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Collective labour law under attack: how anti-crisis measures dismantle workers' collective rights

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Policy recommendations

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Since the outset of the crisis, collective labour law has been under severe attack, in particular when it comes to the role of the trade unions and workers' representatives, the information and consultation of workers and the decentralisation of collective bargaining, thus in a context of a growing democratic deficit in the European management of the crisis. Far from the concept of flexicurity, a dismantling of collective rights is taking place.

As demonstrated by the Transnational Trade Union Rights experts' network, in a forthcoming extensive analysis (Bruun, Lörcher, Schömann, *Economic and financial crisis and collective labour law in Europe*, 2014), the means and methods used by the European Union (EU) in handling the financial and economic crisis hardly sustain sound legal investigation. Compliance with fundamental social rights, and in particular with collective labour rights, might have to be defended via sound litigation strategies and recourse to international instances.

Background

Since 2010 the ETUI has investigated the outreach of the financial and economic crisis followed by the sovereign debt crisis on workers' rights, looking at labour law reforms in the member states (among others, see Clauwaert and Schömann 2011; Lang, Schömann, Clauwaert 2012; Lang, Clauwaert, Schömann 2013; Clauwaert 2013).

In the same vein, the Transnational Trade Union Rights experts' network (TTUR) launched a manifesto in 2011 supported by more than 590 labour and social lawyers to raise awareness across Europe of the dramatic consequences of the anti-crisis measures in labour law and to call on the European Union to respect and promote fundamental social rights, in particular in respect of all crisis-related measures (http://www.etui.org/Networks/The-Transnational-Trade-Union-Rights-Experts-Network-TTUR).

Bolstered by this initiative, the TTUR organised two seminars in 2012 and 2013 dealing with the economic and financial crisis and collective labour law in Europe in order to better understand the complex and authoritative management of the crisis by the EU and to analyse the consequences of crisis management on collective labour rights.

This policy brief aims to reflect concisely on the outcomes of the seminars that are developed much extensively in a forthcoming book, *The economic and financial crisis and collective labour law in Europe*, edited by N. Bruun, K. Lörcher and I. Schömann (2014).

Amending the Lisbon Treaty to better manage the financial and economic crisis

Amendments to the Lisbon Treaty, coupled with national labour law reforms adopted as emergency measures in the crisis context, raise a series of legal issues in terms of competences, scope and possible judicial review, as such reforms have led

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in many cases to infringements of fundamental social rights anchored at international, European and national constitutional levels.

In the first place, it is of the utmost importance to clarify, as far as possible, the quickly evolving European institutional framework and the economic governance structure set up to tackle the crisis. On one hand, amendments to the Lisbon Treaty architecture have led, among other things, to the creation of a European Stability Mechanism, and of a Treaty on Stability, Coordination and Governance in the Economic and Monetary Union: the so-called Fiscal Compact. On the other hand, additional instruments that have been developed by the EU, such as the so-called memorandum of understanding and its supplements, but also the country-specific recommendations aimed at implementing objectives elaborated by the EU within the framework of Agenda 2020 in the member states. Besides these instruments, a new 'European body', the so-called 'Troika' – composed of the EU, the European Central Bank (ECB) and the International Monetary Fund (IMF) – has been very active in setting the conditionalities for programme countries to access to EU financial support. However, the Troika, but also its set-up and its competences, must be considered much more critically, as it hardly sustains rigorous legal investigation. It has been argued that the participation of the European Commission (EC) and of the ECB in the Troika represents an infringement of EU primary law and in particular of the Charter of Fundamental Rights, as even in a situation of financial and economic crisis, EU primary and secondary law is binding on the EU institutions and the member states.

Such developments have been tested on country cases that had and/or still have to face European recommendations and strict reform programmes under the Troika, such as Greece, Ireland, Portugal and Cyprus. These test cases were confronted with the experience of Iceland that, despite dramatic financial and economic difficulties, refused recourse to EU financial support.

Common to all these developments is that labour law reforms, but also of social security systems and public employment have been praised as remedies to the crisis. However, drastic alterations of national labour law have taken place, leading to an explosion of inequalities in and outside the workplace and of insecurity for workers, in some cases, irrespective of fundamental social rights. Furthermore, international labour standards, European values and principles and national constitutional principles have been blatantly violated.

Collective labour rights as permanent adjustment factors in time of crisis

At the onset of the crisis, collective labour rights and individual labour rights were identified as adjustment factors. Although they deem to ensure the necessary balance between flexibility for employers, while providing security for workers at the beginning of the crisis, collective and individual labour rights have fallen under the dictat of the European Commission's crisis management as one source of 'rigidity', costs and sluggishness that hinder European and national economies and therefore as a substantial basis for the 'sclerosis' of the labour markets and the economy in general. As a consequence, labour law and in particular collective labour rights have been subjected to structural reforms, in all member states, as one solution that should fit all, thus legitimising the reduction of labour rights.

Such infringements on labour law standards have led to consideration of the extent to which labour law and in particular collective labour rights have been under attack, with a focus on the impact of the reforms on trade union prerogatives, as well as on the decentralisation of collective bargaining, especially with regard to the role of wage determination/moderation in the crisis (for example, the role of the ECB). Overall, there has been a democratic deficit, especially in relation to adopting social policy reforms.

Structural reforms of member-state industrial relations systems have focused first on decentralising collective bargaining, in other words, shifting from national/sectoral/ branch level to company level, with the declared aim of giving businesses more 'flexibility' and of helping them to adjust to labour market conditions. In parallel, reforms have introduced and/or extended the possibility for lower-level bargaining outcomes to deviate *in pejus*, from the protection provided by higher-level collective agreements or even statutory provisions, for example, regulating wages. Additionally, the EU anti-crisis measures in the form of memorandums of understanding or country-specific recommendations compel member states to reach specific outcomes in collective negotiations, in particular on wage determination.

Structural reforms of collective labour law, moreover, tend to modify the representativeness criteria for the social partners, either by diminishing the role of institutions for social dialogue or by broadening trade union prerogatives to other ad hoc structures of workers' representation at plant level. Prerogatives of union and workers' representatives are further loosened in respect of their duty to better protect workers by diminishing the scope and content of the information and consultation rights of workers' representatives, for example in cases of employment protection law covering restructuring and collective redundancies, in particular the negotiation of social plans.

Additionally, the means of action at the disposal of trade unions might be also weaken and in this context, the question of whether a strike or collective action against economic austerity measures constitute a political strike, and therefore run against member state legislation is of the utmost importance. Indeed, it is necessary for workers and their representatives to be able to make unrestricted use of their right to strike, to protect the collective (and individual) labour *acquis* that are deteriorating rapidly.

Reforms of collective labour law definitely weaken trade union representation and action at all bargaining levels. They affect the very structure of trade unions, as well as their institutional means of protecting and representing workers. In particular, the decentralisation of collective bargaining to the lowest level weakens the social *acquis* achieved so far by the trade unions at

national, branch and local levels, and/or anchored in legislation, for example, on working time, pay, work organisation, working environment and social protection, health and safety at work.

Finally, concerns have been expressed (for example, Clauwaert and Schömann 2011; Escande Varniol, M.C. *et al.* 2012, European Parliament 2013) about the circumvention of democratic procedures at national and at European level in carrying out such reforms with a view to providing a quick and solely economic solution to the crisis. The lack of respect for the information and consultation rights of European social partners, in accordance with Title V on social policy of the TFEU, but also at national level when implementing a memorandum of understanding and the recommendations issued by the European Commission is a striking feature of crisis management processes. However, democratic principles are anchored in the Lisbon Treaty as well as in member states' constitutional law, so that such reforms and Treaty amendments can be deemed unlawful, as national judicial reviews tend to demonstrate, as do cases brought before the CJEU.

The alteration and reduction of the autonomy of social partners in general, and of trade union and workers' representatives in particular, contrasts with the duty of the EU to promote social dialogue, as a dominant feature of European and national collective industrial relations systems in the EU. Social dialogue is a component of democratic governance and of economic and social modernization. In weakening social dialogue as a whole, the current structural reforms undermine the democratic principles of European society.

Ways out of the crisis: what kind of litigation strategy to adopt?

In a series of analyses, the evaluation of the legal background against which austerity measures could be challenged, in terms of litigation strategy, have been assessed, ranging from recourse to primary EU law with the EU Treaties and Charter of Fundamental Rights to international legal and judicial avenues, such as the revised European Social Charter, the European Convention of Human Rights and the International Labour Organisation (ILO).

This evaluation has been carried out by including most of the current judicial complaints in response to anti-crisis measures, some initiated by national trade unions, others by individuals. National constitutional reviews in the Netherlands,[1] Germany,[2] Greece,[3] Ireland,[4] Austria[5] and Poland[6] as well as Estonia[7] have been taken into consideration. Also considered was the complaint submitted to the ILO's Committee of Freedom of Association by the Greek General Confederation of Labour, the Civil Servants' Confederation, the General Federation of Employees of the National Electric Power Corporation and the Greek Federation of Private Employees, supported by the International Trade Union Confederation, concerning austerity measures taken in Greece within the framework of the international loan mechanism agreed with the Troika (EC, ECB and IMF). At its 316st session (1–16 November 2012), the Committee found that violations of ILO Conventions No. 87 and No. 98, in particular, were entailed by the request for suspension of and derogation from collective agreements, as well as derogation *in pejus* and decentralisation of collective bargaining.

Complaints filed with the European Committee of Social Rights of the Council of Europe on austerity measures taken in Greece within the framework of the international loan mechanism agreed with the Troika concluded that a range of fundamental social rights of the Revised European Social Charter had been violated: Art. 4 Right to fair remuneration (Complaint 65/2011), Art. 7 Right of young persons to protection, Art. 10 Right to vocational training and Art. 12 Right to social security (Complaint 66/2011). Finally, the CJEU judgment *Pringle v. Government of Ireland* (CJEU C-370/12),[8] for the first time, addressed the issue of the compatibility of the European Stability and Monetary Treaty with EU law, based on a preliminary question of the Irish Supreme Court in a case in which M. Pringle, a member of the Dáil (the lower house of the Irish Parliament) objected to Ireland's participation in the ESM Treaty and its proposed ratification on the grounds that it was incompatible with the Irish Constitution and the EU Treaties.

The investigations show that in procedural terms and as far as the binding force of the decision is concerned, recourse to collective complaints under the Collective Complaints Procedure Protocol of the Council of Europe might be the most appropriate procedure, on condition that the protocol has been ratified by the member states involved. The same evaluation applies to recourse to the ILO Committee on Freedom of Association at European level, as international instance of review in the case of violations of ILO conventions. In any case, trade unions should use their role as observers within the framework of the reporting systems of the ILO and the Revised European Social Charter.

However, proceedings before the European Court of Human Rights appear more arduous, in particular for trade unions that have, after exhausting domestic remedies, to demonstrate the status of 'victim' to get direct access to the Court, which is less realistic when it comes to general austerity measures.

Finally, recourse to the CJEU in terms of the annulments of Council decisions imposing anti-crisis measures adopted under

1 The Hague District Court of 1 June 2012 (Wilders e.a. v. State of the NL).
2 BVerfG Case No. 2 BvR1390/12 September 2012, 2012 NJW 3145.
3 Greek Constitutional Court: (7 Nov 2012) (Areios Pagos).
4 *Pringle v. Gov. of Ireland* – Irish case – (CJEU C-370/12) directly addresses the compatibility of the EMS with the 'no bailout' clause plus the legal validity of adopting crisis measures in the form of intergovernmental acts in the area of exclusive competences of the EU (recourse to an accelerated procedure).
5 Strache vs. ESM (G104/12-8).
6 Case No. K-33/12. Sejm. 11 February 2013, available at: http://orka.sejm.gov.pl/stanowiskaTK.nsf/nazwa/Stanowisko_K_33_12/$file/Stanowisko_K_33_12.pdf
7 Judgment of the Estonian Supreme Court published in English, available at: http://www.riigikohus.ee/?id=1348
8 C-370/12 Pringle v. Ir. 2012 ECR I, available at: http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=130381&occ=first&dir=&cid=1702925

the European mechanism of financial aid, as legislation and case law currently stand, is obstructed, reducing the right of applicants to effective jurisdictional protection to referrals to national courts. Complaints can therefore tackle national measures adopted in implementation of a Council decision, for which the national court may apply to the Court of Justice for a preliminary ruling on the interpretation of primary law and/or secondary law, or on the validity of secondary law.

Conclusion: a missed opportunity for promoting a social Europe

The dismantling of collective (and individual) labour rights will not bring either economic recovery or fulfil the expectation that labour market bottlenecks and constraints will disappear. Rather such reforms have already led to a dramatic increase in unemployment and will exacerbate the precariousness of the labour market and the pauperisation of the workers, in particular when combined with reforms of atypical employment protection (Lang, Schömann, Clauwaert, 2013), but also of working time (Lang, Clauwaert, Schömann, 2013), public services and unemployment benefit.

As demonstrated by the TTUR, briefly summarised in this policy brief, and developed extensively in a forthcoming book on the issue, the means and methods used by the EU in handling the financial and economic crisis hardly sustain sound legal investigation, in particular when it comes to reforming collective labour law and in loosening existing *acquis*, while dismantling social dialogue and collective bargaining systems. Compliance with fundamental social rights and in particular with collective labour rights as anchored in international and European standards, as well as in constitutional law at national level, will have to be defended, amongst other by trade unions, via sound litigation strategies and recourse to international instances.

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