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The European Union and Employment Law^{*}

Prof. Roger Blanpain¹

Artikel ini membahas hukum perburuhan dalam Uni Eropa, dimana aturan ini mengatur dan mengikat bagi negara-negara anggotanya. Namun Uni Eropa yang memiliki banyak Negara anggota, mencoba untuk menyatukan segala perbedaan diantara hukum nasional anggotanya. Selain itu artikel ini juga membahas mengenai bagaimana status perjanjian perburuhan antara negara-negara di Eropa.

I. Introductory Remarks

1. There is no doubt that the European Union (EU) has extremely high ambitions regarding employment and social policies. The successive

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European Treaties, including the Amsterdam and the Nice Treaty, include ambitious goals, like:

- A high level of employment and social protection;
- Equal treatment;
- Improved living and working conditions;
- Proper social protection;
- Social dialogue;
- Upwards harmonization;
- Combating social exclusion.

The European Council at Nice (2000) welcomed and adopted the Charter of Fundamental Rights of the European Union

2. The Charter contains the following social rights:

- Prohibition of slavery and forced labour;
- Respect for private and family life;
- Protection of personal data;
- Freedom of thought, conscience, and religion;
- Freedom of expression and information;
- Freedom of assembly and of association;
- Right to education;
- Freedom to choose an occupation and the right to engage in work;
- Freedom to conduct business;
- Non-discrimination;
- Equality between men and women;
- Workers' right to information and consultation within the undertaking;
- Right of collective bargaining and action;
- Right of access to placement services;
- Protection in the event of unjustified dismissal;
- Fair and just working conditions;
- Prohibition of child labour and protection of young people at work;
- Family and professional life;
- Social security and social assistance; and
- Freedom of movement and of residence.

3. Notwithstanding that the different national systems of labour law are confronted with the same challenges within the large European common market, such as globalization of the economy, new technologies and the

like, they remain widely divergent and will continue to do so. The diversity is greater than is usually realized.

4. Indeed, some systems are very formal (e.g. Germany), others rather informal (e.g. Italy). Great divergence can also be found in the degree of organization, trade union structure and trade union ideology. The same goes for the role and the structure of employers' associations. May be the most divergent factor lies in the difference in legal culture between various countries, especially regarding the role of legislation and collective bargaining. Continental European countries tend to be legal interventionist, the UK not, while the Scandinavian countries favour collective bargaining to regulate conditions of work.

5. An equally striking difference concerns the legally binding effect of collective agreements. In the UK, collective agreements are in principle not legally binding, while they are binding in continental countries and even can be extended by a Governmental measure to all employees and employers of a given sector of activity or a country as a whole.

The role of Governments in employment relations, particularly in the area of income policies is another topical example. In certain countries income policies limit the freedom of collective bargaining, like in Belgium. In other countries, like Germany, income policies might be unconstitutional.

One can go on. Diversity is the general rule and this will stay so. In other words, there is no European system of employment law or industrial relations. The systems are mainly national and will remain so for a long time to come. This will even be more so as the EU is composed of 27 Member States.

II. Competences Regarding Labour and Employment Matters

6. The EU competences regarding labour law and employment matters are limited to the powers conferred by the Treaty upon the Community. These must be exercised by taking the principles of subsidiarity and proportionality into account. This means that the Community shall take action only if and insofar as the objectives of the proposed action cannot

be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action of the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

A. Legislative Competence

7. The Treaty allows the Community to formulate regulations, directives or recommendations with either unanimity of the votes in the Council of Ministers, or with a qualified majority. Some matters are excluded from the competence of the Community regarding social matters.

1. Qualified Majority

8. This concerns the following matters:

- Health and safety;
- Working conditions;
- Information and consultation;
- Equal treatment between men and women with regard to labour market opportunities and work; and
- Integration of excluded persons.

2. Unanimous Voting

9. This concerns the following matters:

- Social security and social protection of workers;
- Job security;
- Representation and collective defence of the interests of workers and employers, including co-determination;
- Third country nationals; and
- Financial contributions for promoting employment.

To this has to be added the power of the Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (art. 13 TEC) and

that unanimity is also necessary when decisions are made relating to the rights, and interests of employed persons (art. 95 TEC).

3. Excluded Matters

10. This concerns the following matters:

- Pay;
- Right of association;
- Right to strike; and
- Right to impose lockouts.

B. Guidelines and Peer Pressure: Employment Policies

11. In the area of employment the TEC cannot take measures, which would lead to the harmonisation of Community legislation. The Member States are in the first place competent as regards to employment policy. The role of the EU is merely suppletive. A European coordinated employment strategy is provided for.

European strategy shall consist of:

- drawing up guidelines;
- writing annual reports;
- adopting incentive measures;
- exchanging information and best practices;
- promoting innovative practices and recourse to pilot projects; and
- making non-binding recommendations.

National policies consist of:

- implementing the European guidelines; and
- drafting of annual reports to the Council.

C. The European Social Fund

12. The European Social Fund aims to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living; and to render the employment of workers easier and to increase their geographical and occupational mobility within the Community, and to facilitate their adaptation to

industrial changes and to changes in production systems, in particular through vocational training and retraining.

From 1 January 2007, a new programming round for the Structural Funds started for the 27 Member States (including Romania and Bulgaria).

A completely new set of regulations governing the operation of the Structural Funds was adopted. These new regulations introduce some of the biggest changes in the operation of the Structural Funds for more than a decade.

The links between the ESF and the policy framework – the European Employment Strategy – are being reinforced so that the ESF can contribute more effectively to the employment objectives and targets of the "Lisbon Strategy for Growth and Jobs". Particular importance is being placed on the strategy's three main objectives of full employment, quality and productivity at work, social cohesion and social inclusion.

13. The new ESF regulation for 2007-2013, which provides a common framework for ESF interventions throughout the Union, is more focused than the current regulation. Throughout the Union, under both the 'Convergence' and the 'Regional Competitiveness and Employment' objectives, the ESF will provide support for anticipating and managing economic and social change. Its intervention will focus on four key areas for action:

- increasing adaptability of workers and enterprises;
- enhancing access to employment and participation in the labour market;
- reinforcing social inclusion by combating discrimination and facilitating access to the labour market for disadvantaged people; and
- promoting partnership for reform in the fields of employment and inclusion.

14. In the least prosperous regions and Member States, the Fund will concentrate on promoting structural adjustment, growth and job creation. To this end, under the 'Convergence' objective and in addition to the priorities mentioned above, the ESF will also support:

- efforts to expand and improve investment in human capital, in particular by improving education and training;
- action aimed at developing institutional capacity and the efficiency of public administrations, at national, regional and local level; and
- the present ESF regulation reflects more strongly the EU's commitment to the elimination of inequalities between women and men: specific actions aimed at women are combined with a robust gender mainstreaming approach, to increase women's participation and progress in the world of work. These ESF provisions complement a new specific principle on gender equality in the draft regulation common to all Funds.

III. The Role of Social Partners: Consultation and Collective Bargaining

15. The role of the social partners has been dramatically enhanced at the occasion of the Treaties of Maastricht and Amsterdam: from consultation with the European Community regarding the implementation of Community directives to collective bargaining at the European level. As a consequence, the social partners are entitled to real involvement in the shaping of European labour law at least in countries where this is legally possible, in the implementation of Council directives. At the same time a stronger legal basis has been introduced for European-wide collective bargaining and mechanisms, ensuring the binding effect of European collective agreements *erga omnes*.

The social partners can conclude collective agreements, which if they fall within the social competence of the Community can be legally binding by the Council by way of a Council Directive. This means that the social partners are part of the legislative framework within the EC.

16. It is the Commission, which has the task of promoting the consultation of the social partners at Community level, and will take any relevant measures to facilitate their *dialogue*. To this end before submitting proposals in the social policy field the Commission consults management and labour on the possible direction of Community action. If, after such consultation, the Commission considers Community action advisable, it consults the social partners on the content of the envisaged proposal. The partners forward to the Commission an opinion or, where appropriate, a recommendation. On the occasion of such consultation the social partners may inform the Commission of their wish to conclude an agreement on the matters under discussion. The duration of the procedure shall not exceed nine months, unless the social partners and the Commission decide jointly to extend it. If an agreement is concluded it can be made, as indicated, early, and is generally binding by way of a Community Directive.

17. To date three inter-industry-wide European agreements have been concluded, namely:

- on parental leave (14 December 1995);
- on part-time work (6 June 1997);
- on fixed term contracts (18 March 1999);
- a voluntary agreement on telework (2002) and
- a voluntary agreement on stress at work (2004)².

18. The social partners who are involved in the process of negotiation are: BUSINESSEUROPE, CEEP for the employers, and the ETUC for the workers. Needless to say that other 'social partners' are anxious to join the club. When this seemed impossible UEAPME introduced a request to the European Court. This way UEAPME wanted to obtain its recognition as a fully-fledged European Social Partner. UEAPME is of the opinion that it has the right, as the representative of the SMEs in Europe, to participate in the negotiating and conclusion of European-wide collective agreements.

² "European Framework Agreements and Telework. Law and Practice. A European and Comparative Study", (ed. R. Blanpain), *Bulletin of Comparative Labour Relations*, Kluwer Law International, nr. 62, 2007.

The Court (1998), however, refuted UEAPME's claim on the following grounds: according to standing in European law, no one social partner has a right to participate in the negotiations. Moreover, BUSINESSEUROPE also has SMEs amongst its members. So, the Court concluded, these enterprises are adequately represented. It will surprise no one, after what we said above, that we deeply regret this judgment. First, from a democratic point of view. Indeed, one expects from the social partners that they replace, in a sense, the democratically elected EP in this legislative process. How then can the Court refuse UEAPME at the table of negotiations, since it organizes the larger part of the SMEs? Also from the point of view of employment, the Court's decision has to be rejected. Indeed, everyone recognizes that it is the SMEs, which are job creators par excellence, and yet they are kept at length. It is, however, especially in the area of fundamental social rights that this judgment is totally inadequate. The right to collectively bargain is a fundamental right, belonging to the core of fundamental rights laid down by the ILO. As has already be noted, the Conventions of 1987 and 1998 deal explicitly with the freedom of association and collective bargaining. All EU Member States, as well as the national social partners, belong to the ILO. The ILO Conventions, moreover, are a part of the general principles of law, the Court has to respect and apply. In other words, when criteria for representativity are not clearly spelled out at European level, the Court had to look for inspiration in the ILO Conventions. The ILO has repeatedly said that the criteria of representativity needs to be the objectives precise and known beforehand. The Court should have directed the Commission to establish these criteria and to respect them. Pending legal procedures introduced by UEAPME concerning the directives implementing framework agreements have however been put to an end according to an operation agreement concluded between BUSINESSEUROPE and UEAPME, 12 November 1998.

IV. The 'Acquis Communautaire'

A. In General

19. European labour law sets a framework, leaving a lot of room for national developments. The main points covered by European labour law relate to:

- free movement of workers (art. 39 TEC);
- individual employment contracts (1991);
- protection of young people at work (1994);
- equal treatment (art. 141 TEC and 5 directives);
- motherhood (1992);
- working time (1993);
- safety and health (art. 137 TEC and directives);
- collective redundancies (1975–1992–1998);
- transfer of undertakings (1997–1998–2001);
- insolvency of the employer (1980);
- European works councils (1994);
- parental leave (1996);
- posting of workers (1996);
- part-time (1997);
- reversal of the proof in case of discrimination (1997);
- fixed term contracts (1999);
- the European Company Statute (2001);
- framework of information and consultation (2002); and
- the European Cooperative Society (2003).

Let us consider some of the most important issues.

B. Free Movement of Workers

20. Freedom of movement constitutes a fundamental right of workers and their families. It is however not an autonomous, but a purposeful right within the framework of the economic objectives of the Community; this right is only conferred for reasons of the performing of an economic activity. It is a contribution to the economic needs of the Member States.

'Mobility of labour is looked upon as one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States.'

It should be underlined that Article 39 of the TEC concerning the free movement of workers has a *direct effect* on the legal orders of the Member States and confers individuals rights which national courts must protect.' Article 39, however, does not aim to restrict the power of the Member States to lay down restrictions within their own territory on the freedom of movement of all persons subject to their jurisdiction in the implementation of domestic criminal law.'

In order to be truly effective, the right of workers to be engaged and employed without discrimination necessarily entails as a corollary the employer's entitlement to engage them in accordance with the rules governing freedom of movement for workers. The rule of equal treatment can be relied upon as much by a worker as by an employer.'

Free movement of workers entails the right to work in another Member State under the same conditions as national workers; it includes the right to move freely within the territory of Member States for this purpose and the right to stay in a Member State.

The right to free movement of workers from, to and between the Member States that joined the EU on 1 May 2004 (Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, Slovakia) and on 1 January 2007 (Bulgaria, Romania) may be restricted during a transitional period of a maximum of seven years after accession. A number of Member States opened their borders, others kept them closed.

21. The Court has ruled consistently that the notion 'worker' in Article 39 of the TEC has a Community meaning in law. The term 'worker' and 'an activity as an employed person' may not be defined by reference to the national laws of the Member States. If that were the case, the Community rules on free 'movement for workers would be frustrated, as the meanings of those terms could be fixed and modified unilaterally, without any control by the Community institutions, by national laws which would thus be able to exclude at will certain categories of persons from the benefit of the Treaty.'

‘It is appropriate therefore, in order to determine their meaning, to have recourse to the generally recognized principles of interpretation, beginning with the ordinary meaning to be attributed to those terms in their context and in light of the objectives of the Treaty.’ In this respect, it must be stressed that the terms ‘worker’ and ‘activity as an employed person’ define the field of application of one of the fundamental freedoms guaranteed by the Treaty and, as such, may not be interpreted restrictively.

‘Nevertheless, a person who has worked only as a self-employed person before becoming unemployed cannot be classified as a ‘worker’ within the meaning of Article 39 of the Treaty, not even when the person concerned previously worked as an employed person.’

22. The concept of ‘worker’ must, the Court rightly ruled, be defined in accordance with objective criteria, which distinguish the employment relationship, by reference to the rights and duties of the persons concerned. The essential feature of an employment relation, however, is the fact that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.’ The Court therefore retained three criteria: (1) performance of services (2) in subordination for (3) remuneration.

23. The job has to have an economic nature within the meaning of Article 2 of the TEC. Consequently, the Court ruled that the practice of sport is subject to Community law only insofar as it constitutes an economic activity in the meaning of Article 2.’

‘This applies to the activities of professional or semi-professional football players, who are in the nature of gainful employment or remunerated service.’

It follows logically that:

‘where such players are nationals of a Member State they benefit in all the other Member States from the provisions of Community law concerning freedom of movement of persons and of provision of services. However, those provisions do not prevent the adoption of rules or of a practice excluding foreign players from participation in

certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries.'

Community law is also applicable to football trainers.' There is no need to underline that the free movement of professional soccer players is *defacto* not respected given the restrictions imposed upon players for reasons of nationality on one hand and the systems of blockade which operate in the case of a transfer of players from one club to another, at international as well as national level on the other hand. FIFA and UEFA, which have set up international cartels to monopolize professional soccer on a worldwide basis, are violating Community law relating to competition in general and Articles 81 and 82 of the TEC in particular.

24. This was more than confirmed in the *Bosman* Case (1995), where the Court of Justice did justice, which was more than overdue in sports, especially regarding the transfer system in which sportsmen, especially soccer players were – and still are outside the EU – treated like cattle which can be sold and bought. The Court reaffirmed that free movement of workers applies to professional sports and that it constitutes a fundamental right. Transfer systems designed to block players and nationality clauses limiting EU players to be lined up are contrary to Article 39. This landmark decision is a marvelous example of the contribution of European law to human rights and human dignity.

C. Equal treatment: a General Framework – Irrespective of Race or Ethnic Origin

25. Council Directive 2000/78/EC of 27 November 2000 establishes a general framework for equal treatment in employment and occupation. The directive comprises four chapters: general provisions, remedies and enforcement, particular provisions (relating to Northern Ireland), and final provisions.

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards to employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

The discriminatory grounds coincide with those laid down in Article 13 of the TEC, with the exception of the ground of sex. With regard to sexual orientation a clear dividing line should be drawn between sexual orientation, which is covered by this directive and sexual behaviour, which is not. Furthermore, it should be underlined that this directive does not affect marital status and therefore does not impinge upon entitlements to benefits for married couples.

26. For the purposes of this directive, the "*principle of equal treatment*" covers direct as well as indirect discrimination whatsoever on the grounds referred to in Article 1.

There is *direct discrimination* where one person is treated less favourably than another is, has been or would be treated in a comparable situation;

There is *indirect discrimination* where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

- (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
- (ii) as regards to persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in order to eliminate disadvantages entailed by such provision, criterion or practice.

Harassment is a form of discrimination when unwanted conduct takes place with the purpose or effect of violating the dignity of a person and

of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

An *instruction* to discriminate against persons on any of the indicated grounds constitutes discrimination.

The Directive is without prejudice to *measures* laid down by national law which, in a democratic society, are *necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others* (art. 2).

27. The *personal* as well as the *material* scope of the directive are wide: it applies to all persons, as regards to both the public and private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay; and
- (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

28. Council Directive 2000/43/EC of 29 June 2000 implements the principle of equal treatment between persons irrespective of racial or ethnic origin. The directive comprises four chapters: general provisions, remedies and enforcement, bodies for the promotion of equal treatment and final provisions.

The purpose of the directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

The directive applies to all persons, as regards to both the public and private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
- (e) social protection, including social security and healthcare;
- (f) social advantages;
- (g) education; and
- (h) access to and supply of goods and services which are available to the public, including housing.

D. Equal Treatment for Men and Women

29. Here, the EC played an important role, first by adopting Article 141 in the EC Treaty, which contains the principle of equal pay for equal work, and consequently by adopting several directives³:

³ These directives, were for reasons of clarity, brought together in a single text, which contains the main provisions existing in this field as well as certain developments arising out of the case-law of the Court of Justice, namely in directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. With effect from 15 August 2009 Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC shall be repealed

- 1975: relating to the application of equal pay for men and women;’
- 1976: relating to the implementation of the principle of equal treatment for men and women as regards to access to employment, vocational training and promotion, and working conditions;’
- 1978: concerning the progressive implementation of the principle of equal treatment for men and women in matters of social security;
- 1986: on the implementation of the principle of equal treatment for men and women in occupational social security schemes;’ and
- 1997: on the burden of proof in cases of discrimination based on sex.

One has also to mention the role of the Court of Justice, which has tremendously enhanced the principle of non-discrimination.

30. Article 141 is part of the social objectives of the Community aimed at social progress, as laid down in the preamble preceding the Treaty. The Court has repeatedly stated that the respect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.’ It is part of the foundation of the Community. In particular, since Article 141 appears in the context of the harmonisation of working conditions while improvement is being maintained, the objection that the terms of this article may be observed in no other way than by raising the lowest salaries must be set aside.’ It is clear that the 6 instruments, namely, Article 141 and the 5 directives, form one body of rules that are complementary to each other and fortify each other.

Article 141 and the directives have a general scope of application, which follows from the nature of the principle of equal treatment, and thus apply to the private sector as well as to the public sector,’ and to the self-employed.

31. Community law prohibits direct and indirect discrimination: direct on grounds of sex, indirect when other criteria are used, which are *prima facie* objective and acceptable, but *de facto* lead to discriminatory treatment of one sex.

32. Exceptions to the rule of equal treatment relate to:

- the nature of the activity;
- protection of women; and
- positive discrimination.

33. The possibilities for positive discrimination are enhanced in the new Article 141, 4 of the TEC, which reads as follows: ‘with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.’ A Declaration attached to the Treaty of Amsterdam clarifies that the Member States in adopting such measures have to aim in the first place at the improvement of the situation of women in employment and occupation.

34. Article 141 of the TEC concerns equal pay for equal work or work of equal value. The notion, ‘pay’ in the meaning of Article 141 and the equal treatment directives belongs to advanced legal technology.

35. This was confirmed in *Douglas Harvey Barber v. Guardian Royal Exchange Group* (1990), which related to Barber’s right to an early retirement pension on his being made compulsory redundant. Barber’s conditions provided that, in the event of redundancy, members of the pension fund established by the Guardian were entitled to an immediate pension subject to having attained the age of 55 for men and 50 for women. Staff who did not fulfil those conditions received certain cash benefits calculated on the basis of their years of service and a deferred pension payable at the normal pensionable age, which was fixed at 62 for men and 57 for women. Barber was made redundant when he was aged 52. The Guardian paid him the cash benefits provided for in the severance terms, the statutory redundancy payment and the *ex-gratia* payment. He would have been entitled to a retirement pension as from the date of his 62nd birthday. It was undisputed that a woman in the same position as Mr. Barber would have received an immediate

retirement pension as well as the statutory redundancy payment and that the total value of those benefits would have been greater than the amount paid to Mr. Barber. Therefore, Barber contended that he was discriminated against.

36. In deciding this case the Court took a number of important decisions on principle, while confirming some others:

1. The fact that certain benefits are paid after the termination of the employment relationship does not prevent them from being in the nature of pay, within the meaning of Article 141 of the EC Treaty;
2. Compensation in connection with redundancy constitutes a form of pay to which the worker is entitled in respect of his employment and which is paid to him upon the termination of his employment relationship, whether it is paid under a contract of employment, by virtue of legislative provisions or on a voluntary basis;
3. Unlike the benefits awarded by national statutory social security schemes, a pension paid under a contracted-out scheme constitutes consideration paid by the employer to the worker in respect of his employment and therefore falls within the scope of Article 141;
4. It is contrary to Article 141 to impose an age condition which differs according to sex in respect of pensions paid under a contracted-out scheme, even if the difference between the pensionable age for men and that for women is based on the one provided for by the national statutory scheme;
5. The Court emphasized the fundamental importance of transparency and, in particular, of the possibility of a review by the national courts, in order to prevent and, if necessary, eliminate any discrimination based on sex;
6. If the national courts are under the obligation to make an assessment and a comparison of all the various types of consideration granted, according to the circumstances, to men and women, juridical review would be difficult and the effectiveness of Article 141 would be diminished as a result. It follows that genuine transparency permitting an effective review is assured only if the principle of equal pay applies to each of the elements of remuneration granted to men or women;

7. The Court held that, according to its established case-law, Article 141 applies directly to all forms of discrimination which can be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit their application;
8. The direct effect of Article 141 may not be relied upon to claim entitlement to a pension, with effect from a date prior to that of his judgment, except in the case of workers or those claiming for them who have before that date initiated legal proceedings or raised an equivalent claim under the then applicable law.

37. Directive No. 76/207 of 9 February 1976 aims at the implementation of the principle of equal treatment as regards access to employment, vocational training and promotion, and working conditions. This includes selection criteria for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy, as well as to vocational guidance, vocational training, advanced vocational training, and retraining; these must be accessible on the basis of the same criteria and at the same levels without any discrimination on grounds of sex. It is interesting to note that offers of employment do not fall within the scope of the directive. Equal treatment relates also to dismissals.

38. Council Directive 97/80 of 15 December 1997 deals with the burden of proof in cases of discrimination based on sex. The directive reverses the proof provided the plaintiff establishes the fact from which it may be presumed that there has been direct or indirect discrimination.

39. On 17 July 1996, the European Commission adopted a code of practice concerning the application of equal pay for women and men for work of equal value. The aim of this code is:

- (i) to provide concrete advice to employers and partners in the collective bargaining carried out at the level of the enterprise (sectoral and intersectoral) to ensure application of the principle 'equal pay for equal work' in all its elements; and

- (ii) eliminate discrimination based on sex when the remuneration structures are based on systems of classification and evaluation of employment.

Designed in close collaboration with social partners, this code reflects as much as possible the approach proposed by them, i.e. a short code intended to be applied:

- (i) in a voluntary and effective fashion and able to be used during the different phases of the collective negotiation; and
- (ii) at the work place in the public and private sector.

Employers are encouraged to follow the recommendations contained therein by adapting them to the dimension and structure of their companies.

E. Restructuring of Enterprises

40. During the 1970s, called by some the golden years for European labour law, three directives were adopted which were intended to protect the workers against the functioning of the common market. I remember from the discussions we had in the group of experts on labour law from the different Member States that the reasoning underlying those directives was the following: there is a larger market with an increase in scale to which the undertakings will have to adapt themselves; this means: restructuring, mergers, takeovers, collective dismissals, and bankruptcies. Indeed, it was said, the worker should not have to pay the price for the establishment of a common, bigger market; rather the worker should be protected against the social consequences of this restructuring. On the basis of this reasoning, three directives were proposed and, also due to the then political composition of the Council, adopted. These directives relate respectively to collective redundancies (1975⁴), the transfer of undertakings or parts thereof (1977⁵) and the insolvency of the employer (1980⁶). One will notice, when analysing these directives, that the managerial prerogative concerning economic

⁴ Codified by directive 98/59 of 20 July 1998.

⁵ Codified by directive 2001/23 of 12 March 2001.

⁶ Lastly, amended by directive 2002/74 of 23 September 2002.

decisions remains intact. In short, the directives only address the social consequences of restructuring.

1. Collective Redundancies

41. Information concerning the collective redundancies must be given beforehand. This means before the decision is taken. The text of Article 2, § 1 is clear on this point: it concerns an employer who is *contemplating* collective redundancies. The directive explicitly mentions that the employer has to consult the workers' representatives in good *time*. The directive only applies when the employer projects collective redundancies.

The purpose of the information is to enable the workers' representatives to make constructive proposals. The employer shall at least notify them of the reasons of the projected redundancies, the number of categories of workers to be made redundant; the number or categories of workers normally employed; the period over which the projected redundancies are to be effected; the criteria proposed for the selection of the workers and the method for calculating any redundancy payment (other than those arising out of national legislation and/or practice).

The directive holds irrespective whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer (Articles 2 and 4). In considering alleged breaches of the information and consultation duties account shall not be taken of any defence on the part of the employer that the necessary information has not been provided to him by the undertaking, which took the decision leading to collective redundancies. The employer is obliged to consult the worker's representatives with a view to reaching an agreement. This is a very strong form of consultation, which is very close to collective bargaining. The consultations must cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences.

2. Transfer of Undertakings and Acquired Rights

42. Directive No. 2001/23 of 12 March 2001 relates to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. The purpose of the directive is to ensure that the rights of employees are safeguarded in the event of a change of employer by enabling them to remain in employment with the new employer on the terms and conditions agreed at the transfer. The purpose of the directive is therefore to ensure that the restructuring of undertakings within the common market does not adversely affect the workers in the undertakings concerned.

43. There is a transfer within the meaning of the directive where there is a transfer of an economic entity which retains its identity, meaning an organized grouping of resources, which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary. This definition summarizes the abundant case-law of the European Community regarding the notion of transfer. This case-law reads as follows. The key element of the definition lies in the fact whether the employees are, as a consequence of the transfer of the undertaking, confronted with a new, legal employer; in other words, the selling of a number of shares with the consequence that there is a new economic owner is not relevant.

'The directive is applicable where, following a legal transfer or merger, there is a change in the legal or natural person who is responsible for carrying on the business and who, by virtue of that fact, incurs the obligations of an employer *vis-à-vis* the employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred.'

44. The directive applies provided that the undertaking in question retains its identity, as it does if it is a going concern whose operation is actually continued or resumed by the new employer, with the same or similar activities. In order to determine whether those conditions are met, it is necessary to consider all the circumstances surrounding the transaction in question, including, in particular, whether or not the undertakings tangible and intangible assets and the majority of its employees are taken over, the degree of similarity between the activities

carried on before and after the transfer of the period, if any, for which those activities ceased in connection with the transfer.

It is therefore 'necessary to determine, having regard to all the circumstances of the facts surrounding the transaction in question, whether the functions performed are in fact carried out or resumed by the new legal person with the same activities or similar activities, it being understood that activities of a special nature which pursue independent aims may, if necessary, be treated as a business or part of a business within the meaning of the directive.'

The directive may thus apply in a situation in which an undertaking entrusts another undertaking by contract with the responsibility for running a service for employees, previously managed directed, for a fee and various benefits the terms of which are determined by agreement between them.

45. The rule of thumb is that the rights and obligations of the employee arising from his contract of employment in the case of a transfer are automatically transferred. In other words, the employees who are employed on the date of transfers are automatically transferred to the new employer with all their acquired rights, whether they or the new employer want it or not. Therefore, the terms of the contract work or of the working relationship may not be altered with regard to the salary, in particular its day of payment and composition, notwithstanding that the total amount is unchanged. The directive does not preclude, however, an alteration of the working relationship with the new head of the undertaking in so far as the national law allows such an alteration independently of a transfer of the undertaking.

As the Court has repeatedly held, 'the Directive is intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the new employer under the same conditions as those agreed with the transferor'.

It is likewise settled case-law that the rules of the Directive, in particular those concerning the protection of workers against dismissal by reason of the transfer, must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees. It follows that in the event of the transfer of an undertaking the contract of employment or employment relationship between the staff employed

by the undertaking transferred may not be maintained with the transferor and is automatically continued with the transferee.

46. Pursuant to the directive the transferee shall, following the transfer, continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. The directive does not oblige the transferee to continue to observe the terms and conditions agreed in any collective agreement in respect of workers who are not employed by the undertaking at the time of the transfer.

47. The provisions regarding acquired rights do not, unless Member States provide otherwise, cover employee rights to old age, invalidity or survivor's benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States. Member States have, however, to adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer in respect of the rights conferring on them immediate or prospective entitlements to old-age benefits, including survivors' benefits, under the supplementary schemes (Article 3, § 4).

48. The directive protects the concerned employees in the case of a transfer against dismissal by the transferor or the transferee on the grounds of the transfer, except for economic, technical, or organizational reasons entailing changes in the work-force. In order to ascertain whether the employees were dismissed solely as a result of the transfer, it is necessary to take into consideration the objective circumstances in which the dismissal took place such as, in particular, the fact that it took effect on a date close to that of the transfer and that the employees in question were taken on again by the transferee.

49. If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be

regarded as having been responsible for termination of the contract of employment or the employment relationship.

50. The directive provides that the transferor and the transferee shall be required to inform the representatives of their respective employees affected by the transfer with the following information:

- the date or proposed date of the transfer;
- the reasons for the transfer;
- the legal, economic, and social implications of the transfer for the employees; and
- the measures envisaged in relation to the employees.

The transferor must give such information in good time before the transfer is carried out. The transferee must give such information in good time, and in any event before the transfer, as regards to their conditions of work and employment directly affecting his employees. If the transferor or the transferee contemplates measures in relation to his employees, he shall consult his workers' representatives in good time or on such measures with a view to seeking agreement.

V. The Social Dialogue

A. In General

51. The promotion of a social dialogue constitutes one of the key elements of European social policies. This follows clearly from Article 138, 1 of the TEC, which reads as follows, 'The Commission shall have the task of promoting the consultation of management and labour at the Community level and shall take any relevant measures to facilitate their dialogue by ensuring balanced support for the parties.' The notion of social dialogue self-evidently also includes collective bargaining, the conclusion of agreements between the social partners. Consequently, Article 139, 1 of the TEC says, should management and labour so desire, the dialogue between them at the Community level may lead to contractual relations, including agreements.

52. Collective bargaining, however, is a delicate flower. Indeed, quite a number of questions arise over the diverse opinions especially between the social partners. First of all, what is the *division of tasks* between European and national levels? That the answer to that question leads to controversies, and follows clearly from the rather heated discussions concerning the appropriateness of the conclusion of a European agreement on information and consultation rights of employees at the national level. For the employers, this is an issue to be dealt with exclusively at the national level and no business whatsoever for the Community, while the trade unions defend fiercely that this is a matter to be dealt with at the European level and that European minimum requirements are necessary.

Secondly, there is the reality of the *power relationship* between the European social partners, or better the lack of power of the European trade union in pushing the employers to the European bargaining table. Political pressures from the European Institutions, especially from the European Commission, however, efficiently compensate for that lack of power. There is indeed a kind of situation, which one could call 'Damocles bargaining'. This goes as follows, the European Commission invites the European social partners to have a dialogue and negotiate an agreement on a given issue, let's say on information and consultation rights at the national level. The parties and especially the employers know that the Commission, if no agreement is reached, will push for European legislation. So employers are put under pressure and have to consider to join or not to join and eventually to negotiate a given deal in order to prevent legislation, the outcome that would escape them almost completely anyway. So there is a sword, hanging above their heads.

53. There is, on top of that, the problem of *credibility*. The European social partners exist. They want to prove that they are more than mere lobbyists and are able and willing to play a constructive role. Concluding agreements is one way of indicating that they are doing more than merely talking to each other.

54. The Damocles tactic was widely used at the European level. This was not only so for inter-industry-wide agreements, like the ones we discussed concerning parental leave and part-time work, but also for the

level of the European enterprise. Let's take the example of the EWCs. Also here, enterprises are put under pressure of either negotiating an agreement, allowing for some flexibility or undergoing mandatory rules, which come into force when no agreement is reached.

55. A '*social dialogue*' between employers and trade unions at the European level has taken place for a number of years at Val Duchesse, near Brussels, and has led to informal agreements on such issues as motivation and vocational training, information and consultation with respect to the introduction of new technologies, adaptability and flexibility on professional and geographic mobility, and the improvement of the functioning of the Common Market in Europe. However, the outcomes of these talks were labeled '*common orientations*,' and did not even constitute informal guidelines. No real effort has been made to implement these '*common orientations*' at national or sectoral levels. Undoubtedly, a number of sectoral talks do take place in various joint committees, but those talks mostly concern the sharing of information or consultation, not bargaining.

However, again, some positive change can be noted. As mentioned before, three important agreements have been concluded by BUSINESSEUROPE, CEEP, and the ETUC, as the social dialogue at the sectoral level expands. But the developments in this area are more of a political than of an industrial nature. The agreements at European level constitute more another form of legislative machinery than genuine collective bargaining. The issue of who is a '*social partner*' remains unsolved. At the same time, one has to note that at present more than 900 European Works Councils have already been established with information and some consultation rights.

56. Up to now, their impact on European industrial relations remains uncertain. It remains an open question whether the EWCs will become bridgeheads for a fully-fledged European industrial relations system, which might emerge in the 21st century. The chances are slim since the new economy is in a sense sapping the powers and the impact of the European social partners.

57. Moreover, more than another 1,000 councils still need to be established. All this is impressive and even fabulous. One is indeed talking about hundreds of meetings a year, where thousands of works council members meet. But fundamentally nothing has happened, since the power relations remain unchanged. The EWC does not affect the *managerial prerogative* and did not, for example, change the outcome of the shameless and brutal closure of the Renault plant in Vilvoorde (Belgium), where 3,000 workers lost their jobs.

58. Recently the social partners concluded framework agreements (telework – 2002, stress at work – 2004). These agreements, so it is said, testify of the “autonomy” of the European social partners. Indeed, the social partners act on their own without institutional help, neither from the Commission nor of the Council of Ministers or the European Parliament integrating their agreements into legally binding European Directives. These “voluntary” agreements stand on their own.

These framework agreements are labeled “voluntary”, in the sense that they intend not to create legally binding obligations between the concluding parties or imposing them on their national constituents. They merely contain, it seems, a “moral” obligation on the European social partners to recommend the content of the agreement to their national members – employers associations and trade unions, namely to implement the European agreement in their own countries in accordance with local law and practice.

59. The main question is then whether these agreements constitute a new way of developing European employment law or the main way? Is it the idea that, since legally binding directives seems difficult to agree upon between 27 Member States, even with a system of majority voting, framework agreements will do the job? Underlining, at the same time, the important legislative role, social partners may play at European level. Giving an additional dimension to the European Social Dialogue?

So a first question concerns the role of framework agreements in the shaping of European Labour Law: an additional way or a main way?

Secondly, the agreements are voluntary but this is nothing new. Indeed, all agreements are voluntary. Here voluntary does, however, have another meaning, namely that they, as said, do not intend to create legal obligations between contracting parties. This seems to be an English approach, as under English law, collective agreements do not create legal obligations, as parties do not intend to do so.

Is this also so in relation to the constituent members of BUSINESSEUROPE, UEAPME, CEEP and the ETUC? The telework agreement states that it *shall* be implemented by the members of the contracting parties. This seems to imply an obligation. The question is whether this is a legal obligation? This could be the case, depending on the by-laws of the contracting European organisations, whether or not membership implies that the national constituents are bound by the decisions of their mother organisations. If this is the case, could then the European mother oblige the national daughter to comply? Could a teleworker or a member of a daughter do so and engage in legal action in order to obtain appropriate social protection as provided for by the European framework agreement?

The answer on these questions will co-determine the effectiveness of the *framework agreement approach*.

A third question is equally important but of a more practical nature; does the scheme work? How do the national social partners implement the European framework agreement? How effective are the local ways?

60. It is self-evidently, a fact that these ways differ enormously from Member State to Member State.

Indeed, in some countries the legislator plays a role; in other countries inter-industry wide collective agreements have been concluded, some of which have been extended by governmental decree and are enforced by way of penal sanctions. In still others there are sectoral agreements or even mere recommendations.

A number of questions arise: are all workers covered by the benefits of the framework agreement and are we not heading for a social Europe with two speeds, one where the social protection is guaranteed and eventually sanctioned in a penal sense and another where mere recommendations are the rule?

B. The Sectoral Social Dialogue

61. Activities in all areas of the sectoral social dialogue take place in sectoral joint committees under the form of joint opinions, memoranda, recommendations, and agreements being adopted. The following committees are active:

Agriculture
Audiovisual
Banking
Chemical industry
Civil aviation
Cleaning industry
Commerce
Construction
Electricity
Extractive industry
Footwear
Furniture
Horeca
Hospitals
Inland waterways

Insurance
Live performance
Local and regional government
Personal services
Postal services
Private security
Railways
Road transport
Sea fisheries
Sea transport
Shipbuilding
Steel
Sugar
Tanning and leather
Telecommunications
Temporary agency work
Textile and clothing
Woodworking

C. The European Company Statute (SE)

62. An agreement was finally reached on the European Company Statute and Workers Participation⁷. It will be a very weak instrument. First, it is voluntary; secondly, Member States do not have to implement the provisions on workers participation and do not need to have such a system if the national legislation of the Member State, where the SE has

⁷ Council Directive 2001/86/EC of October 2001 supplementing the Statute for a European Company with regard to involvement of employees.

its registered office does not foresee in equivalent provisions (e.g. Ireland, the UK).

The Council of Social Affairs on 20 December 2000 concluded as follows regarding the SE:

'The Council agreed unanimously on guidelines for political agreement on two acts concerning the European Company (SE):

- the Regulation on the Statute for a European Company; and
- the Directive supplementing the Statute for a European Company with regard to the involvement of employees.

The rules relating to employee involvement in the SE are the subject of the Directive described below, on which agreement was also reached at the Council. The provisions contained in that Directive form an inseparable complement to the Regulation and must be applied in parallel.

This Directive supplements the Regulation as regards to the involvement of employees in the affairs of European Companies, in order to ensure that the creation of an SE does not entail the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of an SE.

Given the diversity of rules and practices in the Member States as regards to the manner in which employees' representatives are involved in decision making within companies, a single European model is not intended. Nevertheless, procedures for the information and consultation of workers at the transnational level will be ensured.

When rights to participate exist within one or more of the companies establishing an SE, those rights will be preserved through their transfer to the SE, once established, unless the parties involved decide otherwise.

63. When the management or administrative organs of the participating companies decide to set up an SE, negotiations will start with the representatives of the companies' employees in order to reach agreement on ways to involve employees in the forthcoming SE. A special negotiating body (SNB) representing the employees of all the companies involved will then be established. In electing or appointing members of the SNB, it must be ensured that those members are elected or appointed

in proportion to the number of employees employed in each Member State by the companies concerned.

In principle, such negotiations may continue for six months. The agreement negotiated will specify the scope of the agreement, the composition, number of members and allocation of seats on the employees' representative body, the functions and procedure for the information and consultation of workers, the frequency of meetings of the representative body, the financial and material resources to be available to that body, and if need be the arrangements for participation, as well as the date of entry into force of the agreement and its duration.

If no agreement is concluded, the arrangements for the information, consultation, and where appropriate participation of employees which are laid down by the legislation of the Member State in which the registered office of the SE is situated will apply. That legislation must comply with the reference provisions set out in the Annex to the Directive.

VI. CONCLUSIONS

64. With the Treaty of Amsterdam (1997), the social map has been drawn up for some time to come. The socio-economic balance, which was pursued in Europe by a whole generation since World War II, has been disrupted. The EU has chosen for iron-clad economic agreements, for supply side economics, a tough non-inflationary monetary policy on the one hand and a very soft social Europe, that is crushed by the storms of the extremely volatile international competition on the other hand.

The Treaty needs to be rewritten, especially as far as social policies are concerned. The EU should have the necessary competence to adequately monitor the market economy by way of socially inspired corrections. This is, however, not the case at present. Can one, under those circumstances still boast about a European social model?

The European Top of Nice (December) constituted a last and unique chance to give the EU the necessary competences to combat social exclusion and monitor the globalization of the economy from the social

point of view in an integrated and comprehensive way. To do so successfully the Charter of Fundamental rights should have been integrated into the European Treaty and have binding effect; more majority voting regarding social affairs should have been provided for. This did not happen, rather the contrary occurred.

As said earlier, to change the Treaties unanimity between all the Member States is necessary. One Member State can veto any change. This happened in Nice: a.o. the Labour Government, for domestic reasons, undermined the European Social Model by vetoing more majority voting and amending article 137 of the Treaty

In short, the EU is socially handicapped. It will be so as long as the Thatchers', Blairs' and others veto European progress for purely national ill-conceived concerns. Indeed, social Europe is not so 'Nice'.

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