise to power of

communist dictatorship in Russia and fascist dictatorships in Italy, Portugal, Germany and Spain, which only allowed puppet organizations and outlawed free and independent organizations as well as strikes.

The end of World War II saw the extension of this wave of repression to Eastern Europe under Communist rule and in Western Europe under autocratic rule in Spain and Portugal which lasted until the 1970s en 1980s.

In the other European countries, however, after a few years, recognition returned as a dominant characteristic of industrial relations. Totalitarianism having been defeated, free associations of trade unions and employers re-emerged and were recognized. Then could begin the actual current shape of the process of legalization of the social partners, that I have branded: *integration*.

In this era the trade unions and the social partners are not only recognized. They are involved in the governance of the state. New impetus was given to the collective agreement. And the state – albeit hesitantly – recognized the right to strike as a fundamental right as well. To prevent conflicts, the state also increasingly sought cooperation with the social partners – asking them for advice on legislation and socioeconomic policies and allowing them enough free space to conduct their own policies through collective bargaining.

This domain of integration was considerably extended when ca. 1975 also Spain, Portugal and Greece shook off the fascist dictatorships and notably around 1990 when the Eastern European countries joined the family of free democratic societies, making "integration" now the dominant characteristic of the industrial relations systems of Europe.

Nowadays in several European countries trade unions and employers' associations are involved in tripartite deals with the government on major economic issues. Scholars name this practice: *Neo-corporatism*, the entanglement of the centralized state and the main interest organizations (of capital and labour).

In many European countries the conclusion of tripartite deals on major economic issues has become common practice.

Although it has many critics, many insiders welcome these practices because of its stabilizing effects on the government of the state.

This trend was already perceptible at a global level, were since 1919 ILO Conventions only can be adopted with a 2/3 majority at Conferences, were national delegations are comprising 2 government representatives, 1 trade unionist and 1 employer.

At EU level there is, since the 1980s, the European Social Dialogue (art. 154-155 TFEU). The EU Commission is obliged to consult the 'European social partners' on all envisaged social policy matters. The European social partners may stop the EU Commission to proceed in order to take the matters in their own hands, negotiate on it and conclude an agreement on it. Such an agreement may subsequently be implemented by the own procedures and practices of the social partners or be converted into a EU Directive.

However, in the various European countries the current era of "integration" and "neo-corporatism" shows many signs of differences as to the extent and the form of involvement of the social partners in the state's socioeconomic governance.

In a nutshell: The Netherlands, Belgium, Austria and the Nordic countries have developed very sophisticated forms of interrelationships between the social partners and the government, whereas in Germany, Britain, France, Italy and Spain there is a much weaker involvement of the social partners in socioeconomic governance. And in Eastern Europe the interrelationships between the trade unions, the employers and the State are often still in a rudimentary stage.

Over the years the systems of industrial relations have undergone several modifications, in part because of changes in environmental factors. For example, the shift of our economies from industries to services has had a major impact on industrial relations, if only because, apparently, workers in the services industry are more difficult to organize. The same applies because of the advance of the non-standard forms of employment (see par. 2.5)

The opening of the markets (first European, now global) makes its influence felt, for example because it is easier for multinational companies to deal with strikes.

The prevailing climate of Neo-liberalism has obstructed centralist wages policies (see par. 7.4). and encouraged employers to prefer a decentralization of collective bargaining (see par. 8.3.g).

Through these "winds of change" in Europe in recent years, several countries have seen a diminution of the role of social partners, especially the trade unions, in the regulation of employment issues and their influence on the governance of the state.

7.2. The organizational structure of trade unions and employers' organizations

In all EU countries, unions and employers' organizations have become key partners in building and maintaining labour law and social security law. However, there are major differences in the structure of these organizations.

Actually, in every country of Europe there are trade unions in all shapes and sizes:

- craft unions, composed of workers with the same occupation;
- industrial unions, organizing all workers of the same branch of industry, irrespective of occupation;
- blue-collar unions, organizing manual workers and white-collar unions, organizing non-manual workers, either of the same occupation or in the same branch of industry;
- general unions, organizing employees irrespective of their occupation and industrial boundaries;
- enterprise unions organizing just the workers from one specific enterprise, etc.

In most EU Member States industrial unionism is still the dominant form of labour organization, but it is actually losing much of its vitality due to the decline of traditional industrial sectors (e.g., shipbuilding) and the reduction of manpower following technological innovations (e.g., the motor industry, the ports).

This has prompted many mergers between industrial unions, leading to a reduction of the number of trade unions.

On the other hand, as a result of the expansion of tertiary industry there is now increased fragmentation through the growth of associations each representing just one or a few categories of workers and the rise of so-called independent unions.

For over a century the vast majority of trade unions have joined forces in confederations at a national, all-industry level.

In Europe there are:

- countries in which one confederation embraces the entire trade union movement or the vast majority of unions (UK, DE, AT, HU, LV),
- countries with separate confederations, each uniting mainly white-collar and blue-collar unions (SE, FI) or,
- countries with a plurality of confederations (FR, IT, ES, PT, BE, PO, CZ) basically along political, religious and ideological divides.

The third category showed signs of greater unity in the 1970s, but this process has only resulted in a major union merger in the Netherlands.

In all other countries old rivalries have persisted and competition has increased among different wings of the trade union movement.

In most countries the confederations do not act as agents of collective bargaining, but merely as policy makers and lobby groups.

In many countries, alongside the trade unions united in confederations, there are numerous independent (= non-affiliated) trade unions.

Also the relationship between trade unions and political forces is different in each European country. In some countries there is a formal connection (trade union affiliation with a political party, unions financing the party, control of votes at the party conference, union officers elected in Parliament, etc.). In other countries there are only informal relationships between certain political parties and trade unions.

In some countries a major obstacle to the stability of common trends and relations is the division among left-wing parties, which has historically caused a division among trade unions.

The most unifying force in the labour movement has been the European Trade Union Congress (ETUC), established in 1973. Currently almost all national confederations of trade unions in Europe are affiliated with it, irrespective of their many ideological and professional differences. This is both its strength and its weakness, although the ETUC may enter in agreements with employers

on the basis of qualified majority voting (and not unanimity as is required for its partner Business Europe).

The national federations of trade unions in various sectors of the economy are grouped together in European sector confederations, such as the European Metal Workers Federation.

The creation of employers' organizations was more defensive. They were primarily founded in response to the emergence of unions as well as for the sake of lobbying governments.

At the sectoral level there are in the European countries a great many employers' organizations.

In the former communist countries of Europe there were no associations of employers as formally the private business did not exist. Since the fall of the Berlin Wall such organizations are only slowly emerging.

Today, in most European countries almost only ideologically neutral employers' organizations exist and almost always only one per sector, although the sector may be much fragmented.

Nationally, employers' organizations are affiliated to umbrella organizations:

The confederations of employers in medium-sized and large businesses are the most powerful. In addition, in a number of countries, separate employers' associations have been established to represent small and medium-sized enterprises.

At the European level there are two main confederations: Business Europe and UEAPME. All national confederations of large and medium-sized employers in Europe are associated with Business Europe, which is competent in both the economic and the social field. However, it is extremely difficult for this organization to enter into agreements with trade unions or EU institutions as all its affiliates have the power of veto.

Then there is UEAPME, an umbrella organization of national confederations of small and medium-sized employers.

The sector of public enterprises is organized separately through the European Centre for Public Enterprises (CEEP).

The national federations of employers' associations in various sectors of the economy are united in European sector confederations, such as the European Automobile Manufacturers' Association.

7.3. The degree of organization of trade unions and employers' organizations

The degree of organization of trade unions varies spectacularly from more than 70% in the Nordic countries to 9% in France. No wonder that in the Nordic countries and Belgium trade unions are very important actors in social life.

In past decades employers in most European countries have become increasingly organized. However, in recent years there were some signs of decline visible, especially in Great Britain, where the degree of organization of employers in some sectors is now less than 50%.

Germany also reports a decline in membership figures of employers' organizations. In Central and Eastern Europe the membership of employers' associations remains low.

Many multinational enterprises, such as Ford and Fiat, are not affiliated to national employers' associations, but other are.

7.4. The legal position of trade unions and employers' organizations

In the various European States the legal position of trade unions and employers' organizations is quite diverse. In several European countries there is no special law on trade unions and employers' organizations. They are subject to the rules on associations in general and they comply with those rules. If necessary they can invoke for their protection the international standard on Freedom of Association (see par. 7.5).

In a number of other European States (BE, DE, IT) the unions have always refused to submit to the general rules on associations, because they feared too much interference in their affairs. They are to be considered as *de facto* organizations (in German: *nicht eingetragene Vereine*), which in Germany and Italy does not prevent them to be considered legal entities that may have standing in court. Less so in Belgium.

In another group of European States (FR, UK, IR) the lawmakers have very strongly interfered with the legal regime of trade unions and employers'

organizations, but the unions came to accept these regimes as they do not curb their autonomy too much.

Some of these acts, however, are requiring a certain minimum number of members, which is delicate.

7.5. Aspects of the freedom of association

All European States recognize in principle the Freedom of Association as a fundamental right, on the basis of international treaties. Moreover in many European countries the freedom of association is explicitly laid down in the Constitution.

In other countries the freedom of association follows from the constitutional provisions respecting the freedom of association in general.

In a few Member states the specific freedom of trade union association is given on the basis of national statutes, such as in Belgium.

In all European States it is recognized that the freedom of (trade union) association applies to employers associations alike.

However, the freedom of association is a fundamental right with different faces and not all aspects of it are guaranteed beyond doubt or limitations.

The first aspect is that of its scope. Does the freedom of association cover all workers? In the past, sometimes exceptions were made for radical unions or for the police and the armed forces, for example. Nowadays such restrictions are much diminished. Today in several European nations the right to trade union association is also recognized for organizations of independent workers.

The second aspect is that unions should be free in their organization, internal and external. Administrative requirements should be minimal.

If desired trade unions must easily have access to legal capacity to sue, on behalf of their members and in their own right. A consequence - often, but not always - is, that they can also be sued (e.g. for strikes).

Unions should have the freedom to create and to join groups of unions. They must also have the freedom to refuse members.

A third aspect is the freedom of the activities of trade unions. How free are trade unions in their right of expression, which may collide with other rights

and freedoms, for example when they are using insulting language or when they are disclosing confidential company information?

To what extent can trade unions use this right to claim for themselves and for their members the free deployment of activities within the firm? In several States (notably IT) the statute contains a number of facilities for trade union action in the enterprise.

In most European States employee representatives are legally protected against dismissal.

Trade union freedom should also mean that unions are protected from aggressive behaviour towards them and their representatives or members, such as "union busting" and should include a prohibition of discrimination.

Also the financial and other independence from employers must be ensured. Should collective agreements of employers with yellow unions be illegal?

The fourth aspect is that of protection of individual employees in their trade unions rights. Workers should be free to create trade unions and join them. Public rules should not obstruct them in this respect in any way, nor may the employer's rules and behaviour does so.

This means, in particular that the employers may not refuse, dismiss or otherwise discipline workers because of their union membership. Unfortunately this is still a problem in some European countries.

Should the law especially protect the right of the workers to exert union activities at the workplace as well as the freedom of expression of trade union members inside the enterprise? Should the law prohibit the discrimination of workers for their trade union membership?

The ECtHR already outlawed employers' incentives to induce workers not to become trade union members. And it acknowledged the right of trade union members to take time off for trade union activities.

Finally the fifth aspect is: does this fundamental right of association include the right of the workers *not* to join a trade union (the negative freedom of association)? A number of European countries, notably the UK, Ireland and the Nordic countries, have known a long history of practices in which trade unions could convene with employers that only union members will be employed (the idea of a closed shop). In these countries such strategies were deployed to

enable the unions to maintain a grip on the workforce. Trade union power was largely based on it. In these countries the law recognized these encroachments on the negative freedom of association.

In southern European countries this tendency has been completely absent and it has been prohibited by the law.

Since the 1980s these limitations of the negative freedom of association has been under attack. This process has begun in the UK under the rule of the Conservative government-Thatcher, which had developed a strong legislative action to curb closed shops. This campaign was followed by the European Court of Human Rights which gradually outlawed the closed shop in its various appearances.

And this has resulted in the quasi disappearance of the closed shop from Europe, not only in the UK, but also in Ireland and the Nordic countries.

How far does this negative freedom of association go? Is it also prohibiting the phenomenon that special advantages are being given to trade union members only?

Or the phenomenon that the workers who are not members of trade unions are obliged to participating in the financing of the trade unions?

Some hold the opinion, that these phenomenons are also forbidden because they are putting an indirect pressure on workers to become member of a trade union.

The phenomenon of special advantages to trade-union members is a strong and legally accepted practice in Belgium, but is if very much restricted by the judges in Germany, France and The Netherlands.

The phenomenon of a mandatory participation of non-members in financing the trade unions is the situation in Switzerland.

In a number of countries the negative trade union freedom does even prevent employer's cooperation in collecting union fees by wage deductions but in others not.

7.6. The issue of representativeness

All citizens of European countries are free to establish unions and – as we have seen - in all EU countries there is a fairly large variety of trade unions. In presence of a multitude of trade unions, employers and governments can hardly be expected to bargain with all organizations equally. Choices must be made. This is known as the problem of representativeness.

It means that negotiations need only to be conducted with organizations whose number of members qualifies them as being 'representative'.

There are two sides to this problem:

- the civil law aspect, with particular regard to the negotiation of collective agreements, as well as participations in representative bodies in the enterprise; and
- the public law aspect. This mainly concerns the question which trade union can sit on a board of administration, tribunals, or in consultative bodies of various state institutions. (Both aspects can be at issue simultaneously.)

The issue of representativeness can manifest itself at all levels – company, sector and cross-sector – as well as regional, nationally and internationally. It was already addressed in the 1919 Treaty of Versailles, establishing the ILO. In fact, the first court case on representativeness concerned an international labour dispute, and it appeared also at EU level (UEAPME-case).

Consequently a number of European states have specific rules on the representativeness of trade unions and employers' associations. Such rules often differentiate according to levels State, region, cross-sector, sector or company, etc.

Representativeness is not a big issue in countries which have a quite unitary trade union structure, like Germany and the Nordic Countries.

However, it appears to be a very sensitive issue in countries with a very divided trade union movement (BE, FR, IT). In such countries right wing forces are sometimes trying to use the representativeness criterion to support moderate trade unions in order to weaken more radical trade unions.

8

8. COLLECTIVE AGREEMENTS AND WAGE POLICIES

8.1. Introduction

Collective bargaining emerged in Europe in the 19th century, when workers began to form and join unions and forced employers (mainly through industrial actions such as strikes) to make concessions to improve the working conditions.

The first collective agreements were often called peace treaties that put an end to strikes. The spread of collective agreements was slow. Only after World War I could collective agreements develop as a proper source of law, to which many workers looked for the real contents of their employment contracts.

After World War II, this development reached its peak in the 1970s in Europe where often 80-90% of workers were covered by a collective agreement.

Since the economic crisis of the early 1980s and the dominance of neo-liberalism, this development in many countries ground to a halt, sometimes even a decline has been noticed.

The sharpest decline occurred in Great Britain, where the Conservative government (1979-1997) consciously aimed at a decollectivization and individualization of employment relations, with the result that the coverage rate of collective agreements in the UK is now below 40%. In some other European countries there has also been a certain decrease of the coverage rate of collective agreements (DE), but in again other countries (FR, BE, SE) this coverage could stand as it was before.

8.2. The landscape of collective bargaining in Europe

All over Europe practices of collective bargaining vary enormously. As a matter of fact, collective bargaining can be practiced at several levels: company level, sector level or cross-sector level. In some countries the national cross-sector bargaining plays an important role in the fixation of the labour conditions. In Germany, the Netherlands, Belgium and Spain, the level of employment conditions of most workers is predominantly determined by sector-wide collective agreements, although traditionally there are also company collective agreements. In France and Italy the sector level and the company level are simultaneously dominant.

In most Eastern-European countries collective bargaining is mostly done at company level.

In various countries of Europe in recent years there has been increasing pressure, especially from employers, to decentralize the fixation of employment conditions to the company level. The reason is, that sociologists have established that centralization of collective bargaining strengthens the power and authority of trade unions. It also influences the frequency of strikes. The degree of centralization of bargaining structures is nearly inversely proportional to the number of strikes. This explains why the financial crisis of 2008 has led European and other authorities to pressure European countries to change their systems of industrial relations. They should transfer the collective setting of wages and working conditions closer to the enterprise level and the individual contract between employers and employees.

In this vein, several countries have seen a diminution of the role of the social partners, especially the trade unions, in the regulation of employment issues and limiting their influence on labour market regulation. However, many employers remain cautious in this quest for decentralization, because there are clear disadvantages: more risks of a 'wage drift', more labour disputes at the enterprise level, etc. Flexibility can also be obtained through opening clauses in industry-wide collective agreements and by dispensations. This is the way that trade unions are preferring.

8.3. The law on collective agreements

Under the influence of fundamental rights there exists in Europe certainly a right to collective bargaining and therefore, the conclusion of collective agreement. Either because it has been mentioned in national constitutions, or because if follows from international standards which mention the right to collective bargaining explicitly or because courts have derived it from the Freedom of Association (see par. 7.5). However, this right seldom can be invoked by each single union against a single employer/employers association or v.v. as it is often limited by criteria of representativeness (see par. 8.3.b). The right to free collective bargaining is often invoked against the State if the State would suppress or limit it (see par. 8.3.i and 8.4).

In chapter 3 one aspect of the law on collective agreements was already briefly discussed, viz, the impact of collective agreements on individual employment relationships. In that Chapter we emphasized the hybrid character of the collective agreement.

The collective agreement has the body of a contract: it is concluded between private parties: employers (or employers' organizations) and trade unions.

However, the collective agreement was meant to have a much broader effect than only between these parties. It was meant to rule the individual contracts between the employers and the employees: the individual contracting parties should not be allowed to establish conditions that are disadvantageous to workers as compared to those laid down in the collective agreement.

This hybrid legal concept, was 100 years ago difficult to interpret for lawyers who had only general civil law techniques at their disposal.

Therefore, in most European countries the lawmakers have intervened with an Act of Parliament to make sure that the collective agreement has this "normative effect". In a few countries in Europe cross-sector collective agreements have guaranteed this effect.

Only in the UK and in Italy no Act of Parliament or cross-sector collective agreement have guaranteed the "normative effect" as solid as it is in the other European countries. In these two countries lawyers have to make shift with certain legal expediences to realize the "normative effect" at least partially.

In the countries which do have an Act on collective agreements, those Acts are similar, but not identical.

Besides regulating the supremacy of the collective over the individual employment agreement a number of other aspects have got legal clarification by these Acts and cross-sector collective agreements and by subsequent case law.

8.3.a. The parties to the collective agreement

Most acts on collective bargaining provide in their definitions that a collective agreement is an agreement between one or more employers and one or more employers associations on terms and conditions of employment and the relations between the signing parties.

Everywhere it is provided that individual employers can either conclude agreements themselves or through employers' associations of employers; Austria, where single employers are seldom granted the capacity to conclude collective agreements, is here the remarkable exception.

Employees must perforce be represented by a collective party. Concluding a collective agreement with individual employees as one of the contracting parties is simply impossible.

Here an important question is: what collectivity of workers can validly enter into a collective agreement?

Trade unions are generally inclined to claim this domain for themselves and not to allow other clubs (e.g., works councils and staff associations) to conclude collective agreements.

In most European countries collective bargaining traditionally is the exclusive business of trade unions and employers' associations. In a few countries collective bargaining may also be conducted by entities other than trade unions, for instance works councils.

The ILO is skeptical as regards this last option and so is the ECtHR. This monopoly for "trade unions" as partner in collective agreements is undisputed in cross-sector and sector collective agreements.

In company bargaining it is gradually losing ground certainly as regards other a-typical agreements with the employer but in some countries also on formal

company collective agreements with the unions. In a number of countries this has led to legal disputes about the binding force of the a-typical agreements with the employer. In Hungary works agreement between the employer and a works council may regulate terms and conditions of employment, but only if the employer is not covered by a collective agreement. Moreover the works agreement cannot regulate the remuneration.

In many European countries either statutory law or case law put conditions to trade unions and employers' associations which are parties to collective agreement. Such conditions vary from the NL that requires not more than that an organization already has had full legal capacity for two years, to Ireland that requires a 'negotiating license' for which a trade unions must have at least 1,000 members and pay a deposit of between EUR 25,000 and EUR 76,000).

The number of legal problems in this field is strongly related to the organizational pattern of trade unions and employers' associations in each country. As we have seen in par. 7.2, there are countries which have a highly united trade union movement, others have a very fragmented one, and in between all intermediate gradations can be found. In cases of multi-unionism one of the most tricky problems of the law on collective agreements is to select the potential parties in the process of collective bargaining.

One of the main techniques for doing this – apart from such criteria as legal personality and independence – is that of representativeness.

8.3.b. Representativeness

If there are several trade unions and employers' associations in a country, it must be decided whether to allow all trade unions or only some of them to be parties to collective agreements. The device most commonly used for this purpose is to limit the ability to conclude collective agreements to representative organizations (see par.7.6). Both the ILO and the ECtHR have accepted this device.

In France for instance, a collective agreement has to be concluded by trade unions which represent at least 50% of the electors to professional elections. The non-signatory unions have a right to oppose if they represent more than 30% of the electors.

Some countries, like Sweden and the Netherlands, do not require representativeness as a condition to conclude collective agreements.

8.3.c. Legal personality and other formalities

In many European countries the law requires trade unions and employers' associations to have legal personality if they wish to conclude collective agreements.

Notable exceptions are Belgium, Germany and Italy, where trade unions are reluctant to be invested with legal personality, but this has not prevented the legislator and the courts in these countries from enabling trade unions to conclude collective agreements.

Most countries require a written and signed collective agreement in order for it to have binding force. The most common sanction for failure to meet this requirement is not-application.

Moreover, in the majority of countries collective agreements must be laid down for registration at a specified official location.

In some countries the law requires the parties to a collective agreement to display its contents in the relevant workplaces or to give a copy to the workers. Nowadays they are published at the internet as well.

Collective bargaining, like most other bargaining, in principle need not observe specific forms. It may take place at any moment, in any place and between whatever partners.

Even so, in a number of countries collective bargaining about conditions of employment has been institutionalized to a certain degree. Notably in Belgium sectoral collective bargaining tends to be done in joint industrial committees. Cross-sector collective bargaining is done in the National Labour Council. In The Netherlands cross-sector collective bargaining is done in the Stichting van de Arbeid (Foundation of Labour).

8.3.d. Obligation to negotiate in good faith

Sometimes the question arises whether trade unions have a right on collective bargaining and whether an employer/employers' association are obliged to bargain collectively.

Most countries, such as Germany and NL, basically leave this to the power of the interested parties – a collective agreement can be extorted by a strike! The

courts are playing no or only a marginal role in this. In no European country there is a duty to *conclude* a collective agreement.

However, in some countries (LU, FR, ES, CZ, etc) there is an obligation to both parties concerned to negotiate on a collective agreement.

In Great Britain and Ireland something similar to a duty to negotiate can be detected in the rules with regard to "recognition".

8.3.e. The personal/territorial/occupational scope

Under the law of most countries it is left to the parties to collective agreements to specify its scope as regards the type of workers covered by it, the territory and the industry.

Defining the scope may create legal problems. In some countries the rule is applied: one collective agreement per enterprise. In all countries collective agreements can be agreed for all staff, or part of the staff of an enterprise of an entire sector of the economy. They can also be concluded for a certain category of employees irrespective of the company where they work (for instance: journalists). In a number of countries substantial groups of managing employees are excluded from the effectiveness of collective agreements. While in Poland and Austria top managers are covered, in Italy they have their own collective agreements.

In most countries collective bargaining is focused on workers with the legal status of employee (i.e., persons who a working under a formal contract of employment), but in a number of countries,such as Poland, collective bargaining may also embrace various categories of self-employed or independent workers. In an Irish case this right was recently recognized within the framework of the European Social Charter, but the CJEU denies the applicability of collective agreements on genuine independently working persons.

In some countries the general law on collective agreements is not applicable to collective bargaining in the public sector (civil servants).

8.3.f. Time-frame

In most countries the contracting parties are free to establish the date on which their collective agreement enters into force. The law of many countries contains provisions concerning the maximum time-frame of a collective agreement. For example, the collective agreement may be concluded for a fixed period of two years, with an option for renewal by written consent of the contracting parties.

In all countries the collective agreement may be terminated by mutual consent. The rules vary as regards unilateral denunciations.

In most countries the law requires a minimum period of notice for the denunciation of a collective agreement.

In all countries these principles and rules may provoke great difficulties in cases of economic downturn. An recent example: in the times of the Corona-virus employers sometimes can not pay the high wages of the collective agreement and they would like to cancel the existing collective agreement. Is that legally possible?

In case of a transfer of enterprise the EU Directive on transfer of the enterprise (see par. 2.7) prescribes that the transferee has to continue to apply the terms and conditions agreed in collective agreements binding the transferor until they expire, unless these are replaced by other collective agreements applied by the transferee.

A general rule of contract law says that the effects of an agreement cease upon termination of that agreement, unless otherwise provided by the parties. In many countries the Acts on Collective Agreements provide that after the expiration of the collective agreement its clauses may continue to govern the individual contract of employment until they are replaced either by a new collective agreement or by a new individual agreement between employer and employee. However, this so-called post-valid/after-effect may differ according to the original status of the binding force of the collective agreement and this is far from uniform in the various countries of Europe.

8.3.g. The level of collective bargaining, the coordination between the various levels and the place in the hierarchy

As we have seen already at the beginning of this chapter, in all European countries collective bargaining takes place at various levels: cross-sector (national or regional), sector or same professional occupation (national or regional) and enterprise/company (group or plant).

Most jurisdictions recognize collective agreements at all these levels and leave it to the parties to determine at which level they wish to negotiate.

In most countries several levels of collective bargaining are used simultaneously, and this situation sometimes rises problems of coordination.

In several countries traditionally sector collective agreements had always priority over company agreements if the sector agreement was more favourable to the worker than the company agreement. In some countries even if a sector agreement was less favourable for the workers than a company agreement.

However, in these times of flexibility, in some countries the doors have been opened for company agreements to deviate in peius from sector agreements.

The financial crisis after 2008 has led European and other authorities to pressure Member States to change their systems of industrial relations notably in order to transfer the collective setting of wages and work conditions closer to the enterprise level and the individual employment contracts.

The problem here is, that at enterprise level the appearance of workers 'representation is quite diverse across Europe. As we shall see in par. 10.2 in many countries works councils have emerged alongside the trade unions as a form of employee representation in the workplace, while in contrast, Britain and the Nordic countries still have a predominantly single channel of employee representation: trade unions.

Sociologists have established that often works councils are a weaker institution than trade unions. They also found that centralization of collective bargaining strengthens the power and authority of trade unions and influences the frequency of strikes.

Therefore, trade unions tend to oppose the decentralization of collective bargaining. The ILO emphasizes the need for effective coordination between the various types of collective agreement concluded, if only to prevent unfair

competition between enterprises to the detriment of wages and working conditions.

8.3.h. The subject matter of collective agreements – normative and obligatory stipulations

Because the collective agreement is a hybrid construction the collective agreements normally consist of two parts:

- The normative or substantive provisions which must be respected by the parties to the individual contract of employment, such as wages, holidays, periods of notice and supplementary social security.
- The obligatory or procedural provisions, which govern the relationship between the parties that have concluded the collective agreement: mutual information and consultation, compliance provisions, clauses on renegotiations, peace obligation clauses, dispute mechanisms, etc.

However, in several countries scholars have noticed that a sharp border between the two categories is difficult to make. There may be some intermediary categories.

8.3.i. Judicial review of the contents of the collective agreement

The social partners are often very proud on their competence to conclude collective agreements. They see them as the main expression of the right to collective autonomy and action (in German called: *Tarifautonomie*, in Italian: *autonomia colletiva*). They use to defend it against every incursion from outside. This certainly is at stake when governments try to impose on them wage policies measures (see par. 8.4).

Also courts cannot avoid any interference with the content of collective agreements. For instance, when they are requested to ensure the normative effect of a collective agreement on a contract of employment.

This is firstly a question of interpretation. There is much debate between scholars according what rules the contents of a collective agreement must be interpreted. For interpreting normative clauses of the collective agreement in many countries judges primarily take into consideration the wording of the

document and much less the intention of the parties at the time when the collective agreement was concluded.

The fear that civil court judges may neglect too much the intentions of the parties is a reason why in a number of countries, such as Denmark and Italy, much preference is given to grievance and conciliation procedures set up by the social partners themselves.

Moreover, the courts may be tempted to go further than just interpreting; they may test the contents of a collective agreement against the law, Constitutions, international agreements and so.

In all European countries the parties to a collective agreement are, in general terms, free to determine its contents. However, they are certainly required to respect mandatory legal provisions governing public order. If, however, a collective agreement violates fundamental rights (e.g., equal pay for men and women), courts will nullify the contents of the agreement. The same if clauses in collective agreements violate EU rules like its rules of competition.

Notably, the German Constitutional Court has formulated the principle that the courts should only review the content of the collective agreement marginally, because the parties to the collective agreement have a fundamental right to free collective bargaining (*Tarifautonomie*).

8.3.j. Enforcement and Litigation

As regards the enforcement and the litigation concerning collective agreements a distinction should be made between the normative clauses and the obligatory clauses of collective agreements.

As far as the normative clauses are concerned: In most countries of Europe enforcement of the normative provisions of collective agreements is normally done by the labour courts or the civil courts.

In some countries this can only be done by individual employees, not by the unions.

In other European countries it is just the other way round: claims based on normative clauses in the collective agreements can only be forwarded by the unions, not by the employees themselves.

In most countries, however, the normative (substantive) provisions of the collective agreement may be invoked in court both by the parties to the collective agreement (trade unions and employers) and by the parties to the individual collective agreement.

In most European countries the enforcement of collective agreements is traditionally not a tasks of the administrative or public authorities, like the Labour Inspectorate. Only France has this long tradition. In Slovenia the Labour Inspectorate may have a role of facilitators and mediators. In a number of countries the involvement of the Labour Inspectorate in enforcing collective agreements has increased in the context of the work done by so-called posted workers (see par. 5.15).

As far as the enforcement of the obligatory clauses of collective agreements are concerned: Although it is assumed in all countries that the parties to the collective agreement are bound to cooperate in a spirit of loyalty for the purpose of its execution, the law varies considerably from one country to the other as regards the consequences of the binding force of the collective agreement between the contracting parties themselves (trade unions, employers and employers' associations).

In Great Britain compliance with the obligatory provisions of the agreement cannot be legally enforced, because a collective agreement is just a gentleman's agreement and therefore, not enforceable in court, unless otherwise provided (which is seldom the case).

In the Netherlands and Germany,on the contrary, the fulfillment of the obligatory provisions of the collective agreement can be claimed in court, but only by the collective parties. However, apart from strike cases, this rarely happens.

In many other countries, such as France and Belgium, any affirmation of the *bona fide* execution is an empty shell, as the law in those states very much restricts or even excludes any civil liability (damages) for non-execution by the contracting parties.

In no European country the obligation to loyally execute the collective agreement stretches so far as to imply a guarantee of peace.

From all the aforementioned it should be clear that in most countries the obligatory binding force of the collective agreement trade unions and employers alike prefer to refrain from action in ordinary courts about the obligatory binding force between themselves of the collective agreement,

Normally the parties prefer to submit disputes to mediation or arbitration or they adjourn the solution of the difference to the next round of collective bargaining.

8.3.k. Conciliation, mediation and arbitration

In most countries in the event of a breakdown of collective bargaining, the parties are offered mediation, conciliation and arbitration, either by institutes and procedures provided by law or by the social partners themselves, either on a permanent or an ad hoc basis.

However, in no country in Europe, the use of the strongest of these devises – arbitration – is mandatory. Many scholars, expert committees and courts are of the view that obligatory arbitration is contrary to the fundamental right to free collective bargaining. Nevertheless the countries in Europe vary as to the degree of intensity with which the parties to collective bargaining are under legal pressure to resort to conciliation and arbitration.

8.4. Wages Policies

After the First World War wage levels in Europe were increasingly determined by collective agreements. Governments became more active in shaping and pursuing socioeconomic policy and in intervening in the wage policies of unions and employers in order to keep wage increases within acceptable limits.

In Germany the first government intervention in wage policy was in the Weimar period (1923: *Zwangschlichtung*, mandatory arbitration. In 1930: Wage freezing laws). The Nazis subsequently assigned full powers to set wages to government officials.

All over Europe wages were kept under strict control during World War II and after this War was over this control was continued in the UK, in France, in The Netherlands, in occupied Germany, etc.

Around 1950 free collective bargaining was restored in most countries of Western-Europe. Only the Netherlands and Greece after World War II continued a strict system of governmental wages policies until the 1980s.

Governmental intervention in wage setting, however, remained a characteristic of the countries in Eastern Europe under communist rule and in Spain and Portugal under fascist rule.

In the 1960s the threats of inflation and in the 1970s and 1980s the economic slowdown gave rise to fresh examples of government 'activism' in setting wage levels.

The financial crisis of 2008 and subsequent years has provoked a new round of governmental interventions in some European countries, notably Greece.

This historic overview may have made clear, that governmental interventions with wage setting is very much determined by serious threats to the national economy. In times of crisis interventions in wage setting are considered everywhere in Europe. We have not seen very much of it during the Corona-crisis in the past months.

However, apart from emergency situations in most European countries directs governmental interference in wage setting is now out of date. Governments are playing the cart of persuasion when they see the economic necessity for moderation by the social partners.

This model of "government by speech" and in good concert with the social partners is apparently possible in the small countries of Europe, such as the Benelux, the Nordic countries, Austria, Ireland etc. But it is apparently less an option in the larger countries like the UK, France and Italy.

In these countries there has traditionally been a strong polarization in socio-political relations. Employers are reluctant to sit down with the often dogmatic leftist unions, who in turn are not very keen on 'dealing with the devil'. The unions and the employers do not see the government as a neutral broker, but as siding with either the unions or the employers.

In some countries like France wages policies have often been forged by the strong presence of the State in the economy.

In all European countries the governments are still heavily involved in wage setting as regards their own staff (the public service).

Governments also often intervene, either directly or indirectly, in the semi-public sector (teachers, healthcare, media). In all countries collective bargaining in these sectors for years used to be highly centralized, but there is currently a

strong trend towards decentralization. This, in its turn, asks for new forms of coordination, which the various countries implement in different ways.

In many countries economists and employers criticize the current systems of income formation produced by the collective bargaining system. These systems are often perceived to be inflexible and rigid.

The fact is that this rigidity is not there on the upper level: employers anywhere are now free to pay more than required by the collective agreements.

They can do so via regular pay or in bonuses, options, lease cars and so on. In recent years most national governments within the EU have promoted forms of variable pay. Economists assess them as more favourable for the economy, but unions are traditionally skeptical. The unions are not always against granting additional extras to workers, but they do not want to exchange solid pay elements for flexible pay elements. For a long time they have been successful in their resistance in Germany and Belgium because of union strength in those countries.

Executive pay has become a major concern in recent years. In order to canalize it, a number of EU Member States have changed the law so that large or listed companies are obliged to disclose their executive pay bill. In the Netherlands and Poland there is even a statutory cap on executive pay in certain sectors close to the government.

However, many employers are unsatisfied with the fact that they can only add to the collective standards and not detract from them. They believe that collective norms should be less rigid at the floor level.

There is now a trend to decentralization to a lower level, were wage bargaining increasingly must be allowed, even by works councils and non-representative unions as well, even to derogate in peius of sector agreements and of general legislation see par. 8.3.g).

Consequently, it seems now seems to be a common trend in Europe that the level of collectively set wages in relation to the total amount of the wages is declining.

9

9. THE RIGHT TO STRIKE

9.1. From Crime to Fundamental Right

Those who go on strike seek to impose their views on the adversary by simply inflicting harm. However, resolving a dispute by inflicting harm on the other party runs counter to all notions most dear to lawyers, such as the adagio of "nobody has the right to injure another" [*neminem laedere*, *nul n'ayant le droit de nuire à autrui*] and "nobody is entitled to self-justice" [*nul ne peut se faire justice à soi-même*].

Nevertheless, in the modern welfare state, the practice of collective bargaining is accepted as the most suitable way to settle the conditions of employment. And this method incurs the risk that the parties will not conclude their negotiations successfully. If this occurs, there must be recourse to some method of resolving the impasse, i.e., the parties must be free to mount economic pressures in order to force the opposite party to make concessions.

Otherwise collective bargaining would amount to 'collective begging'.

The change from the early 'classic' approach towards industrial disputes to the latest 'modern' view has not come overnight. It has in fact taken centuries. In virtually all the countries of Europe, worker organization, collective bargaining, strikes and other collective actions were at first suppressed on the grounds of general legal principles, or by specific legislation assessing criminal liability, or by the mere showing of police and military muscle.

Later, when the repression of worker organization and collective bargaining was lifted, industrial disputes remained curtailed by the employers' right

to impose disciplinary sanctions and by the general law of civil liability in the form of damages.

In the first half of the 20th century the law reacted on the phenomenon of industrial disputes in varying ways. In the Netherlands new prohibitions under criminal law were laid on strikes by civil servants and railway personnel (1903). In Great Britain worker organizations were exempted from criminal and civil liability for these actions (1906).

A complete ban on industrial action returned under fascism in Italy (1926-1943) and Nazism in Germany (1933-1945).

The same held true for the countries under corporatist rule, Portugal (1932-1972) and Spain (1936-1975), in the military dictatorship of Greece (1967-1974), and in the countries under communist rule, Russia (1918-1990) and the Eastern European states (1945-1989).

On the other hand, in some Western European countries the right to strike emerged after World War II as one of the shibboleths of a free, democratic order. This right was explicitly mentioned in the Constitutions of France (1946) and Italy (1948). In the 1970s the Southern European States – Portugal, Spain, and Greece – followed the lead of France and Italy by including the right to strike as a fundamental right in their new democratic constitutions.

Sweden and Switzerland too included this right in their constitutions, in 1974 and 1998 respectively. Eastern European states such as Poland, Slovenia and Hungary followed after the fall of the Berlin Wall.

On an international level, the ILO failed to explicitly include the right to strike in the standards laid down in its Constitution and its numerous Conventions. However, the right to strike was explicitly included in the International Covenant on Economic, Social and Cultural Rights of 1966 (Article 8). At the European level, the right to strike was recognized in the European Social Charter of the Council of Europe (article 6.4) and in the EU Charter of Fundamental Rights (article 28).

In doctrine, the thesis has been developed that the right to strike is implicit when constitutions guarantee the right of trade union association and/or the right to collective bargaining (see par. 7.5). This is also the opinion of the ILO.

This thesis has recently been followed by the ECtHR: in a 2009 ruling it accepted the idea that the right to trade union association (art. 11 ECHR) in principle includes the right to strike.

In various countries, the highest courts have made explicit statements of recognition of the right to strike in their jurisdictions. And even if in some countries this question is still undecided, it would seem legitimate to conclude that at this stage (2021) the right to strike has overwhelmingly acquired the status of a fundamental right in all countries in Europe.

However, in some European countries, notably the UK and DK, scholars still avoid to speak of a "right to strike" but only of a "freedom to strike. For many years, scholars have debated whether it makes a difference for a jurisdiction to recognize a 'freedom to strike' or a 'right to strike'. Now that so many countries in Europe have rallied to the recognition of a right to strike either in their constitution, by statute, in case law or by ratifying international standards, it is questionable whether it makes sense to continue to emphasize the legal consequences of the differences between the 'right to strike' and the 'freedom to strike'.

9.2. Strike behaviour in Europe

From statistics one can infer that in recent years the number of strikes have very much decreased across Europe. As general reasons for that decrease are mentioned the decreasing degree of unionization (see par. 7.3) and the increased use of precarious employment contracts (see par. 2.5). Apparently workers on precarious employment contracts are less eager to go out on strike.

In practice one can see collective actions of the workers for various purposes and in various forms. Such actions can be about many types of conflicts: to enforce wage rises, to resist a deterioration of working conditions, to fight off dismissals or the closing down of an entire factory, disputes about rights versus disputes about interest, etc. Strikes may also be deployed to ventilate protests against managerial policies and practices and against governmental policies.

Among the carious forms of collective conflicts one might discern:

- Official strike versus wildcat strike,
- Total strike versus Rotating strike,
- Solidarity strikes/sympathy strikes/secondary action,
- Overtime ban and Work-to-the-rule/go slow,
- Sit-down/sit-in/occupation and Picketing,
- Recognition disputes and boycotts,
- General strikes and Political strikes, etc.

9.3. The limits of the right to strike

It is safe to say that nowadays all over Europe the right to strike is considered as a fundamental right. For some people this means that they consider the right to strike as an (almost) absolute right. However, the sanctity of the right to strike is not absolute. To every legislator and judge it has always been evident that the freedom or the right to strike can only be recognized within certain limits, because of the nuisance and the damage a strike may do to the interest of the society.

None of the above-mentioned international standards on the right to strike is very clear about the derogations from and restrictions on the right to strike. The institutions that supervise the application of the ILO Conventions, the UN Human Rights Conventions and the ESC are not courts that render binding decisions, such as the ECtHR and the CJEU. So the opinions that these institutions, apart from the ECtHR and the CJEU, give on the limitations of the right to strike, interesting as they may be, have no binding force on national legislators and courts in the various European countries.

One may think, that the EU should issue standards on the limitations of the right to strike that bind the national Member States. However, it is unlikely that the EU legislator will do this, as the most obvious competence provision to launch such standards, Art. 153 TFEU, explicitly excludes the right to strike and to impose lock-out from its scope.

In the meantime the CJEU has given its first standards. In the Viking and Laval cases this Court recognized the right to strike as a fundamental right, but in both cases it gave priority to economic freedoms of the EU Treaties over the right to strike in case of a conflict. Now that also the ECtHR has recognized

in principle the right to strike (Enerji-case, 2009), it will be interesting to see which norms this Court will develop, but until now this harvest is very meager.

So far, in all European countries the power to limit the right or freedom to strike is largely in the hands of the domestic lawmakers, courts and social partners.

In a number of European countries (e.g. the U.K) the legislator has been very active in delimiting the freedom or right to strike.

In another group of countries (e.g. SE, DK) the idea prevails that the rules governing the lawful exercise of the right to industrial action should be decided between the social partners themselves as the most visible expression of their autonomy.

In again other European countries (e.g. DE, NL) the courts have marked a boundary between the legal and illegal exercise of the right to strike. They have often looked towards general doctrines, most of which derive from civil law.

We shall now summarize the main sorts of limitations of the right to strike/ collective action as they can be encountered in the various jurisdictions of Europe.

9.3.a. Limitations as regards the aim of strikes

In various countries industrial conflict must be exclusively understood as complementary to collective bargaining. It is seen as a precondition for the proper functioning of the process of collective bargaining. To put it differently: industrial action is only allowed in so far as its purpose is the achievement of a collective agreement and the achievement of aims that can be regulated by collective agreements.

Therefore, in some European countries (Germany, Poland, United Kingdom) a strike is not lawful if its purpose is unfit to be regulated by collective bargaining, although this criterion is applied with several nuances.

In other countries this is an irrelevant criterion.

However, most countries in Europe will require that a strike has as an occupational or professional aim. Everywhere except Italy, strikes that are *purely political strikes* in nature are in principle considered unlawful.

In practice it may be very difficult to distinguish between political and economic strikes. Protests by way of strikes against low wages and bad working conditions are often mixed with, and transformed into a protest against general economic and social policies as implemented by the government and parliament. Thus, the general prohibition of political strikes is somewhat softened by the readiness of the courts in a number of countries to allow manifestations of solidarity for political or trade union purposes in the form of strikes or demonstrations of short duration, as well as strikes against the State as an employer or against a given social and economic policy of the State, directly influencing wages and working conditions.

9.3.b. Official strikes versus wildcat strikes

If the right to strike is essentially considered as a right which parasites on the process of collective bargaining - a tactic to be used to press bargaining demands or to ensure that agreements are honoured - then it is obvious that such a functional approach to the right to strike entails another important limitation, notably in Germany and Sweden. There the right to strike is a trade union's right and not an individual right. As a consequence, wildcat strikes are unlawful, as workers outside the official trade unions cannot conclude collective agreements.

In other European countries (e.g. FR, IT) the right to strike is essentially conceived as an individual right for each worker (although of course it can only be exercised by workers joining forces). As a consequence, in these countries wildcat strikes are not treated any differently to official strikes.

9.3.c. Disputes of rights and disputes of interests

The potential variety of purposes of industrial action has led scholars to divide industrial disputes into disputes of interests and disputes of rights. Whereas the latter concerns the interpretation and application of existing contractual rights, the former relates to changes in the existing collective rules and require conflicting economic interests to be reconciled.

In many jurisdictions (DE, NL, SE) the use of legal remedies in disputes about employment conditions has become so much normal that industrial warfare in cases of disputes of rights seem unnecessary. Such disputes can be settled in court.

Disputes of interests, on the other hand, are unsuitable to be subject to judicial decision and it is for these kinds of conflicts that the strike weapon should be reserved.

However, in numerous other jurisdictions (e.g. FR, IT) the distinction between disputes of interests and disputes of rights is wholly or mostly irrelevant for its legality.

9.3.d. The peace obligation

Very often collective agreements contain a promise that there will be no strike or lock-out for the duration of the agreement (peace or no-strike clauses).

Peace clauses seldom prohibit all collective disputes before expiration of the collective agreement (absolute peace obligation). Mostly, the peace obligation is only relative. It then leaves space for industrial actions aimed at matters which have not been regulated in the existing collective agreement, such as sympathy strikes and actions on health and safety matters and other grounds.

In many countries (e.g. DE, NL), it is the general opinion that even if a collective agreement does not explicitly contain such a clause, a relative duty of peace is nevertheless implied. This is based on the idea that this duty is an expression of a general principle of the law of contracts – *pacta sunt servanda* – and should therefore be honoured. For that reason, strikes in contravention of collective agreements are in principle unlawful.

Another branch of the doctrine regards the peace obligation as suspect. According to scholars in this area trade unions cannot serve (either intentionally or accidentally) to restrict individual workers in exercising their right to strike. Thus, at most the peace obligation can bind the trade unions themselves. Trade unions may refuse to sign a peace obligation and – failing such an obligation – its existence should not be construed as implicit.

This doctrine has mostly influenced strike law in the Southern European (FR, IT) and Great Britain, where explicit peace clauses are rare and implicit clauses are not assumed.

9.3.e. Procedural restrictions

The right to strike is not only determined by the objective(s) of a strike but also by the circumstances in which a strike is initiated.

For instance:

- the requirement of strike ballots,
- to give prior notice of a certain length to employer parties and/or the public authorities,
- or the readiness to make available security staff.

Yet, the binding force of such provisions varies from one country to another, and from one trade to another. Sometimes such procedural restrictions may flow from the rulebooks of the trade unions or from collective agreements, or from laws or regulations.

In many other countries such requirements are largely absent save perhaps in the public or essential services sectors (see section 9.3.i).

In some countries surprise strikes cannot be legal because of the idea of *ultima ratio* (*ultimum remedium*), although sometimes "warning strikes", may be considered compatible with this principle.

Indeed, courts in a number of countries have frequently confirmed the idea that a strike is an *ultima ratio* (*ultimum remedium*) and that it is illegal as long as not all options through which a bargained deal can be made have been exhausted.

In a number of countries a procedure of previous obligatory conciliation or arbitration has to be observed. A strike is unlawful if this procedure has not been followed. In some countries the intervention of mediators or arbitrators may temporarily suspend the right to strike (see par. 9.6). On these grounds surprise strikes are problematic.

9.3.f. Proportionality and fairness

Another remarkable limitation on strikes is the principle of proportionality: in duration and intensity strikes should be in proportion to the interests at stake.

In many countries case law has made incursions into the right to strike by making an appraisal of fairness, reasonableness or moderation of purposes.

Although this attitude has often been rejected in part by doctrine, it has not failed to repeatedly charm the courts in many countries and also the CJEU. They require a certain balance between the sacrifices of the workers on strike and the damage done to society.

This not only means that strikes which would completely destroy the productive capacity of the employer are unlawful; it also entails that rotation strikes (or intermittent strikes, sequential strikes, *grèves tournantes*, waves of strikes, pinpoint strikes, hourly strikes, partial and successive strikes in different departments of the same plant or in the same department at short intervals) are at risk of being held unlawful.

In respect to these types of actions, other countries follow an alternative approach.

They consider such types of actions lawful, but also recognize the employer's right to a proper defense, either by giving him the right to impose lock-outs (see par. 9.5.b) or by liberating him from the obligation to pay wages (see par. 9.3.b).

Another principle, developed by the German courts, is the principle of fairness. A good application of this principle can be found in cases that involve bans on work-to-rule, go slow, collective sick leave, non-cooperation, overtime. Such actions constitute a partial failure to fulfill in good faith the obligations of the labour contract. In most countries they are very much at risk of being declared illegal. However, in Sweden most forms of partial strikes are lawful *per se*.

9.3.g. Other collective actions of workers

How can a strike be defined?

There is no universal definition of words like strike, collective action, labour dispute, etc. A very concise and classic definition of strike is: a collective temporary cessation of work by employees in defense of their economic and social interests.

Many scholars assert that the narrow definition of a strike as work stoppage should be replaced by a wider one, including various means of pressure on the employer, such as sit-downs, sit-ins, occupations, work-ins and overtime bans, leave on request, blockade, boycott, rotating strikes, picketing, etc.

Although these forms have become prominent forms of industrial disputes in many countries, several of these phenomenons of collective actions are considered unlawful in a number countries.

In some countries, such as France, where the Constitution is using the precise notion of strike, the conclusion is easily drawn, that certain forms of industrial action, such as go-slow action, sit-ins, etc. are not protected by the constitutional right to strike and therefore in principle illegal.

Some of these actions constitute an infringement of various classic civil rights, and court may easily prohibit them, for example, by requiring the strikers to guarantee free access to the premises and imposing fines in cases where public order is not respected.

However, there are exceptions. In some countries the courts have accepted sit-ins in obvious cases of self-defense.

In some countries those actions are largely judged on the same criteria as strikes, so they can be sometimes allowed and other times not. In some countries the situation is unclear.

Striking workers may also try to pressure the primary employer by mounting actions against third parties. Boycotts are very legitimate in Sweden to put pressure on employers unwilling to bargain with the unions.

In some European countries *solidarity strikes* (sympathy strikes, secondary action) enjoy similar levels of protection as other strikes, especially if they are based on economic matters.

At the other end of the spectrum some countries (e.g. UK) consider most sympathy strikes unlawful. Between these extremes there are many countries where circumstances (sometimes measured on criteria) determine whether solidarity strikes are legal. One of those criteria may be: whether it is an intra-concern solidarity-strike.

In most countries the legal response (from either the courts or the legislature), to secondary disputes has been to prohibit or to restrict them if neutral outsiders are involved.

In other words, the restriction or prohibition does not cover secondary employers who have close economic relations with the primary employer or have supported him in a dispute.

In most countries the law recognizes the right of workers not to undertake work from an establishment on strike ('hot cargo'/"contaminated work").

9.3.h. Picketing

In some countries picketing is an important component of strike actions. It is a tactic used to support workers' demands during a strike as a means for workers to express their solidarity and their aspirations and to prevent the employer from keeping his business operating.

Nowadays, in most countries the courts *prima facie* consider peaceful picketing lawful. However, no national court permits picketing that is perceived to interfere with personal security or that entails bodily harm, sequestration of management, breaking and entering, degrading of property or reputation, of either the employer who is its primary target, or of other persons to whom appeals for support are directed. The legislators in Great Britain and Ireland have issued a more general prohibition of all forms of picketing other than at the workers' own place of work.

9.3.i. Public and essential services

A last important limitation on the right to strike concerns strikes in public and/or essential services. Strikes in these sectors tend to victimize the public and sometimes even threaten the whole economy.

Many countries in Europe in the past outlawed strikes in all or in some of these areas. And even when criminalization has been repealed workers in this area have been impeded from striking by forceful hindrances under disciplinary law or by legal powers of the authorities used to limit or neutralize the effects of such actions.

However, it was the recognition of the right to strike as a fundamental right which led to some changes and now in most European countries strikes in the civil services are in principle allowed, except for a few categories, such as the security forces, the military and the judiciary professions (magistrate). However, some countries (notably DE) continue to deny large groups of civil servants the right to strike.

The ECtHR in 2009 ruled that certain categories of civil servants, acting in their capacity as agents of the public authority, can be prohibited from striking, but that such a ban cannot be extended to all public servants or to employees of state-run commercial or industrial enterprises.

Even if nowadays strikes in the public and essential services sectors are in principle possible, the right to strike is much more limited in these areas than it is in other areas. These limitations are of a threefold nature.

The first type of limitation concerns specific categories of public service workers, such as police officers, prison officers, military personnel, fire brigade personnel, and intelligence services staff. This type of limitation has often also affected workers employed in the production and distribution of gas, electricity, and water, in the postal services, in public health care, etc.

The second type of limitation concerns the modalities of the strike. For example, in various countries (e.g. BE), public employees or employees in essential services are required by law to announce a strike a number of days in advance.

The third type of limitation is that in many countries (e.g. IT) it is now required that a minimum level of essential services be maintained.

In some countries the government has the power to requisition workers to maintain essential services, to permit the deployment of the military to secure essential services or to enact other types of emergency regulations, but in Germany the Federal Constitutional Court rejected the use of *Beamte* (who are not allowed to go on strike) to replace *Angestellte* who were on strike.

9.4. The effects of (un)lawful strikes

It is the quintessence of the right to strike that exemptions are granted from criminal and civil liability and that there is no room for a discharge or disadvantageous treatment of a worker for engaging in a legal action or dispute.

Apart, of course, of general criminal prohibitions of certain behaviour during a strike.

9.4.a. Liability of trade unions

In all European countries the organizers (trade unions) of lawful collective action are exempted from liability for damages. Neither employers nor customers can claim indemnity from a trade union or its members for the damage caused by strikes or other acts of dispute which were legal.

The opposite – if a strike is unlawful the organizing or supporting trade union can be forced to pay damages – is true for a number of countries. In other countries, however, the unions cannot, or only exceptionally, be held responsible for damages caused by a unlawful strike, nor can they be ordered to withdraw their support for a unlawful strike.

Yet, in all countries where unions can be subject to civil suits, damages are rarely claimed from unions organizing unlawful strikes. In most cases employers are satisfied with a formal declaration from the court that the strike is illegal. This attitude generally suffices when unions are law-abiding actors and retract their support of a strike as soon as it has been declared illegal.

In most countries strikes are assumed to be legal and unions are not held responsible for damage caused by them before they have been declared illegal, even if the wronged parties (the employers) did seek damages.

9.4.b. The wages of the striking worker

It is generally understood that an employee who goes on strike forfeits the right to his regular pay unless the strike is provoked by the employer. Even though the right to strike is recognized as a fundamental right, this consequence is undisputed, at least from a legal point of view.

The right to pay is a very delicate issue in such situations as a go-slow, work-to-rule, work-ins, and partial strikes.

An important difference between the European countries is the ability of their respective unions to support striking workers with money from strike funds. The availability of 'healthy' strike funds has always been a characteristic of industrial relations in Germany, the Nordic countries and the Benelux countries.

In other countries, such as Britain and Ireland, strike funds play a more modest role and in countries like France and Italy there are virtually no strike funds.

Social security schemes in all countries contain provisions disqualifying strikers from receiving unemployment benefits for the duration of the labour dispute. Nevertheless some countries provide for some leniency in this respect, notably as far as social assistance (income support) for the families of the strikers is concerned.

9.4.c. Disciplinary actions against striking workers

Then there is the question of whether employers can discipline employees for going on strike, for example by depriving them of certain advantages in their jobs or by taking more severe measures, such as dismissal.

The law in most countries in Europe is currently based on the *suspension theory*.

This theory implies that during a lawful strike, the performance of the employment contract with respect to striking employees is suspended, whereas their service are treated as continuous and they retain their social protection under the state social insurance schemes. Coercive, harmful or discriminatory practices against workers, motivated by their adhesion to a strike, are not allowed.

Still, the suspension theory does not sanction temporary cancellation of all duties of the parties during the strike. Striking workers are required to

maintain the safety measures necessary to ensure the protection of people and possessions, as well as to maintain premises, machinery, installations, materials, etc.

In a minority of countries, like the UK, the suspension theory is only partially applied.

Although there would appear to be consensus among lawyers on the applicability of the suspension theory to legal strikes, many lawyers maintain that in the event of an unlawful strike the employer should be able to take disciplinary action. This is the law in Greece, Britain and France.

Yet, even when workers participate in an unlawful strike, in a number of countries discharge or other disciplinary action may occasionally be deemed too harsh a penalty for employees.

Employers may also contemplate suing their striking workers for damages. Obviously no liability can be sought from strikers participating in a lawful strike, although it is possible that unlawful behaviour during a lawful strike can give rise to a suit for damages.

In some European countries the employer, or other injured persons, cannot sue employees in an unlawful strike for damages, but in other countries, like Germany and Sweden, they theoretically can although it is unusual.

In no European country the striking workers can be forced to return to their work.

9.4.d. The impact of strikes on non-striking workers

It is unlawful for a union or for strikers to coerce or attempt to coerce other workers into joining a strike. In Spain the right of workers to refrain from participating in concerted activities is statutorily protected.

According to the classic rules of civil law (applied to employment relationships), if employees are willing to work but the employer cannot use their services, the employer is *in mora accipiendi* and must continue to provide pay, despite work not being done (see par. 3.4). If this rule were to be applied to strikes, the employer would risk extra financial losses due to the strike. Moreover, such a rule could entice the trade unions to organize strikes on a cheap basis: paralyzing an entire firm by a strike of only a few key workers while at the

same time securing the continuation of payment of the other workers, who nevertheless stand to gain from a positive strike result.

In other countries the employer must cope with this difficulty by means of the lock-out (see par. 9.5.b).

9.5. The employers' defense and retaliation

Employers confronted with industrial action essentially have two options: either to keep their business operating or to close down the unit hit by industrial action (and perhaps other units as well): the lock-out.

9.5.a. The employers' right to keep their business operating

Traditionally, employers have not hesitated in exercising their right to try to continue operations during a strike, by using non-striking employees, sub-contractors or newly-hired replacements. In Europe the employers' right to keep their business operating has often been challenged and in a number of countries this right has been severely restricted by statute or through case law, but in Denmark and Poland it still is rather available, certainly in intra-concern relationships.

In many countries the law prohibits governmental employment referral services from referring workers to job vacancies resulting from a strike. Also, national law often prohibits private employment agencies or temporary employment companies from supplying workers as replacements for strikers. However, in other countries (HU) the employer may order its employees who are not participating in the strike to perform tasks which otherwise belong to the scope of tasks of the employees on strike.

In some countries (FR, NL) employers are forbidden to entice workers, not yet on strike, with extra pay if they don't join the strike.

9.5.b. The lock-out

Another forceful weapon an employer can use to respond to a strike is the lock-out. A lock-out means the partial or full halting of the work by the employer as a weapon in a collective conflict. When an employer imposes a lock-out, employees are denied the opportunity to work until the dispute is settled. They forfeit their wages, but the contract of employment is not broken.

Two types of lock-out need to be distinguished. The offensive lock-out is used by employers to support their aims in changing employment conditions even though the unions have not resorted to industrial action. The defensive lock-out, on the other hand, occurs when employers refuse to allow the continuation of business work whenever it is made impracticable by industrial action by the same or by other employees, and in doing so it legitimizes the non-payment of wages (see par. 3.3.b).

The use of the lock-out as a weapon of retaliation is highly controversial from a particular doctrinal perspective and it is this perspective that has molded the law, especially in the Southern European countries and in some Central and Eastern European states. In these countries the lock-out has been either completely or mostly prohibited.

From another doctrinal perspective the lock-out is considered an employer's natural counter-response, which should be lawful from the principle of equality of arms.

This perspective has molded the law in Germany, Sweden and a few Central European countries, where at least the defensive lock-out, although sometimes with exceptions, has been recognized.

In a great number of countries the lock-out has become a more or less theoretical notion and there is no peremptory case law on it.

9.6. Mediation, Conciliation and Arbitration

All European countries have rules and/or institutions for mediation, conciliation and arbitration in collective labour disputes.

In a number of states most mediation, conciliation and arbitration is done based on the provisions in collective agreements or by public authorities on an ad hoc basis.

In other countries such rules and institutions are written down in Labour law legislation of Parliament.

Such rules and institutions are much developed in Sweden, while in a country like France, such rules and institutions, although abundantly present, play only a very marginal role.

As regards the other countries, some mediation, conciliation and arbitration are more voluntary than others.

9.7. Litigation

Since the right to strike is not an unlimited right, employers, employees and third parties have an interest in knowing whether a strike is legal or not.

In most countries in Europe employers may institute legal proceedings against the workers on strike. In several countries employers may also institute legal proceedings against union(s) organizing and/or supporting the strike,but in other countries (B, IR) this is not possible. In several Member States (BG, DE, NL, UK) also third parties (e.g., non-striking workers or interest groups of consumers) can summon trade unions or strikers to appear before a court to obtain a verdict on strike.

Although the usual remedy in civil litigation is monetary damages, in all countries, cases in which the employer or third parties seek compensation for damages caused by an illegal strike are rare. In quite a number of European countries, the injunction with prohibitory and mandatory orders has been the most frequently sought remedy for strikes by far. Frequently an injunction is sought with the sole purpose of forestalling the action and the employer or third party has no intention of going to a full trial to obtain damages and a permanent injunction. However, in several other European countries (BE, FR, GR, SE), injunctions to stop industrial action are not or only exceptionally part of the legal system.

10

10. WORKER INVOLVEMENT IN THE ENTERPRISE

10.1. Historic background

Traditionally, workers in Europe have been outsiders in the management of companies. Certainly, there have always been attempts to set up companies governed by the workers themselves – even as late as in the 19th century – but over the years only few of them have been successful.

The much more successful way of influencing managerial decision-making by workers, has been through the countervailing power of the trade unions, which are bodies outside the company.

Occasionally, 'enlightened employers' set up 'company councils' for their own work force. In 1891 in Germany the first legislation was adopted providing for the establishment of factory councils.

However, the Socialists and the trade unions mistrusted the councils as they saw them as a device to outflank them.

After the First World War, in 1920, in Germany, the ruling social democrats conceived a general system of *Betriebsräte*, works councils which, however, in the eyes of more dogmatic socialists and communists, was only a poor extract of their ideals.

This *Betriebsrätegesetz* was repealed by Hitler in 1934.

After World War II the idea of workers involvement in the company was revived. It was written in 1948 in the Italian Constitution (art. 46), but was never implemented in this country. It was realized in Germany in the 1950s.

Worker involvement in the enterprise became a major topic in the 1960s and 1970s in Western Europe. In countries like DE, NL, BE, FR, IT in those years systems of workers involvement in company affairs were upgraded. However, in most cases these systems offered the workers and their representatives only rights to information and consultation, few included workers' involvement in the (composition of) boardrooms.

Although many people were in favour of giving workers' representatives real co-determination rights, it was exactly this aspect of co-determination rights that proved an evergreen of ideological dissension and power struggle. While social democratic and Christian unions were canvassing for real worker co-determination, communist and socialist trade unions continued to reject worker co-determination in the fabric of capitalism.

Socially minded and pragmatic employers were open for certain forms of worker involvement, while die-hard capitalists opposed it.

Politicians were equally divided on the subject.

Because of this differences it took many decades before the EU could adopt Directives to give some (but not much) concretization in this field. Information and consultation of workers representatives have been recognized as a fundamental right at European level by the turn of the century when it was mentioned in the Revised ESC (art. 21) and in the EU Charter of Fundamental Rights (art. 27).

However, since the 1980s this issue has gradually been eclipsed by the processes of new forms of work at the labour market, the fragmentation of the firm and by globalization.

In most countries in Europe workers involvement in company affairs has now been stabilized on the aspects of information and consultation, while on the aspect of co-determination no further progress is made.

10.2. Single, dual and triple systems of workers' representatives

As a result of this historical development, quite a number of European countries (Germany, France, Poland, Hungary, Luxembourg and the Netherlands) now have at enterprise level a dual-channel system of workers' representatives: trade unions and works councils.

However, in a number of countries (Denmark, Italy, Ireland, Portugal and Britain) trade unions have remained the only or at least the main 'channel' of worker representation. They are confronting the employers by systems of "shop stewards".

However, we should not overemphasize the differences between single-channel and dual-channel systems. In many states with a dual-channel system of worker representations the works councils are dominated by activist trade union members. This is certainly so in Belgium, Germany, and Sweden, and to a lesser extent also in France, the Netherlands, Poland and Hungary.

Some countries have adopted combining institutions and procedures:

In a few countries there is (Spain) or was (France until 2020) even a triple system of worker representation in the enterprise.

Across Europe employee representation has emerged especially in matters of health and safety at the work place. In some countries, such representation is simply part of the system of shop stewards or works councils; in others, the workers concerned are workers' representations in their own right.

In cases that works council operate alongside union representatives, the various countries should delineate a boundary or a hierarchy between the works councils and the union representatives on possible points of conflict in the negotiations with management. In general, the trade unions have acquired priority, because in the eyes of most observes works councils are considered less mighty, less independent and less expedient than works councils.

The most used formulas for the hierarchy are:

(a) either that the works council may not at all conclude agreements about terms and conditions of employment, or

(b) that a works council may conclude such agreements only when a trade union does not exist in the enterprise, or on matters on which the collective agreement is silent, or on items where they make more

favourable conditions for the workers, or where the collective agreement or statutes explicitly allows them to set additional standards.

Everywhere this is a very delicate, political issue. In view of the tendency of decentralization and flexibility (see par. 8.3.a and 8.3.f) many politicians, economists and employers would like to stretch the importance of work councils as far as possible; trade unionists and other politicians are afraid of weakening the unions and want to limit this possibility.

10.3. Regulations on trade union rights in the enterprise

In all European countries worker involvement in the enterprise has become an important facet of labour law. In the course of time in the various countries a great variety of rules and practices has emerged concerning worker representation in the enterprise.

In a number of countries (notably IT) the law contains detailed prescriptions on the numbers, the rights, the prerogatives, the facilities and the protection of trade union representatives in the enterprise and trade union members. Facilities include paid time-off for trade union representatives, the check-off of union fees, the use of notice boards and/or the intranet and the availability of meeting places. Protection concerns protection against dismissal and victimization of leading trade union representatives and trade union members.

In other countries in Europe these precise provisions are often laid down in cross-sector collective agreements or in sector or company collective agreements. In the event of a plurality of trade unions the law has to deal with the question whether all trade unions are entitled to these facilities and rights or only some of them (the issue of representativity at company level, see par. 8.3.b).

10.4. Regulations on works councils

In the countries with works councils, the system of works councils is largely laid down in Acts of Parliament. In most countries special arrangements have been made for the works councils in small enterprises. Some countries have arrangements for a hierarchy of works councils. There are between the various European countries substantial differences as to how works councils are composed and how their members are elected.

As a result of the fragmentation on the labour markets and with an increasing number of people working in non-standard employment relationships, the question has come up to what extent and how the usual forms of employee representation can cover these workers. In most countries the law contains detailed prescriptions on the thresholds for the installment of works councils. The number of persons to be elected to the works council normally increases with the number of employees that have to be represented.

10.4.a. The EU rules on information and consultation

In all European countries that have works councils, the competences of the works councils have traditionally also been laid down in precise prescriptions in statutory law or in collective agreements. However, since the mid 1980s all Member States of the EU the workers' representation, be it workers councils or trade union representatives, are subject to minimum standards. A number of directives require the Member States to provide for information and consultation of the workers' representatives in case of collective redundancies (Dir. 98/59/EC), transfer of the enterprise (Dir. 2001/23/EC) and in health and safety matters (Dir. 89/391/EEC).

And since 2002 an EU Directive of 2002 (2002/14/EC) requires the Member States to set up mechanisms covering all large and medium-sized enterprises for the sake of the general information and consultation of the workers or their representatives. It sets out minimum requirements for the right to information and consultation of employees in either undertakings employing at least fifty employees or establishments employing at least twenty employees.

In these enterprises there should be:

- timely information on the development of the undertaking and the employment situation;
- timely consultation content thereof with a view to reaching an agreement.

The EU Directives on worker involvement have tried to take into account the differences in the national systems of industrial relations and have therefore left it to the EU Member States to choose the most appropriate way to implement the minimum requirements of information and consultation. Thus the Member states are free to allocate these competences to trade unions, works councils, cooperation bodies, workforce representatives, etc.

Thanks to these EU Directives all EU Member States now have at least a minimum level of information and consultation of workers' representatives inside the enterprise in common. This minimum level of worker involvement leaves ample room for additions and variations.

10.4.b. More rights for workers involvement in the company under domestic law

In all Member States of the EU the works councils, cooperation bodies and/or the trade union representatives have now acquired this minimum floor of rights, secured by statutes or collective agreements binding erga omnes.

In many Member States the national provisions are much more precise and elaborate then the provisions of the Directive, but in itself not much stronger. However, there are also various Member States of the EU were the worker representatives have substantially more competences than the minimum laid down in the EU Directives.

In these countries the workers' representatives have often stronger influence on management decisions in economic affairs.

And/or they have co-determination rights in social issues, such as work load, the organization of work, the hiring of temporary agency workers, employee evaluation, privacy arrangements, cultural and social activities/institutions for employees, monitoring of health and safety measures, etc.

In these countries management decisions in these matters are only possible on the basis of consensus with the workers' representatives.

In some countries (notably DE) the workers' representatives have also a say in individual dismissals, in the nomination of managers, etc. In many countries (NL, HU) there is a prohibition on employers to carry out a proposed action during the time of consultation or even a period after this.

Finally, several Member States have gone further and have granted workers some form of co-determination (see par. 10.6).

In a small number of European countries (notably IT) it are certain large employers notably state-owned, that take initiatives for new forms of employee involvement in company affairs.

10.5. Information and consultation of workers in multinationals

The EU has also adopted in 1994 a Directive on European Works councils, slightly improved by a Directive of 2009, on involvement of the employees in 'EU-scale' (groups of) undertakings. 'EU-scale' (groups of) undertakings (Dir. 2009/38/EC).

The Directive covers (groups of) undertakings that have at least 1,000 employees in the EU and at least two establishments in different EU Member States each employing at least 150 people.

The Directive also covers undertakings or groups of undertakings with headquarters outside the territory of the Member States, in so far as they meet the above conditions.

All these large multinationals are obliged either to establish a European Works Council (EWC) or to make the practical arrangements for an alternative procedure for information and consultation of employees.

The very flexible Directive does not immediately impose specific rules as to the nature, composition, competence and mode of operation of the EWC. It seeks to set in motion negotiations between management and labour within undertakings on whatever provisions are best suited to their own particular circumstances.

For this reason the Directive provides for the creation, at the initiative of the company or group management or at the written request of at least 100 employees or their representatives in at least two different Member States, of a temporary 'special negotiating body' (SNB) with the task of concluding an agreement between management and the employees' representatives on the scope, composition, powers and term of office of the EWC to be set up in the undertaking or group, or of the alternative procedure for information and consultation of employees.

It is left to the Member States to determine how the 'special negotiating body' should be composed and how its members are to be elected.

Where in this SNB no agreement is reached after two years (or within six months if central management refuses to commence negotiations), the Directive stipulates that the EWC be set up on the basis of minimum requirements set out in the Annex to the Directive. According to this Annex the EWC:

- is to have a minimum of three and a maximum of thirty members;
- should meet with central management at least once a year as well as in special circumstances;
- the costs of the EWC shall be borne by central management.

Even before the Directive was adopted in 1994 some multinational companies (e.g., Thomson, Bull and Volkswagen) had voluntarily agreed to establish an EWC.

Such voluntarily established councils were recognized by the Directive.

It blessed all agreements on the establishment of EWCs concluded before September 1996, even if they did not meet the minimum requirements laid down in the Annex to the Directive.

The agreements concluded after the EU Directive came into force, have establish EWCs that are largely framed on the minimum requirements laid down in the Annex to the Directive. This stands to reason, as management is seldom prepared to give up more of its powers than it is obliged to, and labour is not prepared to take less than it can obtain under the Directive.

So, at the end of the day the Directive has proven to be less flexible than was advertised and its Annex has very much standardized the new industrial relations phenomenon, the EWC.

All Member States currently have national laws in force which more or less sufficiently implement the 1994 EU Directive on EWCs and its 2009 Amendment Directive.

However, in practice not much than half the number of multinational enterprises that should have an European works council, have one.

10.6. Workers' influence in the boardroom

About workers' influence in the boardrooms of private companies there have been many dreams in the past.

Some have suggested to turn private companies in workers' cooperatives. The communists have tried to implement this idea by the Soviets, socialists have suggested Betriebsräte.

A now almost forgotten implementation has been in former Yugoslavia in the 1950s-1970s in its system of Worker Directors, much admired by leftist circles in the West.

In Western Europe, after the Second World War, *Mitbestimmung* was introduced in Germany.

As the English language does not have a proper equivalent for this phenomenon ('participation' and 'industrial democracy' are inadequate), the term co-determination by board-level employee representation will be used here.

Board-level is in itself a dubious term as many countries have a one-tier system in which there is one board consisting of executive and non-executive members, and countries that have a dual-tier-system with an supervisory board overseeing the executive board.

Mitbestimmung was imposed on Germany by the Allied occupying forces, which saw it as one of the ways to curb possible new Nazi developments.

Ultimately, three models of *Mitbestimmung* evolved in Germany:

- One for the coal, iron and steel industry (*Montanindustrie*), where employees may choose half of the Supervisory Board and appoint the Human Resources Director (*Arbeitsdirektor*) (*Montan-Mitbestimmungs-gesetz* 1951);
- In medium-sized enterprises (500-2,000 staff) employees may appoint one third of the Supervisory Board (1952, now in the *Drittelbeteiligungsgesetz*);
- In large companies (over 2,000 staff) employees may appoint half the members of the Supervisory Board, but the shareholders have a slightly more influential position (*Mitbestimmungsgesetz* 1976).

The other European countries have been slow to follow the German lead, but board-level-employee representation was eventually introduced in a number of other EU Member States.

By the end of 2003 seven out of the then fifteen EU Member States, comprising one third of the EU population of that time, had board-level employee representation in the private sector on their statute books.

Subsequently, the existing systems of board-level employee representation have been reproduced in a number of former Communist states in Central Europe.

At the end of the 1990s, Denmark, Sweden and Germany evaluated the existing systems of board-level employee representation and the conclusions were very favourable. Their systems are not a nuisance for the economic performance of these countries.

Nevertheless, in a major part of the countries in Europe, such as BE, FR, ES, IT and the UK, there is no legislation for participation of employees in (composing) the top management of the company, notably because the national trade union movement and politics have always been much divided on the issue.

When the EU wanted to create single legal persons called the European Company (Societas Europea) (Dir. 2001/86/EC) and the European Cooperation (Dir. 2003/72/EC), the great differences on the point of board-level employee representation turned out to be a major stumbling block.

Finally, this problem was tackled by an ingenious solution, which ensures that existing national provisions cannot be undermined.

According to this solution employees representation at board level is only mandatory where such participation is a substantial feature of the national law applicable to one or more of the founding companies

In these cases the European Company/Cooperation must have board-level employee representation to the maximum proportion of employee representation in the founding companies.

10.7. Employee participation through share ownership by employees

Conservative circles often advocate systems of worker participation in the enterprise through the possession of shares by employees.

This was first propagated on a large scale by the French government in the 1960s, and companies with more than fifty employees have to negotiate with the trade unions, the works council or the workforce representatives on a scheme for financial participation (art. 3322 CdT).

In Great Britain the Conservative government (1979-1997) promoted such schemes primarily through fiscal means and through its generous grant of shares to employees during the privatization of public enterprises.

The EU Council of Ministers in 1992 adopted a Recommendation on the promotion of schemes on employee participation in profits and enterprise results. According to this Recommendation, the Member States are encouraged to promote the use of these schemes, *inter alia*, by ensuring adequate legal structures for them and by considering fiscal and other incentives.

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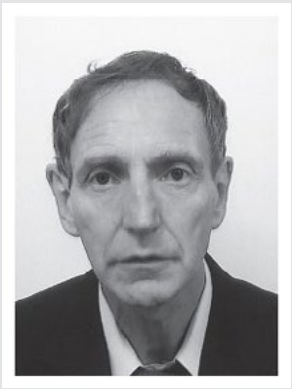

The ongoing globalization of the economy and the entanglement of the economies of the EU Member States increasingly make comparisons between the labour law systems in Europe necessary. This book aims to provide a key to such comparative research.

The author, Prof. Antoine Jacobs, is emeritus professor in labour law, social insurance law and social politics at Tilburg University, the Netherlands, where he still teaches a course in Comparative Labour Law.

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