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The Future of European Labour Law
- a preliminary approach

I. Introduction

In preparing this small report, I had to face at least three difficulties.

The first one was of a linguistic nature. I would have preferred to speak French, but the organizers told me everybody would understand English, but not French. But will German English be understood in Portugal where English is spoken in a Portuguese manner? I will try so speak slowly in order to facilitate international understanding.

The second problem was last Sunday´s referendum in France. The victory of "Yes" would have forced me to enter into the legal framework established by the Constitution. The "No" gives us more freedom in conceiving aims and developments. The first big defeat for those who construct Europe according to their views and wishes was followed bys a second one in the Netherlands. This creates a new situation: The Community has to fight for the support of the peoples, its legitimation has become weaker. That may be a considerable chance for social policy which can make Europe more attractive to the working majority of the population in all Member States.

The third difficulty is a scientific one. Germany produces every year between 100 and 200 books on labour law – but you cannot find any research on the future of European labour law. Details of the codetermination on foods and beveridges in the canteen seem to be more important than the discussion of megatrends. Even the future of national labour law is a topic rarely dealt with. This may be explained by the lack of methods how to analyse the current situation in relation to future developments: A legal futurology does not exist. You may add the idea that lawyers normally are cautious people who are anxious if not horrified to be refuted by the facts. Would it not be better to keep the good scientific reputation and not to

skate on thin ice? There are some few examples of very bold people who tried to predict what will come in some 10 or 20 years – but the question would be impolite to ask them whether they were wright or wrong. I was told that in other Member States the situation is a very similar one.

Let´s put away all these obstacles and try to give some suggestions which, of course, are just an attempt, which does not pretend to give any definite truth. In a first part I would like to describe the main characteristics of European labour law. The second one is dedicated to the neoliberal challenges which became visible in recent years and which will continue after the French and Dutch referendum. The third part deals with some issues which can be a possible topic of future European labour law.

II. Characteristics of EC Labour Law

EC labour law and national labour law are closely linked. This is due not only to the fact that outside the freedom of movement for workers you will only find directives and no regulations. The more important reason is that European law normally deals with one aspect of a case or a conflict of interest, but never contains a comprehensive substantive rule. It is difficult to conceive a case which you can solve by referring exclusively to EC law. The only exception – the EC staff rules – get their exhaustive character only by referring to general legal principles of the Member States and to UN- and ILO-Conventions.

There are specific elements EC labour law picks up. It puts the main emphasis on two points thus completing the national labour relations.

1. Equality rights

EC law gives equality rights to employees. Equal pay between men and women according to the famous article 119 of the old Treaty became nearly a symbol of progress through community law: Gabrielle Defrenne, the SABENA stewardess, is nowadays known to nearly every law student throughout the Community. The three decisions of the European Court of Justice in her case were in some way a starting point to numerous activities on EC level. Equality between men and women in all working conditions was the next step later on completed by a partial extension to social security schemes and in the end of 2004 to civil law

contracts. Article 13 of the Treaty of Amsterdam and the directives based on it create a system of antidiscrimination law: No discrimination on the grounds of racial and ethnic origin, of religion or belief, of disability, age or sexual orientation. Most Member States have implemented the directives, but Germany still hesitates despite a clear decision of the European Court of Justice.

But these are not the only equality rights. Employees from other member states must be treated the same way as own nationals. To a certain degree, the directive on posted workers has a similar impact; at least some fundamental working conditions of the host state are guaranteed to workers sent by their employer from another Member State. The famous directive on acquired rights in cases of transfer of enterprises can be seen in the same way: For at least one year, it conserves the standard employees had before the reorganisation of the enterprise took place. Employees with restructuring employers shall for some time have more or less the same conditions as workers in a stable labour relationship. Part-time workers and employees with a fixed-term contract have to be treated in the same way as full-time employees.

The catalogue of legal rules is impressing, but equality is silent on the level of protection. It applies in very modest as well as in splendid situations. It is an extremely flexible rule. This flexibility may be indispensable regarding the different economic development of the Member States. In addition, Member States and Social Partners keep the right to establish new rules on an – let´s say – intermediate level. Inequality can be repaired in different forms, it will not always extend the rights of the better placed to those in an underprivileged, discriminated position.

The above-mentioned equality rights are of a quite different power. Some of them – e.g. in the cases of Art. 13 – are taken seriously whereas equality between full-time workers for an indefinite time and workers with a fixed-term contract is a very weak guarantee: The directive does not only recognise and accept the fact that one group is without any protection at the end of its employment contract. Even during the employment a "justifying reason" is sufficient for a differentiation between the two groups of employees. One may speak of first-class and second-class antidiscrimination rules. Additionally, it may be permitted to mention that the "prohibited grounds" in article 13 refer to personal qualities; the role in the labour market or in society as such is not mentioned: No antidiscrimination rule as to social origin, lack of

qualification or fortune. Article 14 of the European Convention on Human Rights picks up these points but is restricted to the exercise of the fundamental rights enumerated in the Convention.

2. Procedural Rights

EC Labour law does not grant exclusively equality rights. Its second main topic are procedural rights. “Consultation” is the magic word which shall replace codetermination in Germany and strike in Portugal. The acquired rights directive provides for consultation as well as the mass dismissal directive does. The main purpose of the directive on European works councils is “information and consultation”. Even in the field of health protection and working environment Community Law offers above all procedures: The risk assessment which should be realized at every working place may serve as an important example.

The outcome of the procedure is not an object of Community Law. If the employer has consulted the employees´ representation in an adequate way, he is free to take his decisions. A veto of the employees´ side may derive from national law as in the case of outsourcing in Sweden – but Community Law does not provide it. Everything which is outside the exchange of arguments is no object of EC law – codetermination and strike seem to exist in a zone of tabou; even to mention it in Brussels or Strasbourg would be a curious behaviour.

The procedures as such are limited to the enterprise or the group of enterprises. Negotiations on the level of the branch or the conclusion of nation-wide agreements are outside the scope of EC labour law. It would be too obvious that consultation would be no more sufficient to come to an agreement in such cases.

But is the Social Dialogue not an important exception? Indeed, the European social partners can influence the legislation on EC level. If their agreement is transformed into a directive, its effect is enormous and goes far beyond any generally binding agreement on national level. But the consensus is reached because the employers or both sides are afraid of an own initiative of the Commission which could lead to undesired consequences. If this “threat” does not exist, an agreement will not be taken into account or will take place but lead to no real consequences as the telework-example shows: It is up to the national social partners to

implement the agreement found in the Social Dialogue – a burial of second class, as it was said in Germany. The example shows that the Social Dialogue does not imply real autonomy of the social partners; it is just a procedure to facilitate the law-making process in the European Union. One could even say that the social partners take the place of the Parliament which shall only be "heard", consulted in these matters. A curious form of democracy.

3. Freedom and solidarity at work?

Does EC-law provide for freedom of opinion or for trade union rights at the working place? You will have big difficulties to find any guarantee of that kind. These rights exist, however, in Community Law, but they are hidden to the citizen as to the observer: The lawyer will find them as general principles derived from die Constitutions of the Member States and from International Conventions ratified by the Member States. The European Court has stated at many times on the existence and the scope of these fundamental rights. But there is a restriction of crucial importance: These rights can be invoked only in fields where Community law is applied: If there is no EC rule applicable in a certain conflict no fundamental right can be invoked.

4. Substantive Guarantees

In a very few cases, EC law provides for substantive rights. The directive on working time gives four weeks of paid holidays a year to every employee (and a working week of statistically 48 hours, completed by a lot of exceptions). In case of insolvency of the employer, the employee keeps his or her wages during a period of three months before the bankruptcy takes place.

5. Evaluation

Seen from a German or a French experience, the outcome of nearly 50 years of Community labour law seems to be rather modest. But the picture would be incomplete if we would focus exclusively on EC law. The rules briefly described are added to national labour law; seen together, the protection of the employees has been improved despite of some 30 years of deregulation policy in different member states. In some cases, EC law brought new elements: if a traditional paternalistic system of health protection at the working place is completed by

procedural rights, it has a good chance to be more effective than before. Relying only on EC law would – on the other hand – lead to a kind of catastrophe; we would more or less be even on a lower level than the US.

Why did EC law concentrate on equality and procedural rights? The main reason seems to me that this kind of rules is compatible with different economic situations of the Member States. Equality can be practiced in Lithuania, too, where wages normally are about five percent of the German level, and there is no obstacle to go on with the same procedures as in other Member States. Both forms of law have the rarely mentioned advantage not to create any problem of legitimation: Who would be against equality? Who would oppose to consultation? To guarantee minimum wages would on the other hand evoke broad discussions which could finally lead to "unfair" questions about the distribution of wealth and chances in our society.

III. Challenges to EC labour law

Economic Globalization has become part of everydays life in Europe. Firms transfer production to China or India or buy components in countries with lower wages and lower prices. The neoliberal reaction consists in lowering the own costs, especially wages and working conditions. Taxes for the own enterprises have to be reduced. Practiced as a general principle, this leads to a race to the bottom.

Equality rights and procedural rights have some impact on the market. You cannot use female workforce or migrant workers to come to lower costs, even if the market would permit it. Procedures may complicate decisions and therefore prevent enterprises from reacting in a flexible way. It is clear that there is a pression to reduce the standards of EC labour law.

1. Revision of directives?

To enact a directive needs a lot of patience; normally you have to wait for years. In some cases, even 30 years have not been sufficient; the rules on the European company may stand as an example. This is due to different national interests but also to governments with divergent political options. In the EU, we never had a situation that all governments were conservative or social-democratic.

The obstacles which make the legislation process so lengthy play an important role in the adverse situation of changing and reducing existing directives: It is nearly impossible, to put away well established rules and to renounce on some equality or procedural rights. During the last 20 years, Council and Parliament managed only in few cases to modify existing directives: The acquired rights directive and the directive on the protection of workers in the case of insolvency of the employer were changed in some minor points; the concept as such was left untouched. EC labour law is obviously not suitable for deregulation. But can it really resist to the general trend? Help seems to come from the so-called fundamental freedoms, the right of establishment and the right to provide services.

2. The right of establishment

Art. 48 of the Treaty gives the right of establishment to companies "formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community". It seems convincing that this rule implies the right to transfer the headquarters to another Member State; the right to establish a subsidiary would not be sufficient. In recent years, the European Court of Justice has given a very broad interpretation to companies´ right of establishment. In a series of decisions, the Court has acknowledged the right to be registered in a freely chosen country without having any genuine link to it: A firm is entitled to chose the company law which seems to it the most suitable one (Centros, Überseering, Inspire Art). In the Überseering-Case, two Germans went to the Netherlands in order to register a company doing business afterwards exclusively in Germany. The Court stated that Germany had to recognize the existence of the company under Dutch law. Having an accommodation address is now sufficient – we call these companies in Germany Briefkastenfirmen ("letter box firms"). The consequences for German labour law are considerable: The codetermination on enterprise level, especially by sending employee representatives to the so-called supervisory board of a joint stock company or a limited company cannot not be extended to firms under foreign law. A legal flight from the codetermination system seems possible; at least a firm which expects to reach the limit for codetermination can go abroad without any transfer of real activities. Thus, the European Court has successfully managed to deregulate at least one part of German labour relations.

The Court´s decisions will have some impact in other Member States, too. People go to Britain or to Ireland to found a limited company which needs no initial capital; you just have to pay some fees. These companies make business in France or in Portugal; if they have no money, creditors including workers will have big difficulties in piercing the corporate veil. Who knows the Irish rules on that topic? Or the Polish or the Estonian ones, if they exist? Can we apply the rules of the country where the business is done? Nobody knows and this legal uncertainty is not in favour of employees or consumers.

3. The draft directive on services

In the beginning of the year 2004, the Commission presented a "Proposal for a directive of the European Parliament and of the Council on services in the internal market" (COM(2004)2 final), often called the "Bolkestein-Directive". The big document was more or less ignored until autumn of last year. In Germany, the union of construction industries woke up and organized some meetings where the contents of the proposal were discussed.

It is impossible to present the whole text as the paper has more than 100 pages. Some characteristics may be sufficient.

A corner-stone of the proposal is the "Country of origin principle" laid down in article 16. Providers of services are subject only to the national provisions of their state of origin. This covers "provisions relating to access to and the exercise of a service activity, in particular those requirements governing the behaviour of the provider, the quality or content of the service, advertising, contracts and the provider´s liability." As a labour lawyer, one should put the accent on the word "contracts": The employment contract will totally be governed by the law of the country of origin. The parties may come to a different agreement but why should a Czech or a Polish employer accept such a proposal? The rules of the country of origin comprise even a part of health protection: According to Art. 16 § 3 lit. h the Member State in which the service is provided is not entitled to impose "requirements which affect the use of equipment which is an integral part of the service provided." At least, consumers are in a better position than employees, because Art. 17 no 21 in so far provides for an exception from the country of origin principle.

Another exception refers to the directive on posted workers which shall remain untouched. But in this field there is another big problem. Art. 24 of the proposed directive forbids the Member States where the services are delivered to exercise an efficient control. They can no more ask for a preliminary information about the envisaged activity, they can no more impose the existence of a representative. All data about the activities fulfilled have to be send to the country of origin which is the only competent one to control whether its provisions have been observed or not. Why should it create difficulties for its own enterprises and reduce the competitive advantage which a not-implemented law gives? The country where the service are delivered can intervene only in cases of imminent danger for life and health. The directive on posted workers as well as other labour law rules become meaningless under such circumstances; they are good for Sunday speeches preaching the benefits of European unification. If the directive on services became realized, that would be the biggest deregulation program Europe has ever seen. Mrs. Thatcher´s activities would be just a timid attempt to re-establish the free market and the law of the stronger linked to it.
It is up to all of us to stop these plans; during the French discussion, the “Bolkestein”-Directive was one of the points the movement for the “No” campaigned with.

IV. Perspectives

Even if we succeed in defending the existing achievements, this will not be sufficient for the future. Can we go further in the traditional fields of equality and procedural rights? Can we perhaps go into other fields giving more substantive protection to workers? An answer can be tried only if we consider first the economic and political framework in which the Community can act.

Let us begin with the political side. The Community has a legitimation problem which has existed since a long time before the French and Dutch referenda. It can be described by three factors.

The Community has more difficulties to get the support of the majority than a nation-state. In terms of its powers, it is only a fragment of a state for large parts of the economy; however, for legal and political reasons, it cannot become active in many other fields. This means that the Community supplies less “public goods” than traditional nation-states: it can do very little, for instance, in the fields of external and internal security. It has very little say on the

distribution of incomes, wealth and educational opportunities; nor does it have a common culture or a common language with which its citizens could identify. So economic drawback suffered, for example, by farmers or employees, cannot be compensated for by a “Right or wrong, it´s my country”.

The second disadvantage of the European Community is its obvious and still continuing democratic deficit. The European Parliament, which is directly elected, has no undivided legislative power. The more important decision-making centre is still the Council of Ministers. Although this body may have an indirect democratic legitimation, it often escapes effective control by national parliaments.

Thirdly, the lack of democratic structures is aggravated by the lack of transparency in decision-making mechanisms; there is only limited control by the media and the public. Decisions are made by means of complicated procedures, often behind closed doors. No critical observers are allowed to attend, not even at the deliberations of the Council of Ministers. The individual´s level of information depends on his or her social or political proximity to certain people in key positions. It is true that legal acts and corresponding proposals that are produced are accessible in the “Official Journal” and by internet, but there is such an overwhelming plethora that the individual is not in a position to know where to look for relevant information in a given context. In addition, the perspective horizon of many European citizens is still limited to their nation-states and their national policies. To them, what happens at the EC in Brussels, at the Council of Europe in Strasbourg or at the United Nations in New York is basically a second-class reality. And even courts ignore or lightly push aside international agreements, as they traditionally do not enjoy the same dignity as acts adopted by, for instance, the German Parliament. Because of both these factors – the well-shielded decision-making process in Brussels and the dispositions of individual citizens – what happens onthe EC level is for most Europeans a “book with seven seals”.

All three “peculiarities” of the EC are relatively harmless if there are no major conflicts, and if the two main objectives are to stimulate growth and to distribute wealth. However, as soon as the fair weather period is over . and it has been over since at least 1974 - things are quite different. The Community is losing credit not only because it has to “hurt” certain population groups such as the farmers ; it is also losing some of its legitimacy because it is becoming apparent to many people that its decision-making processes are slow and cumbersome and

that there are new manifestations of national egoism which, in turn, are used by others to justify their egoist responses.

The broad interpretation given by the European Court to the market freedoms, has aggravated the Community´s legitimation problems. The privatization of public services brings competition in reducing workers´ rights. Why should a worker of a power plant or a transport company be a good European if he loses, due to European "principles", his job or in the best of the cases one third of his wages?

What can the Community do under such circumstances? Against this background, there is practically no other option than to make the European market an economic success for all the parties involved. This means that serious efforts have to be made to tackle the various social problems. Under the current conditions, it is in the interest of European unification that social policy not be regarded as a more or less secondary "supporting measure" whose omission would not entail any major disadvantages. Instead, social policy is a matter of utmost importance; it is a necessary foundation for supporting the entire process. If large sections of the population were to become disappointed, to resign or to oppose the Community instead of supporting it, the "No" would become an overall phenomenon. Taking concrete steps at present, therefore, does not mean implementing - at long-last – well-meant programs but it is part of an urgently required policy.

What is possible when the first shock after the referenda is over? For economic reasons, it will not be feasible to go into new fields and improve, for instance, social security systems or reduce weekly working time to 40 hours. The Community can go ahead in its traditional fields where only minor costs are at stake. Let me make some concrete proposals.

Social policy could be facilitated if it can be based on fundamental social rights. The declaration of 1989 and the Charter of Nice should get a binding character. This could be done by the European Court, but it would be preferable to introduce these principles into the Treaty itself.

Equality rights could be extended. Art. 13 should incorporate other personal characteristics and social positions and roles which involve a considerable risk of discrimination. Self-

employed workers economically depending on one contractor may serve as an example, single parents would be an other one.

The consultation procedure could be taken more seriously without going so far as to demand a comprehensive codetermination. A right of veto for the representation of the workers could be feasible if its effect would only be a suspensive one.

The Community could take more care of the individual worker. Why would it not be possible to establish rules on the protection of the personality at the working place? In the field of privacy this has been already done by the data protection directive; would it not be possible to continue this way? Freedom of opinion for employees as a principle of EC-law applicable to all working places from Finland to the Algarve: Would it not create a new European spirit? The same could be said for an effective protection against dismissals. Would fair labour law standards not be the best precondition for much more innovation in our economy? I hope there will be an open discussion about all thosesubjects.