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Perspectives of European Labour Law

I. Introduction

The Europeanization of labour law and industrial relations was not on the agenda of the European Economic Community (EEC) in 1957. In its origins the European project was understood as being primarily an effort to construct a single market. Social policy almost exclusively was left to the Member States. The original Treaty did not contain legislative powers on labour law.

In the meantime the European integration of labour law and industrial relations have become an important part of the European project. The first steps in this direction were made in the 1970s. In spite of the lack of legislative powers of the EEC in the area of labour law, Directives in this field were passed (in particular equal pay for men and women[1], comprehensive equal treatment of men and women in employment[2], protection of workers in case of collective redundancies[3], in case of transfers of undertakings and in case of the insolvency of the employer[4]). They were based on articles in the original Treaty (100 and 205) which had nothing to do with labour law and which required unanimous voting in the Council. This shows that the Treaty is more or less irrelevant if there is a consensus by the Member States. In reference to minimum standards. This was the case until 1979 when Thatcher came into power in the U.K.

Only when in 1987 the Treaty was amended by the Single European Act the EEC became empowered to legislate in a very limited area of labour law (work environment) with qualified majority vote in the Council. By further amendments the EEC not only was renamed in European Community (EC) but the legislative powers in the area of labour law were significantly extended (by the social protocol to the Maastricht Treaty in 1992 and later on in 1998 by the Treaty of Amsterdam). These

[1] Directive 75/117/EEC of 10 February 1976, L 45/19
[2] Directive 76/207/EEC of 9 February 1976, OJ 1976, L 39/40
[3] Directive 75/129/EEC of 22 February 1975 OJ 1975, L 48
[4] Directive 77/187/EEC of 5 March 1977, OJ 1977, L 61

amendments now simply were transferred into the Lisbon Treaty on the Functioning of the European Union (TFEU). Accordingly the EU is empowered to establish minimum standards for practically all aspects of labour law except “pay, the right of association, the right to strike and the right to impose lock-outs” (art. 153 par. 5 TFEU). Legislation is possible on most of the subject matters by qualified majority.

The indicated amendments have brought another innovation. If the Commission wants to initiate legislation it has twice to consult the social partners of the inter-professional social dialogue, the European Trade Union Confederation (ETUC) on the employees’ side and the Confederation of European Business (BUSINESSEUROPE), the European Association of Craft Small and Medium-Sized Enterprises (UEAPME) as well as the Centre of Employers and Enterprises providing Public Services (CEEP) on the employers’ side. First they are to be consulted on the question “whether” a specific piece of legislation on subject matters listed up in art. 153 par. 1 TFEU should be initiated and secondly on the question “how” such a piece of legislation should look like. In the latter consultation the social partners are entitled to take away the project from the Commission and are invited to try within a certain period to reach an agreement by themselves. Such an agreement then by the social partners can be brought via the Commission to the Council which may transfer it into a directive. So far this happened only three times in the 1990s. Afterwards it only led to an amendment of the already negotiated Directive on parental leave[5]. Therefore, this structural innovation should not be overestimated.

Finally it should be remembered that after a long and very controversial discussion a Charter of Fundamental Rights of the EU was passed in 2000 as a legally non binding declaration which expressed the consensus of all 15 Member States of that time[6]. The Charter now has become a legally binding part of the Lisbon Treaty. It contains a whole set of fundamental social rights, among them the right to protection against unjustified dismissal, the right to fair and just working conditions, the right to collective bargaining and collective action as well as right for either workers or their representatives on information and consultation, to just give an impression.

[5] Directive 2010/18/EU on parental leave of 8 March 2010 repealing Directive 96/34/EC of 3 June 1996, OJ 2010, L 68/13

[6] For the genesis and the content of the Charter see M. Weiss, The politics of the EU-Charter of Fundamental Rights, in B. Hepple (ed.) Social and Labour Rights in a Global Context, Cambridge 2002, 73 et seq.

These developments have to be kept in mind if in the following the status quo of European labour law and industrial relations is briefly sketched. And it is a necessary precondition for an assessment of the possible further development- .

II. The Status Quo

In individual labour law major progress has been made particularly in legislation on health and safety, on working time, on work and life balance, on atypical work, on protection of employees in case of trans-national services and on prohibition of discrimination.

In addition European legislation has tried to resolve the tension between the freedom of services and social considerations. In the early 1990s construction companies from member states with significantly lower levels of working conditions and labour standards provided their services in high wage countries. Their employees of course remained to be employees with employment relationships in their country of origin, not being covered by the equal treatment principle which would have to be applied if they would have become workers of the country where the services are performed. Therefore, due to much lower labour costs these companies were able to offer their services much cheaper than companies in higher wage countries. This led to a substitution effect: companies in higher wage countries had less work, many of them went into insolvency and many workers in the construction industry lost their jobs[7]. This led in 1996 to the Posting of Workers Directive[8] according to which essential employment protection standards in the host country (minimum wage, maximum work periods, minimum rest periods, minimum paid holidays, health and safety standards etc.) are to be applied to the posted workers. This Directive has been strengthened by a Directive improving its enforcement[9] and by an amendment[10] which not only extends its scope of application but prescribes no longer not only minimum condition but equal conditions for posted workers.

[7] For this development see M. Weiss, The Implication of the Service Directive on Labour Law – A German Perspective, in: R. Blanpain (ed.), Freedom of Services in the European Union – Labour and Social Security Law: The Bolkestein Initiative, The Hague 2006, 77 et seq. (78 et seq.)
[8] Directive 96/71/EC of 16 December 1996, OJ 1997, L 18/1
[9] Directive 2014/67/EU of 15 May 2014, OJ 2014, L 159/11
[10] Directive 2018/957/EU of 25 June 2018, OJ 2018, L 173/16

Even more important than the inputs into individual labour are the European legislative measures in the area of collective labour law: they shape the interaction and the power relationship between both sides of industry and, thereby, have an enormous impact on the structure of industrial relations. In particular three legislative steps in the area of workers' participation are of utmost interest, two referring to trans-national undertakings and groups of undertakings and one referring to domestic structures within the Member States.

The first step in this context is the Directive of 1994 on European Works Councils (EWC)[11] which has been amended in 2009[12], slightly amendedin 2009-. It covers trans-national undertakings and groups of undertakings with at least 1000 employees within the EU and with at least 150 employees of the undertaking or of different undertakings of the group in each of at least two different Member States.

An important step in this context was the Directive supplementing the statute for a European Company with regard to the involvement of employees[13], particularly in company boards. This Directive has to be read together with the Statute on the European Company[14] which contains the rules on company law. The main goal of establishing a European Company as an option is to save transaction coasts, to increase efficiency and transparency. It no longer should be necessary to create complicated structures of holding companies in order to overcome the problems arising from national company law. The Directive on employee involvement in the European Company has been followed by similar patterns for transnational mergers etc.

Whereas the two Directives mentioned above refer to the trans-national context, the Directive on a framework for information and consultation of 2002[15] shapes the participation structure within the member states. It covers public or private undertakings of at least 50 employees and establishments of at least 20 employees in Member States. On the whole the Directive remains very flexible and leaves the structural framework and the modalities to a great extent to the member states.

[11] Directive 94/45/EC of 22 September 1994, OJ L 254/64
[12] Directive 09/38/EC of 6 May 2009, OJ L 122/28
[13] Directive 01/86/EC of 8 October 2001, OJ L 294/22
[14] Regulation 01/2157/EC of 8 October 2001, OJ L 294/1
[15] Directive 02/14/EC of 11 March 2002, OJ L 80/29

Nevertheless it is an important step to promote minimum conditions for information and consultation throughout the Community. Since the directive only provides for a minimum framework it of course does not affect more favourable arrangements in Member States. In addition the Directive cannot be used to justify the reduction or destruction of existing patterns.

This very sketchy assessment of the status quo shows that employees' involvement in management's decision making has become an important feature of European collective labour law.

The inputs into labour law by the European legislator are undoubtedly impressive. However, taken everything together, legislation on social minimum standards is still unsystematic and fragmentary. Important areas are still missing. Wage and collective bargaining are still totally out of range due to the lack of legislative power and topics like protection against unfair dismissal still need unanimous voting in the Council. These deficiencies have become particularly evident when in the course of managing the financial crisis in the context of the austerity strategy Member States in Southern Europe were forced to reduce their standards of dismissal protection and of minimum wage and also forced to dismantle their collective bargaining systems. The construction of social Europe needs a comprehensive floor of rights throughout the EU which cannot be undercut. This, of course, does not mean that diversity between the labour law systems of the Member States should be abolished. It only means that minimum standards are established which are in line with the worker's fundamental right to "working conditions which respect his or her ...dignity" (Art. 31 of the Charter). At least this minimal social coherence is to be achieved.

II. The Obstacles for Further Legislation

1. The Diversity of Interests

In spite of the fact that the EU has a relatively comprehensive power to legislate in the area of labour law the obstacles for legislation in this field are significant. This is first of all due to the fact that the interests of the Member States in the EU of 28 have become so heterogeneous that it is very unlikely to get even a qualified majority for a

piece of legislation. And it has no realistic chance if unanimous voting is required. It is understandable that low wage countries want to use lower labour standards as a competitive advantage in comparison to high wage countries.

2. The Emphasis on Subsidiarity and Proportionality

But it is not only the conflict of interests between the Member States which creates difficulties for legislation in the area of labour law. Perhaps even more important is the fact that the Lisbon Treaty by a "Protocol on the Application of the Principles of Subsidiarity and Proportionality" has given these principles such an enormous significance that legislation on controversial issues has become very difficult. Formerly it was sufficient that the Commission gave reasons to justify its view that the principles of subsidiarity and proportionality have been respected. Now a new procedure is established in reference to subsidiarity. Each proposal of legislation – be it a Directive or a Regulation - has to be presented to the national Parliaments at the same time when it is presented to the European bodies of legislation. Within eight weeks the national Parliaments can declare in written and be giving reasons why in their view the proposal is not compatible with the principle of subsidiarity. Each national Parliament has two votes and in two chamber systems each of the representative bodies has one vote. If at least one third of the votes of the total number for national Parliaments reject the proposal because of violation of subsidiarity, the proposal has to be re-examined by the Commission. If the Commission wants to further promote the proposal, a new decision with reasons is necessary. The need for justification by the Commission is even stronger if a majority of the national Parliaments has rejected the proposal. It may well be predicted that national Parliaments will be inclined to stress subsidiarity and that afterwards it will be psychologically extremely difficult for the Commission to overrule a third or even the majority of national Parliaments. Therefore, the expectation for legislation in such a controversial area as labour law may be to a great extent a futile hope in the future. This protocol definitely is not an instrument to support and promote European integration.

III. Can the Lack of Legislation be compensated by the CJEU ?

In the past the CJEU has proved to be a body supporting and promoting European integration. And it also has played an important role in developing fundamental rights. Already very early in the development of the European Community fundamental rights became an issue. When the jurisdiction of the CJEU destroyed any doubts about the supremacy of Community law over the law of the Member States, this position was questioned by those States who had a constitution containing fundamental rights. In particular the German Federal Constitutional Court was not willing to accept this dogma of supremacy as long as there was no guarantee that the level of fundamental rights as provided by the German constitution would be respected by the CJEU[16] . Since the Treaty mainly was focusing on the freedoms of movement of capital, goods, services and workers in order to optimize market conditions, it was not at all clear what its position was towards fundamental rights. Therefore, the danger of a deconstruction of the platform of fundamental rights on national level could not be excluded. It, however, soon turned out that fears of this kind were unjustified. By referring to the European Convention of Human Rights and to the constitutional traditions of the Member States the ECJ established a jurisdiction which was and still is based on fundamental rights[17]. In view of this development the German Federal Constitutional Court gave up its opposition and declared to respect the supremacy of European Law as long as the CJEU is following this path[18]. The CJEU strengthened the efforts to built its judgements on the sound basis of fundamental rights on Community level[19]. It has to be stressed that it was first of all the CJEU who established fundamental rights on EU level.

Of course the CJEU could not develop systematically a comprehensive set of fundamental rights. By necessity the Court's efforts had to be fragmentary and, therefore, unsatisfactory. This is the reason why the Charter of Fundamental Rights now is so important. By the fact that the Lisbon Treaty has made this Charter legally binding the CJEU no longer is forced to construct fundamental rights by referring to all kind of international and national sources. The simple recourse to the Charter now provides the legitimacy the Court needs. And here the fact that fundamental social rights are embedded in the Charter becomes important. The CJEU has already

[16] BVerfG of 29 May 1974, BVerfGE 37, 27
[17] J. H. H.Weiler, The Constitution of Europe, Cambridge 1999, 107
[18] BVerfG of 22 October 1986, BVerfGE 73, 339
[19] B. Hepple, The Development of Fundamental Social Rights in European Labour Law, in: A. Neal and S. Foyn (eds.), Developing the Social Dimension in an Enlarged European Union, Oslo 1995, 23 et seq.

shown that it is willing to activate these rights[20] and, therefore, optimism in this respect is justified.

After the CJEU's judgements on Viking[21] and Laval[22] court-bashing has become a favourite sport of all those who do not like the outcome of these court rulings. "The Court subordinates workers' rights to economic freedoms"[23] has become the verdict of an ever increasing group. This Court-bashing is based on a very short-minded and not well founded perspective.

As mentioned in the beginning the EEC primarily was meant to establish a Common Market. Therefore, it is no surprise that the free movement of goods and capital as well as the freedoms of services and establishment became the cornerstones of the Treaty. The freedom of movement of workers throughout the EEC also belongs in this context: it was necessary to provide for the optimal allocation of workers. Abolition of distortions of competition is another element of this concept. The EEC from the beginning had widespread powers to legislate in order to facilitate the efficient implementation of the market freedoms and the concept of competition. And, as already mentioned, social policy in the original Treaty almost totally was left to the Member States.

Even if – as sketched above – things have changed in the meantime and the social dimension has become an important part of the European project, it cannot be ignored that the market freedoms still are the pillars of the Treaty. Service providers acting in another Member State as well as companies residing in another Member State are guaranteed to move to the other Member States under the conditions of the country of origin. The underlying philosophy is free competition between the different Member States. This implies the abolition of all restrictions preventing companies and other service providers to take use of these freedoms. The prohibition of restrictions, therefore, always has been the guiding principle for the CJEU in order to facilitate the use of these freedoms and to fight protectionist tendencies.

[20] See for example recently ECJ of 19 January 2010 (Kuecuekdeveci) C-555/07
[21] ECJ of 11 December 2007 (Viking) C-438/05 , ECR 2007, 10779
[22] ECJ of 18 December 2007 (Laval) C-341/05 , ECR 2007, 11767
[23] J.E. Dolvik / J. Visser, Free movement, equal treatment and workers' rights: can the European Union solve its trilemma of fundamental principles ?, Industrial Relations Journal 2009, 491 et seq. (492)

Only to a very limited extent the Treaty allows for exceptions of these freedoms (art. 52 par. 1 TFEU). The wording of the Treaty undoubtedly does not justify exceptions beyond "public policy, safety or health", in particular not in reference to wages and similar working conditions. Nevertheless the CJEU very early tried to establish a compromise between the market freedoms and the social dimension. The CJEU considered legislation or extended collective agreements on minimum working conditions in the host country in principle as justification to restrict market freedoms if these conditions are necessary and proportionate and are applied to the foreign service provider in a non-discriminatory way[24] This formula developed by the CJEU in spite of the text of the Treaty was a precondition for the acceptability of the Posted Workers Directive of 1996 and the restrictions in the Service Directive of 2006. It should be kept in mind that the Posted Workers Directive by many experts was considered to be incompatible with the wording and the philosophy of the Treaty and denunciated as a protectionist instrument. In this context it was the CJEU who has taken the decisive move to prevent social dumping by use of market freedoms.

The judgments on Viking and Laval have to be evaluated in this context. The CJEU recognized the right to strike as a fundamental right on Community level, even if the Charter of Fundamental Rights then was not yet binding. Already in the judgements Schmidberger[25] (C-112/00) and Omega[26] (C-36/02) the Court has used the same method as in Viking and Laval: to take the market freedom and the fundamental right as conflicting entities of equal value and to find a balance between them. The criterion in all these cases was the same: proportionality.

Proportionality undoubtedly offers a big leeway for interpretation. And the CJEU may be critisized for the way it used this leeway. It also may be debatable whether there should not be a hierarchy between fundamental social rights and market freedoms in favour of the fundamental rights. However, this would have been a major correction of the Treaty's architecture and, therefore, none of the Court's business. Otherwise the CJEU's legitimacy would have suffered. The ETUC's request to amend the Treaty by putting therein a social clause would have been a way to resolve the problem in favour of fundamental social rights. However, this strategy did not succeed. But the

[24] Starting with ECJ of 27 March 1990 (Rush Portuguesa) C 113/89 , ECR 1990, 1417
[25] ECJ of 12 June 2003 (Schmidberger) C-112/00 , ECR 2003, 5659
[26] ECJ of 14 October 2004 (Omega) C-36/02, ECR 2004, 9609

Lisbon Treaty has brought by article 9 TFEU an innovation which may facilitate the CJEU's task in the future and which might give the social dimension more weight in its judgements. According to this article "in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion....". In short: thereby the CJEU has a basis in the Treaty to give the social dimension more weight than before without being in the danger to lose legitimacy. Of course, it is uncertain how the Court will use this new instrument. However, in view of its attitude in the past optimism seems to be justified.

The CJEU has the difficult task to balance the social dimension with the market freedoms and the prohibition to distort competition within the EU. In doing this it is necessary to convince the different actors in order to guarantee acceptability of decision-making. The fact that the deliberations within the Court remain in the dark, is not very helpful in reaching this goal. Therefore, it might be recommendable to change the structure of the CJEU towards a system which allows to better understand the discourse within the Court by increasing transparency. The introduction of the possibility to dissenting and concurring opinions might be helpful in this respect. This, however, would be dangerous for the independence of the judges if the present system of a term of office of 6 years with a possibility of a second term of office would be maintained. Therefore, it might be necessary to change it into one single term of office of 12 years[27]. It goes without saying that for such a change the Treaty would have to be amended.

Even if there are indications that the CJEU might be willing to promote the social dimension of the EU, it, of course, cannot substitute missing legislation. The CJEU has to be aware that the boundaries of existing legislation and the Treaty are not exceeded. Otherwise it risks to lose legitimacy. Therefore, only to a very limited extent the CJEU will be able to compensate the lack of legislation. Further 'hard law' by way of legislation is indispensable.

IV. Alternative Strategies as a Substitute to Legislation ?

[27] For this proposal see M. Hoereth, Richter contra Richter, Sondervoten beim EuGH als Alternative zum 'Court Courbing', Der Staat 2011, 191 et seq. and M. Hoereth, Warum der EuGH nicht gestoppt werden sollte, in: U. Haltern / A. Bergmann, Der EuGH in der Kritik, Tübingen 2012, 73 et seq. (111)

Possibly alternative strategies might compensate for the lack of minimum standards which cannot be undercut.

1. The Potential of the Social Dialogue

The social partners in the inter-professional social dialogue not only are integrated into the legislative machinery but are also entitled to conclude voluntarily agreements whose content might go far beyond the topics covered by article 153 TFEU and which are to be implemented "in accordance with the procedures and practices specific to management and labour and the Member States" (Art. 155 par. 2 TFEU). Examples for such voluntary agreements on inter-professional level are the framework agreements on tele-work of (2002), on stress at the workplace of (2004), on harassment in the workplace (2006), on violence in the workplace (2009) and on inclusive labour markets (2010).

Voluntary agreements are nothing else but an offer for the actors on national scale to give them some guidance and to enrich their imagination. Or to put it differently: they are to be understood as a European input intending better coordination of collective bargaining on national scale by offering ideas on how to cope with specific problems (as "tele-work", "stress at the workplace" etc.). The national actors are supposed to reflect on the basis of the framework agreement. This implies that the European actors have no choice but to convince the national actors of the advantages the content of the framework agreement. Only close and continuous communication offers a chance of success[28]. This form of vertical communication is again of utmost importance for the growth of real European actors of both sides of industry: another step towards a European collective bargaining system which then might deserve its name.

The problems which arise in the context of the sectoral social dialogue are essentially the same. Here the confederations of trade unions and employers associations of specific branches of activity are put together in a social dialogue. In the meantime there are European social dialogues for almost 50 sectors. The sectoral social

[28] For such a perspective see already M. Weiss (FN 1), 68 et seq.

dialogue is not even mentioned in the EC-Treaty. It grew up as an informal structure and was somehow formalised by a Commission's program of 20 May 1998 to promote the sectoral social dialogue..

So far the sectoral social dialogue was not very successful in producing framework agreements. They are still a rarity[29]. The important aspect is that the sectoral dialogue has enormous potential in two ways. First it may help – possibly in an informal way to better coordinate collective bargaining in the Member States. And secondly it may be a helpful setting to improve the vertical dialogue between national and European actors in order to build up a multi-level-structure for all the sectors.

2. Agreements concluded with European Works Councils (EWC)

The system of European Works Councils (EWC) normally is neglected if the future perspectives of European social dialogue are at stake. The reason is very simple: the context in which EWC are put is information and consultation. However, in the meantime the system of EWC has developed dynamics of its own and gone far beyond information and consultation towards negotiations, leading to agreements. These agreements refer to a whole variety of topics: health and safety; environment; fundamental rights, in particular trade union rights and data protection; corporate social responsibility, equal treatment at work, job security, codes of conduct, mobility management; mergers; closures; relocations and restructuring. They are found in quite a few sectors, among them the chemical industry and therein in particular the pharmaceutical industry, the banking industry, the food industry, the oil industry, the metal industry and therein in particular the automobile industry, and even the tourism industry[30].

The most spectacular agreements were concluded in the automobile industry of which the agreements at Ford and General Motors are the most prominent and far-reaching ones. Just for the sake of illustration I briefly would like to sketch the

[29] For a comprehensive assessment and a rather sceptical perspective in this respect see B. Keller, Social Dialogues at sectoral Level. The neglected Ingredient of European Industrial Relations, in: B. Keller / H.W. Platzer, Industrial Relations and European Integration. Trans- and supranational Developments and Prospects, Hampshire / Burlington 2003, 30 et seq.

[30] For this development see T. Blanke, European Works Council Agreements: Types, Contents and Functions, Legal Nature, in: Comisión Consultiva Nacional de Convenios Colectivos (op. cit.), 395 et seq. (413 et seq.)

example of General Motors Europe. After a dispute – which was accompanied by European wide strikes - on relocation of production from Germany to Sweden the central management of General Motors Europe on the one side and the EWC as well as the European Metalworkers' Federation on the other side concluded[31] a rather complicated and detailed agreement in which rules for restructuring were established. In essence it requires that no production units are to be closed, that dismissals for economic reasons should be excluded and that effects of restructuring are to be distributed equally among the different locations. The rules are to be supervised by a special committee of the EWC. This agreement has to be read in the context with another agreement named "Principles for a fair and equal use of locations" in which the representatives of plants in Poland, Belgium, England, Sweden and Germany established a so called 'solidarity-concept' which again intends to make sure that in the course of restructuration there should be neither winners or losers.

The legal effect of this agreement as well as of all other agreements concluded in the context of the EWC system is totally unclear. Since, however, the bodies of workers' representation of the subsidiaries in the different Member States as well as national trade unions and their European confederations normally take part in the elaboration of such agreements, they are considered to be a product of a joint effort and, therefore, are respected in practice. The factual observance, however, is not legally formalised. Since in this context the interaction between national and European actors is far more developed than in the context of the inter-professional and sectoral social dialogue, the EWC pattern might be somehow the forerunner for a system of future European collective agreements, of course confined to the respective groups of undertakings. This development is not without risks. The danger might be that the focus is too much on groups of undertakings, thereby neglecting other companies, in particular small and medium-sized enterprises. One of the difficult tasks in developing a European system of collective bargaining will be to find the right balance between big groups of trans-nationally operating undertakings and all the many other companies which are not linked to the EWC structure.

3. The Open Method of Coordination (OMC)

[31] Unfortunately the documents I am referring to in my example are not published

The OMC has been developed in the context of the European Employment Policy (EEP) in the Amsterdam Treaty[32]. Since then it has become the favourite strategy of the EU in social policy. According to the OMC the genuine competence of the member states remains uncontested. The EU merely is supposed to encourage co-operation between member states, to support and, if necessary, complement their action. It is mainly based on the idea that best practices as discovered in one country may be imitated by other countries, thereby leading to social progress. Instead of regulation by way of legislation the EU only tries to put soft pressure on the Member States, leaving them the task to regulate. This method, however, runs into difficulties if the gap of the economic situation between Member States is too big to allow for similar remedies. Then the capacity of OMC is quickly exhausted.

Since the beginning of the new century the EU has tried to combine OMC with specific goals to be reached. The first expression of this new approach was the Lisbon strategy launched in 2000 for the EU “to become the most dynamic and competitive knowledge-based economy in the world by 2010 capable of sustainable economic growth with more and better jobs and greater social cohesion and respect for the environment”. A whole set of ambitious targets for 2010 were listed up, among them targets for employment rates and for full employment. The concepts for reaching these goals were put in vague notions as are "flexicurity" or "employability". However, soon it turned out that the strategy was much too complex, that it was lacking a clear division of tasks between EU and member states and that there was no really functioning governance structure[33]. Therefore, the strategy was modified and re-launched in 2005. Of great importance were country specific recommendations. They were meant to help the Member States to better realize the objectives in their national reform programs. The OMC as a mutual learning strategy was the underlying philosophy of the whole exercise.

The Lisbon strategy has, of course, not reached its goals but been replaced by the new agenda "Europe 2020", a "strategy for smart, sustainable and inclusive growth"

[32] For the development of EEP see J. Goetschy, European Employment Policy since the 1990s, in B. Keller, op. cit., 137

[33] For an assessment of the Lisbon Strategy see the report of the High Level Group chaired by W. Kok, Facing the Challenge: The Lisbon Strategy for Growth and Employment, Luxemburg 2004

[34]focuses on five goals to be reached by so-called flagship initiatives. In essence it is nothing else but a slimmed Lisbon strategy in new clothes. There is still the reference to the flexicurity agenda, to new forms of work-life balance, to the problem solving potential of social dialogue at all levels and to the European qualification framework. The new strategy remains to a great extent within the old paths.

It has to be stressed that in the the 'Lisbon Strategy' as well as in 'Europe 2020' social policy has been subordinated to the many instruments developed by the EU for macro-economic governance, culminating in the 'European semester'. This macro-economic governance is driven by the neo liberal approach primarily focusing on economic efficiency. The social dimension in this view has remained to be a residual category. This explains why for example the concept of flexicurity in practice has been perverted to flexibility, leading to de-construction of protective standards in many Member States.

4. Evaluation

Taken all these soft law strategies together, the perspectives for the future of European labour law do not seem to be very promising. The role of the EU is reduced to be at its best a promoter and coordinator of reform debates within the Member States. In different ways it puts soft pressure on the Member States. Therefore, these approaches are categorized to be "soft law". The advantage of such strategies is utmost flexibility. However, in the very end the Member States cannot be forced to anything. To guarantee a minimum social level it needs binding instruments, it needs "hard law" which cannot be substituted by "soft law" mechanisms.

V. The European Pillar of Social Rights

In view of this frustrating analysis it is of utmost interest whether the recently proclaimed European Pillar of Social Rights means a new start, getting rid of the economic dominance and finally promoting a holistic approach to employment policies.

[34] COM (2010) 2020 final

The pillar, announced by President Juncker in September 2015, has been elaborated by the European Commission which in March 2016 issued a Communication[35]. According to the Commission 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".[36] This very vague and unspecific concept left open the most important question, namely whether the Pillar is meant to provide rights, meaning hard law, or whether it is merely an extension of the soft law approach. This uncertainty was not eliminated by the preliminary outline for the consultation process which was put at the end of the Communication.

The consultation with all relevant actors in the EU took place in 2016. In January 2017 the Commission held a European Conference in order to wrap up the results of the consultation and to define the future direction of the Pillar of social rights. On 26 April 2017 the Commission presented the final text which was adopted at the summit in Goeteborg in Novemver 2017 as a joint declaration by the Commission, the European Parliament and the Council.

The European Pillar of Social Rights is divided into three chapters: (a) Equal opportunities and access to the labour market, (b) fair working conditions and (c) social protection and inclusion. It lists up goals and principles for 20 policy areas. Some of it is already part of the social acquis and some of it refers to rights contained in the Charter of Fundamental Rights. The powers of the EU as defined in the Treaties are not extended. Even if the set of principles and rights looks very impressive, most of the policy recommendations are meant as encouragement for the Member States to develop respective standards, among them the right to receive support for job search, training and requalification, the right to adequate minimum wages or the right to redress, including adequate compensation, in case of unjustified dismissal. The pillar also contains, even if only to a very limited extent, a program for EU legislation. However, the indicated difficulties for legislation do not disappear by the proclamation of the pillar.

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[35] 'Launching a consultation on a European Pillar of Social Rights', COM (2016), 127 final.
[36] Ibidem p. 7

Undoubtedly the European Pillar of Social rights, providing a comprehensive social agenda, is a step in the right direction. However, it is too early for euphoria. It is uncertain how the Member States will respond to the Member States invitation. There is, of course, pressure on them to implement the recommendations, but the pressure remains to be soft. Binding EU law only can be expected to a marginal extent. Therefore, the need to reflect on possibilities for further hard law on European level does not disappear.

As much as the broad scope of topics as well as the inclusion of the holistic approach including the quality aspect has to be welcomed, the fact that the pillar at least so far remains 'soft law' and lacks legal enforceability has to be seen with scepticism. Nevertheless, the pillar can be interpreted as an attempt to liberate social policy from the one-dimensional dominance of merely focussing on economic efficiency instead of understanding the social dimension as an important cornerstone of society. Seen in this light the pillar of social rights may be understood as a change of paradigm and a strong sign of hope to finally overcome the legitimacy crisis of the EU.

VI. Possible Strategies to overcome the Deficiencies of the Status Quo

1. Enhanced Cooperation

In a situation where the necessary majority for legislation is rather unlikely, enhanced cooperation might be an option. Art. 20 TEU in connection with Art. 326 to 334 TFEU contain a rather complicated mechanism to be observed for this strategy. In spite of this complexity it has already three times[37] taken the obstacles embedded in the Treaties. In essence enhanced cooperation means that a group of at least nine member states "within the framework of the Union's non-exclusive competences", as it is the case in labour law, may make use of the EU's institutions and exercise those competences. The idea is "to further the objectives of the Union, protect its interests

[37] Council Decision 2010/405/EU of 12 July 2010 and Council Regulation 1259/2010/EU of 20 December 2010 on enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010, L 189/12 and L 343/10; Council Decision 2011/167/EU of 10 March 2011, Regulation 1257/2012/EU of 17 December 2012 and Council Regulation 1260/2012/EU on enhanced cooperation in the area of the creation of unitary patent protection, OJ 2011, L 76/53, OJ 2012, L 361/1 and L 361/89; Council Decision 2013/52/EU of 22 January 2013 on enhanced cooperation in the area of financial transaction tax, OJ 2013, L 22/11

and to reinforce its integration process" (Art. 20 par. 1 TEU). Any member state can participate in this strategy. The final decision is made by the Council where only representatives of the member states participating in enhanced cooperation have a voting right, even if all members are entitled to participate in the Council's deliberations. The acts adopted in the framework of enhanced cooperation only are binding the participating member states. The competences, rights and obligations of the non-participating member states are to be respected. Those member states shall not impede the implementation by the participating member states. The procedure to be followed is regulated in Art. 328 to 331.

It is important to stress that enhanced cooperation is not merely an inter-governmental strategy but takes place within the legal framework of the EU. In a situation where - particularly in responding to the challenges implied by the refugee problem - it has become evident that solidarity between Member States is more than fragile, the temptation to take use of the possibility of enhanced cooperation is big. However, this option by necessity leads to an EU of different speeds. Whether on the long run these differences of speed can be be equalised and whether the non-participating member states eventually will join in, remains to be an open question. It is not surprising that some countries have tried to oppose enhanced cooperation[38] as being potentially dangerous for their national interests. The fact that the CJEU[39] rejected this opposition does not mean that enhanced cooperation is an uncontested strategy. It is very ambiguous. The gap between core Europe and the periphery could become too big. And the incentive of those who are willing to build a social Europe for all citizens within the union might get lost. Whether the EU can survive under such perspectives, is at least uncertain.

2. Extension of Competences

As indicated above, the EU legislator still has no power to legislate on pay, the right of association, the right to strike and the right to impose lock-outs. This exclusion of competences is in sharp contrast to the fundamental social rights contained in the Charter of Fundamental Rights of the EU. But not only this contrast is puzzling, it is necessary to empower the EU to establish minimum standards also in these areas.

[38] Italy and Spain in reference to the creation of unitary patent protection
[39] Judgement in Spain v. Council C- 274/11 and 295/11 of 16 April 2013, EU:C 2013, 240

Since only minimum standards are at stake, such legislative powers would not take away the Member States' power to legislate above this minimum level in favour of the employees. To just give two examples to show how important it would be to have minimum standards in this context: (a) a minimum wage for the EU could be established, of course not the same amount for each Member State but fixed as a percentage of the average wage in the respective country. This would guarantee a minimum wage for all employees and at the same time leave the national legislator and/or the parties to collective agreements to lift up this level according to the possibilities in each country. (b) It could be forbidden to undercut the level reached in collective agreements by agreements which are not concluded with trade unions but with other actors, a pattern which has been established in some Member States in the course of austerity politics. In short and to make the point: there is no need to leave these areas of legislation exclusively in the national context, an EU wide floor of minimum standards should be made possible.

3. Reconstruction of the Legislative Procedure

As shown above, under the present system of legislative procedure on EU level it is almost impossible to expect further legislation on minimum social standards. Therefore, it is necessary to facilitate the production of European hard law by all means. Recently Fritz Scharpf has presented a whole set of proposals on how to amend the Treaty in this respect.[40] Two of them are to be strongly supported: (a) The right to initiate legislation should no longer be exclusively with the Commission as it is up to now but should be extended to qualified minorities in the Parliament and in the Council. This to a much bigger extent would force the legislative bodies into discussions on the pros and cons of legislation, thereby increasing the transparency as well as the likelihood of legislative results. (b) Instead of requiring qualified majority or even unanimity in the Council, secondary law should be adopted by simple majority votes in both legislative bodies, the Parliament and the Council. I would add another proposal: So far the deliberations in the Council are secret and not even documented in a way available to the public. They should be made public in order to also increase transparency in this respect.

[40] See in particular F. W. Scharpf, After the Crash: A Perspective on Multilevel European Democracy, MPIfG Discussion Paper 14/21, Cologne 2014, 1 et seq. (17 -22)

There is a further suggestion made by Scharpf for which in my view there is no need. He wants to give the individual Member States the right to opt out from secondary law. Legal acts that exclude opt outs according to him should only be adopted by qualified majority in the Council and absolute majority in the Parliament. The present construction of the principles of subsidiarity and proportionality, as sketched above, allows the Member States to intervene and prevent exaggerations on European level, takes account sufficiently of the individual Member States interest. A right to opt out might go too far. It would imply the danger to fragment and undermine the effect of secondary legislation. After all only social minimum standards are at stake which leaves the Member States enough room to shape the social dimension in their respective countries.

It, of course, is self-evident that in view of the unanimity requirement and the ratification procedures for ratification in all the Member States amendments to the Treaty are an ambitious project. But perhaps the Brexit shock and the danger of populist right-wing movements all over might serve as a wake-up call to finally do something to improve the possibility for European citizens to identify with the social face of the European project.

VIII. Conclusion

The steps taken by the EU from an originally mere market approach to recognition of the social dimension are undoubtedly impressive. This, last not least, is symbolised by the fundamental social rights in the Charter of the Fundamental Rights of the EU which now has become legally binding.

This success story, however, cannot ignore that the obstacles for further development of minimum social standards for the EU have grown significantly in the meantime. New legislation in this controversial area has become very unlikely. To some extent hopes remain on the CJEU which now is in a better position to further play its crucial role as a motor of European social policy. But this, of course, only can happen on the basis of the already existing normative structure. To a great extent European involvement in shaping labour law now has become a soft law approach, an ongoing discourse on measures to be taken combined with mechanisms of soft

pressure. This strategy is no real alternative to an EU wide floor of minimum rights which cannot be undercut. Whether the European Pillar of Social Rights will make a difference, is uncertain.

There is an urgent need to establish further social minimum standards in order to overcome the EU legitimacy crisis. Enhanced cooperation of Member States would be a possibility. But it is an ambiguous strategy, possibly increasing the gap within the EU too far. More promising might be an extension of legislative competences in the social field and facilitation of the legislative procedure. This, however, would require amendments to the Treaty. Whether such a perspective is too ambitious or whether the present legitimacy crisis turns it into a realistic project, remains to be an open question.