EU Labour Law in Flux – Hard, Soft or Fundamental?

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1. Introduction

These are difficult times. Not only is EU labour law in flux, but recent developments reflect that EU law, and the EU as a whole, are fundamentally challenged – by Brexit, a perceived conflict between the EU and national sovereignty and increased division in Europe; by the refugee situation and increased ethnocentrism and xenophobia; by terror attacks, fear and hostility; and, by unemployment, inequality, poverty and social exclusion in the aftermath of the economic crisis.[1]

These developments, and a sense of urgency, are also reflected in recent influential international and European scholarly debates on the crisis, ideas and foundations of labour law, as well as on the scope of labour law (most recently manifested in critical analyses of crowdsourcing and work in the 'gig-economy' as a new form of labour market flexibility, often beyond the scope of labour law).[2]

The aim of this paper is to discuss some current important EU labour law developments and reflect on them from the perspective of the role of hard law, soft law and fundamental rights in EU law, as well as from the perspective of the interplay between EU labour law and national labour law and industrial relations. In focus here are free movement and posting of work; employment policy, austerity and the proposal for a European Pillar of Social Rights; and the EU Charter of Fundamental Rights.

The labour law and industrial relations systems of the EU Member States vary as regards, for example, the importance of constitutional law and fundamental rights; the balance between legislation and collective bargaining; the degree of state intervention or voluntarism; the role of the courts; the degree of trade union organization and forms of workers' representation;

[1] Cf., for example, European Commission, Commission Staff Working Document, *Key economic, employment and social trends behind a European Pillar of Social Rights*, SWD(2016) 51 final, p. 20.

[2] See, for example, G. Davidov and B. Langille, *Boundaries and Frontiers of Labour Law. Goals and Means in the Regulation of Work* (Hart, 2006), G. Davidov and B. Langille, *The Idea of Labour Law* (Oxford University Press, 2011)), M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011), M. Freedland and N. Countouris, *Resocialising Europe in a Time of Crisis* (Cambridge University Press, 2013), R. Dukes, *The Labour Constitution. The Enduring Idea of Labour Law* (Oxford University Press, 2014). – On crowdsourcing and the 'gig-economy', see, for example, the Special Issue on 'Crowdsourcing, the Gig-Economy and the Law' in the *Comparative Labor Law & Policy Journal*, Vol. 37(3), 2016.

and the coverage, design and degree of centralization or decentralization of the collective bargaining system.[3] EU labour law is an area of shared competence, and aims for a partial harmonization of the Member States' labour law and industrial relations systems. The legal framework for the adoption of EU labour law rules has changed a number of times, and Treaty competence has gradually expanded.[4] The traditional 'Community method' whereby the Commission proposes legislative – *hard law* – measures and the Council and European Parliament adopt them is important in EU labour law. The main body of EU labour law is made up of Directives, which provide flexibility in relation to the variety of national labour law and industrial relations systems, and by now secondary law has become well-developed.[5]

In 2009 the Lisbon Treaty strengthened the *fundamental rights*, made the EU Charter of Fundamental Rights legally binding and part of primary law, stated that the EU is to accede to the European Convention of Human Rights (ECHR) and introduced social market economy as one of the main aims of the EU. Thus the Treaties confirm the economic and social objectives of the EU and Article 3(3) TEU states that

> [t]he Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. … It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

According to Article 151 TFEU the Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers, shall have

> the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion

as their objective. However, even though the competence of the EU covers areas such as non-discrimination, equality between men and women, health and safety, working conditions, employment protection, and information, consultation and worker participation, it is still limited.[6] Central aspects of national labour law and industrial relations systems, such as pay, the right of association, the right to strike and the right to impose lock-outs, are excluded from

[3] Reference is often made to the Romano-Germanic system, the Anglo-Irish system and the Nordic system of industrial relations. Within the Romano-Germanic system the southern Mediterranean states display some specific characteristics, as do the countries which joined the EU as part of the enlargement since 2004. See, for example, B. Hepple and B. Veneziani (eds), *The Transformation of Labour Law in Europe. A comparative study of 15 countries 1945–2004* (Hart, 2009).

[4] See Barnard, More and Bell in P. Craig and G De Búrca (eds), *Evolution of EU law*, 1st and 2nd edns (Oxford University Press, 1999 and 2011) on the evolution of EU labour law, cf. also A. Numhauser-Henning and M. Rönnmar (eds), *Normative Patterns and the Legal Development of the Social Dimension of the EU* (Hart, 2013).

[5] Directives may be implemented in the Member States by legislation or by the social partners and collective bargaining; however, in the latter case it remains the responsibility of the Member States to guarantee that individuals are afforded the rights and full protection provided by the Directive. See Article 155 TFEU and Case C-187/98 *Commission v. Greece* [1999] ECR I-7713 and Case 143/83 *Commission v. Denmark* [1985] ECR 427.

[6] To adopt Directives on the basis of Article 19 TFEU and Article 153(1)(c), (d), (f) and (g) unanimity is required, while to adopt Directives on the basis of Article 157 TFEU and the other parts of Article 153 qualified majority is required.

the EU's competence to adopt Directives[7] – though not from the scope of EU law; this reflects a difference – and tension – between the legislative and the judicial competence of the EU in this area.

The Commission is pursuing a 'Better Regulation Agenda',[8] including a Regulatory Fitness and Performance Programme (REFIT), which aims at reviewing EU legislation through 'fitness checks' in order to keep the regulation 'fit for purpose'; the objective is to 'identify excessive burdens, overlaps, gaps, inconsistencies and/or obsolete measures which may have appeared over time'.[9] The focus on efficiency and cost-cutting also taking place in the employment and social policy field has been criticized and debated. The first 'fitness check' in the labour law field involved information and consultation and the Directives on collective redundancies (98/59/EC), transfers of undertakings (2001/23/EC) and a general framework for information and consultation (2002/14/EC). The Commission concluded in 2013 that the Directives were broadly fit for purpose and generally relevant, effective, coherent and mutually reinforcing.[10]

The Maastricht Treaty introduced the European social dialogue and a collective route to hard law and legislation at Union level.[11] Social dialogue takes place at cross-industry and sectoral level. A number of agreements have been reached at cross-industry level, for example agreements on parental leave, part-time work and fixed-term work. These agreements can be implemented either through a decision by the Council and a Directive, or by the social partners themselves.[12] The output of social dialogue is not only hard law agreements though, but also different kinds of soft law documents, such as guidelines, declarations, framework of actions etc.

The European social partners' fifth bipartite work programme for 2015–2017 aims to improve the functioning of labour markets.[13] The common goals are to create inclusive growth and employment but also to strengthen Europe's position in the global economy, while fostering prosperity and social cohesion within Europe. The Commission together with the European social partners have launched a new start for social dialogue aimed at a more substantial involvement of the social partners in the European Semester, a stronger emphasis on capacity-building of national social partners, strengthened involvement of social partners in EU policy

[7] Article 153(5) TFEU.

[8] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Better regulation for better results – and EU agenda*, COM(2015) 215 final.

[9] See European Commission, *Commission Work Programme 2010. Time to Act*, COM(2010) 135 final, p. 10 f. and European Commission, Commission Staff Working Document, *Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook*, SWD(2015) 110 final.

[10] European Commission, *Commission Staff Working Document. 'Fitness check' on EU law in the area of Information and Consultation of Workers*, SWD(2013) 293 final. – However, a number of issues in need of further examination and discussion were identified, and the Commission initiated consultations with the European social partners on a possible consolidation of the Directives; see European Commission, *First phase consultation of Social Partners under Article 154 TFEU on a consolidation of the EU Directives on information and consultation of workers*, C(2015) 2303 final.

[11] See C. Welz, *The European Social Dialogue under Articles 138 and 139 of the EC Treaty* (Kluwer Law International, 2008). – Article 152 TFEU now also states that the EU recognizes and promotes the role of the European social partners, and shall facilitate dialogue between the social partners.

[12] Article 155(2) TFEU.

[13] See the *2015–2017 Work Programme of the European Social Partners. Partnership for inclusive growth and employment*, entered into by BUSINESSEUROPE, CEEP, UEAPME and ETUC.

and law-making and a clearer relation between social partners' agreements and the better regulation agenda.[14]

The Court of Justice of the European Union (CJEU) – and the interplay between the CJEU and national courts – play key roles in EU labour law, and case law has contributed greatly to the development of EU labour law. The principles and rules developed by the CJEU in case law have often later been codified in secondary law and Directives. The CJEU has both strengthened the protection of individual employees and favoured free movement and economic integration before labour law and social protection.

Soft law is increasingly important in EU labour law, both as a complement and alternative to hard law. The European Employment Strategy was introduced in 1997 through the Amsterdam Treaty, and labour law is since seen as an integrated part of employment policy. Through soft law and the open method of coordination, not only employment policy but also aspects linked to social security, such as old age pensions, social inclusion and social protection, have been further developed.

The outline of the paper is as follows. Sections 2, 3 and 4 discuss free movement and posting of work; employment policy, austerity and the proposal for a European Pillar of Social Rights; and the EU Charter of Fundamental Rights, respectively. Section 5 provides some concluding remarks.

2. EU labour law, free movement and posting of work

Free movement of persons, goods, services and capital, the fundamental economic Treaty freedoms, form the basis of the European Union and EU law. Posting of work – an expression of the freedom to provide services – is one aspect of free movement and cross-border labour mobility within the EU that has been much debated in recent years. Hard law regulation in this area – by way of legislation and case law developments – reflect a basic tension between free movement and social protection. In 2014 there were 1.9 million postings in the EU, which represents 0.7 percent of the total EU labour force. Between 2010 and 2014 there was a 44.4 percent increase in the number of postings.[15] Labour mobility comes in different shapes and forms and includes also, for example, employees making use of their free movement as workers and self-employed persons making use of their freedom of establishment and freedom to provide services.[16] In recent years increased attention has been paid to labour migration into the EU, and to the intersection of – and possible conflict between – labour law and migration law, and to the legal position and vulnerability of third country nationals migrating to the EU.[17]

[14] See *A New Start for Social Dialogue*, Statement of the Presidency of the Council of the European Union, the European Commission and the European Social Partners, 27 June 2016.

[15] See European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services*, COM(2016) 128 final, p. 2.

[16] A related, and in recent years much discussed, issue is the CJEU case law on Union citizenship, free movement, right of residence and the coordination of social security benefits. See, for example, Case C-333/13 *Elisabeta Dano, Florin Dano v Jobcenter*, EU:C:2014:2358 and Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic, Sonita Alimanovic, Valentina Alimanovic, Valentino Alimanovic*, EU:C:2015:597.

[17] See, for example, C. Costello and M. Freedland (eds), *Migrants at Work. Immigration and Vulnerability in Labour Law* (Oxford University Press, 2014).

Free movement, labour mobility and the access to social benefits was a key issue in UK Prime Minister Cameron's renegotiations with the EU as well as in the debate in the lead up to the Brexit-referendum. In this paper there is unfortunately no room for discussing the complex challenges and problems connected to Brexit – linked also to labour law and industrial relations – or the many difficult legal issues (for example, connected to Article 50 TEU) that now have to be resolved.[18]

Posting of workers is regulated in Article 56 TFEU and the (1996/71) Posted Workers Directive.[19] Case law from the CJEU serves as an important background to the Directive.[20] A restriction of the free movement of services may be accepted only if justified by overriding reasons of public interest, and if proportional, i.e. if the measure is suitable for securing the attainment of the objective pursued and does not go beyond what is necessary in order to attain it.[21] The Posted Workers Directive is adopted on a free-movement Treaty base,[22] and has a twofold aim: to enable the free movement of persons and services, and to provide protection for workers in the case of the posting of workers and the transnational provision of services.[23] Article 3 of the Posted Workers Directive lays down the nucleus of mandatory rules for minimum protection, which the host Member State must ensure (regardless of the law applicable to the employment relationship) that the undertakings guarantee to workers posted to their territory. The terms and conditions in question can be laid down by law, regulation, or administrative provision, and/or by collective agreements or arbitration awards declared universally applicable within the meaning of Article 3(8). The nucleus covers terms and conditions of employment regarding, for example, maximum work periods and minimum rest periods, minimum paid annual holidays, the minimum rates of pay, health, safety and hygiene at work, and equality of treatment between men and women and other provisions on non-discrimination. Article 3(7) states that it will not prevent application of terms and conditions of employment which are more favourable to workers.[24]

In focus in the *Viking* and *Laval* case law,[25] on the one hand, are freedom of establishment and free movement of services, and, on the other hand, national collective labour law and industrial relations systems and fundamental trade union rights, such as freedom of association, the right to collective action and right to collective bargaining.

[18] See P. Craig, 'Brexit: A Drama in Six Acts', *European Law Review*, August 2016, Oxford Legal Studies Research Paper No. 45/2016.

[19] Cf. also the (2006/123/EC) Services Directive, which relationship to labour law was controversial before its adoption. In the end, Article 1(7) of the Services Directive states that '[t]his Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law'.

[20] See, for example, Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417.

[21] Cf., for example, Case C-76/90 *Säger* [1991] ECR I-4221, para. 12 and Case C-55/94 *Gebhard* [1995] ECR I-4165.

[22] Articles 57(2) and 66 EC, now Articles 53(1) and 62 TFEU.

[23] Preamble, recitals 1, 2 and 5. – A posted worker is a worker who ' for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works' (Article 2 (1)).

[24] According to Article 3(10), the Directive shall not preclude the application by Member States, in compliance with the Treaty, of terms and conditions of employment on matters other than those covered by the nucleus of mandatory rules for minimum protection in the case of public policy provisions, on a basis of equality of treatment.

[25] See Cases C-438/05 *Viking*, EU:C:2007:772 and C-341/05 *Laval*, EU:C:2007:809.

In both cases the CJEU declared that collective action falls within the scope of the Treaty, and that Articles 56 and 49 TFEU can be invoked against trade unions.[26] The CJEU, with reference to Article 28 of the EU Charter of Fundamental Rights, also recognised the right to take collective action as a fundamental right which forms an integral part of the general principles of Union law. However, the exercise of the right to collective action may be restricted. The Court concluded in *Laval* that the collective action constituted a restriction on the free movement of service. The right to take collective action for the protection of the workers of the host State against social dumping may constitute an overriding reason of public interest. However, the specific obligations linked to the signature of the collective agreement in the building sector in *Laval* (also going beyond the nucleus of mandatory rules for minimum protection in Article 3(1) of the Directive) could not be justified as necessary to attain such an objective. Similarly, in *Viking*, the CJEU found that the collective action constituted a restriction on the freedom of establishment. When it came to justification and proportionality the Court left the assessment to the national court.[27]

Viking and *Laval* have been interpreted as putting fundamental Treaty freedoms and economic integration first, and trade union rights and social integration, second.[28] The *Laval*, *Rüffert*[29] and *Commission v Luxembourg*[30] case law also clarified that the Posted Workers Directive establishes only a minimum protection of a nucleus of mandatory rules, and does not provide for equal treatment of domestic and foreign employers, as a means of combating social dumping. Thus, the Directive is not only a minimum Directive, but also a maximum Directive, establishing a 'ceiling' for the terms and conditions of employment that a trade union or a state may require foreign service providers to apply to employees.[31]

The *Viking* and *Laval* case law caused a huge debate. Early on proposals were put forward for the need to revise the Posted Workers Directive or to revise the Treaty. Some Member States also had to reform their laws on collective action and posted work, especially those building

[26] This is the case even though the right to strike is excluded from the EU's competence to adopt Directives according to Article 153(5) TFEU.

[27] However, the CJEU provides some guidance, and points to the importance of whether the jobs and conditions of employment of the trade union members on board the ship were jeopardized or under serious threat, and whether, under the national rules and collective agreements, the trade union did not have other means at its disposal which are less restrictive on freedom of establishment.

[28] See, for example, A. Davies, 'One Step forward Two Steps back? The Viking and Laval Cases in the ECJ', *Industrial Law Journal*, Vol. 38(2) (2008) 126 and M. Rönnmar, 'Free movement of services vs national labour law and industrial relations systems: understanding the Laval case from a Swedish and Nordic perspective' in C. Barnard (ed.), *Cambridge Yearbook of European Legal Studies* 2007–08.

[29] Case C-346/06 *Rüffert* [2008] ECR I-1989. – Cf. also Case C-271/08 *Commission v Germany*, EU:C:2010:246 on public procurement and collective agreements and Case C-115/14 *RegioPost GmbH & C. KG v Stadt Landau in der Pfalz*, EU:c:2015:760 on public procurement and posting of work.

[30] Case C-319/06 *Commission v. Luxembourg* [2008] ECR I-4323.

[31] The more recent Finnish case, Case C-396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa spólka Akcyjna*, EU:C:2015:86, highlights the possibility (under certain circumstances) of trade unions in the host state to bring actions to court on behalf of posted workers in order to recover their pay claims in relation to the minimum rates of pay as regulated by the Posted Workers Directive. On the interpretation of the concept of minimum rates of pay in Article 3(1) the CJEU stated that 'the task of defining what are the constituents elements of the minimum wage, for the application of [the Posted Workers Directive], is a matter for the law of the Member States of the posting, but only in so far as that definition, as it results from the relevant national law or collective agreements or from the interpretation thereof by the national courts, does not have the effect of impeding the freedom to provide services between Member States' (para. 34).

on autonomous collective bargaining, such as Denmark and Sweden.[32] The Commission initially concentrated on issues of transparency, enforcement and research and analysis.

Another important development was the reorientation of the ECtHR case law regarding freedom of association. In two important decisions, *Demir and Baykara v. Turkey* and the case of *Enerji Yapi-Yol Sen v. Turkey*,[33] the ECtHR aligned its case law with ILO Conventions No 87 on freedom of association and protection of the right to organise, and No 98 on right to organise and collective bargaining, as well as the Council of Europe's European Social Charter. The freedom of association, as protected by Article 11 of the ECHR, is now said to comprise the right to bargain collectively and the right to industrial action as well.[34] The ILO Committee of Experts, in response to a complaint by the trade union in the BALPA case (a British industrial dispute, illustrating how trade unions can face the threat of employer claims for massive damages for breach of EU law), observed with '*serious concern* the practical limitations on the effective exercise of the right to strike of the BALPA workers in this context' and declared that 'the doctrine that is being articulated in these judgements [*Viking* and *Laval*] is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention'.[35] These developments prompt the question: are EU law, and national labour law implementing EU law, in coherence with international labour law, such as ILO Conventions, the ECHR and the European Social Charter?

The Lisbon Treaty, with its emphasis on social market economy and fundamental rights, set partly a new scene. In 2012 the Commission put forward two proposals, a proposal for a 'Monti II' Regulation on the exercise of the right to take collective action in the context of freedom of establishment and the freedom to provide services, and a proposal for a Directive on the enforcement of the Posted Workers Directive.[36] The proposal for a 'Monti II'

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[32] On legal implications of *Viking* and *Laval* in different national contexts, see, for example, E. Ales and T. Novitz (eds), *Collective Action and Fundamental Freedoms in Europe: Striking the Balance* (Intersentia, 2010) and M. Freedland and J. Prassl (eds), *EU Law in the Member States: Viking, Laval and Beyond.* (Hart Publishing, 201. – In the final judgment in the *Laval* case the Swedish Labour Court, controversially and without explicit support in EU law, found the trade unions liable for damages for their unlawful collective action.

[33] Judgment of the 12 November 2008 and Judgment of the 21 April 2009. See, for example, K. D. Ewing & J. Hendy, 'The Dramatic Implications of Demir and Baykara', *Industrial Law Journal* Vol. 39(1) (2010) 2.

[34] See, however, also *RMT v UK*, judgment of 8 April 2014. Kilpatrick remarks in this relation that '[a]lthough the ECtHR found … no violation of Article 11 in challenges to ballot notices and secondary action, it stressed the fact-bound nature of its decision-making, unlike the broader more general assessments which can be undertaken by the ECSR and ILO supervisory bodies [98]. This suggests careful selection of future Article 11 cases from the UK and a 'small-steps' strategy', see C. Kilpatrick, 'Has Polycentric Strike Law Arrived in the UK? After *Laval*, After *Viking*, After *Demir*?', *the International Journal of Comparative Labour Law and Industrial Relations*, Vol. 30(3), 2014, pp. 293–318.

[35] Cf. also in 2013 the similar opinion of the ILO Committee of Expert in relation to the Swedish post-*Viking* and *Laval* legislation and the final judgment by the Swedish Labour Court in the *Laval* case, stating damage liability for the trade unions, the ILO Committee of Experts, *2013 General Report on the Application on Conventions and Recommendations*, Sweden, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). – The European Committee of Social Rights, supervising the European Social Charter, decided in relation to a collective complaint made by Swedish trade unions in relation to the same legal developments that there was a violation of the right to bargain collectively (Article 6§2), the right to collective action (Article 6§4) and the right of migrant workers to treatment not less favourable (Articles 19§4a and 19§4b), Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employee (TCO) v. Sweden, Complaint No. 85/2012.

[36] See COM(2012) 130 and COM(2012) 131. See also M. Monti, *A New Strategy for the Single Market at the Service of Europe's Economy and Society: Report to the President of the European Commission José Barroso*, 2010.

Regulation was withdrawn by the Commission after hard criticism and opposition by many Member States' Parliaments on grounds of subsidiarity.[37]

The (2014/67/EU) Enforcement Directive was adopted in 2014 and establishes a common framework of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of the Posted Workers Directive.[38] The Enforcement Directive aims to guarantee respect for an appropriate level of protection of the rights of posted workers (in particular the enforcement of the terms and conditions of employment in Article 3 of the Posted Workers Directive), while facilitating the exercise of the freedom to provide services for service providers, promoting fair competition between service providers, and supporting the functioning of the internal market (Article 1(1)). The Enforcement Directive shall not affect the exercise of fundamental rights, including the right to strike, to collective action and to collective bargaining (Article 1(2)). The Enforcement Directive increases the Member States' ability to monitor working conditions and enforce the rules (for example, by listing national control measures that may be applied and by laying down rules to improve administrative cooperation between national authorities) and addresses so-called 'letter-box companies' and the assessment of whether a person falls within the definition of a posted worker.[39]

The Juncker Commission announced in its Political Guidelines and later confirmed in its Work Programme 2016 that they would present a targeted revision of the Posted Workers Directive to address unfair practices leading to social dumping and brain drain by ensuring that the same work in the same place is rewarded by the same pay.[40] On 8 March 2016 the Commission presented a proposal for a targeted – or piecemeal – revision of the Posted Workers Directive.[41] According to the Commission the revision of the Posted Workers Directive and the Enforcement Directive are complementary and mutually reinforcing.[42]

Importantly the proposal addresses the rates of pay a posted worker is entitled to, long-term posting and temporary work agencies.[43]

The proposal provides that mandatory rules on remuneration[44] – not only minimum rates of pay – applicable to local workers, stemming from law or collective agreements universally

[37] In line with Protocol No 2 to the Treaties on the application of the principles of subsidiarity and proportionality, the so-called 'yellow card-procedure'.

[38] The Enforcement Directive must be transposed into national law in the Member States by 18 June 2016.

[39] According to Article 4 the competent authorities of the Member States shall, for the purpose of implementing, applying and enforcing the Posted Workers Directive, make an overall assessment of all factual elements that are deemed to be necessary, including, in particular, a list of elements set out in Article 4. Those elements are intended to assist competent authorities when carrying out checks and controls and where they have reason to believe that a worker may not qualify as a posted worker under the Posted Workers Directive. Those elements are indicative factors in the overall assessment to be made and therefore shall not be considered in isolation.

[40] See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Commission Work Programme 2016. No time for business as usual*, COM(2015) 610 final, p. 8.

[41] On 2 March 2016 the European social partners sent a joint letter to the Commission asking, without result, for a more robust social partner consultation on the revision of the Posted Workers Directive and a delay in publishing the proposal.

[42] See COM(2016) 128 final, p. 3.

[43] See COM(2016) 128 final and European Commission, Communication from the Commission to the European Parliament, the Council and the National Parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2, COM(2016) 505 final.

[44] When it comes to the concept of remuneration the Commission refers to the Case C-396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa spólka Akcyjna*, EU:C:2015:86, see n 31.

applicable within the meaning of Article 3(8), are also applicable to posted workers (and rules set by universally applicable collective agreements are applicable to posted workers in all economic sectors). Furthermore, in the interest of transparency the Member States must publish information on the constituent elements of remuneration.[45]

When it comes to long-term posting the proposal provides that whenever the anticipated or effective duration of posting exceeds 24 months the host Member State is deemed to be country in which the work is habitually carried out. According to the (593/2008) Rome I Regulation the labour law of the Member State will then apply to the employment contracts of such posted workers (if no other choice of law was made by the parties).[46]

The conditions to be applied to cross-border temporary work agencies must be those that, pursuant to Article 5 of the (2008/104) Temporary Agency Work Directive, are applied to national temporary work agencies.[47]

BusinessEurope declared that it was against the Commission's decision to revise the Posted Workers Directive, arguing *inter alia* that it will 'trigger a period of debate and political divisions between Member States in times when the EU needs actions promoting unity' and that the proposal is 'an attack on the single market'.[48] The ETUC appreciated the Commission's intentions and efforts but held that 'the solution proposed is not satisfactory. It is equal pay that many posted workers will never get'.[49]

In the process leading up to the presentation of the proposal a number of Member States (including, for example, France, Germany and Sweden) in a joint letter expressed support for a revision of the Posted Workers Directive establishing the principle of 'equal pay for equal work in the same place'. A number of other Member States that joined the EU in 2004 or thereafter (including, for example, Bulgaria, Poland, Slovakia and Romania) in a joint letter argued that a review of the Posted Workers Directive was premature and should be postponed until after the deadline of the implementation of the Enforcement Directive.[50]

Protocol No 2 to the Treaties on the application of the principles of subsidiarity and proportionality allows national Parliaments to issue reasoned opinions when they consider that a legislative proposal does not comply with the principle of subsidiarity. When these reasoned opinions represent at least one third of all the votes allocated to them, the proposal must be reviewed by the Commission, where after the Commission may decide to maintain, amend or withdraw the proposal, and must give reasons for its decision.[51] This process was triggered when fourteen chambers of national Parliaments[52] sent reasoned opinions to the Commission. The subsidiarity arguments raised were the following: the existing rules are sufficient and adequate; the EU is not the adequate level of action; the proposal fails to explicitly recognize the Member States' competences on remuneration and conditions of

[45] Amendments to existing Article 3. – Where Member States in accordance with their national rules and practices require undertakings to subcontract only with undertakings that grant workers the same conditions on remuneration as those applicable to the contractor, the proposal for a revised Posted Workers Directive allows Member States to apply such rules equally to undertakings posting workers to their territory.

[46] Insertion of a new Article 2a.

[47] Amendment to existing Article 3.

[48] BusinessEurope, *Revision of the Posting of Workers Directive – BUSINESSEUROPE position*, Position Paper, 17 May 2016.

[49] ETUC, *Posted Workers revision – equal pay for some*, www.etuc.org, 8 March 2016.

[50] See COM(2016) 128 final, p. 4.

[51] See COM(2016) 505 final.

[52] In Romania, the Czech Republic, Poland, Lithuania, Denmark, Croatia, Latvia, Bulgaria, Hungary, Estonia and Slovakia.

employment; and the subsidiarity justification is too succinct.[53] In the Commission's assessment of these arguments it emphasized, for example, that the proposal did not aim to align wages across Member States and that individual action by the Member States could not achieve the objective of bringing legal consistency through the internal market and clarity to the legal framework for posted work. On 20 July 2016 the Commission concluded that the proposal complied with the principle of subsidiarity enshrined in Article 5(3) TEU, wherefore the proposal was maintained.

3. EU labour law, employment policy, austerity and the European Pillar of Social Rights

The European Employment Strategy was introduced in 1997 through the Amsterdam Treaty and is now regulated by Title IX Employment of the TFEU. Labour law is seen as an integrated part of *employment policy*, and the Member States and the Union shall according to Article 145 TFEU

> work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 3 of the Treaty on European Union.

Today the European Employment Strategy forms part of the Europe 2020 Strategy and is implemented through the open method of coordination, the European Semester and the Integrated Guidelines. The Europe 2020 Strategy puts forward three mutually reinforcing priorities: smart growth, sustainable growth and inclusive growth, and integrates the EU flexicurity strategy.[54]

The implementation of the European Employment Strategy involves four elements: 1) employment guidelines, common priorities and targets for employment policies (proposed by the Commission and adopted by the Council); 2) joint employment report, based on the assessment of the employment situation in Europe and the implementation of the Employment Guidelines (published by the Commission, adopted by the Council); 3) National Reform Programmes (submitted by national governments, analysed by the Commission for compliance with the Europe 2020 Strategy); 4) Country Reports and Country-specific recommendations (published by the Commission, based on an assessment of the National Reform Programmes).[55]

The economic crisis – with resultant high unemployment (especially youth unemployment), increased inequality and poverty and social unrest – has resulted in *austerity* and an increased fiscal and employment policy coordination. The Commission's assessment of the Member

[53] COM(2016) 505 final, p. 5.

[54] The Council has adopted Common Principles of Flexicurity. Flexicurity is about combining flexibility for employers and security for employees, and aims at reducing labour market segmentation and increasing economic growth. The EU flexicurity strategy has been criticized for focusing too much on flexibility, and includes flexible and reliable contractual arrangements, effective active labour market policies, reliable and adaptable systems for lifelong learning, and modern social security systems. See COM(2007) 359 final and M. Rönnmar, 'Flexicurity the notion of equal treatment and labour law' in M. Rönnmar (ed.), *Swedish Studies in European Law. Labour Law and Social Security Law*, Vol. 4 (Hart Publishing, 2011).

[55] See D. Ashiagbor, *The European Employment Strategy. Labour Market Regulation and New Governance* (Oxford University Press, 2005) for a detailed and interdisciplinary analysis of the European Employment Strategy.

States' employment policy and National Reform Programmes covers labour law and industrial relations, and (draft and final) Country-specific recommendations to the Member States have contained deregulatory elements targeted at employment protection, wage setting, collective bargaining and industrial relations and caused controversy and opposition.

Initially, Member States put in place crisis-related measures, such as internal flexibility, short-time working arrangements and wage concessions. The 'Eurozone' and sovereign debt crisis later led to fundamental financial and governance reforms at EU level and to far-reaching austerity measures and deregulatory labour law reforms in many Member States.[56] These measures targeted, for example, employment protection, collective bargaining and wage setting – all central to labour law and industrial relations systems.[57] The Member States that were given 'bail-out' packages by the 'Troika' (the European Commission, the European Central Bank and the IMF) were particularly affected. The Memoranda of Understanding accompanying these 'bail-out' packages specify which labour law and labour market reforms are to be considered and introduced.

The austerity measures have been legally challenged at several levels – in national constitutional courts, in the CJEU and in international human rights bodies, such as the ILO and the Council of Europe.[58] An important question is what relevance the EU Charter of Fundamental Rights, and fundamental rights of equality before the law, non-discrimination, protection against unjustified dismissal, fair and just working conditions and collective bargaining, have in this context? A number of preliminary references have also been made to the CJEU related to austerity measures. In the case *Sindicato dos Bancários do Norte*[59] the Portuguese legislation introducing salary reductions for certain public-sector workers was questioned on the basis of the EU Charter of Fundamental Rights and equality, non-discrimination and fair and just working conditions. However, the CJEU, without much reasoning, found that it lacked jurisdiction, and the Court has refused to apply the Charter in similar cases (Section 4).[60]

At the same time, other courts and supervisory bodies within the framework of the Council of Europe and the ILO have advanced the protection of social rights and criticized the EU emphasis on economic freedoms. In 2011 the ILO sent a specific High Level Mission to Greece and the ILO Committee of Experts, in its General Report on the Application on Conventions and Recommendations, has expressed concern about the Greek developments in relation to Conventions No 87 and No 98 and the freedom of association and right to collective bargaining. The Committee

[56] See, for example, C. Barnard, 'The Financial Crisis and the Euro Plus Pact: a labour lawyer's perspective', *Industrial Law Journal*, 2012, Vol. 41, 98, S. Deakin and A. Koukiadaki, 'The sovereign debt crisis and the evolution of labour law in Europe' in N. Countouris and M. Freedland (eds), *Resocialising Europe in a Time of Crisis*, Cambridge University Press (Cambridge, 2013), 163 and K. Armingeon and L. Baccaro, 'Political economy of the sovereign debt crisis: The limits of internal devaluation', *Industrial Law Journal*, Vol. 41, 2012, 254.

[57] See, for example, S. Clauwaert and I. Schömann, *The crisis and national labour law reforms: a mapping exercise*, ETUI WP 2012:04 (ETUI, 2012).

[58] In the *Pringle* case the European Stability Mechanism was challenged, and found lawful by the CJEU, see Case C-370/12 *Pringle*.

[59] Case C-128/12 *Sindicato dos Bancários do Norte.*

[60] Cf. also Cases C-434/11, C-134/12, and C-264/12. See further C. Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They are Not EU Law?', *European Constitutional Law Review*, Vol. 10, 2014, pp. 393–421 and C. Barnard, 'The Charter in time of crisis: a case study of dismissal' in N. Countouris and M. Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge University Press, 2013), 250.

> observes with deep concern that [the reforms of collective bargaining and negotiations structures] are likely to have a significant – and potentially devastating – impact on the industrial relations system in the country.

The European Committee of Social Rights, in relation to a number of collective complaints, has found, for example, some Greek reforms to be in violation of the right to a fair remuneration and the right to social security according to the European Social Charter.

In March 2016 the Commission launched consultations on a proposal for a *European Pillar of Social Rights*.[61] This initiative was announced by President Juncker in his State of the Union address in September 2015, and was included in the Commission 2016 Work Programme and its work for a deeper and fairer EMU. It is set against, for example, the need to overcome the economic crisis and its negative implications and the aim to achieve a highly competitive social market economy where social policy reduces inequality and maximizes job creation.

The purpose of the European Pillar of Social Rights is to express a number of essential principles to support well-functioning and fair labour markets and welfare systems. The Pillar will be developed within the Euro area, while allowing other EU Member States to join in if they want to do so.

> The Pillar will thus build on, and complement, the existing EU-level social "acquis", and the principles it contains will have a specific focus on addressing the needs and challenges confronting the euro area. Once established the Pillar should become a reference framework to screen the employment and social performance of participating Member States, to drive reforms at national level and, more specifically, to serve as a compass for renewed convergence within the euro area.[62]

The Pillar relates to the wider notion of social policy, and covers employment policy, labour law and social security law. The preliminary outline contains 20 principles (selected for their economic and social importance), divided into three main groups. The group 'equal opportunities and access to the labour market' includes, for example, skills, education and life-long learning; flexible and security labour contracts; gender equality and work-life balance; and equal opportunities. The group 'fair working conditions' includes, for example, wages and conditions of employment; health and safety at work; and social dialogue and involvement of workers. The group 'adequate and sustainable social protection' includes, for example, social benefits and services; health care and sickness benefits; pensions and unemployment benefits.

The legal nature of the final European Pillar of Social Rights will need to take account of the competence and limitations at EU and Euro-area levels. Various legal instruments can be considered, and the Commission declares that it 'will find it essential to involve Parliament and Council, as well as other EU institutions, and to gather broad support for its implementation'.[63]

The consultation aims at making an assessment of the present EU 'acquis', reflecting on new trends in work patterns and societies, gathering views and getting feedback on the outline of

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[61] See, in the following, in general European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Launcing a consultation of a European Pillar of Social Rights, COM(2016) 127 final with Annex 1, First preliminary outline of a European Pillar of Social Rights, European Commission, Commission Staff Working Document, The EU social acquis, SWD(2016) 50 final and European Commission, Commission Staff Working Document, Key economic, employment and social trends behind a European Pillar of Social Rights, SWD(2016) 51 final.

[62] See COM(2016) 127 final, p. 7.

[63] See COM(2016) 127 final, p. 9.

the European Pillar of Social Rights itself with the prospect of presenting a final proposal in early 2017.

4. EU labour law and the EU Charter of Fundamental Rights

Fundamental rights protection became part of EU law at an early stage. The case law of the CJEU on fundamental rights and general principles of EU law developed with reference to constitutional traditions common to the Member States and international conventions, most especially the ECHR. The EU Charter of Fundamental Rights was proclaimed in 2000, and in 2009 the Lisbon Treaty made it legally binding and part of primary law, and also stated that the EU is to accede to the ECHR.[64] In recent years there has been a vivid labour law scholarly debate on the general theme of labour rights as human rights.[65]

The EU Charter of Fundamental Rights encompasses rights, freedoms and principles of great importance to labour law and industrial relations, such as respect for private and family life, freedom of expression, freedom of assembly and of association, equality before the law, non-discrimination, equality between men and women, right to information and consultation within the undertaking, right of collective bargaining and collective action, right to protection against unjustified dismissal and fair and just working conditions.

The provisions of the Charter are 'addressed to the institutions, bodies and offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law' (Article 51). According to the Explanations to the Charter, the requirement to respect fundamental rights is binding on the Member States when they act within the scope of Union law. According to settled case law of the CJEU, general principles of EU law, including fundamental rights, apply when Member States implement, derogate from and act within the scope of EU law.[66] The Charter does not extend the field of application of EU law beyond the powers of the Union or establish any new power or task for the EU (Article 51(2)). Article 52(3) states that so far as the EU Charter contains rights which correspond to rights guaranteed in the ECHR the meaning and scope of those rights shall be the same as those laid down in the ECHR.

There is now a growing and important CJEU case law on the EU Charter of Fundamental Rights related to the interpretation and content of specific Articles, as well as to the general scope and application of the Charter.[67] In the following I will discuss a selection of case law

[64] However, the CJEU in its Opinion 2/13, delivered in December 2014, on the draft accession agreement concluded that '[t]he agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms', and thus put – at least a temporary – stop to the accession process. In its Opinion the CJEU emphasized the draft agreement's possible adverse effects on the autonomy of EU law and its specific characteristics. See Opinion 2/13, *ECHR*, EU:C:2014:2454, cf. also 'The EU's Accession to the ECHR – a "NO" from the ECJ!', Editorial Comments, *Common Market Law Review*, Vol. 52, 2015, pp. 1–16.

[65] See, for example, P. Alston (ed.), *Labour Rights as Human Rights* (Oxford University Press, 2005), V. Mantouvalou, 'Are Labour Rights Human Rights?', *European Labour Law Journal*, Vol. 3(2), 2012, pp. 151–172, and J. Fudge, 'Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining and Strikes', *Current Legal Problems*, Vol. 68(1), 2015, pp. 267–305.

[66] See Cases C-5/88 *Wachauf* [1989] ECR 2609, C-260/89 *ERT* [1991] ECR I-2925, C-309/96 *Annibaldi* [1997] ECR I-7493 and C-617/10 *Åklagaren v Hans Åkerberg Fransson.*

[67] See generally S. Peers *et al*. (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing, 2014).

developments related to a number of specific fundamental rights, such as age discrimination; information and consultation and freedom to conduct a business as well as some general issues related to the Charter, such as its horizontal effect and the balancing of rights.

The first case on *age discrimination* was the *Mangold* case in 2005, which created a lot of debate.[68] Here the CJEU declared that not only was age discrimination covered by the (2000/78/EC) Employment Equality Directive,[69] but that EU law encompassed a general principle of non-discrimination on grounds of age. This was reaffirmed in 2010 in the *Kücükdeveci* case,[70] where the CJEU also referred to the fact that this principle now was enshrined in Article 21 on non-discrimination in the EU Charter of Fundamental Rights. Another important – and controversial – aspect of this case law has been the nature of the horizontal effect the CJEU has afforded to this general principle of law and the EU Charter of Fundamental Rights. In April 2016 in the *Rasmussen* case[71] the CJEU confirmed *Mangold* and *Kücükdeveci*, and further concluded that

> EU law is to be interpreted as meaning that a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age. Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation.[72]

EU age discrimination law reflects underlying – partly conflicting – rationales. The EU Charter of Fundamental Rights, and the right to equality, right to non-discrimination and rights of the elderly, emphasize the human rights rationale. At the same time, the traditional role age plays in the organization of labour markets and the design of labour laws is partly maintained. Thus, despite the fundamental right to protection against age discrimination, in principle, EU age discrimination law – through a large scope for justification of age-related differential treatment, specific exemptions and a broad margin of appreciation for Member States and social partners – enables direct and indirect age-related regulation. A comparative analysis of a number of EU Member States also reveals that there is still a large number of directly and indirectly age-related labour law rules, collective bargaining schemes and industrial relations practices in the areas of recruitment, working conditions, flexible employment, employment protection and compulsory retirement. Furthermore, there is a

[68] Case C-144/04 *Werner Mangold v. Rudiger Helm* [2005] ECR I-09981.

[69] The (2000/78) Employment Equality Directive lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation, as regards employment and occupation. It contains protection against direct and indirect discrimination, harassment and instructions to discriminate, as well as a rule on a reversed burden of proof. The Directive provides a scope for positive action, as well as an exemption for genuine and determining occupational requirements.

[70] Case C-555/07 *Seda Kücükdeveci v. Swedex GmBH& Co* [2010] ECR I-00365.

[71] Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*.

[72] Para. 43. – On the issue of horizontability see also, for example, D. Schiek, 'Constitutional Principles and Horizontal Effect: Kücückdeveci revisited', *European Labour Law Journal*, 2010, 1(3), pp. 368–378.

strong emphasis on the individual-complaints-led model and on the bans against direct and indirect age discrimination.[73]

Gender equality is a central area of EU labour law, where the case law of the CJEU has been particularly influential. In the *Test-Achats* case[74] the CJEU used Articles 21 and 23 on non-discrimination and equality between men and women in the EU Charter of Fundamental Rights and the general principle of equal treatment for men and women to invalidate Article 5(2) of the (2004/113/EC) Directive on Gender Equality in Goods and Services. Article 5(1) of the Directive provides that Member States shall ensure in all new contracts that the use of sex as a factor in the calculation of premiums and benefits in insurance and related financial services shall not result in differences in individual's premiums and benefits. Article 5(2) allowed for an exemption from the main rule and a possibility for the Member States to permit proportionate differences in and individual's premium and benefits in these cases. The Court argued that

> this provision, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter.

In the area of *disability discrimination* law one fundamental rights aspect explored by the CJEU in its case law is the relation between EU law and the United Nations Convention on the Rights of Persons with Disabilities. The EU, as well as its Member States, has signed the UN Convention. In *HK Danmark* (*Skouboe Werge*)[75] the CJEU aligned its interpretation both of the concept of disability and the duty of reasonable accommodation with the UN Convention. The Court declared that the Convention formed an integral part of the EU legal order, wherefore the Employment Equality Directive must 'as far as possible, be interpreted in a manner consistent with that Convention'. The CJEU interpreted the concept of disability and developed its reasoning in relation to its earlier judgment in *Chacón Navas*.[76] The CJEU stated that

> the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.[77]

The *AMS* case[78] is of relevance both to *information and consultation* and to general aspects of the EU Charter of Fundamental Rights. Information and consultation is a central element of EU labour law, which enjoys protection in Article 27 of the EU Charter of Fundamental Rights and is regulated in a number of directives, such as the (2002/14/EC) Directive on a

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[73] See further A. Numhauser-Henning and M. Rönnmar (eds), *Age Discrimination and Labour Law. Comparative and Conceptual Perspectives in the EU and Beyond* (Kluwer Law International, 2015).

[74] Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011].

[75] Joined Cases C-335/11 and C-337/11 *HK Danmark*, EU:C:2013:222.

[76] Case C-13/05 *Chacón Navas* [2006] ECR I-6488.

[77] This has been seen as a shift on the part of the CJEU from a medical or individual model of disability to a social model of disability, see L. Waddington, 'HK Danmark (Ring and Skouboe Werge): Interpreting EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities', *European Anti-Discrimination Law Review*, November 2013, Issue 17, pp. 13–23. For a critical assessment of the alignment as regards the concept of disability, see D. Schiek, 'Intersectionality and the Notion of Disability in EU Discrimination Law', *Common Market Law Review*, 2016, Vol. 53, pp. 35–64.

[78] Case C-176/12 *AMS*, EU:C:2014:2.

general framework for information and consultation, at issue in the *AMS* case. In *AMS* the CJEU confirmed earlier case law,[79] and stated that the Directive has defined the group of persons to be taken into account in the calculation of the staff numbers of the undertaking. Member States cannot exclude a specific category of persons initially included in the group of workers. That would exempt certain employers from the obligations laid down in the Directive, deprive their employees of the rights granted under the Directive and make the Directive ineffective. The French provision at stake was thus found to be contrary to the Directive.

According to settled case law a provision in a directive has direct effect when its subject-matter is unconditional and sufficiently precise, and the provision can thus be relied upon before national courts by individuals against the State, when the State has failed to implement the directive in time or has implemented the directive incorrectly. The CJEU found that the relevant article in the Directive has such direct effect, but also emphasized that according to settled case law

> even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.[80]

A national court is obliged to interpret national provisions, implementing EU law, in conformity with EU law. However, this obligation cannot serve as the basis for an interpretation *contra legem*, which would be the case in *AMS*. The CJEU stated that it is clear from the wording of Article 27 that in order for it to be fully effective it must be given a more specific expression in EU or national law. The CJEU distinguished the facts of *AMS* from the facts of *Kücückdeveci*,[81] where

> the principle of non-discrimination on grounds of age at issue in that case [*Kücückdeveci*], laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.[82]

Thus, the CJEU found that Article 27, by itself or in conjunction with provisions of the Directive, could not be invoked in a dispute between individuals to conclude that a national provision contravening the Directive should not be applied. The CJEU instead referred to *Francovich*[83] and its settled case law on state liability, and the possibility of individuals to obtain compensation for the loss sustained.[84]

The case *Glatzel*[85] concerned a challenge of minimum standards relating to the physical fitness to drive a motor vehicle set in a Directive and their compatibility with the EU Charter of Fundamental Rights and Articles 20, 21 and 26 on equality before the law, non-

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[79] Case C-385/05 *Confédération générale du travail and Others* [2007] ECR I-611.

[80] Para. 36.

[81] Case C-555/07 *Kücükdeveci* [2010] ECR I-365.

[82] Para. 47.

[83] Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

[84] In *AMS* the CJEU did not follow the opinion of Advocate General Villalón Cruz, who found that Article 27, given specific substantive and direct expression in Article 3(1) of the Directive 'may be relied on in a dispute between individuals with the potential consequences which this may have concerning non-application of the national legislation' (para. 98(1)). The CJEU also chose not to refer to the Advocate General's argumentation on the distinction made between rights and principles in the EU Charter of Fundamental Rights and Article 52(5). – See further P. Herzfeld-Olsson, 'Possible Shielding Effects of Article 27 on Workers' Rights to Information and Consultation in the EU Charter of Fundamental Rights', *International Journal of Comparative Labour Law and Industrial Relations*, 2016, 32(2), pp. 251–274.

[85] Case C-356/12 *Glatzel*, EU:C:2014:350.

discrimination and integration of persons with disabilities. The last principle states that the Union is to recognize and respect the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community. *Glatzel*, in principle, confirmed *AMS*, and the CJEU stated that

> although Article 26 of the Charter requires the European Union to respect and recognize the right of persons with disabilities to benefit from integration measures, the principle enshrined by that article does not require the EU legislature to adopt any specific measure. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right which they may invoke as such.[86]

In the much debated *Alemo-Herron* case[87] Article 16 of the EU Charter of Fundamental Rights and the *freedom to conduct a business* was in focus. The case had UK origin, related to the (2001/23/EC) Transfers of Undertakings Directive and its regulation on collective agreements in Article 3 and concerned a transfer of an undertaking from the public to the private sector. The question was whether Article 3 of the Directive must be interpreted as precluding a Member State from providing in transfers of an undertakings that dynamic clauses referring to collective agreements negotiated and agreed after the date of transfer are enforceable against the transferee. The CJEU emphasized that the Directive

> does not aim solely to safeguard the interests of employees in the event of a transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other.[88]

The CJEU referred to the fact that the dynamic clause was liable to undermine the fair balance between the interests of the transferee and the interests of the employees. Furthermore, the Court held that

> by reason of the freedom to conduct a business, the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity … In those circumstances, the transferee's contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business.[89]

The CJEU then concluded that Article 3 of the Directive precluded a Member State from providing that such dynamic clauses were enforceable against such a transferee, where the transferee did not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer.

The CJEU's reasoning and conclusions in *Alemo-Herron* can be criticized for a number of different reasons, some of them related to the EU Charter and fundamental rights protection. For example, the CJEU failed to balance the fundamental right of the freedom to conduct a business to other fundamental rights of relevance to employees, such as the right of collective bargaining in Article 28 and the right to fair and just working conditions in Article 31. Furthermore, in its reasoning the Court paid little attention to the fact that the Transfer of

[86] Para. 78.

[87] Case C-426/11 *Alemo-Herron*, EU:C:2013:82.

[88] Para. 25.

[89] Paras. 33 and 35.

Undertakings Directive has a social policy Treaty basis and aims to provide protection for employees as a minimum rights directive.[90]

5. Concluding remarks

This paper discusses some current developments and challenges in EU labour law, and reflects on them from the perspective of the role of hard law, soft law and fundamental rights in EU law, as well as from the perspective of the interplay between EU labour law and national labour law and industrial relations.

EU industrial relations are based on European integration, an emphasis on transnational and supranational levels of industrial relations and the interplay between different levels of the system. EU labour law and national labour law is an essential part of EU industrial relations.[91] Generally, the content and development of EU labour law reflect a tension between the EU and national sovereignty, economic and social integration and market and human rights discourses. The development of labour law is closely related to the functioning of the labour market, industrial relations and economic, welfare state and societal conditions. The relations between labour law and social security law and human rights law are also fundamental. EU law and its current emphasis on the internal market, free movement and austerity implies a 'blurring' of the boundaries between labour law and economic law, and a challenge to the traditional function and content of labour law.

Enlargement and increased cross-border labour mobility highlight free movement and economic freedoms as well as the need for social protection and the counteraction of social dumping. In the last ten years there have been dynamic – and controversial – hard law developments in the area of posting of work with both important case law, from the CJEU and other courts and supervisory bodies (such as the ECtHR, the ILO Committee of Experts and the European Committee of Social Rights) and new EU legislation (such as the Enforcement Directive and the proposal for a revised Posted Workers Directive).

The *Viking* and *Laval* case law on fundamental freedoms and posted work has restricted fundamental rights to collective bargaining and collective action and challenged national systems for wage setting, collective bargaining and industrial relations. Thus, EU law implies an internal market for services and workers, but not for organized labour. Trade unions have only limited possibilities to address worker issues through collective action and collective bargaining in an integrated and cross-border Europe.

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[90] See Prassl for a thorough and critical analysis of *Alemo-Herron* from the perspective of UK and EU labour law, J. Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law. Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd*', *Industrial Law Journal*, Vol. 42(4), 2013. See also S. Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of "freedom of contract". Judgment of the Court of 18 July 2013: Case C-426/11 Mark Alemo-Herron and Others v Parkwood Leisure Ltd', *European Review of Contract Law*, Vol. 10(1), 2014, pp. 167–182, and his by now well-known quote that '[o]n occasion a decision of the Court of Justice of the European Union is so downright odd that it deserves to be locked into a secure container, plunged into the icy waters of a deep lake and forgotten about'.

[91] See further, for example, M. Rönnmar, 'Labour Law in the Courts. The Role of European Case Law on Fundamental Trade Union Rights in an Evolving EU Industrial Relations System' in U. Neergaard, R. Nielsen and L.M. Roseberry (eds), *The Role of Courts in Developing a European Social Model. Theoretical and Methodological Perspectives* (DJØF Publishing, 2010) and P. Marginson and K. Sisson, *European integration and industrial relations. Multi-level governance in the making* (Palgrave MacMillan, 2004).

The *Viking* and *Laval* case law and other CJEU case law on posted work – but also the Enforcement Directive and the proposal for a revision of the Posted Workers Directive – challenge in particular national systems built on voluntarism, such as the Swedish and Danish labour law and industrial relations systems, and implies a shift of emphasis towards transparency, legislation, extension of collective agreements and an increased role for the state and government authorities.

In contrast with the failed proposal for a 'Monti II' Regulation the proposal for a revision of the Posted Workers Directive does not address the right to collective action, or the balance between the right to collective action and the freedom to provide services, as regulated by the Treaty and interpreted by the CJEU in the *Viking* and *Laval* case law. The legislative processes related to the 'Monti II' Regulation and the proposal for a revised Posted Workers Directive – with interventions from Member States, subsidiarity challenges and utilization of the 'yellow card-procedure' – reveal a persistent division in the EU, and a tension between newer and older Member States, and between predominantly sending and receiving Member States.

Within the framework of the European Employment Strategy, the European Semester and the Europe 2020 Strategy there is increased fiscal and employment policy coordination, and the Commission's Country-specific recommendations clearly target labour law and industrial relations. Likewise, in the wake of the economic crisis far-reaching austerity measures have been introduced in many Member States, promoting labour market flexibility and undermining existing structures for wage-setting, collective bargaining and industrial relations. The austerity measures have been legally challenged with reference to fundamental rights, and, although the CJEU has refrained from applying the EU Charter of Fundamental Rights to these measures, for example, the ILO Committee of Experts and the European Committee of Social Rights have criticized the emphasis on deregulation and economic freedoms and advanced the protection for social rights.

The proposal for a European Pillar of Social Rights raises a number of questions, and is characterized by vagueness and uncertainty in several respects. The very notion of the European Pillar of Social Rights is vague as is its aim, function and relation to the EU Charter of Fundamental Rights and existing EU labour law and employment policy. Does the Pillar aim to 'restate' existing EU law and policy or to achieve normative and legal shifts and reforms?[92] The language used in the proposal is legally unprecise and differs from the language used in existing EU labour law. This may risk resulting in uncertainty and changes to the legal regulation and its content and interpretation.[93] Likewise, the selection of principles is not clearly related to existing EU law.

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[92] As regards this ambiguity confer the following statement, '[t]he Pillar does not repeat nor paraphrase the EU "acquis": it spells out in more detail principles and commitments that can steer greater convergence within the euro area. And, in the same way that the Pillar does not replace the "acquis", the principles proposed here do not replace existing rights; they offer a way to assess and, in future, approximate for the better the performance of national employment and social policies. But the process leading to the Pillar should also be an occasion to revisit the "acquis". The present "acquis" has been established step by step, at different points in time, with some domains better covered than others. The consultation on the Pillar provides an opportunity to take a holistic view of the "acquis", to review its relevance in light of new trends and to identify possible areas for future action, at the appropriate level', COM(2016) 127 final, p. 8.

[93] For example, the proposal refers to 'common values and principles shared at national, European and international levels … [which] feature prominently in reference documents such as the Treaty on European Union (TEU), the Treaty of the Functioning of the European Union (TFEU), the Charter of Fundamental Rights and the case-law of the Court of Justice of the European Union, as well as international instruments such as the Social Charter adopted by the Council of Europe and recommendations from the ILO', see COM(2016) 127 final, p. 6. – Here the legal language of fundamental rights and legally binding treaties and conventions are

The growing and multifaceted case law from the CJEU on the EU Charter of Fundamental Rights is of great importance to EU labour law and to national labour law and industrial relations. At a general level, the complex issue of the horizontal effect of the Charter is of a particular importance for labour law and industrial relations – as it decides the 'reach' of fundamental rights into the individual employment relationship and the relationship between trade unions and employers.

In the area of posting of work the *Viking* and *Laval* case law caused an intensified fundamental rights discourse at EU and Member State level, and highlighted the importance of the interplay – and possible conflicts – between the fundamental rights regimes in national constitutions, the EU, the Council of Europe and the ILO. Today, fundamental rights are not only challenged – by free movement and austerity – but also increasingly highlighted and protected through the constitutionalization trend in the EU, the Council of Europe and the ILO. However, fundamental rights need to be balanced against each other, and the *Alemo-Herron* case reflects how the EU Charter of Fundamental Rights not only protects the right to collective bargaining but also the freedom to conduct a business. The CJEU's interpretation of the EU Charter of Fundamental Rights in the area of information and consultation and transfers of undertakings in *AMS* and *Alemo-Herron*, can be said to reflect a more restrictive view towards labour law protection and social rights.

In recent years (not least after the enlargement and the increase in the number of EU Member States) it has become increasingly difficult to reach the support (such as unanimity or qualified majority) required for the adoption of new hard law or revisions of existing hard law. Instead we have seen an increased emphasis on the case law from the CJEU – including an increased importance of negative integration and removal of restrictions for free movement[94]– and on soft law measures, both as a complement and alternative to hard law.

The European social dialogue can result in both hard law and soft law outcomes. What kind of dynamics at cross-industry and sectoral levels will be the result of the 'new start for social dialogue', and will there be an emphasis on hard or soft law?

The open method of coordination has been applied in areas such as old age pensions, social inclusion and social protection, and soft law may assist in establishing firmer links between labour law and social security law.

There are no clear-cut boundaries between hard law and soft law, which recent developments in EU labour law and policy confirm. Employment policy and the soft law coordination within the framework of the European Employment Strategy and the European Semester is becoming increasingly 'hard'. At present, and given its vague character and content it is difficult to describe and discuss the proposal for a European Pillar of Social Rights in terms of hard and soft law. Similarly it is difficult to analyse the institutional frameworks, 'bail out-packages' and austerity measures developed after the economic crisis in terms of the traditional hard law and soft law distinction – despite their crucial impact on EU labour law and labour law and industrial relations in the Member States

replaced with common values and principles and reference documents and instruments. Furthermore, one may question the selection of legal sources, leaving out for example the ECHR and ILO *conventions*. Similarly, the selection and formulation of the principles partly differs from existing EU labour law.

[94] See, for example, P. Syrpis, *EU Intervention in Domestic Labour Law* (Oxford University Press, 2007).