EUROPEAN SOCIAL UNION

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DIE EUROPÄISCHE SOZIALUNION

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Foreword from the Editor

The third main topic of the XXX FIDE Congress (Sofia, Bulgaria, 31st May – 3rd June 2023), the **"*European Social Union*"**, focuses on the very fabric of the European project. The discussion on the social dimension of Europe is long overdue and is at the core of the legitimate concerns expressed by European citizens.

Traditionally, European integration has been all about what was initially the common, and is now the internal, market. Economic considerations have always led the way with the free movement of goods, services and capital, competition and state aid law, as well as the common commercial policy taking centre-stage as the main thrust of the Union's policies. For years, social coherence and social integration have lagged behind.

The time has now come to bring the need for a European Social Union into the spotlight, placing it at the centre of European discourse and policy-making. Accordingly, this topic aims at conceptualizing the idea of a European Social Union as a way of bringing the EU closer to its citizens.

The general, institutional and national reports discuss the development and strengthening of a genuine and meaningful EU social dimension. They address a number of crucial issues such as conflicts between free movement rights and social rights, the importance of the Charter-based "solidarity" rights and the emergence of social fundamental rights. In particular, the reports focus on the enduring discrimination against mobile workers and the limits of equal treatment of posted workers; the forms of indirect discrimination or other forms of unequal treatment, for instance in the case of family benefits, or the exclusion of non-economically active citizens from social benefits.

The reports raise and study – quite possibly for the first time in European legal writing – the question of the impact of free movement of workers on the demographic crisis and the consequential "brain drain" phenomenon, which have ravaged Eastern and Central Europe, as well as some of the Southern regions of the continent. This problem has remained on the sidelines of EU policy making and is largely under-studied. Yet, it is a serious problem, which is also a source of social and economic tensions. Is it indeed fair for Member States to finance the education of highly qualified workers for the benefit of other Member States, to which those workers tend to move upon graduation? The matter also raises legitimate security concerns as often the affected depopulated areas are situated along the Union's external borders.

The dire demographic picture in many Member States is yet another social phenomenon that will need to be addressed sooner rather than later. Part of the solution may lie precisely in the Union's policies financing social measures aimed at combatting this phenomenon, as well as more broadly in the Union's immigration policy.

Another important topic examined in the reports focuses on the European pillar of social rights on the renaissance of EU social law-making and the nature of the transformation of EU social policy that is required in order to take into consideration the objectives of the European Green Deal. The discussion leads us ultimately to a broader constitutional debate about the relationship between the rule of law and social rights in the European Union.

After all, solidarity and social justice are listed among the values and objectives of the Union, which shall aim at building a "social market economy" (Articles 2 and 3 TEU).

I express my gratitude to the general rapporteur for this topic *Sophie Robin-Olivier*, Professor of Law at the Sorbonne School of Law, one of the leading EU scholars in the area of social law, and to the institutional rapporteur *Sacha Graben*, Professor of EU Law, at the College of Europe, Bruges, who combines her unrivalled academic credentials with her practical experience at the European Commission. Their vision of a European Social Union is both inspiring and legally robust. Last but not least, I thank the authors of the national reports which form the backbone of all FIDE congresses.

Let there be no doubt: this topic is both visionary and programmatic. The present volume of FIDE's work has the potential to help rethink and refocus the very fundamentals of European integration.

Assoc. Prof. Dr. Alexander Kornezov

Judge, President of the Eighth Chamber of the General Court of the European Union, Principal Scientific Coordinator for the XXX FIDE Congress

Avant-propos de l'éditeur

Le troisième sujet principal du XXXe Congrès de la FIDE (Sofia, Bulgarie, 31 mai – 3 juin 2023), l' "***Union sociale européenne***", touche au fondement même du projet européen. La discussion sur la dimension sociale de l'Europe, devenue indispensable depuis longtemps, est au cœur des préoccupations légitimes exprimées par les citoyens européens.

Traditionnellement, l'intégration européenne s'est concentrée sur ce qui était à l'origine le marché commun, et qui est aujourd'hui le marché intérieur. Les considérations économiques ont toujours été au cœur de cette intégration sous la forme de la libre circulation des marchandises, des services et des capitaux, le droit de la concurrence et des aides d'État, ainsi que la politique commerciale commune, qui ont depuis toujours constitué les principaux axes des politiques de l'Union. Pendant des années, les questions de cohérence sociale et d'intégration sociale sont restées plutôt marginales.

Il est désormais nécessaire de mettre en lumière la nécessité d'une Union sociale européenne, en la plaçant au centre du discours et de l'élaboration des politiques européennes. En conséquence, ce thème vise à conceptualiser l'idée d'une Union sociale européenne comme un moyen de rapprocher celle-ci de ses citoyens.

Les rapports généraux, institutionnels et nationaux examinent le statu quo mais explorent aussi les possibilités de développement et du renforcement d'une dimension sociale européenne authentique et significative. Ils abordent un certain nombre de questions cruciales telles que les conflits entre les droits de libre circulation et les droits sociaux, l'importance des droits de "solidarité" fondés sur la Charte et l'émergence de droits sociaux fondamentaux. En particulier, les rapports se concentrent sur la discrimination persistante à l'encontre des travailleurs mobiles et les limites de l'égalité de traitement des travailleurs détachés ; les formes de discrimination indirecte ou d'autres formes d'inégalité de traitement, par exemple en matière d'allocations familiales, ou l'exclusion des citoyens non économiquement actifs des prestations sociales.

Les rapports soulèvent et étudient – peut-être pour la première fois dans la doctrine européenne – la question de l'impact de la libre circulation des travailleurs sur la crise démographique et le phénomène de "fuite des cerveaux" qui en découle, lesquels ont eu des effets dévastateurs sur l'Europe centrale et orientale ainsi que sur certaines régions méridionales du continent. Ce problème est resté en marge des politiques de l'Union et n'a pas fait l'objet d'études approfondies. Il s'agit pourtant d'un problème grave, qui est également source de tensions sociales et économiques. Est-il en effet juste que les États membres financent l'éducation de travailleurs hautement qualifiés au profit d'autres États membres vers lesquels ces travailleurs ont

tendance à s'établir une fois leur diplôme obtenu? La question soulève également des préoccupations légitimes en matière de sécurité, car les zones dépeuplées touchées sont souvent situées le long des frontières extérieures de l'Union.

La situation démographique alarmante dans de nombreux États membres est un autre phénomène social auquel il faudra faire face le plus rapidement possible. Une partie de la solution pourrait précisément provenir des politiques de l'Union consistant à financer des mesures sociales visant à combattre ce phénomène ainsi que, plus largement, de la politique migratoire de l'Union.

Un autre sujet important examiné dans les rapports porte sur le pilier européen des droits sociaux, sur la renaissance de la législation sociale européenne et sur la nature de la transformation de la politique sociale de l'Union nécessaire pour prendre en considération les objectifs du pacte vert européen. La discussion nous conduit finalement à un débat constitutionnel plus large sur la relation entre l'État de droit et les droits sociaux dans l'Union européenne.

N'oublions surtout pas que la "solidarité" et la "justice sociale" figurent parmi les valeurs et les objectifs de l'Union, qui ouvre pour le développement d'une «économie sociale de marché» (articles 2 et 3 du TUE).

J'exprime ma gratitude à la rapporteure générale pour ce sujet, *Sophie Robin-Olivier*, professeure de droit à la faculté de Droit de la Sorbonne, une des universitaires les plus éminentes dans le domaine du droit social, et au rapporteur institutionnel, *Sacha Graben*, professeur de droit européen au Collège d'Europe, à Bruges, qui combine son riche parcours académique avec son expérience pratique à la Commission européenne. Enfin, je remercie les auteurs des rapports nationaux qui constituent l'épine dorsale de tous les congrès de la FIDE.

Qu'il n'y ait aucun doute : ce sujet est à la fois visionnaire et programmatique. Le présent ouvrage de la FIDE contribuera à repenser et à recentrer les fondements mêmes de l'intégration européenne.

Prof. Associé Dr. Alexander Kornezov

Juge, président de la huitième chambre
du Tribunal de l'Union européenne,
Coordinateur scientifique principal pour
le XXXe Congrès de la FIDE

Vorwort des Herausgebers

Das dritte Hauptthema des XXX FIDE-Kongresses (Sofia, Bulgarien, 31. Mai – 3. Juni 2023), die „Europäische Sozialunion", konzentriert sich auf ein Strukturelement des europäischen Projekts. Die Erörterung der sozialen Dimension Europas ist schon lange überfällig und betrifft den Kern legitimer Anliegen die von europäischen Bürgerinnen und Bürger vorgetragen werden.

Traditionell ging es bei der europäischen Integration vorwiegend um das, was ursprünglich der gemeinsame und nunmehr der Binnenmarkt ist. Wirtschaftliche Überlegungen haben immer eine führende Rolle gespielt, wobei der freie Verkehr von Waren, Dienstleistungen und Kapital, das Wettbewerbs- und das Beihilfenrecht sowie die gemeinsame Handelspolitik im Zentrum der Stoßrichtung der Unionspolitiken standen. Über Jahre hinweg hinkten dagegen soziale Kohärenz und soziale Integration hinterher.

Nun ist es an der Zeit, die Notwendigkeit einer Europäischen Sozialunion in den Mittelpunkt zu stellen und sie zum Kernthema der europäischen Debatten und Politikgestaltung zu machen. Dieses Thema zielt mithin darauf ab, die Idee einer Europäischen Sozialunion als einen Ansatz zu begreifen, der die EU ihren Bürgerinnen und Bürger näher bringt.

Die allgemeinen, institutionellen und nationalen Berichte diskutieren die Entwicklung und Stärkung einer wahrhaften und bedeutsamen sozialen Dimension der EU. Sie behandeln eine Reihe von maßgeblichen Fragen betreffend die Spannungen zwischen Freizügigkeitsrechten und Sozialrechten, die Bedeutung der „Solidaritätsrechte" die auf der Charta fußen und das in Erscheinung treten von sozialen Grundrechten. Insbesondere konzentrieren sich die Berichte auf die fortdauernde Diskriminierung mobiler Arbeitnehmer, auf die Schranken bei der Gleichbehandlung von entsandten Arbeitnehmern, auf die Formen der indirekten Diskriminierung oder anderer Formen der Ungleichbehandlung, beispielsweise im Fall von Familienleistungen, sowie auf den Ausschluss von nicht-erwerbstätigen Bürgerinnen und Bürgern von Sozialleistungen.

Die Berichte stellen und untersuchen – möglicherweise zum ersten Mal in der europäischen Rechtsliteratur – die Frage nach den Auswirkungen der Freizügigkeit von Arbeitnehmern auf die demografische Krise und das damit verbundene Phänomen des „brain drain", das Osteuropa, Zentraleuropa sowie Teile des Südens des Kontinents heimgesucht hat. Dieses Problem wurde von der EU-Politik im Wesentlichen übergangen und ist bei weitem nicht hinreichend erforscht. Es ist jedoch ein ernsthaftes Problem, das auch eine Quelle sozialer und wirtschaftlicher Spannungen darstellt. Ist es fair, dass Mitgliedstaaten die Ausbildung hochqualifizierter Arbeitskräfte finanzieren, während der Nutzen dieser Ausbildung anderen Mitgliedstaaten zu Gute kommt, in

die diese Arbeitnehmer nach ihrem Abschluss ziehen, mit steigender Tendenz? Dieser Belang wirft auch legitime Sicherheitsbedenken auf, da die betroffenen entvölkerten Gebiete oft entlang der Außengrenzen der Union liegen.

Das düstere demografische Bild in vielen Mitgliedstaaten ist ein weiteres soziales Phänomen, das früher oder später angegangen werden muss. Ein Teil der Lösung könnte genau in den Politiken der Union liegen, die soziale Maßnahmen zur Bekämpfung dieses Phänomens finanzieren, sowie, im weiteren Sinne, in der Einwanderungspolitik der Union.

Ein weiteres wichtiges Thema, das in den Berichten vertieft wird, bezieht sich auf die europäische Säule sozialer Rechte, auf das Wiederaufleben der EU-Sozialgesetzgebung sowie auf die Art und Weise der Transformation der EU-Sozialpolitik, die erforderlich ist, um die Ziele des Europäischen „Green Deal" zu berücksichtigen. Die Erörterung führt uns letztlich zu einer breiteren verfassungsrechtlichen Debatte über die Beziehung zwischen Rechtsstaatlichkeit und sozialen Rechten in der Europäischen Union.

Letzten Endes sind Solidarität und soziale Gerechtigkeit unter den Werten und Zielen der Union aufgeführt, die darauf abzielt, eine „soziale Marktwirtschaft" aufzubauen (Artikel 2 und 3 AEUV).

Ich möchte sowohl der allgemeinen Berichterstatterin für dieses Thema, Frau Sophie RobinOlivier, Professorin der Rechtswissenschaft an der Sorbonne Universität und eine der führenden europäischen Wissenschaftler im Bereich des Sozialrechts als auch der institutionellen Berichterstatterin, Frau Sacha Graben, Professorin für Europarecht am Europakolleg, Brügge, die konkurrenzlose akademische Referenzen mit ihrer praktischen Erfahrung in der europäischen Kommission verbindet, unsere Dankbarkeit ausdrücken. Nicht zuletzt möchte ich den Autoren der nationalen Berichte danken, die das Rückgrat aller FIDE-Kongresse bilden.

Es sollte kein Zweifel daran bestehen: dieses dritte Hauptthema ist sowohl visionär als auch programmatisch. Das vorliegende Werk der FIDE hat das Potenzial, die Grundlagen der europäischen Integration neu zu überdenken und neu auszurichten.

Assoc. Prof. Dr. Alexander Kornezov

Richter, Präsident der Achten Kammer des Gerichts der Europäischen Union,
Hauptwissenschaftlicher Koordinator für den XXX FIDE-Kongress

FIDE XXX Congress,
Sofia, 2023

Questionnaire Topic III: European Social Union

General Rapporteur: Sophie Robin-Olivier,

La Sorbonne School of Law, University Paris 1 Panthéon Sorbonne

Introduction

The purpose of this topic is to discuss the development and strengthening of a true and meaningful EU social dimension. It is often thought that while European economic integration leads the way in European affairs, social cohesion and integration frequently lag behind. The topic thus aims at conceptualizing the idea of a European Social Union as a way of bringing the EU closer to its citizens.

The following questions relate to the development of a Social Europe and the challenges related to social integration.

Those challenges are grouped into seven chapters:

1. Free movement of workers
2. Conflicts between fundamental freedoms and social rights
3. Social acquis and social "non-acquis"
4. The Relevance and the Importance of the Charter of Fundamental Rights
5. EU Trade policy and the protection of social rights
6. Green deal and Social justice
7. Achieving Social Europe: Social rights, democracy and the rule of law

Chapter 1. Free movement of workers

Free movement of workers is part of internal market law. As a result, it could be considered to be outside the scope of social integration, but this would ignore the important contribution of EU law to the status of EU workers.

In this domain, EU law has profound roots, and has proved resistant to many challenges. However, recent developments indicate that limits to free movement remain and, that, solid as they are, the social rights of EU workers are not immutable. This constitutes a threat to one important dimension of social Europe: the social rights of EU mobile workers.

Free movement of workers and the right to equal treatment

Since its inception, free movement of workers has been linked to a right to equal treatment, that was conceived extensively, *ratione materiae* and *ratione personae,* both as an incentive to mobility, and a constitutive element of EU citizenship. Sixty years later, is it possible to say that equal treatment is still incomplete?

Another difficult question relates to the growing divide between workers, benefiting from equal treatment with nationals, and other EU citizens, especially those who are not "economically active"? Is this line justified? Is it a source of tension, in Member States?

Question 1

How is the right to equal treatment of EU mobile workers implemented in national legislation and case law?

a. Is equal treatment respected, or limited in various ways, through direct, or rather indirect discrimination? Are national authorities and courts, in particular, fully aware of the European conception of equal treatment, and EU workers' rights? Are there specific barriers to equal treatment? Who is particularly concerned? Unemployed workers? Precarious workers? What about access to vocational training?
b. Are EU workers and EU non "economically active" citizens treated differently? Is such a difference based on legislation, case law and/or administrative practice? Is this difference contested (by academics, the press, political parties...)?

Free movement of workers and social security coordination

Social security coordination was considered necessary to ensure that workers' mobility is not hindered by the risk of lacking or losing social protection as a result of moving to another Member state. EU coordination aims at limiting this risk through a series of rules (equal treatment, aggregation of periods, exportability of benefits, in particular). EU regulations, in this domain, have been updated to cope with emerging problems. The recent reform currently under way[1], sheds light on central issues concerning the coordination of social security. Amongst those issues, access of economically inactive citizens to social benefits: the proposal aims to clarify, on the basis of CJEU case law, that Member States have the right

[1] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, 13.12.2016, COM(2016) 815 final.

to refuse to grant social benefits to economically inactive EU mobile citizens (citizens who are not working or actively looking for a job, and who do not have the legal right of residence on the Member State's territory except when they have means of subsistence and comprehensive health coverage). Such a controversial solution would be carved in stone.

Another source of concern relates to child benefits. Indexation of child benefits to take into account the cost of living in the State of residence of the child has taken place in some States, violating the principle of equal treatment (which led to recent infringement procedures against Austria). Whether this indicates a growing opposition to the principle that the country of work of the parent(s) is responsible for paying child allowance, even when the child resides elsewhere, should be assessed, together with the reasons for this emerging resistance to equal treatment.

Question 2

What is the approach, at national level, of equal treatment in the domain of social security benefits?

Is there support or opposition (civil society, political parties, unions, governments, academics...) to the CJEU case law according to which Member States have the right to refuse to grant social benefits to economically inactive EU mobile citizens (citizens who are not working or actively looking for a job, and who do not have the legal right of residence on the Member State's territory except when they have the means of subsistence and comprehensive health coverage)?

Is there a growing opposition, in your country, to the principle that the country of work of the parent(s) is responsible for paying child allowances, even when the child resides elsewhere? Is that set out in legislation, case law, administrative practice?

The right to free movement and actual mobility of EU workers

The right to free movement, and any benefits associated with it (right to enter, reside, equal treatment.) was supposed to foster free movement, and benefit workers and national economies. However, it remains unclear whether workers' rights were sufficient to encourage mobility. Did it help industries in need of workforce to attract EU workers?

Proposals concerning the evolution of the concept of free movement of persons include the idea of substituting "fair movement", also called "managed migration"[2], for free movement. The proposal aims to give States the possibility of controling the migration of EU citizens in order to avoid a sudden influx of people. It is based

[2] On this concept: C. Barnard and S. Fraser Butlin, Common Market Law Review, vol. 55, 2018, pp. 203-226.

on recognising the limits of solidarity, and on the “political reality” of popular resistance to freedom of movement illustrated, namely by the British vote on Brexit. Pragmatism would dictate a narrower conception of free movement, in line with current aspirations of some European governments.

Another, very different, perspective suggests focusing on the circulation of particular workers, in order to achieve a certain concept of the common good through free movement of workers[3]. This would imply specific (preferential) treatment for some mobile workers, considered to be essential to achieving EU priorities, learning from the experience of the COVID-19 crisis: essential workers in critical occupations (in sectors such as health and care, farming, transportation etc.) would be a priority, and concrete support for their mobility would be established.

Question 3

What is the actual situation, and what are the developments envisaged, regarding workers’ mobility, in your country?

a. On the basis of the available data, how many workers from other Member States work in your Member State? In what sectors/industries? How has this evolved over time? Are there any national industries currently reporting that they have problems finding workforce?
b. Has the idea of “fair movement” gained support rather than the concept of “free movement” in your country, among academics, civil society, economic and politic leaders...?
c. Is the mobility of “essential workers in critical occupations” considered to be an important issue, in your country, requiring a rethinking of the freedom of movement of workers? Which particular workers, in which sectors, are concerned?

The ‘supply side’ of free movement of workers: the brain drain phenomenon and demographic imbalances

The mobility of workers is not homogeneous across the EU. In some Member states, the use of the right to move to another Member states, by a great number of workers, especially the most qualified, is a source of serious economic and social tensions. The European Parliament underlined, in a recent report[4], that the sharp decline of the population in Eastern and Southern Europe, due to the

[3] On this idea: S. Robin-Olivier, European Papers, Vol. 5, 2020, n° 1, European Forum, Insight of 16 May 2020, pp. 613.

[4] European Parliament, Report on reversing demographic trends in EU regions using cohesion policy instruments, 25.3.2021 (2020/2039(INI)).

combination of low fertility rates and net intra-EU migration from these areas, and, in particular, the movement of young educated professionals from southern and eastern Europe to north-western Europe, since the beginning of the economic crisis in 2008, has led to a deterioration in the quality of medical care and education, making it difficult, especially in remote, rural areas and in the outermost regions, to access high-quality care and education. This "brain drain" phenomenon divides the EU, as countries are competing for the workforce. According to the European Parliament, this phenomenon requires action in the affected Member States, to create conditions for retaining younger workers and families[5], using the means provided by cohesion policy.

There are already several initiatives in various Member States, such as incentives to retain workers with highly specialised skills, in order to turn the brain drain into a brain gain for the regions concerned[6]. The European Parliament invited Member State States to take into account the *brain drain* when designing their national recovery and resilience plans, their national development policies, long-term strategies for sustainable development and tailored cohesion policy programmes, correlated with the European Semester goals, with a view to ensuring proper financing aimed at tackling depopulation and reversing negative trends and enhancing territorial attractiveness[7]. It also called on the local, regional and national authorities in the regions at risk of depopulation to focus investments on ways of encouraging young families to settle in those regions, as well as on universal accessibility to quality services and infrastructure, with the participation of SMEs and service management businesses, and a focus on job creation, in particular for young people, reskilling workers, creating entrepreneurial conditions and supporting SMEs[8] [9].

To transform a *brain drain* into a *brain gain,* return processes for those who had left for a more economically attractive region must also be fostered, with a focus on higher education students in agriculture and rural economics, who should be encouraged to go back to their region after graduation with a view to contributing to the economic viability of their respective home regions .

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[5] Ibid, point 13.
[6] Ibid, point 29.
[7] Point 41.
[8] Point 42.
[9] Point 53.

Question 4

What is the national reaction to the *brain drain* phenomenon ?

a. Is there is a significant outflow of workers to other Member States, from your country? What are the sectors affected? What is the profile (age, level of education, gender) of the mobile worker? Are certain regions more affected than others? Has this also caused demographic problems?
b. Are there, at national level, any measures aimed at retaining certain types of workers (for instance, with a certain level and type of qualification)? For example, are there measures which require graduates to work in their Member State of origin, which has financed the studies, for a certain period of time, before being able to migrate? Have there been other measures pursuing the same objective?
c. Is there, at national level, case-law or administrative decisions which examine the compatibility with EU law, in particular with the Treaty provisions on freedom movement, of such measures?

Chapter 2. Conflicts between fundamental freedoms and social rights

The most important source of conflict between fundamental freedoms and social rights derives from an understanding of the free provision of services, which has been the source of an erosion of social rights, in Member states (as illustrated in particular by the well-known *Laval* case, CJEU, C-341/05, 2007). Freedom of establishment also calls into question national labour and employment law, as *Viking* (C-438/05, 2007) and *Aget Iraklis* (C-201/15, 2016) cases show. More generally, the rise of the right under Article 16 of the Charter of fundamental rights ("the freedom to conduct a business"), can call into question or limit social rights' protection, both at national and European level.

Free provision of services and the exploitation ofposted workers in the internal market

The posting of workers in the context of the free provision of services has led to social dumping and unfair competition. It was intended that Directive 96/71 would tackle that issue. Persistent problems have prompted the adoption of Directive 2004/67 on the enforcement of Directive 96/71. More recently, Directive 2018/957 amended Directive 96/71 in order to ensure equal pay for equal work (revised Article 3 of the Directive). However, equal pay remains out of reach, namely when pay is mostly determined by individual contracts and collective agreements at company level, which do not cover posted workers. In addition,

there are difficulties in assessing cases of fraud, in particular whether an employer is genuinely established in the country from which workers are supposed to be posted. Some of the most problematic cases concern posting by Temporary work agencies, as illustrated, namely, in the case *Team Power Europe* (C-784/19, 2021).

Question 5

How does national law deal with the situation of posted workers?

a. Was Directive 2018/957 transposed into national law? How, more specifically, has the principle of equal pay for equal work as manifested in the revised Article 3 of the Directive, been implemented in national law? Are there sectors of activity where 'equal pay for equal work' in the context of posting does not apply? What are the sectors in which exploitation of workers is most problematic (agriculture, meat packing, construction...)?
b. Were cases decided at national level, concerning posting of workers by temporary work agencies established in other Member states? How were these cases solved by national courts?

Market freedoms, freedom to conduct a business, and labour law

The Court of justice's reasoning in *AgetIraklis* (C-201/15, 2016) has shed light on the impact of a broad interpretation of the freedom of establishment, and combined with freedom to conduct a business (Article 16 of the CFR), on national labour law.

In addition, according to the Court of justice, freedom to conduct a business (Article 16 of the CFR) is self-executing. It can thus be invoked against national laws falling within the scope of EU law, as the *Achbita* and *Bougnaoui* cases (C-157/15 and C-188/15, 2017) evidenced, in the field of anti-discrimination law (discrimination on grounds of religion).

On the right to strike, in particular, the CJEU's case law in *Viking* and *Laval* (2007) has shed light on the negative consequences of a concept of this right as a 'restriction' of internal market freedoms – in particular the freedom of establishment and the freedom to provide services: the (inappropriate) hierarchy between fundamental rights and freedoms that the CJEU supported was very much criticized. Recently, the debate was revived by the European Court of Human Rights, which held that the EU economic freedoms are not to be considered as counterbalancing fundamental rights to the freedom of association and the right to take collective action in Art. 11 ECHR, but rather as elements to be taken into consideration

in the assessment of proportionality of the restriction of a right included in the ECHR[10].

Question 6

Is the freedom of establishment and the right to conduct a business (Article 16 of the CFR) used to challenge national or EU social law in national courts?

a. If so, which areas of employment law are affected?
b. How is the right to strike currently protected in national law, and how is it applied in national (case) law in relation to the freedom to provide services and the freedom of establishment? More specifically, is the right to strike treated as equal to, more important than, or less important than (i.e. as an exception that needs to be proportionate) the internal market freedoms?

Chapter 3. Social acquis and social "non-acquis"

The substance of the social acquis is important, but EU social legislation still covers only a limited part of labour and employment law issues. Many important areas of labour and employment law remain under national law jurisdiction. The line between the acquis and what falls outside the scope of EU competence, either because of a lack of power at EU level (right to strike, harmonization of remunerations) or because of exercising EU competence is difficult (social security), continues to be debated. Identifying what should be covered, in order for a full social Union to emerge, is an important question. In parallel, the substance of the acquis, and the capacity to ensure the protection of workers, in changing labour markets, should be assessed.

The substance of the social acquis

EU anti-discrimination law constitutes an important part of the acquis. An extensive and rich case-law together with legislative developments show that action against gender discrimination, in particular, was taken early on, at EU level. The Amsterdam treaty attributed competence to the EU to combat discrimination on race and ethnic origin, age, religion, sexual orientation and disability (Article 19 TFEU). Two directives were adopted in 2000 (Directive 2000/43 and 2000/78), opening a new domain for EU social law developments. Questions related to these more recent developments of EU anti-discrimination policy include establishing a proper balance between the prohibition against discrimination and an employers'

[10] ECtHR, Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway, Application no. 45487/17, Judgment of 10 June 2021.

freedom to conduct their business (Article 16 CFR). When discrimination on religious grounds is concerned, for instance, the Court of justice has to balance the right not to be discriminated against on the basis of religion (and freedom of religion) with the employers' demand for a "neutral workplace". This case law, which recently evolved (CJEU, *WABE* and *Muller Handels,* C-804/18 et C-341/19, 2021) requires a transformation of national concepts of religious freedom and the prohibition against discrimination on grounds of religion. Another question concerns the scope and the notion of "reasonable accommodation": whether that requirement applies only to disability (as Directive 2000/78 suggests), or whether it also applies to other grounds continues to remain uncertain.

Another important area of the EU social acquis is working time. Directive 2003/88 on the organization of working time is often invoked by workers seeking protection (including the most vulnerable, and platform workers, among them). It has prompted hostile reactions in recent times, namely, when the Court of justice decided that Directive 2003/88 applies to the military (CJEU, *Ministrstvo za obramo,* C-742/19, 2021). This situation provokes questions, once again, on the margin of discretion that Member States should enjoy, in the organization of working time, and more radically, the justification for regulating working time at EU level.

Among the new topics, the Regulation of platform work is indeed, an important one. In addition to the recent Directive on transparent and predictable working conditions (Directive 2019/1152), the Commission proposed the adoption of a Directive specifically addressing the lack of protection for platform workers (Proposal for a Directive on improving working conditions in platform work, COM(2021) 762 final, 9 Dec. 2021). In the meantime, some Member states have started to regulate platform work, and many national courts had to decide on the (wrongful) classification of platform workers as self-employed.

Last, and more generally, questions arise concerning the relationship between the EU acquis and international labour law. Only in rare cases does EU social legislation or case law expressly refer to ILO conventions, or the European social charter. This can be considered problematic for Member States, which are committed to the development of international labour law, and it also raises the question of the integration of international labour law in the concept of social Europe.

Question 7

How is the *social acquis* implemented in your Member State, and how does it relate to national law?

a. In particular, how is the acquis, in the domain of anti-discrimination law, implemented in your country? Have recent developments in CJEU case-law have had a significant impact on religious discrimination at national level? Is the notion of reasonable accommodation properly implemented? What are the developments that are still required, in the field of anti-discrimination law, if any? Should such developments be initiated at t EU level?
b. How is the acquis, in the domain of working time, implemented in your country? In which areas is the acquis most useful to workers? In which areas is the acquis invoked most before national courts (limitation of daily or weekly working time? Annual paid leave? Other matters)? Are there hostile reactions to the case law of the CJEU?
c. Is platform work regulated in your country? Are there cases on the (wrongful) classification of platform workers as self-employed? What is the role of social partners or other groups in the regulation of platform work, in your country?
d. Have the national legislator and the national courts taken a position on the relationship between EU law and international labour law? Are there, for instance, conflicts between EU law and international law that courts have had to deal with? Is the European social charter cited often by the legislator or in case law?

Missing parts of EU social law

The social acquis is important, but fragmented: it covers only some of the domains of national labour and employment law, while others remain outside the scope of the acquis (work contracts termination, workers' representation or social protection, for instance). This is not only a question of competences (existence and exercise), but also a matter of political will to act, in these domains, at EU level. However, the recent Commission proposal on an adequate minimum wage in the EU suggests that these obstacles can be overcome. Should the EU social acquis cover new areas? Or is regulation at national level more appropriate?

Another important limit is the personal scope of EU social legislation. The social acquis generally applies to workers, and does not cover self-employed persons. This is supposedly dictated by the TFEU. Is that interpretation of the TFEU set in stone? Or can that limitation be changed, in order, namely, to include (truly) independent platform workers?

Question 8

What should be the new frontier for EU social policy?

a. Is there a demand for new developments in EU social policy in your country? In which fields? Is the limit of EU competence to harmonize in the domains of remuneration, the right to associate and the right to strike considered to be an obstacle to all EU action in these fields?
b. Is EU law considered to apply strictly to workers, or is it extended to the selfemployed persons, in your country? In which domains of labour law? Under what circumstances?

Impact of Economic and Monetary Union on the social acquis and the role of the European Pillar of Social rights

The effects of EMU on national social policies, since the economic and financial crisis, have been often criticized. It resulted in developments of the CJEU's case-law and the adoption of the European Pillar of Social rights (EPSR). The Pillar has been described by the European Commission as a way both to socialize EMU, and to revitalize EU social policy.

Question 9

Has EMU affected labour law or social policies in your country?

a. What, in general terms, is the impact of the European Semester and the Country Specific Recommendations on national social law and policy?
b. What are or would be the problems/advantages of moving European social policy into the EMU?

Chapter 4. The Relevance and the Importance of the Charter of Fundamental Rights

The Charter of Fundamental Rights of the EU includes a wide range of social rights, in a separate title, called "Solidarity". This title has a great potential for the protection of social rights. Since the Charter acquired the status of primary law, with the Lisbon treaty, the social rights it contains are on an equal footing with other fundamental rights and Treaty provisions, more generally.

However, until recently, the social rights of the Charter seemed paralysed, including when they were particularly needed: to counter balance austerity measures imposed on Member states in the context of the economic and monetary crisis. It was also unclear that more resistance to "economic freedoms" could

be derived from social rights, or whether workers could rely on such rights in disputes with private sector employers. This issue started to change only recently, in cases concerning Art. 31 of the Charter (CJEU, *Max Planck,* C-684/16; *Bauer,* C-569/16 and C-570/16, 2018 and *CCOO,* C-55/18, 2019). However, the force and impact of social rights in the Charter remains limited in the case law of the CJEU.

Question 10

What is the role and legal force of the Charter's social rights in national case law and administrative practice?

a. Are these rights "equal" in importance to the other fundamental rights, in particular in the case law of national courts?
b. Are they "fully effective" in the language of the Court (CJEU, *AMS,* C-176/12, 2014) or only some of them?
c. Are (some of) social rights considered, in the case-law of national courts, as "principles" within the meaning of Art 52(5) of the Charter? If so, what consequences have been drawn from that classification?
d. Is Art 52(2) of the Charter relied upon by national authorities and courts in order to limit or hamper the scope of social rights under the Charter? In particular, do national courts consider that social rights in the Charter have the same content as under EU secondary legislation, and therefore have no "autonomous" content?
e. How have courts dealt with the matter of social rights under the Charter in actions between individuals ('horizontal actions') in your country?

Chapter 5. EU Trade policy and social rights' protection

International trade can affect social rights' protection in different ways. There is indeed a risk that increased international competition entails a race to the bottom, when goods and services are produced at lower labour costs, in developing countries. Different ways to avoid such a race to the bottom involves the introduction of "social clauses" in international agreements. The EU new generation of trade agreements include a reference to social rights, and the obligation of parties to respect basic rights protected by ILO conventions.

Indeed, the protection of social rights in the development of free trade is the result of a longstanding link between human rights and trade liberalization. Today, not only the EU, but other important trade powers, such as the US and Canada, embed human and labour-rights provisions in their new trade agreements. For the EU, the objective is not only to avoid regressive pressures on social rights,

but also to promote fundamental rights, which include fundamental social rights, through external action. In addition, the promotion of the European social model can become part of 'European soft power', 'geopolitical' 'appeal' and 'clout'.

In its "Trade Policy Review" of 18 February 2021[11], the European Commission committed to provide guidance to assist EU businesses on taking appropriate measures to address the risk of forced labour in their operations and supply chains, in line with international due diligence guidelines and principles. It then published a document in July 2021 to provide the necessary guidance[12]. The Commission is also currently preparing a legislative proposal on "Sustainable Corporate Governance" to foster long-term sustainable and responsible corporate behavior. The future proposal aims at introducing mandatory human rights and environmental due diligence, including risks linked to forced labor.

The central question concerns the kind of regulation, which is appropriate to protect workers in the context of international trade. Taking into account global supply chains, and the role of private actors (corporations) in the design of proper instruments to protect social rights, has become a more pressing issue, in the last decades.

Question 11

What are the ways through which social rights are protected in the context of international trade and global supply chains in your country?

a. Are rules on public procurement used to foster social rights?
b. Are private actors, especially corporations, involved? Have codes of conduct or charters been adopted in certain sectors? At company level? What impact do they have?
c. Have trans-national collective agreements been concluded by national firms? What obstacles do they face?
d. Do national courts admit civil or criminal claims, when violations of social rights have taken place abroad?
e. Are there possibilities for collective or class actions?
f. Does national law require social rights due diligence? If so, what are the duties imposed on firms?

[11] European Commission Communication, Trade Policy Review -An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final; https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf

[12] https://trade.ec.europa.eu/doclib/docs/2021/july/tradoc_159709.pdf

Chapter 6. Climate change and Social justice

On 11 Dec. 2019, the Commission published a Communication on "the European Green Deal". It is described as a roadmap for making the EU economy sustainable "by turning climate and environmental challenges into opportunities across all policy areas and making the transition just and inclusive for all".

According to the Communication, "careful attention will have to be paid when there are potential trade-offs between economic, environmental and social objectives" and "the European Pillar of Social Rights will guide action in ensuring that no one is left behind". This language, however, does not clarify what a "just and inclusive" transition means in terms of social policies and social rights.

Question 12

How do policies to combat climate change, at national level, take social justice into account and what are the methods (the instruments, the judicial actions...) through which the link between climate change and social justice is achieved?

Chapter 7. Achieving Social Europe: Social rights, democracy and the rule of law

What are the European social values, underpinning a meaningful Social Europe, that should cement the European integration? How are they related to the Rule of Law, with which Member States must comply? In the context of of European democracies becoming more fragile, social rights and social justice, together with the question of the perception of these rights, is of highest importance. However, the link between the rule of law and the protection of social rights has not been afforded much attention.

To make the Social dimension of the EU more tangible, the role of EU citizenship and EU citizenship education, should be explored. The 1992 Maastricht Treaty inserted EU citizenship into the Treaty and provided it with a limited list of citizenship rights. The 2009 Lisbon Treaty added a political dimension to EU citizenship in Title II TEU "Provisions on democratic principles". More than a decade later, in order to build a European Social Union, EU citizenship and democratic principles should be reconsidered in the light of EU citizenship education in mainstream education. In view of a Union based on the values of Art. 2 TEU, going beyond a market rationale, the European public space needs an educational substratum, allowing for a stronger connection between EU citizens and solidarity beyond national borders, bringing the EU closer to its citizens. There seems to be consensus on the objectives. However, how should it be implemented? What concrete action has been undertaken by Member States?

Question 13

What measures, if any, have been taken in your country to provide education on EU citizenship and the values set out in the Treaties in mainstream education (primary, secondary and higher education)?

a. Are these matters covered in the curriculum and how?
b. Are there rules or guidelines in that regard?
c. Are there examples of bestpractices that can be provided ?

Question 14

What national developments (in law and policy) in the area of fundamental social rights can be related to democracy and the rule of law (equality between men and women, the fight against racial discrimination and hate speech, equal access to social services, social benefits and housing...)?

Question 15

Is the EU perceived as a Social Union in your Member State, in particular in academic, judicial and political discourse? Are common European values, in particular equality and solidarity, laid down in Article 2 TEU, considered to be the constitutional basis for a European Social Union?

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Questionnaire Thème III: Union sociale européenne

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Introduction

Ce theme a pour objectif de discuter du developpement et du renforcement d'une dimension sociale de l'UE reelle et significative. La perception selon laquelle la cohesion et Integration sociales sont souvent a la traine tandis que l'integration economique europeenne constitue le fil conducteur des affaires europeennes est tres repandue. Le theme vise ainsi a conceptualiser l'idee d'une Union sociale europeenne comme un moyen de rapprocher l'UE de ses citoyens.

Les questions suivantes portent sur le developpement d'une Europe sociale et les defis lies a l'integration sociale.

Ces defis sont regroupes en sept chapitres:

1. Libre circulation des travailleurs
2. Conflits entre libertes fondamentales et droits sociaux
3. Acquis social et "non-acquis" social
4. La pertinence et l'importance de la Charte des droits fondamentaux
5. Politique commerciale de l'UE et protection des droits sociaux
6. Pacte vert pour l'Europe et justice sociale
7. Realiser une Europe sociale: Droits sociaux, democratie et Etat de droit

Chapitre 1. Libre circulation des travailleurs

La libre circulation des travailleurs fait partie du droit du marche interieur. Par consequent, on pourrait considerer qu'elle n'entre pas dans le cadre de l'integration sociale, mais cela reviendrait a negliger l'importante contribution du droit de l'UE au statut des travailleurs de l'UE.

Dans ce domaine, le droit de l'UE est profondement enracine et a su resister a de nombreux defis. Toutefois, des evolutions recentes indiquent que des limites a la libre circulation subsistent et que, aussi solides soient-ils, les droits sociaux des travailleurs de l'UE ne sont pas immuables. Cela constitue une menace pour une dimension importante de l'Europe sociale: les droits sociaux des travailleurs mobiles de l'UE.

Libre circulation des travailleurs et droit a l'egalite de traitement

Depuis sa creation, la libre circulation des travailleurs est liee a un droit a l'egalite de traitement, qui a ete conqu de maniere etendue, *ratione materiae* et *ratione personae,* a la fois comme une incitation a la mobilite et comme un element constitutif de la citoyennete de l'Union europeenne. Soixante ans plus tard, peut-on dire que l'egalite de traitement est toujours incomplete?

Une autre question difficile concerne la fracture croissante entre les travailleurs, beneficiant de l'egalite de traitement avec les ressortissants nationaux, et les autres citoyens de l'UE, en particulier ceux qui ne sont pas "economiquement actifs". Cette position est-elle justifiee? Est-elle source de tension dans les Etats membres?

Question 1

Comment le droit a l'egalite de traitement des travailleurs mobiles de l'UE est-il mis en reuvre dans la legislation et la jurisprudence nationales?

a. L'egalite de traitement est-elle respectee, ou limitee de differentes manieres, par une discrimination directe, ou plutot indirecte? Les autorites et les juridictions nationales, en particulier, sont-elles pleinement conscientes de la conception europeenne de l'egalite de traitement et des droits des travailleurs de l'UE? Existe-t-il des obstacles specifiques a l'egalite de traitement? Quels sont les travailleurs particulierement concernes? Les travailleurs au chomage? Les travailleurs precaires? Qu'en est-il de l'acces a la formation professionnelle?
b. Les travailleurs de l'UE et les citoyens de l'UE "economiquement non actifs" sont-ils traites differemment? Une telle difference est-elle fondee sur la legislation, la jurisprudence et/ou la pratique administrative? Cette difference est-elle contestee (par les universitaires, la presse, les partis politiques...)?

Libre circulation des travailleurs et coordination des systemes de securite sociale

La coordination des systemes de securite sociale a ete jugee necessaire pour faire en sorte que la mobilite des travailleurs ne soit pas entravee par le risque d'absence ou de perte de protection sociale a la suite d'un demenagement dans un autre Etat membre. La coordination au niveau de l'UE vise a limiter ce risque par une serie de regles (egalite de traitement, totalisation des periodes, exportabilite des prestations, entre autres). La reglementation de l'UE dans ce domaine a ete mise

a jour pour faire face aux problemes emergents. La recente reforme en cours[1] met en lumiere des questions centrales concernant la coordination de la securite sociale. Parmi ces questions, figure celle de l'acces des citoyens economiquement inactifs aux prestations sociales: la proposition vise a preciser, sur la base de la jurisprudence de la CJUE, que les Etats membres ont le droit de refuser l'octroi de prestations sociales aux citoyens mobiles de l'UE economiquement inactifs (citoyens qui ne travaillent pas ou ne recherchent pas activement un emploi, et qui ne beneficient pas du droit de sejour legal sur le territoire de l'Etat membre, sauf s'ils disposent de moyens de subsistance et d'une couverture medicale complete). Une solution aussi controversee serait gravee dans le marbre.

Les prestations pour enfants constituent une autre source de preoccupation. L'indexation des allocations familiales pour tenir compte du cout de la vie dans l'Etat de residence de l'enfant a eu lieu dans certains Etats, en violation du principe d'egalite de traitement (ce qui a donne lieu a de recentes procedures d'infraction contre l'Autriche). Il convient d'evaluer si cela indique une opposition croissante au principe selon lequel le pays de la prestation du travail du ou des parents est responsable du paiement des allocations familiales, meme lorsque l'enfant reside ailleurs, ainsi que les raisons de cette resistance emergente a l'egalite de traitement.

Question 2

Quelle est l'approche, au niveau national, de l'egalite de traitement dans le domaine des prestations de securite sociale?

a. Existe-t-il un soutien ou une opposition (societe civile, partis politiques, syndicats, gouvernements, universitaires, etc.) a la jurisprudence de la CJUE selon laquelle les Etats membres ont le droit de refuser d'octroyer des prestations sociales aux citoyens mobiles de l'UE economiquement inactifs (citoyens qui ne travaillent pas ou ne recherchent pas activement un emploi, et qui ne beneficient pas du droit de sejour legal sur le territoire de l'Etat membre, sauf s'ils disposent des moyens de subsistance et d'une couverture medicale complete)?
b. Constate-t-on dans votre pays une opposition croissante au principe selon lequel le pays de la prestation du travail du ou des parents est responsable du paiement des allocations familiales, meme lorsque l'enfant reside ailleurs? Est-ce prevu par la legislation, la jurisprudence, la pratique administrative?

[1] Proposition de reglement du Parlement europeen et du Conseil du 13 decembre 2016 modifiant le reglement (CE) n° 883/2004 portant sur la coordination des systemes de securite sociale et le reglement (CE) n° 987/2009 fixant les modalites d'application du reglement (CE) n° 883/2004 [COM(2016) 815 final].

Le droit a la libre circulation et la mobilite reelle des travailleurs de l'UE

Le droit a la libre circulation et tous les avantages qui y sont associes (droit d'entree, de sejour, egalite de traitement...) etaient supposes favoriser la libre circulation et profiter aux travailleurs et aux economies nationales. Toutefois, il n'est pas certain que les droits des travailleurs aient ete suffisants pour encourager la mobilite. Le droit a la libre circulation a-t-il aide les industries ayant besoin de main-d'reuvre a attirer des travailleurs de l'UE?

Les propositions relatives a revolution du concept de libre circulation des personnes incluent l'idee de remplacer la libre circulation par une "circulation equitable", egalement appelee "migration geree"[2]. La proposition vise a donner aux Etats la possibilite de controler la migration des citoyens de l'UE afin d'eviter un afflux soudain de personnes. Elle repose sur la reconnaissance des limites de la solidarite et sur la "realite politique" de la resistance populaire a la liberte de circulation illustree, notamment, par le vote britannique sur le Brexit. Le pragmatisme voudrait que l'on adopte une conception plus etroite de la libre circulation, conformement aux aspirations actuelles de certains gouvernements europeens.

Une autre perspective, tres differente, propose de se concentrer sur la circulation de travailleurs particuliers, afin de parvenir a une certaine conception du bien commun par la libre circulation des travailleurs[3]. Cela impliquerait de reserver un traitement specifique (de faveur) a certains travailleurs mobiles, consideres comme essentiels pour atteindre les priorites de l'UE, en tirant les leqons de l'experience de la crise de la COVID-19: les travailleurs essentiels exerqant des professions critiques (dans des secteurs tels que la sante et les soins, l'agriculture, les transports, etc.) seraient prioritaires et un soutien concret a leur mobilite serait mis en place.

Question 3

Quelle est la situation reelle, et quels sont les evolutions envisagees, en matiere de mobilite des travailleurs, dans votre pays?

a. Sur la base des donnees disponibles, combien de travailleurs originaires d'autres Etats membres travaillent dans votre Etat membre? Dans quels secteurs/quelles branches d'industrie? Comment cette situation a-t-elle evolue au fil du temps? Y a-t-il des industries nationales qui signalent actuellement des difficultes a trouver de la main– d'reuvre?

[2] Sur ce concept: C. Barnard et S. Fraser Butlin, Common Market Law Review, vol. 55, 2018, p. 203-226.

[3] Sur cette idee: S. Robin-Olivier, European Papers, Vol. 5, 2020, n° 1, European Forum, Insight of 16 May 2020, p. 613.

b. L'idee de "circulation equitable" a-t-elle recueilli un soutien plus marque que celui accorde au concept de "libre circulation" dans votre pays, parmi les universitaires, la societe civile, les dirigeants economiques et politiques...?
c. La mobilite des "travailleurs essentiels exerqant des professions critiques" est-elle consideree, dans votre pays, comme une question importante, necessitant de repenser la libre circulation des travailleurs? Quels travailleurs particuliers sont concernes, dans quels secteurs?

Du cote de l'"offre" de la libre circulation des travailleurs: le phenomene de la fuite des cerveaux et les desequilibres demographiques

La mobilite des travailleurs n'est pas homogene au sein de l'UE. Dans certains Etats membres, l'exercice du droit de se rendre dans un autre Etat membre par un grand nombre de travailleurs, en particulier les plus qualifies, est source de graves tensions economiques et sociales. Le Parlement europeen a souligne, dans un rapport recent[4], que la forte baisse de la population en Europe orientale et meridionale, due a la combinaison de faibles taux de fecondite et de la migration intraeuropeenne nette en provenance de ces regions, et en particulier le deplacement des jeunes professionnels instruits de l'Europe meridionale et orientale vers le nord-ouest de l'Europe, depuis le debut de la crise economique de 2008, a entraine une deterioration de la qualite des soins medicaux et de l'education, rendant difficile, en particulier dans les zones rurales eloignees et dans les regions ultraperipheriques, l'acces a des soins et a une education de qualite. Ce phenomene de "fuite des cerveaux" divise l'UE, car les pays sont en concurrence pour la main-d'reuvre. Selon le Parlement europeen, ce phenomene necessite des mesures dans les Etats membres concernes, afin de creer les conditions permettant de retenir les jeunes travailleurs et les familles[5], en utilisant les moyens prevus par la politique de cohesion.

Il existe deja plusieurs initiatives dans differents Etats membres, telles que des mesures incitatives visant a retenir les travailleurs dotes de competences hautement specialisees, afin de transformer la fuite des cerveaux en afflux de cerveaux pour les regions concernees[6]. Le Parlement europeen a invite les Etats membres a tenir compte de la *fuite des cerveaux* lors de l'elaboration de leurs plans nationaux pour la reprise et la resilience, de leurs politiques nationales de developpement, de leurs strategies a long terme en faveur du developpement durable et de leurs programmes de politique

[4] Parlement europeen, Rapport sur l'inversion des tendances demographiques dans les regions de l'UE en utilisant les instruments de la politique de cohesion, 25.3.2021 (2020/2039(INI)).

[5] Ibid, point 13.

[6] Ibid, point 29.

de cohesion adaptes, en correlation avec les objectifs du Semestre europeen, en vue de garantir un financement adequat visant a lutter contre le depeuplement, a inverser les tendances negatives et a renforcer l'attractivite territoriale[7]. Il a egalement invite les autorites locales, regionales et nationales des regions exposees au risque de depeuplement a concentrer leurs investissements sur les moyens d'encourager les jeunes familles a s'installer dans ces regions, ainsi que sur l'accessibilite universelle a des services et infrastructures de qualite, avec la participation des PME et des entreprises de gestion des services, et a mettre l'accent sur la creation d'emplois, en particulier pour les jeunes, la requalification des travailleurs, la creation de conditions propices a l'esprit entrepreneurial et le soutien aux PME[8].

Pour transformer la *fuite des cerveaux* en *afflux de cerveaux,* il convient egalement de favoriser les processus de retour des personnes qui sont parties dans une region economiquement plus attrayante, en mettant l'accent sur les etudiants de l'enseignement superieur dans les domaines de l'agriculture et de l'economie rurale, qui devraient etre encourages a retourner dans leur region apres l'obtention de leur diplome, afin de contribuer a la viabilite economique de leurs regions d'origine respectives[9].

Question 4

Quelle est la reaction nationale au phenomene de la *fuite des cerveaux*?

a. Y a-t-il un flux important de travailleurs de votre pays vers d'autres Etats membres? Quels sont les secteurs concernes? Quel est le profil (age, niveau d'education, sexe) du travailleur mobile? Certaines regions sont-elles plus touchees que d'autres? Ce phenomene a-t-il egalement engendre des problemes demographiques?

b. Existe-t-il, au niveau national, des mesures visant a retenir certains types de travailleurs (par exemple, possedant un certain niveau et un certain type de qualification)? Par exemple, existe-t-il des mesures qui obligent les diplomes a travailler dans leur Etat membre d'origine, qui a finance les etudes, pendant un certain temps, avant de pouvoir migrer? Y a-t-il eu d'autres mesures poursuivant le meme objectif?

c. Existe-t-il, au niveau national, une jurisprudence ou des decisions administratives qui examinent la compatibilite de ces mesures avec le droit de l'Union, en particulier avec les dispositions du traite relatives a la libre circulation?

[7] Ibid, point 41.

[8] Ibid, point 42.

[9] Ibid, point 53.

Chapitre 2. Conflits entre libertes fondamentales et droits sociaux

La source la plus importante de conflit entre les libertes fondamentales et les droits sociaux decoule d'une conception de la libre prestation de services, qui a ete a l'origine d'une erosion des droits sociaux, dans les Etats membres (comme l'illustre notamment la celebre affaire *Laval,* CJUE, C-341/05, 2007). La liberte d'etablissement remet egalement en cause le droit national du travail et de l'emploi, comme le montrent les affaires *Viking* (C-438/05, 2007) et *Aget Iraklis* (C-201/15, 2016). Plus generalement, la montee en puissance du droit confere par Particle 16 de la Charte des droits fondamentaux ("la liberte d'entreprise") peut remettre en cause ou limiter la protection des droits sociaux, tant au niveau national qu'au niveau europeen.

Libre prestation de services et exploitation des travailleurs detaches dans le marche interieur

Le detachement de travailleurs dans le cadre de la libre prestation de services a conduit au dumping social et a la concurrence deloyale. Il etait prevu que la directive 96/71 aborde cette question. Des problemes persistants ont conduit a l'adoption de la directive 2004/67 relative a l'execution de la directive 96/71. Plus recemment, la directive 2018/957 a modifie la directive 96/71 afin d'assurer une remuneration egale pour un travail egal (article 3 revise de la directive). Toutefois, l'egalite de remuneration reste hors de portee, notamment lorsque la remuneration est principalement determinee par des contrats individuels et des conventions collectives au niveau de l'entreprise, qui ne couvrent pas les travailleurs detaches. En outre, il est difficile d'apprecier les cas de fraude, en particulier si un employeur est reellement etabli dans le pays ou les travailleurs sont censes etre detaches. Certaines des affaires les plus problematiques concernent le detachement par des entreprises de travail interimaire, comme l'illustre notamment l'affaire *Team Power Europe* (C-784/19, 2021).

Question 5

Comment le droit national traite-t-il la situation des travailleurs detaches?

a. La directive 2018/957 a-t-elle ete transposee en droit national? Comment, plus precisement, le principe de l'egalite de remuneration pour un travail egal, tel qu'il est enonce a Particle 3 revise de la directive, a-t-il ete mis en reuvre dans le droit national? Existe-t-il des secteurs d'activite dans lesquels le principe "a travail egal, remuneration egale" ne s'applique pas dans le cadre du detachement? Quels sont les secteurs dans lesquels l'exploitation des travailleurs pose le plus de problemes (agriculture, conditionnement de la viande, construction...)?

b. Des affaires concernant le detachement de travailleurs par des entreprises de travail interimaire etablies dans d'autres Etats membres ont-elles ete tranchees au niveau national? Comment ces affaires ont-elles ete reglees par les juridictions nationales?

Libertes du marche, liberte d'entreprise et droit du travail

Le raisonnement de la Cour de justice dans l'affaire *Aget Iraklis* (C-201/15, 2016) a mis en lumiere l'impact d'une interpretation large de la liberte d'etablissement, combinee a la liberte d'entreprise (article 16 de la Charte des droits fondamentaux), sur le droit national du travail.

En outre, selon la Cour de justice, la liberte d'entreprise (article 16 de la Charte des droits fondamentaux) est d'application directe. Elle peut ainsi etre invoquee a l'encontre des lois nationales relevant du champ d'application du droit de l'Union, comme en temoignent les affaires *Achbita* et *Bougnaoui* (C-157/15 et C-188/15, 2017), dans le domaine de la legislation anti-discrimination (discrimination fondee sur la religion).

En ce qui concerne le droit de greve, en particulier, la jurisprudence de la CJUE dans les affaires *Viking* et *Laval* (2007) a mis en lumiere les consequences negatives d'une conception de ce droit en tant que "restriction" des libertes du marche interieur – en particulier la liberte d'etablissement et la libre prestation de services: la hierarchie (inappropriee) entre les droits et libertes fondamentaux soutenue par la CJUE a ete tres critiquee. Recemment, le debat a ete relance par la Cour europeenne des droits de l'homme, qui a juge que les libertes economiques de l'UE ne doivent pas etre considerees comme des elements contrebalanqant les droits fondamentaux a la liberte d'association et de reunion vises a Particle 11 de la CEDH, mais plutot comme des elements a prendre en consideration dans l'appreciation de la proportionnalite de la limitation d'un droit inscrit dans la CEDH[10].

Question 6

La liberte d'etablissement et la liberte d'entreprise (article 16 de la Charte des droits fondamentaux) sont-elles utilisees pour contester le droit social national ou europeen devant les tribunaux nationaux?

a. Dans l'affirmative, quels domaines du droit du travail sont concernes?

b. Comment le droit de greve est-il actuellement protege dans le droit national, et comment est-il applique dans la jurisprudence nationale en relation avec la libre prestation de services et la liberte d'etablissement?

[10] Cour europeenne des droits de l'homme, Confederation norvegienne des syndicats (LO) et Syndicat norvegien des travailleurs des transports (NTF) c. Norvege, requete n° 45487/17, arret du 10 juin 2021.

Plus precisement, le droit de greve est-il traite comme etant egal, plus important ou moins important que les libertes du marche interieur (c'est-a-dire comme une exception qui doit etre proportionnee)?

Chapitre 3. Acquis social et "non-acquis" social

La substance de l'acquis social est importante, mais la legislation sociale de l'UE ne couvre toujours qu'une partie limitee des questions de droit du travail et de l'emploi. De nombreux domaines importants du droit du travail et de l'emploi restent regis par le droit national. La frontiere entre l'acquis et ce qui ne releve pas de la competence de l'UE, soit en raison d'un manque de pouvoir au niveau de l'UE (droit de greve, harmonisation des remunerations), soit du fait que l'exercice de la competence de l'UE est difficile (securite sociale), continue de faire l'objet de debats. L'identification de ce qui devrait etre couvert afin qu'une Union sociale complete puisse emerger est une question importante. Parallelement, il convient d'evaluer la substance de l'acquis et la capacite a assurer la protection des travailleurs dans des marches du travail en mutation.

La substance de I'acquis social

Le legislation anti-discrimination de l'UE constitue une partie importante de l'acquis. Une jurisprudence abondante et riche ainsi que revolution de la legislation montrent que des mesures de lutte contre la discrimination fondee sur le sexe, en particulier, ont ete prises a un stade precoce, au niveau de l'UE. Le traite d'Amsterdam a attribue a l'UE la competence de lutter contre la discrimination fondee sur la race et l'origine ethnique, l'age, la religion, l'orientation sexuelle et le handicap (article 19 du TFUE). Deux directives ont ete adoptees en 2000 (directive 2000/43 et directive 2000/78), ouvrant un nouveau domaine aux evolutions du droit social de l'UE. Les questions liees a ces evolutions plus recentes de la politique de l'UE en matiere de lutte contre la discrimination comprennent l'etablissement d'un juste equilibre entre l'interdiction de la discrimination et la liberte d'entreprise des employeurs (article 16 de la Charte des droits fondamentaux). En ce qui concerne la discrimination fondee sur la religion, par exemple, la Cour de justice doit trouver un equilibre entre le droit de ne pas faire l'objet de discrimination fondee sur la religion (et la liberte de religion) et la demande des employeurs en faveur d'un "lieu de travail neutre". Cette jurisprudence, qui a recemment evolue (CJUE, *WABE* et *Muller Handels,* C-804/18 et C-341/19, 2021), requiert une transformation des conceptions nationales de la liberte de religion et l'interdiction de la discrimination fondee sur la religion. Une autre question concerne la portee et la notion d'"amenagement raisonnable": la question de savoir si cette exigence

ne s'applique qu'au handicap (comme le suggere la directive 2000/78), ou si elle s'applique egalement a d'autres motifs, reste incertaine.

Un autre domaine important de l'acquis social de l'UE est le temps de travail. La directive 2003/88 relative a l'amenagement du temps de travail est souvent invoquee par les travailleurs en quete de protection (notamment les plus vulnerables, dont les travailleurs des plateformes). Elle a recemment suscite des reactions hostiles, a savoir lorsque la Cour de justice a decide que la directive 2003/88 s'applique a l'armee (CJUE, *Ministrstvo za obramo,* C– 742/19, 2021). Cette situation souleve, une fois de plus, des interrogations quant a la marge d'appreciation dont devraient disposer les Etats membres dans l'amenagement du temps de travail, et plus radicalement, quant a la justification d'une reglementation du temps de travail au niveau de l'UE.

Parmi les nouveaux themes, la reglementation du travail via une plateforme est effectivement un theme important. Outre la recente directive relative a des conditions de travail transparentes et previsibles (directive 2019/1152), la Commission a propose l'adoption d'une directive visant specifiquement a remedier au manque de protection des travailleurs des plateformes (proposition de directive relative a l'amelioration des conditions de travail dans le cadre du travail via une plateforme, COM(2021) 762 final, 9 decembre 2021). Entre-temps, certains Etats membres ont commence a reglementer le travail via une plateforme, et de nombreuses juridictions nationales ont du se prononcer sur la classification (erronee) des travailleurs des plateformes en tant qu'independants.

Enfin, et de maniere plus generale, des questions se posent au sujet de la relation entre l'acquis de l'UE et le droit international du travail. Ce n'est que dans de rares cas que la legislation sociale ou la jurisprudence de l'UE font expressement reference aux conventions de l'OIT ou a la Charte sociale europeenne. Cette situation peut etre consideree comme problematique pour les Etats membres, qui sont attaches au developpement du droit international du travail, et souleve egalement la question de l'integration du droit international du travail dans la notion d'Europe sociale.

Question 7

Comment 1'*acquis social* est-il mis en reuvre dans votre Etat membre et quel est son lien avec le droit national?

a. En particulier, comment l'acquis est-il mis en reuvre dans votre pays dans le domaine de la legislation anti-discrimination? Les evolutions recentes de la jurisprudence de la CJUE ont-elles eu un impact significatif sur

la discrimination fondee sur la religion au niveau national? La notion d'amenagement raisonnable estelle correctement mise en reuvre? Quels sont les evolutions encore necessaries dans le domaine de la legislation anti-discrimination, le cas echeant? De telles evolutions devraient-elles etre initiees au niveau de l'UE?

b. Comment l'acquis est-il mis en reuvre dans votre pays dans le domaine du temps de travail? Dans quels domaines l'acquis est-il le plus utile aux travailleurs? Dans quels domaines l'acquis est-il le plus invoque devant les juridictions nationales (limitation du temps de travail journalier ou hebdomadaire? conges payes annuels? autres questions)? Existe-t-il des reactions hostiles a la jurisprudence de la CJUE?

c. Le travail via une plateforme est-il reglemente dans votre pays? Existe-t-il des cas de classification (erronee) des travailleurs des plateformes en tant qu'independants? Quel est le role des partenaires sociaux ou d'autres groupes dans la reglementation du travail via une plateforme, dans votre pays?

d. Le legislateur national et les juridictions nationales ont-ils pris position sur la relation entre le droit de l'UE et le droit international du travail? Y a-t-il, par exemple, des conflits entre le droit de l'Union et le droit international que les juridictions ont du traiter? La charte sociale europeenne est-elle souvent citee par le legislateur ou dans la jurisprudence?

Parties manquantes du droit social de l'UE

L'acquis social est important, mais fragmente: il ne couvre que certains des domaines du droit national du travail et de l'emploi, tandis que d'autres ne relevent pas du champ d'application de l'acquis (par exemple, la resiliation des contrats de travail, la representation ou la protection sociale des travailleurs). Il ne s'agit pas seulement d'une question de competences (existence et exercice), mais aussi d'une question de volonte politique d'agir, dans ces domaines, au niveau de l'UE. Toutefois, la recente proposition de la Commission relative a un salaire minimum adequat dans l'UE suggere que ces obstacles peuvent etre surmontes. L'acquis social de l'UE devrait-il couvrir de nouveaux domaines? Ou une reglementation au niveau national est-elle plus appropriee?

Une autre limite importante est le champ d'application personnel de la legislation sociale de l'UE. L'acquis social s'applique generalement aux travailleurs salaries et ne couvre pas les travailleurs independants. Cela est pretendument dicte par le TFUE. Cette interpretation du TFUE est-elle immuable? Ou cette limitation peut-elle etre

modifiee, afin, notamment, d'inclure des travailleurs des plateformes (reellement) independants?

Question 8

Quelle devrait etre la nouvelle frontiere de la politique sociale de l'UE?

a. Existe-t-il une demande de nouvelles evolutions de la politique sociale de l'UE dans votre pays? Dans quels domaines? La limite de la competence de l'UE en matiere d'harmonisation dans les domaines de la remuneration, du droit d'association et du droit de greve est-elle consideree comme un obstacle a toute action de l'UE dans ces domaines?
b. Le droit de l'Union est-il considere comme s'appliquant strictement aux travailleurs salaries ou est-il etendu aux travailleurs independants dans votre pays? Dans quels domaines du droit du travail? Dans quels cas?

Incidence de I'Union economique et monetaire sur l'acquis social et le role du socle europeen des droits sociaux

Les effets de l'UEM sur les politiques sociales nationales, depuis la crise economique et financiere, sont souvent critiques. L'UEM a donne lieu a revolution de la jurisprudence de la CJUE et a l'adoption du socle europeen des droits sociaux (SEDS). La Commission europeenne a decrit le socle comme un moyen a la fois de socialiser l'UEM et de revitaliser la politique sociale de l'UE.

Question 9

L'UEM a-t-elle eu une incidence sur le droit du travail ou les politiques sociales dans votre pays?

a. Quel est, d'une maniere generale, l'impact du Semestre europeen et des recommandations par pays sur la legislation et la politique nationales sur les questions sociales?
b. Quels sont ou seraient les problemes/avantages de l'integration de la politique sociale europeenne dans l'UEM?

Chapitre 4. La pertinence et l'importance de la Charte des droits fondamentaux

La Charte des droits fondamentaux de l'UE inclut un large eventail de droits sociaux, dans un titre distinct intitule "Solidarite". Ce titre presente un grand potentiel pour la protection des droits sociaux. Depuis que la Charte a acquis le statut de droit primaire, avec le traite de Lisbonne, les droits sociaux qu'elle

contient sont sur un pied d'egalite avec les autres droits fondamentaux et les dispositions du traite, de maniere plus generale.

Toutefois, jusqu'a recemment, les droits sociaux de la Charte semblaient paralyses, y compris lorsqu'ils etaient parti culierement necessaries pour contrebalancer les mesures d'austerite imposees aux Etats membres dans le contexte de la crise economique et monetaire. Il etait egalement difficile de savoir si une plus grande resistance aux "libertes economiques" pouvait decouler des droits sociaux, ou si les travailleurs pouvaient se prevaloir de ces droits dans les litiges avec les employ eurs du secteur prive. Cette question n'a commence a evoluer que recemment, dans les affaires relatives a Particle 31 de la Charte (CJUE, *Max Planck,* C-684/16; *Bauer,* C-569/16 et C-570/16, 2018 et *CCOO,* C-55/18, 2019). Toutefois, la force et l'impact des droits sociaux inscrits dans la Charte restent limites dans la jurisprudence de la CJUE.

Question 10

Quel est le role et la force juridique des droits sociaux de la Charte dans la jurisprudence nationale et la pratique administrative?

a. Ces droits ont-ils une importance "equivalente" aux autres droits fondamentaux, notamment dans la jurisprudence des juridictions nationales?
b. Sont-ils "integralement efficaces" dans la langue de la Cour (CJUE, *AMS,* C-176/12, 2014) ou ne le sont-ils que partiellement?
c. Certains droits sociaux sont-ils consideres, dans la jurisprudence des juridictions nationales, comme des "principes" au sens de Particle 52, paragraphe 5, de la Charte? Dans l'affirmative, quelles consequences ont ete tirees de cette classification?
d. Les autorites et les juridictions nationales se fondent-elles sur Particle 52, paragraphe 2, de la Charte pour limiter ou entraver la portee des droits sociaux reconnus par la Charte? En particulier, les juridictions nationales considerent-elles que les droits sociaux enonces dans la Charte ont le meme contenu que celui de la legislation secondaire de l'UE et n'ont donc pas de contenu "autonome"?
e. Comment les juridictions ont-elles traite la question des droits sociaux au titre de la Charte dans le cadre d'actions entre particuliers ("actions horizontales") dans votre pays?

Chapitre 5. Politique commerciale de l'UE et protection des droits sociaux

Le commerce international peut affecter la protection des droits sociaux de differentes manieres. Il existe en effet un risque que le renforcement de la concurrence internationale entraine un nivellement par le bas, lorsque les biens et les services sont produits a des couts de main-d'reuvre moins eleves, dans les pays en developpement. L'introduction de "clauses sociales" dans les accords internationaux constitue l'un des moyens d'eviter un tel nivellement par le bas. La nouvelle generation d'accords commerciaux de l'UE inclut une reference aux droits sociaux et l'obligation des parties de respecter les droits fondamentaux proteges par les conventions de l'OIT.

En effet, la protection des droits sociaux dans le developpement du libre-echange est le resultat d'un lien de longue date entre les droits de l'homme et la liberalisation des echanges. Aujourd'hui, non seulement l'UE, mais d'autres puissances commerciales importantes, telles que les Etats-Unis et le Canada, integrent des dispositions relatives aux droits de l'homme et aux droits du travail dans leurs nouveaux accords commerciaux. Pour l'UE, l'objectif n'est pas seulement d'eviter les pressions regressives sur les droits sociaux, mais egalement de promouvoir les droits fondamentaux, qui englobent les droits sociaux fondamentaux, par le biais de l'action exterieure. En outre, la promotion du modele social europeen peut faire partie du "pouvoir discret", de l'"attrait" et de l'"influence geopolitique" de l'Union europeenne.

Dans son "Reexamen de la politique commerciale" du 18 fevrier 2021[11], la Commission europeenne s'est engagee a fournir des orientations afin d'aider les entreprises de l'UE a prendre des mesures appropriees pour faire face au risque de travail force dans leurs operations et chaines d'approvisionnement, conformement aux lignes directrices et principes internationaux en matiere de diligence raisonnable. Elle a ensuite publie un document en juillet 2021 afin de fournir les orientations necessaires[12]. La Commission prepare egalement actuellement une proposition legislative sur la "gouvernance d'entreprise durable" afin de favoriser un comportement durable et responsable des entreprises a long terme. La future proposition vise a introduire une diligence raisonnable obligatoire en matiere de droits de l'homme et d'environnement, y compris les risques lies au travail force.

La question centrale concerne le type de reglementation, qui est approprie pour proteger les travailleurs dans le contexte du commerce international. La prise en

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[11] Communication de la Commission europeenne, Reexamen de la politique commerciale – Une politique commerciale ouverte, durable et ferme, COM(2021) 66 final; https://eur– lex.europa.eu/resource.html?uri=cellar:5bf4e9d0-71d2-neb-9ac9-01aa75ed71a1.0002.02/DOC_1&format=PDF

[12] https://trade.ec.europa.eu/doclib/docs/2021/july/tradoc_159709.pdf

compte des chaines d'approvisionnement mondiales et du role des acteurs prives (societes) dans l'elaboration d'instruments adequats pour proteger les droits sociaux est devenue une question plus urgente au cours des dernieres decennies.

Question 11

Comment les droits sociaux sont-ils proteges dans le contexte du commerce international et des chaines d'approvisionnement mondiales dans votre pays?

a. Les regles en matiere de marches publics sont-elles utilisees pour promouvoir les droits sociaux?
b. Les acteurs prives, notamment les entreprises, sont-ils impliques? Des codes de conduite ou des chartes ont-ils ete adoptes dans certains secteurs? Au niveau des entreprises? Quel est leur impact ?
c. Des conventions collectives transnationales ont-elles ete conclues par les entreprises nationales? Quels obstacles rencontrent-elles?
d. Les juridictions nationales admettent-elles des actions civiles ou penales lorsque des violations des droits sociaux ont eu lieu a l'etranger?
e. Existe-t-il des possibilites d'actions collectives?
f. La legislation nationale exige-t-elle une diligence raisonnable a l'egard des droits sociaux? Dans l'affirmative, quelles sont les obligations imposees aux entreprises?

Chapitre 6. Changement climatique et justice sociale

Le 11 decembre 2019, la Commission a publie une communication intitulee "Le pacte vert pour l'Europe". Elle est decrite comme une feuille de route visant a rendre l'economie europeenne durable "en transformant les defis climatiques et environnementaux en opportunites dans tous les domaines d'action et en garantissant une transition juste et inclusive pour tous".

Selon la communication, "il conviendra tout de meme d'etre particulierement attentif lors de possibles arbitrages entre des objectifs economiques, environnementaux et sociaux" et "le socle europeen des droits sociaux orientera l'action en veillant a ce que nul ne soit laisse pour compte". Toutefois, cette formulation ne precise pas ce qu'une transition "juste et inclusive" signifie en termes de politiques sociales et de droits sociaux.

Question 12

Comment les politiques de lutte contre le changement climatique, au niveau national, tiennent-elles compte de la justice sociale et quelles sont les methodes (les instruments, les actions en justice...) par lesquelles le lien entre changement climatique et justice sociale est etabli?

Chapitre 7. Realiser une Europe sociale: Droits sociaux, democratie et Etat de droit

Quelles sont les valeurs sociales europeennes qui sous-tendent une Europe sociale significative et qui devraient renforcer l'integration europeenne? Comment sont-elles liees a l'Etat de droit, auquel les Etats membres doivent se conformer? Dans un contexte ou les democraties europeennes deviennent plus fragiles, les droits sociaux et la justice sociale, ainsi que la question de la conception de ces droits, revetent une importance capitale. Toutefois, le lien entre l'etat de droit et la protection des droits sociaux n'a pas fait l'objet d'une grande attention.

Afin de rendre la dimension sociale de l'UE plus tangible, il convient d'explorer le role de la citoyennete de l'Union et de l'education a la citoyennete de l'Union. Le traite de Maastricht de 1992 a introduit la citoyennete de l'Union dans le traite et lui a fourni une liste limitee de droits de citoyennete. Le traite de Lisbonne de 2009 a ajoute une dimension politique a la citoyennete de l'Union au titre II du TUE "Dispositions relatives aux principes democratiques". Plus d'une decennie plus tard, afin de construire une Union sociale europeenne, il convient de reexaminer la citoyennete de l'Union et les principes democratiques a la lumiere de l'education a la citoyennete de l'Union dans l'enseignement ordinaire. Dans la perspective d'une Union fondee sur les valeurs de Particle 2 du TUE, allant au-dela d'une logique de marche, l'espace public europeen a besoin d'un substrat educatif, permettant un lien plus fort entre les citoyens de l'UE et la solidarite au-dela des frontieres nationales, rapprochant ainsi l'UE de ses citoyens. Il semble y avoir un consensus sur les objectifs. Toutefois, comment cette perspective devrait– elle etre mise en reuvre? Quelles actions concretes ont ete entreprises par les Etats membres?

Question 13

Quelles mesures ont ete prises, le cas echeant, dans votre pays pour enseigner la citoyennete de l'Union et les valeurs enoncees dans les traites dans l'enseignement ordinaire (enseignement primaire, secondaire et superieur)?

a. Ces questions sont-elles abordees dans le programme scolaire et comment?

b. Existe-t-il des regles ou lignes directrices a cet egard?
c. Existe-t-il des exemples de bonnes pratiques qui peuvent etre fournis?

Question 14

Quelles evolutions nationales (en matiere de droit et de politique) dans le domaine des droits sociaux fondamentaux peuvent etre mises en relation avec la democratie et l'Etat de droit (egalite entre les hommes et les femmes, lutte contre la discrimination raciale et les discours de haine, egalite d'acces aux services sociaux, aux prestations sociales et au logement...)?

Question 15

L'UE est-elle perdue comme une union sociale dans votre Etat membre, en particulier dans le discours academique, judiciaire et politique? Les valeurs europeennes communes, en particulier l'egalite et la solidarite, prevues a l'article 2 du TUE, sont-elles considerees comme la base constitutionnelle d'une Union sociale europeenne?

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Fragebogen Thema III: Die Europäische Sozialunion

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Einleitung

Im Rahmen dieses Themas soll erörtert werden, auf welche Weise eine echte und sinnvolle soziale Dimension in der EU entwickelt und gestärkt werden kann. Vielfach herrscht die Auffassung vor, dass in der EU die wirtschaftliche Integration zwar auf einem sehr guten Weg ist, der soziale Zusammenhalt und die soziale Integration jedoch oftmals hinterherhinken. Bei diesem Thema geht es daher um die Konzeptualisierung des Gedankens einer Europäischen Sozialunion als Möglichkeit, die EU den Menschen näherzubringen.

Die folgenden Fragen beziehen sich auf die Ausgestaltung eines sozialen Europas und die Herausforderungen, die mit der sozialen Integration verbunden sind.

Diese Herausforderungen sind in sieben Kapitel unterteilt:

1. Freizügigkeit der Arbeitskräfte
2. Konflikte zwischen Grundfreiheiten und sozialen Rechten
3. Besitzstand im sozialen Bereich und was nicht Teil des sozialen Besitzstands ist
4. Relevanz und Bedeutung der Grundrechtecharta
5. Die EU-Handelspolitik und der Schutz der sozialen Rechte
6. Grüner Deal und soziale Gerechtigkeit
7. Verwirklichung eines sozialen Europas: Menschenrechte, Demokratie und Rechtsstaatlichkeit

Kapitel 1. Freizügigkeit der Arbeitskräfte

Die Freizügigkeit der Arbeitskräfte ist Teil des Binnenmarktrechts. Von daher ließe sich die Auffassung vertreten, dass sie nicht zum Bereich der sozialen Integration gehört. Bei einer solchen Sichtweise würde man jedoch den wichtigen Beitrag des EU-Rechts zum Status der Arbeitnehmerinnen und Arbeitnehmer in der EU außer Acht lassen.

Das EU-Recht ist in dieser Domäne tief verwurzelt und hat sich gegenüber zahlreichen Herausforderungen als widerstandsfähig erwiesen. Aktuelle Entwicklungen lassen jedoch erkennen, dass es immer noch Hindernisse für die Freizügigkeit gibt und dass die sozialen Rechte von Arbeitskräften in der EU zwar fest verankert, aber dennoch nicht in Stein gemeißelt sind. Dies ist eine Bedrohung für eine sehr wichtige Dimension des sozialen Europas: für die sozialen Rechte mobiler Arbeitskräfte in der EU.

Die Freizügigkeit der Arbeitskräfte und das Recht auf Gleichbehandlung

Von Anfang an war die Freizügigkeit der Arbeitskräfte an ein Recht auf Gleichbehandlung geknüpft, das umfassend (ratione materiae und ratione personae) konzipiert war und sowohl ein Anreiz für mehr Mobilität als auch ein konstitutives Element der Unionsbürgerschaft sein sollte. Nach nunmehr sechzig Jahren scheint die Gleichbehandlung jedoch immer noch unvollständig zu sein.

Eine weitere schwierige Frage betrifft die wachsende Kluft zwischen Arbeitskräften, die von der Gleichbehandlung mit Staatsangehörigen des Aufenthaltsmitgliedstaats profitieren, und anderen EU-Bürgerinnen und Bürgern, insbesondere solchen, die nicht erwerbstätig sind. Ist diese Unterscheidung gerechtfertigt? Kommt es dadurch in den Mitgliedstaaten zu Spannungen?

Frage 1

Wie wird das Recht auf Gleichbehandlung mobiler Arbeitskräfte in der EU in den nationalen Rechtsvorschriften und in der nationalen Rechtsprechung umgesetzt?

a. Wird die Gleichbehandlung befolgt oder auf unterschiedliche Weise eingeschränkt, etwa durch direkte oder indirekte Diskriminierung? Sind sich insbesondere nationale Behörden und Gerichte des europäischen Konzepts der Gleichbehandlung und der EU-Arbeitnehmerrechte voll und ganz bewusst? Gibt es spezifische Hindernisse für die Gleichbehandlung? Wer ist besonders betroffen? Arbeitslose? Arbeitskräfte in prekären Arbeitsverhältnissen? Wie sieht es mit dem Zugang zu beruflicher Bildung aus?

b. Werden EU-Arbeitskräfte und nicht erwerbstätige EU-Bürgerinnen und Bürger unterschiedlich behandelt? Sind derartige Unterscheidungen auf Rechtsvorschriften, auf die Rechtsprechung und/oder auf die Verwaltungspraxis zurückzuführen? Gibt es Widerstand dagegen (von der akademischen Welt, der Presse, Parteien usw.)?

Die Freizügigkeit der Arbeitskräfte und die Koordinierung der Systeme der sozialen Sicherheit

Die Koordinierung der Systeme der sozialen Sicherheit wurde als notwendig erachtet, um sicherzustellen, dass die Mobilität der Arbeitskräfte nicht durch das Risiko behindert wird, dass bei einem Umzug in einen anderen Mitgliedstaat der soziale Schutz eingeschränkt wird oder verloren geht. Die Koordinierung auf EU-Ebene zielt darauf ab, dieses Risiko durch eine Reihe von Vorschriften (Gleichbehandlung, Zusammenrechnung berücksichtigter Zeiten, Exportierbarkeit von Leistungen usw.) zu begrenzen. Die EU-Verordnungen in diesem Bereich wurden aktualisiert, um neu entstehenden Problemen gerecht zu werden. Die jüngste Reform, an der derzeit gearbeitet wird[1], gibt Aufschluss darüber, welche zentralen Fragestellungen im Zusammenhang mit der Koordinierung der Systeme der sozialen Sicherheit bestehen. Ein Beispiel dafür ist der Zugang nicht erwerbstätiger Bürgerinnen und Bürger zu Sozialleistungen: Mit dem Kommissionsvorschlag soll – auf der Grundlage der Rechtsprechung des EuGH – klargestellt werden, dass die Mitgliedstaaten es ablehnen dürfen, nicht erwerbstätigen mobilen EU-Bürgerinnen und Bürgern (die weder arbeiten noch aktiv nach einem Arbeitsplatz suchen und die kein Aufenthaltsrecht im Hoheitsgebiet des Mitgliedstaats haben, es sei denn, sie verfügen über Mittel zur Sicherung des Lebensunterhalts und eine umfassende Krankenversicherung) Sozialleistungen zu gewähren. Eine solch kontroverse Lösung wäre damit festgeschrieben.

Ein weiterer Anlass für Bedenken bezieht sich auf das Kindergeld. In einigen Staaten ist es zu einer Indexierung des Kindergeldes gekommen, bei der die Lebenshaltungskosten im Wohnmitgliedstaat des Kindes in Anschlag gebracht wurden, was einen Verstoß gegen den Grundsatz der Gleichbehandlung bedeutet (und kürzlich zu einem Vertragsverletzungsverfahren gegen Österreich geführt hat). Ob dies auf eine zunehmende Ablehnung des Grundsatzes hindeutet, dass für die Zahlung des Kindergeldes maßgeblich ist, in welchem Land ein Elternteil bzw. die Eltern arbeiten, auch wenn das Kind in einem anderen Mitgliedstaat wohnt, sollte ebenso untersucht werden die Gründe für diesen aufkommenden Widerstand gegen die Gleichbehandlung.

[1] Vorschlag der Kommission für eine Verordnung des Europäischen Parlaments und des Rates zur Änderung der Verordnung (EG) Nr. 883/2004 zur Koordinierung der Systeme der sozialen Sicherheit und der Verordnung (EG) Nr. 987/2009 zur Festlegung der Modalitäten für die Durchführung der Verordnung (EG) Nr. 883/2004 (COM(2016) 815 final).

Frage 2

Welchen Ansatz gibt es auf nationaler Ebene für die Gleichbehandlung bei Sozialleistungen?

a. Gibt es für die Rechtsprechung des EuGH, wonach die Mitgliedstaaten nicht erwerbstätigen mobilen EU-Bürgerinnen und Bürgern (die weder arbeiten noch aktiv nach einem Arbeitsplatz suchen und die kein Aufenthaltsrecht im Hoheitsgebiet des Mitgliedstaats haben, es sei denn, sie verfügen über Mittel zur Sicherung des Lebensunterhalts und eine umfassende Krankenversicherung) die Gewährung von Sozialleistungen verweigern dürfen, Unterstützung oder Ablehnung (bei der Zivilgesellschaft, den politischen Parteien, Gewerkschaften, Regierungen, Wissenschaftlerinnen und Wissenschaftlern usw.)?

b. Gibt es in Ihrem Land eine wachsende Ablehnung des Grundsatzes, wonach für die Zahlung des Kindergeldes maßgeblich ist, in welchem Land ein Elternteil bzw. die Eltern arbeiten, auch wenn das Kind in einem anderen Mitgliedstaat wohnt? Kommt dies in den Rechtsvorschriften, der Rechtsprechung, der Verwaltungspraxis zum Ausdruck?

Das Recht auf Freizügigkeit und die tatsächliche Mobilität von EU-Arbeitskräften

Das Recht auf Freizügigkeit und alle damit verbundenen Vorteile (Recht auf Einreise, Aufenthalt, Gleichbehandlung usw.) sollten ursprünglich die Freizügigkeit fördern und sowohl den Arbeitskräften als auch den Volkswirtschaften Nutzen bringen. Nach wie vor ist allerdings unklar, ob diese Rechte ausreichend waren, um die Mobilität zu fördern. Haben sie Branchen mit Fachkräftemangel dabei geholfen, Arbeitskräfte aus anderen EU-Mitgliedstaaten zu gewinnen?

Ein Vorschlag, der die Weiterentwicklung des Konzepts des freien Personenverkehrs betrifft, geht in die Richtung, die freie Mobilität durch „faire Mobilität", auch als „gesteuerte Migration"[2] bezeichnet, zu ersetzen. Dieser Vorschlag zielt darauf ab, den Staaten die Möglichkeit zu geben, die Migration von EU-Bürgerinnen und Bürgern zu steuern, um einen plötzlichen, sehr großen Zustrom von Menschen zu verhindern. Er beruht auf dem Zugeständnis, dass Solidarität Grenzen haben müsse, und auf der „politischen Realität" eines Widerstands der Bevölkerung gegen die Freizügigkeit, der insbesondere an der britischen Abstimmung über

[2] Vgl. zu diesem Konzept C. Barnard und S. Fraser Butlin, Common Market Law Review, Bd. 55, 2018, S. 203-226.

den Brexit deutlich wurde. Im Einklang mit den derzeitigen Bestrebungen einiger europäischer Regierungen wäre demnach ein enger gefasstes Freizügigkeitskonzept ein Gebot des Pragmatismus.

Eine ganz andere Sichtweise konzentriert sich auf die Mobilität bestimmter Berufsgruppen mit dem Ziel, durch die Freizügigkeit der Arbeitskräfte ein bestimmtes Konzept von Gemeinwohl zu erreichen.[3]3 Dies würde eine besondere (bevorzugte) Behandlung bestimmter mobiler Arbeitskräfte bedeuten, die als wesentlich für die Erreichung der EU-Prioritäten angesehen werden, aufbauend auf den Erfahrungen mit der COVID-19-Krise: Erwerbstätige in systemrelevanten Berufen (in Sektoren wie Gesundheit und Pflege, Landwirtschaft, Transport usw.) würden Priorität genießen, und für ihre Mobilität würde eine konkrete Unterstützung eingeführt.

Frage 3

Wie ist in Ihrem Land die tatsächliche Situation und welche Entwicklungen sind in Bezug auf die Arbeitskräftemobilität geplant?

a. Auf der Grundlage der verfügbaren Daten: Wie viele Arbeitnehmerinnen und Arbeitnehmer aus anderen Mitgliedstaaten arbeiten in Ihrem Mitgliedstaat? In welchen Sektoren/Branchen? Wie hat sich dies im Laufe der Zeit entwickelt? Gibt es nationale Branchen, die derzeit eigenen Angaben zufolge Schwierigkeiten haben, Arbeitskräfte zu finden?

b. Hat die Idee der „fairen Mobilität“ in Ihrem Land inzwischen mehr Unterstützung als das Konzept der „freien Mobilität“ unter Wissenschaftlerinnen und Wissenschaftlern, in der Zivilgesellschaft, bei Unternehmerinnen und Unternehmern sowie bei Politikerinnen und Politikern?

c. Wird die Mobilität von „systemrelevanten Arbeitskräften“ in Ihrem Land als ein wichtiges Thema gesehen, das ein Umdenken in Bezug auf die Freizügigkeit der

Die „Angebotsseite“ der Freizügigkeit der Arbeitskräfte: Braindrain und demografische Ungleichgewichte

Die Mobilität der Arbeitskräfte ist in der EU nicht einheitlich. In einigen Mitgliedstaaten wird das Recht, in einen anderen Mitgliedstaat zu ziehen, von einer so großen Zahl insbesondere hochqualifizierter Arbeitnehmerinnen

[3] Vgl. dazu S. Robin-Olivier, European Papers, Bd. 5, 2020, Nr. 1, European Forum, Insight vom 16. Mai 2020, S. 613.

und Arbeitnehmer wahrgenommen, dass dies für ernsthafte wirtschaftliche und soziale Spannungen sorgt. Das Europäische Parlament betonte in einem kürzlich veröffentlichten Bericht[4], dass der massive Bevölkerungsrückgang in Ost– und Südeuropa – aufgrund der niedrigen Geburtsraten und einer Netto-Abwanderung aus diesen Gebieten innerhalb der Union und insbesondere der Abwanderung junger, gut ausgebildeter Fachkräfte aus Süd– und Osteuropa nach Nordwesteuropa seit Beginn der Wirtschaftskrise 2008 – zu einer Verschlechterung der Qualität der medizinischen Versorgung und Ausbildung geführt hätten. Dadurch sei es vor allem in abgelegenen und ländlichen Gebieten sowie in Gebieten in äußerster Randlage schwierig, Zugang zu hochwertiger Versorgung und Ausbildung zu erhalten. Dieses Phänomen des Braindrain, der Abwanderung hochqualifizierter Arbeitskräfte, spaltet die EU, da die Mitgliedstaaten um diese Fachkräfte konkurrieren. Nach Ansicht des Europäischen Parlaments erfordert dieses Phänomen Maßnahmen in den betroffenen Mitgliedstaaten, um die Voraussetzungen zu schaffen, jüngere Arbeitskräfte und Familien dort zu halten[5]; dabei müsse man sich der Mittel der Kohäsionspolitik bedienen.

In einzelnen Mitgliedstaaten gebe es bereits verschiedene Initiativen, wie z. B. Anreize für Arbeitskräfte mit hochspezialisierten Fähigkeiten, um für die betreffenden Gebiete die Abwanderung von Hochqualifizierten in eine Zuwanderung umzukehren.[6] Das Europäische Parlament forderte die Mitgliedstaaten auf, bei der Gestaltung ihrer nationalen Aufbau– und Resilienzpläne, ihrer nationalen entwicklungspolitischen Maßnahmen, ihrer langfristigen Strategien für eine nachhaltige Entwicklung und ihrer jeweiligen kohäsionspolitischen Programme den Braindrain zu berücksichtigen, und zwar in Verknüpfung mit den Zielen des Europäischen Semesters, damit für eine angemessene Finanzierung gesorgt werde, um die Abwanderung zu bekämpfen, negative Entwicklungen umzukehren und Gebiete aufzuwerten.[7] Ferner forderte es die lokalen und regionalen Gebietskörperschaften und die staatlichen Stellen auf nationaler Ebene in Regionen, die von Abwanderung bedroht sind, auf, ihre Investitionen auf die Aufwertung dieser Regionen für junge Familien sowie unter Einbindung von KMU und Unternehmen für Dienstleistungsmanagement auf die allgemeine Zugänglichkeit von hochwertigen Dienstleistungen und Infrastruktur und auf die Schaffung

[4] Europäisches Parlament, Bericht über die Umkehrung demografischer Trends in den Regionen der EU mithilfe von Instrumenten der Kohäsionspolitik, 25.3.2021 (2020/2039(INI)).

[5] Ebd., Ziffer 13.

[6] Ebd., Ziffer 29.

[7] Ziffer 41.

von Arbeitsplätzen insbesondere für junge Menschen und die Umschulung von Arbeitnehmerinnen und Arbeitnehmern zu konzentrieren, indem unternehmerische Initiative gefördert wird und KMU unterstützt werden.[8]

Um die Abwanderung von Hochqualifizierten in eine Zuwanderung umzukehren, müsse auch die Rückkehr von Menschen gefördert werden, die aus einer wirtschaftlich unattraktiveren Region abgewandert sind, wobei der Schwerpunkt auf Hochschulstudentinnen und studenten der Bereiche Landwirtschaft und Agrarwirtschaft liegen sollte, für die es Anreize geben müsse, nach ihrem Abschluss in ihre jeweilige Heimatregionen zurückzukehren, um zu deren wirtschaftlicher Entwicklung beizutragen.[9]

Frage4

Wie reagiert man in den Mitgliedstaaten auf das Phänomen des Braindrains?

a. Gibt es eine erhebliche Abwanderung von Arbeitskräften aus Ihrem Land in andere Mitgliedstaaten? Welche Sektoren sind davon betroffen? Welches ist das typische Profil (Alter, Bildungsniveau, Geschlecht) einer mobilen Arbeitskraft?Sind bestimmte Regionen stärker betroffen als andere? Hat dies auch demografische Probleme verursacht?
b. Gibt es auf nationaler Ebene Maßnahmen, die darauf abzielen, bestimmte Gruppen von Arbeitskräften (z. B. mit bestimmten Bildungsabschlüssen oder Qualifikationen) zu halten? Gibt es beispielsweise Maßnahmen, die Absolventinnen und Absolventen dazu verpflichten, für einen bestimmten Zeitraum in ihrem Herkunftsmitgliedstaat zu arbeiten, der ihnen das Studium finanziert hat, bevor sie abwandern dürfen? Gab es andere Maßnahmen, mit denen dieses Ziel verfolgt wurde?
c. Gibt es auf nationaler Ebene Gerichtsurteile oder Verwaltungsentscheidungen, in denen die Vereinbarkeit solcher Maßnahmen mit dem Unionsrecht, insbesondere mit den in den EU-Verträgen enthaltenen Bestimmungen über die Freizügigkeit, geprüft wird?

Kapitel 2. Konflikte zwischen Grundfreiheiten und sozialen Rechten

Die wichtigste Ursache für Konflikte zwischen Grundfreiheiten und sozialen Rechten ist ein Verständnis des freien Dienstleistungsverkehrs, das in den Mitgliedstaaten zu einer Aushöhlung der sozialen Rechte geführt hat (und das etwa in der weithin bekannten Rechtssache Laval [Urteil des Gerichtshofs,

[8] Ziffer 42.
[9] Ziffer 53.

Rechtssache C-341/05, 2007] illustriert wird). Die Niederlassungsfreiheit stellt auch das nationale Arbeits– und Sozialrecht infrage, wie an den Rechtssachen Viking (C-438/05, 2007) und AGET Iraklis (C-201/15, 2016) deutlich wird. Durch die vermehrte Inanspruchnahme des Rechts der unternehmerischen Freiheit (Artikel 16 der Grundrechtecharta) ist es durchaus möglich, dass der Schutz der sozialen Rechte sowohl auf nationaler als auch auf europäischer Ebene infrage gestellt oder eingeschränkt wird.

Freier Dienstleistungsverkehr und Ausbeutung entsandter Arbeitskräfte im Binnenmarkt

Die Entsendung von Arbeitnehmerinnen und Arbeitnehmern im Rahmen der Dienstleistungsfreiheit hat zu Sozialdumping und unlauterem Wettbewerb geführt. Diese Schwierigkeit sollte in der Richtlinie 96/71/EG geregelt werden. Anhaltende Probleme haben zum Erlass der Richtlinie 2004/67 zur Durchsetzung der Richtlinie 96/71/EG geführt. Kürzlich wurde die Richtlinie 96/71/EG durch die Richtlinie (EU) 2018/957 geändert, um die Einhaltung des Grundsatzes „gleicher Lohn für gleiche Arbeit" sicherzustellen (Änderung von Artikel 3 der Richtlinie). Das Ziel der Lohngleichheit bleibt jedoch unerreichbar, wenn Löhne überwiegend in individuellen Verträgen und Tarifverträgen auf Unternehmensebene festgelegt werden, von denen entsandte Arbeitskräfte nicht erfasst werden. Darüber hinaus ist es schwer, Betrugsfälle zu erkennen, insbesondere wenn es darum geht, ob ein Arbeitgeber tatsächlich in dem Land ansässig ist, aus dem die Arbeitskräfte entsandt werden sollen. Einige der problematischsten Fälle betreffen die Entsendung durch Leiharbeitsunternehmen, wie etwa in der Rechtssache Team Power Europe (C-784/19, 2021).

Frage 5

Wie ist die Situation entsandter Arbeitskräfte im nationalen Recht geregelt?

a. Wurde die Richtlinie (EU) 2018/957 in nationales Recht umgesetzt? Wie wurde insbesondere das Lohngleichheitsprinzip, wie es im geänderten Artikel 3 der Richtlinie festgelegt ist, in nationales Recht umgesetzt? Gibt es Branchen, in denen der Grundsatz „gleicher Lohn für gleiche Arbeit" im Zusammenhang mit Entsendungen keine Anwendung findet? In welchen Branchen ist die Ausbeutung von Arbeitnehmerinnen und Arbeitnehmern am problematischsten (Landwirtschaft, Fleischverarbeitung, Bauwesen usw.)?

b. Gab es auf nationaler Ebene Gerichtsurteile im Zusammenhang mit der Entsendung von Arbeitskräften durch Leiharbeitsunternehmen mit

Sitz in anderen Mitgliedstaaten? Wie haben die nationalen Gerichte in diesen Fällen entschieden?

Marktfreiheiten, unternehmerische Freiheit und Arbeitsrecht

Die Argumentation des Gerichtshofs in der Rechtssache AGET Iraklis (C201/15, 2016) hat gezeigt, welche Auswirkungen eine weite Auslegung der Niederlassungsfreiheit, noch dazu in Kombination mit der unternehmerischen Freiheit (Artikel 16 der Grundrechtecharta), auf das nationale Arbeitsrecht hat.

Nach Auffassung des Gerichtshofs ist die unternehmerische Freiheit (Artikel 16 Grundrechtecharta) darüber hinaus unmittelbar anwendbar. Sie kann demnach geltend gemacht werden, um gegen nationale Rechtsvorschriften vorzugehen, die in den Anwendungsbereich des EU-Rechts fallen, wie es sich in den Rechtssachen Achbita und Bougnaoui (C157/15 und C188/15, 2017) für den Bereich des Antidiskriminierungsrechts (Diskriminierung aus Gründen der Religion) gezeigt hat.

Was das Recht auf Streik betrifft, haben insbesondere die Urteile des EuGH in den Rechtssachen Viking und Laval (2007) deutlich gemacht, welche negativen Folgen es hat, wenn dieses Recht als „Einschränkung“ von Binnenmarktfreiheiten – insbesondere der Niederlassungsfreiheit und der Dienstleistungsfreiheit – begriffen wird: Die vom EuGH unterstützte (unangemessene) Hierarchie zwischen Grundrechten und Freiheiten ist massiv kritisiert worden. Kürzlich wurde diese Debatte vom Europäischen Gerichtshof für Menschenrechte wiederaufgenommen, der entschied, dass die wirtschaftlichen Freiheiten der EU nicht als Gegengewicht zu den in Artikel 11 EMRK festgelegten Grundrechten der Versammlungs– und Vereinigungsfreiheit und dem Recht, Gewerkschaften zu gründen, zu betrachten sind, sondern vielmehr als Elemente, die berücksichtigt werden müssen, wenn die Verhältnismäßigkeit einer Einschränkung eines in der EMRK verankerten Rechts beurteilt wird.[10]

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[10] EGMR, Norwegischer Gewerkschaftsbund (Landsorganisasjonen i Norge, LO) und Norwegische Transportarbeitergewerkschaft (Norsk Transportarbeiderforbund, NTF)/Norwegen, Antrag Nr. 45487/17, Urteil vom 10. Juni 2021.

Frage 6

Werden die Niederlassungsfreiheit und das Recht auf unternehmerische Freiheit (Artikel 16 der Grundrechtecharta) geltend gemacht, um nationales oder EU-Sozialrecht vor nationalen Gerichten anzufechten?

a. Wenn ja, welche Bereiche des Arbeitsrechts sind davon betroffen?
b. Wie wird das Recht auf Streik derzeit im nationalen Recht geschützt, und wie wird es im nationalen Recht (in der nationalen Rechtsprechung) im Verhältnis zur Dienstleistungsfreiheit und zur Niederlassungsfreiheit angewandt? Wird das Recht auf Streik als gleichwertig, wichtiger oder weniger wichtig als die Freiheiten des Binnenmarkts behandelt (d. h. als eine Ausnahme, die verhältnismäßig sein muss)?

Kapitel 3. Besitzstand im sozialen Bereich und was nicht Teil des sozialen Besitzstands ist

Der soziale Besitzstand ist sehr umfangreich, aber die Sozialgesetzgebung der EU deckt nach wie vor nur einen begrenzten Teil der arbeits– und sozialrechtlichen Probleme ab. Für viele wichtige Bereiche des Arbeits– und Sozialrechts sind nach wie vor die nationalen Gerichte zuständig. Immer noch ist umstritten, wo die Grenze verläuft zwischen dem Besitzstand und dem, was außerhalb der Zuständigkeit der EU liegt, entweder weil die Befugnisse auf EU-Ebene fehlen (Recht auf Streik, Harmonisierung von Löhnen und Gehältern), oder weil die Ausübung der Zuständigkeit der EU schwierig ist (soziale Sicherheit). Eine wichtige Frage ist, was alles abgedeckt werden sollte, damit eine vollständige Sozialunion entstehen kann. Parallel dazu sollten der Umfang des Besitzstands bewertet werden sowie die Fähigkeit, den Schutz der Arbeitnehmerinnen und Arbeitnehmer in sich wandelnden Arbeitsmärkten zu gewährleisten.

Der Umfang des sozialen Besitzstands

Das Antidiskriminierungsrecht der EU ist ein wichtiger Teil des Besitzstands. Die umfassende und umfangreiche Rechtsprechung und die Entwicklungen in der Gesetzgebung zeigen, dass insbesondere Maßnahmen gegen Diskriminierung aufgrund des Geschlechts frühzeitig auf EU-Ebene ergriffen wurden. Im Vertrag von Amsterdam wurde der EU die Zuständigkeit für die Bekämpfung von Diskriminierung aus Gründen der Rasse, der ethnischen Herkunft, des Alters, der Religion, der sexuellen Ausrichtung oder einer Behinderung übertragen (Artikel 19 AEUV). Im Jahr 2000 wurden zwei Richtlinien verabschiedet (Richtlinie 2000/43/EG und Richtlinie 2000/78/EG), mit denen ein neuer Entwicklungsbereich im

EU-Sozialrecht geschaffen wurde. Zu den Anliegen im Zusammenhang mit diesen aktuellen Entwicklungen in der Antidiskriminierungspolitik der EU gehört die Herstellung eines angemessenen Gleichgewichts zwischen dem Diskriminierungsverbot und der unternehmerischen Freiheit der Arbeitgeber (Artikel 16 der Grundrechtecharta). Wenn es beispielsweise um Diskriminierung aus Gründen der Religion geht, muss der Gerichtshof das Recht, nicht aufgrund der Religion diskriminiert zu werden (Basis der Religionsfreiheit), gegen die Forderung von Arbeitgebern nach einem „neutralen Arbeitsplatz" abwägen. Die damit befasste Rechtsprechung der letzten Zeit (Urteile des Gerichtshof in den Rechtssachen WABE, C804/18, und Müller Handels GmbH, C341/19, 2021) erfordert einen Wandel der nationalen Konzepte der Religionsfreiheit und des Verbots der Diskriminierung aufgrund der Religion. Eine weitere Frage betrifft den Geltungsbereich und den Begriff der „angemessenen Vorkehrungen"; ob diese Anforderung nur in Bezug auf Menschen mit Behinderungen gilt (wie die Richtlinie 2000/78/EG nahelegt) oder auch in anderen Fällen, ist nach wie vor unklar.

Ein weiterer wichtiger Bereich des sozialen Besitzstands der EU ist die Arbeitszeit. Arbeitnehmerinnen und Arbeitnehmer, die Schutz suchen (u. a. besonders gefährdete Personen und auf Online-Plattformen beschäftigte Arbeitskräfte), berufen sich häufig auf die Richtlinie 2003/88/EG über die Arbeitszeitgestaltung. Diese hat in jüngster Zeit für scharfe Kritik gesorgt, nämlich als der Gerichtshof befand, dass die Richtlinie 2003/88/EG für Militärangehörige gilt (Urteil des Gerichtshofs, Ministrstvo za obramo, C742/19, 2021). In dieser Situation werden erneut Fragen nach dem Ermessensspielraum aufgeworfen, über den die Mitgliedstaaten bei der Arbeitszeitgestaltung verfügen sollten, und – radikaler formuliert – nach der Rechtfertigung einer Regulierung der Arbeitszeit auf EU-Ebene.

Ein sehr wichtiges aktuelles Thema ist in der Tat die Regulierung der Plattformarbeit. Zusätzlich zu der relativ neuen Richtlinie über transparente und vorhersehbare Arbeitsbedingungen (Richtlinie (EU) 2019/1152) hat die Kommission die Annahme einer Richtlinie vorgeschlagen, die speziell auf den mangelnden Schutz von auf Online-Plattformen Beschäftigten abzielt (Vorschlag für eine Richtlinie zur Verbesserung der Arbeitsbedingungen in der Plattformarbeit, COM(2021) 762 final, vom 9. Dezember 2021). In der Zwischenzeit haben einige Mitgliedstaaten begonnen, die Plattformarbeit zu regulieren, und viele nationale Gerichte mussten über die (ungerechtfertigte) Einstufung von Plattformbeschäftigten als Selbstständige entscheiden.

Schließlich stellen sich auch ganz allgemeine Fragen, die das Verhältnis zwischen dem EU-Besitzstand und dem internationalen Arbeitsrecht betreffen. Nur in seltenen Fällen wird in der Sozialgesetzgebung oder in der Rechtsprechung der EU ausdrücklich auf IAO-Übereinkommen oder die Europäische Sozialcharta Bezug genommen. Dies kann für Mitgliedstaaten, die sich für die Entwicklung eines internationalen Arbeitsrechts einsetzen, als problematisch angesehen werden und wirft auch die Frage der Integration des internationalen Arbeitsrechts in das Konzept des sozialen Europas auf.

Frage 7

Wie wird der soziale Besitzstand in Ihrem Mitgliedstaat umgesetzt, und in welcher Beziehung steht er zum nationalen Recht?

a. Wie wird insbesondere der Besitzstand im Bereich des Antidiskriminierungsrechts in Ihrem Land umgesetzt? Haben die jüngsten Entwicklungen in der Rechtsprechung des EuGH erhebliche Auswirkungen auf die Diskriminierung aus Gründen der Religion auf nationaler Ebene gehabt? Wird das Konzept angemessener Vorkehrungen ordnungsgemäß umgesetzt? Welche Entwicklungen sind gegebenenfalls im Bereich des Antidiskriminierungsrechts noch erforderlich?Sollten solche Entwicklungen auf EU-Ebene eingeleitet werden?
b. Wie wird der Besitzstand im Bereich der Arbeitszeit in Ihrem Land umgesetzt? In welchen Bereichen profitieren Arbeitnehmerinnen und Arbeitnehmer am meisten vom Besitzstand? In welchen Bereichen wird der Besitzstand vor nationalen Gerichten am häufigsten geltend gemacht (Beschränkung der täglichen oder der wöchentlichen Arbeitszeit; bezahlter Jahresurlaub; andere Angelegenheiten)? Gibt es ablehnende Reaktionen auf die Rechtsprechung des EuGH?
c. Ist Plattformarbeit in Ihrem Land reguliert? Gibt es Rechtssachen, in denen es um die (ungerechtfertigte) Einstufung von Plattformbeschäftigten als Selbstständige geht? Welche Rolle spielen die Sozialpartner oder andere Gruppen bei der Regulierung der Plattformarbeit in Ihrem Land?
d. Haben sich der nationale Gesetzgeber und die nationalen Gerichte zum Verhältnis zwischen EU-Recht und internationalem Arbeitsrecht positioniert? Gibt es beispielsweise Konflikte zwischen EU-Recht und internationalem Recht, mit denen sich die Gerichte befassen mussten? Wird die Europäische Sozialcharta häufig vom Gesetzgeber oder in der Rechtsprechung zitiert?

Lücken im EU-Sozialrecht

Der soziale Besitzstand ist umfangreich, aber fragmentiert: Er deckt nur manche Bereiche des nationalen Arbeits– und Sozialrechts ab, während andere außerhalb seines Geltungsbereichs bleiben (z. B. Beendigung von Arbeitsverträgen, Arbeitnehmervertretung oder Sozialschutz). Dies ist nicht nur eine Frage der Zuständigkeiten (ob sie vorhanden sind und wie sie wahrgenommen werden), sondern auch des politischen Willens, in diesen Bereichen auf EU-Ebene tätig zu werden. Der jüngste Vorschlag der Kommission für einen angemessenen Mindestlohn in der EU deutet jedoch darauf hin, dass diese Hindernisse überwunden werden können. Sollte der soziale Besitzstand der EU neue Bereiche abdecken? Oder ist eine Regulierung auf nationaler Ebene sinnvoller?

Eine weitere wichtige Beschränkung ist der personenbezogene Anwendungsbereich der EU-Sozialgesetzgebung. Der soziale Besitzstand gilt generell für abhängig Beschäftigte, nicht aber für Selbstständige. Dies ist eine vermeintliche Vorgabe des AEUV. Ist diese Auslegung des AEUV unumstößlich? Oder kann diese Beschränkung dahingehend abgeändert werden, dass (tatsächlich) selbstständig Erwerbstätige, die auf Plattformen arbeiten, einbezogen werden?

Zu Frage 8

Wo sollte die neue Grenze für die EU-Sozialpolitik verlaufen?

a. Gibt es einen Bedarf an neuen Entwicklungen in der EU-Sozialpolitik in Ihrem Land? In welchen Bereichen? Wird die Einschränkung der Zuständigkeit der EU in Bezug auf eine Harmonisierung in den Bereichen Entlohnung, Vereinigungsfreiheit und Recht auf Streik als Hindernis für sämtliche EU-Maßnahmen in diesen Bereichen angesehen?

b. Ist man in Ihrem Land der strikten Auffassung, dass die EU-Rechtsvorschriften nur für abhängig Beschäftigte gelten, oder werden sie auch auf Selbstständige ausgedehnt? In welchen Bereichen des Arbeitsrechts? Unter welchen Voraussetzungen**?**

Auswirkungen der Wirtschafts– und Währungsunion auf den sozialen Besitzstand und die Rolle der europäischen Säule sozialer Rechte

Die Auswirkungen, die die WWU seit der Wirtschafts– und Finanzkrise auf die Sozialpolitik der Mitgliedstaaten hatte, wurden häufig kritisiert. Dies führte zu einer Weiterentwicklung der Rechtsprechung des EuGH und zur Errichtung der europäischen Säule sozialer Rechte. Die Säule wurde von der Europäischen Kommission als eine Möglichkeit beschrieben, um sowohl zu einer „Sozialisierung" der WWU zu kommen als auch die EU-Sozialpolitik zu erneuern.

Frage 9
Hat sich die WWU auf das Arbeitsrecht oder die Sozialpolitik in Ihrem Land ausgewirkt?

a. Wie wirken sich das Europäische Semester und die länderspezifischen Empfehlungen allgemein auf das Sozialrecht und die Sozialpolitik der Mitgliedstaaten aus?
b. Welches sind die Probleme bzw. Vorteile, die sich aus der Verlagerung der europäischen Sozialpolitik in die WWU ergeben bzw. ergeben würden?

Kapitel 4. Relevanz und Bedeutung der Grundrechtecharta

Die Charta der Grundrechte der Europäischen Union enthält ein breites Spektrum sozialer Rechte in einem eigenen Kapitel „Solidarität". Dieses Kapitel ist für den Schutz der sozialen Rechte von enormer Bedeutung. Da die Charta mit dem Vertrag von Lissabon in das Primärrecht der EU gehoben wurde, sind die darin verankerten sozialen Rechte gleichrangig mit anderen Grundrechten und mit anderen Bestimmungen der EU-Verträge.

Bis vor Kurzem schienen die sozialen Rechte der Charta jedoch gleichsam auf Eis zu liegen, und das in einer Zeit, in der sie besonders nötig gewesen wären, nämlich als Ausgleich zu den Sparmaßnahmen, die den Mitgliedstaaten im Zusammenhang mit der Wirtschafts– und Finanzkrise auferlegt wurden. Auch war unklar, ob ein vermehrter Widerstand gegen die „wirtschaftlichen Freiheiten" aus den sozialen Rechten abgeleitet werden könne oder ob sich Beschäftigte bei Meinungsverschiedenheiten mit Arbeitgebern des Privatsektors auf diese Rechte berufen könnten. Die diesbezügliche Einstellung hat sich erst in der letzten Zeit langsam gewandelt, was an verschiedenen Urteilen deutlich wird, die Artikel 31 der Charta betreffen (Urteile des Gerichtshofs, Rechtssache Max Planck (C684/16), Rechtssache Bauer (C569/16 und C570/16, 2018) und Rechtssache CCOO (C55/18, 2019)). Der Einfluss und die Wirkungsmacht der in der Charta verankerten sozialen Rechte sind in der Rechtsprechung des EuGH jedoch nach wie vor begrenzt.

Frage 10

Welche Rolle und welche rechtliche Bedeutung haben die sozialen Rechte der Charta in der nationalen Rechtsprechung und Verwaltungspraxis?

a. Sind diese Rechte „gleich wichtig" wie die übrigen Grundrechte, insbesondere in der Rechtsprechung der nationalen Gerichte?

b. Entfalten sie „volle Wirksamkeit", wie es der Gerichtshof formuliert (Urteil des Gerichtshofs, Rechtssache AMS, C176/12, 2014), oder trifft dies nur auf einige wenige zu?
c. Werden (bestimmte) soziale Rechte in der Rechtsprechung der nationalen Gerichte als „Grundsätze" im Sinne von Artikel 52 Absatz 5 der Charta angesehen? Wenn ja, welche Konsequenzen wurden aus dieser Einstufung gezogen?
d. Berufen sich nationale Behörden und Gerichte auf Artikel 52 Absatz 2 der Charta, um den Geltungsbereich der in der Charta verankerten sozialen Rechte einzuschränken oder zu erschweren? Vertreten nationale Gerichte insbesondere die Auffassung, dass die in der Charta verankerten sozialen Rechte den gleichen Inhalt haben wie im Sekundärrecht der EU, und dass sie demzufolge keinen „autonomen" Inhalt haben? e. Wie sind Gerichte in Ihrem Land mit der Frage der in der Charta verbrieften sozialen Rechte in Rechtsstreitigkeiten zwischen Privatpersonen („horizontale Klagen") umgegangen?

Kapitel 5. Die EU-Handelspolitik und der Schutz der sozialen Rechte

Der internationale Handel kann den Schutz der sozialen Rechte auf unterschiedliche Weise beeinträchtigen. Es besteht in der Tat die Gefahr, dass ein verstärkter internationaler Wettbewerb zu einem Unterbietungswettlauf führt, wenn Waren und Dienstleistungen in Entwicklungsländern mit niedrigeren Arbeitskosten produziert werden. Um einen solchen Wettlauf zu vermeiden, gibt es verschiedene Möglichkeiten, „Sozialklauseln" in internationale Abkommen aufzunehmen. Die neue Generation von Handelsabkommen der EU enthält einen Bezug zu sozialen Rechten, und die Vertragsparteien müssen sich verpflichten, die durch die IAO-Übereinkommen geschützten Grundrechte zu achten.

Der Schutz der sozialen Rechte bei der Entwicklung des Freihandels ist das Ergebnis einer langjährigen Verknüpfung zwischen Menschenrechten und Handelsliberalisierung. Heute haben nicht nur die EU, sondern auch andere wichtige Handelsmächte wie die USA und Kanada Bestimmungen über Menschen– und Arbeitnehmerrechte in ihre neuen Handelsabkommen integriert. Für die EU besteht das Ziel nicht nur darin, regressiven Druck auf die sozialen Rechte zu vermeiden, sondern auch darin, die Grundrechte, einschließlich der sozialen Grundrechte, durch auswärtiges Handeln zu stärken. Darüber hinaus kann die Förderung des europäischen Sozialmodells zu einem Bestandteil der „Soft Power der EU" werden und zu ihrer geopolitischen Attraktivität und Einflussmacht beitragen.

In ihrer Mitteilung „Überprüfung der Handelspolitik“ vom 18. Februar 2021[11] hat sich die Europäische Kommission verpflichtet, den EU-Unternehmen Leitlinien an die Hand zu geben, die mit internationalen Leitlinien und Grundsätzen der Sorgfaltspflicht im Einklang stehen, damit sie geeignete Maßnahmen gegen die Gefahr von Zwangsarbeit in ihren Betriebsabläufen und Lieferketten ergreifen können. Anschließend veröffentlichte sie im Juli 2021 ein Dokument mit den erforderlichen Leitlinien[12]. Die Kommission erarbeitet derzeit außerdem einen Legislativvorschlag zur nachhaltigen Unternehmensführung, um langfristig nachhaltiges und verantwortungsvolles unternehmerisches Verhalten zu fördern. Mit diesem Vorschlag soll eine obligatorische Sorgfaltspflicht in Bezug auf Menschenrechte und Umweltschutz eingeführt werden, die auch die Gefahren im Zusammenhang mit Zwangsarbeit einschließt.

Die zentrale Frage besteht darin, welche Art von Regelung geeignet ist, die Arbeitnehmerinnen und Arbeitnehmer im Kontext des internationalen Handels zu schützen. Bei der Gestaltung geeigneter Instrumente zum Schutz sozialer Rechte auch globale Lieferketten und die Rolle privater Akteure (Wirtschaftsunternehmen) zu berücksichtigen, ist in den letzten Jahrzehnten zu einer wachsenden Herausforderung geworden.

Frage 11

Auf welche Weise werden soziale Rechte im Kontext von internationalem Handel und globalen Lieferketten in Ihrem Land geschützt?

a. Werden die Vorschriften für die Vergabe öffentlicher Aufträge genutzt, um soziale Rechte auszubauen?
b. Sind private Akteure, insbesondere Unternehmen, involviert? Wurden in bestimmten Branchen Verhaltenskodizes oder Chartas verabschiedet? Auf Unternehmensebene? Welche Wirkungen haben sie?
c. Haben nationale Unternehmen länderübergreifende Tarifverträge geschlossen? Mit welchen Hindernissen sind sie konfrontiert?
d. Lassen nationale Gerichte zivil– oder strafrechtliche Klagen zu, wenn soziale Rechte im Ausland verletzt wurden?
e. Gibt es Möglichkeiten von Sammel– oder Gemeinschaftsklagen?

[11] Mitteilung der Europäischen Kommission, Überprüfung der Handelspolitik – Eine offene, nachhaltige und entschlossene Handelspolitik, COM(2021) 66 final; https://eur-lex.europa.eu/resource.html?uri=cellar:5bf4e9d0-71d2-11eb-9ac9-01aa75ed71a1.0003.02/DOC_1&format=PDF.

[12] https://trade.ec.europa.eu/doclib/docs/2021/july/tradoc_159709.pdf

f. Schreiben die nationalen Gesetze eine Sorgfaltspflicht im Bereich der sozialen Rechte vor? Wenn ja, welche Verpflichtungen werden Unternehmen auferlegt?

Kapitel 6. Klimawandel und soziale Gerechtigkeit

Am 11. Dezember 2019 veröffentlichte die Kommission eine Mitteilung mit dem Titel „Der europäische Grüne Deal". Dieser europäische Grüne Deal wird beschrieben als ein Fahrplan, der die Wirtschaft in der EU nachhaltiger machen soll, „indem die klima– und umweltpolitischen Herausforderungen in allen Politikbereichen in Chancen umgewandelt und der Übergang für alle gerecht und inklusiv gestaltet wird".

In der Mitteilung heißt es, es müsse „genau auf mögliche Konflikte zwischen wirtschaftlichen, ökologischen und sozialen Zielen geachtet werden", und „[d]amit niemand auf der Strecke bleibt, werden die Maßnahmen an der europäischen Säule sozialer Rechte ausgerichtet sein". Diese Formulierung lässt jedoch im Unklaren, was ein „gerechter und inklusiver" Übergang im Hinblick auf Sozialpolitik und soziale Rechte bedeutet.

Frage 12

Wie wird bei Maßnahmen zur Bekämpfung des Klimawandels auf nationaler Ebene der sozialen Gerechtigkeit Rechnung getragen, und mit welchen Methoden (Instrumente, juristisches Handeln usw.) wird der Zusammenhang zwischen Klimawandel und sozialer Gerechtigkeit hergestellt?

Kapitel 7. Verwirklichung eines sozialen Europas: Menschenrechte, Demokratie und Rechtsstaatlichkeit

Auf welche europäischen sozialen Werte stützt sich ein tragfähiges soziales Europa, das in der Lage ist, die europäische Integration zu festigen? In welcher Beziehung stehen diese Werte zu der von den Mitgliedstaaten einzuhaltenden Rechtsstaatlichkeit? Angesichts der zunehmenden Gefährdung der europäischen Demokratien sind soziale Rechte und soziale Gerechtigkeit sowie die Haltung gegenüber diesen Rechten von herausragender Bedeutung. Dennoch wurde dem Zusammenhang zwischen Rechtsstaatlichkeit und dem Schutz sozialer Rechte bisher nur wenig Aufmerksamkeit geschenkt.

Um die soziale Dimension der EU konkreter herauszuarbeiten, sollte die Rolle der Unionsbürgerschaft und der EU-bezogenen Staatsbürgerkunde untersucht werden. Im Vertrag von Maastricht wurde 1992 die Unionsbürgerschaft

festgeschrieben und mit einer begrenzten Anzahl von Bürgerrechten ausgestattet. Im Vertrag von Lissabon von 2009 wurde der Unionsbürgerschaft in Titel II EUV mit den „Bestimmungen über die demokratischen Grundsätze" eine politische Dimension hinzugefügt. Mehr als ein Jahrzehnt später wäre es sinnvoll, die in der EU-bezogenen Staatsbürgerkunde in der regulären Bildung vermittelten Kenntnisse über die Unionsbürgerschaft und die demokratischen Grundsätze zu überprüfen, um eine Europäische Sozialunion zu verwirklichen. Mit Blick auf eine Union, die sich auf die Werte von Artikel 2 EUV gründet, die über eine marktwirtschaftliche Logik hinausgehen, braucht der europäische öffentliche Raum eine Bildungsgrundlage, die eine stärkere Verbindung zwischen den Menschen in der EU und eine Solidarität über Landesgrenzen hinweg ermöglicht; dies würde die EU ihren Bürgerinnen und Bürgern näherbringen. Über die Ziele scheint Konsens zu bestehen. Doch wie sollte die Umsetzung vonstattengehen? Welche konkreten Maßnahmen haben die Mitgliedstaaten ergriffen?

Frage 13

Wurden in Ihrem Land Maßnahmen ergriffen, um Kenntnisse über die Unionsbürgerschaft und die in den Verträgen verankerten Werte in der regulären Bildung (Primar-, Sekundar– und Hochschulbildung) zu vermitteln? Wie sehen diese Maßnahmen aus?

a. Sind diese Themen Bestandteil der Lehrpläne? In welcher Form?
b. Gibt es diesbezüglich Vorgaben oder Leitlinien?
c. Gibt es Beispiele für bewährte Verfahren, die zur Verfügung gestellt werden können?

Frage 14

Welche nationalen (rechtlichen und politischen) Entwicklungen im Bereich der sozialen Grundrechte können mit Demokratie und Rechtsstaatlichkeit in Verbindung gebracht werden (Geschlechtergleichstellung, Bekämpfung von Rassendiskriminierung und Hassreden, gleichberechtigter Zugang zu sozialen Dienstleistungen, Sozialleistungen, Wohnraum usw.)

Frage 15

Wird die EU in Ihrem Mitgliedstaat als Sozialunion wahrgenommen, insbesondere im akademischen, juristischen und politischen Diskurs? Werden die in Artikel 2 EUV verankerten gemeinsamen europäischen Werte, insbesondere Gleichheit und Solidarität, als die verfassungsmäßige Grundlage für eine Europäische Sozialunion betrachtet?

GENERAL REPORT

European Social Union

Sophie Robin-Olivier[1]

Introduction

The purpose of questionnaires sent to national rapporteurs was to assess the development and, possibly, strengthening of a true and meaningful EU social dimension. As expected, reports are very diverse in style and substance. They illustrate the variety of reactions, at national level, to questions covering EU social dimension very broadly. However, one lesson can be learnt from national reports: there is a remaining gap between the developments taking place at EU level, concerning social issues, and the perception of the EU as a social Union.

To be sure, from a substantive point of view, all national reports acknowledge that social matters are profoundly determined by EU law and acts in many fields, and, in particular, in the domain of labour law. The current situation in the UK (where a "Retained EU law (revocation and reform)" Bill is currently examined) can only confirm this: national labour and employment law is deeply rooted in EU law, especially in some Member states, in which regulation of work relations was limited, before they joined the Union. And this importance of EU role in social matters is not about to end, if "just transition", that the Green Deal calls for, concretizes. However, in stark contrast, there are very few reports indicating that the EU is perceived as a social, and not mostly economic, integration. Oftentimes, this is not considered a problem, but a fact: only rare reports insist on the need for further development of EU law, in the field of social policy. A number, on the contrary, mention critics and resistance to EU legislation, when it is considered to encroach excessively upon national preferences. In Sweden, for instance, hostility against the Minimum adequate wage Directive[2] can be traced back to the *Laval* case[3]. The Court of justice's decision in *Laval* resulted in vivid opposition to a social model imposed by the EU on all Member states, which calls in question well-functioning national traditions (concerning collective bargaining and collective action).

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[1] La Sorbonne School of Law, University Paris 1 Panthéon Sorbonne

[2] Which led to an action for annulment against the Directive being brought to the Court of justice on 18 January 2023.

[3] ECJ, C-341/05, 2007.

In this context, how can it be that a "European Social Union" serve the purpose of bringing the EU closer to its citizens? How can the EU appeal more to citizens than to businesses; more to a majority of its citizens than an elite capable of reaping the fruits of free trade, the internal market, and, in particular, free movement of capitals? As the aftermath of *Laval* show, it is unsure whether this requires more involvement of the EU in social matters, especially in labour and employment law, or rather less.

In this general report, we are making the hypothesis, based on what national reports have shed light on, that the traditional paths towards a Social Union, free movement of workers, developments in the domain of EU social policy (EU social legislation), and the emergence of social fundamental rights, important as they are, have had less impact of the perception of the impact of the EU on social rights than developments taking place elsewhere (within internal market law and the EMU, namely), which, as for them, have until now degraded, rather than improved, the image of the EU as a Social Union. This observation suggests a brighter path for the future: socialization of EU policies, which, although they are not formally part of EU social policy, have a considerable impact of social issues. The report is divided in two parts. The first part examines the impact of the traditional paths taken by social union, from the national points of view reflected in national reports. The second, more prospective, considers the hypothesis of a "socialization" of some of the EU policies, which objectives are not, primarily, the protection of social rights, but which could contribute to social Union: it proposes an exploration of new territories towards a social Union.

PART I: THE TRADITIONAL PATHS TOWARD A SOCIAL UNION

Among the "traditional paths" towards social Union, the questionnaire identified two central domains: free movement of workers, and the protection of social rights, including social fundamental rights. The first part of the report follows these lines, and consider successively these two domains: it proposes a reflection on the social dimension of free movement of workers, in the first section, and on the remaining limits of EU protection of social rights, in the second section.

Section 1– How "social" is free movement of workers?

How "social" is free movement of workers? This question divides into many others. It can be understood as a question on means, or instruments, allowing the social dimension of free movement to concretize. But it is also pointing at the

degree of protection (how much protection is granted). Lastly, although it may seem less obvious, the very notion of a "social" dimension of free movement is raised: if "social" means protective, for group of workers in need of protection, is it so evident that this group is composed only of mobile EU workers? To be sure, the answer to this question, from an EU law and policy perspective, is straightforward: free movement law is concerned with mobile workers only, not with those who are not mobile. This, of course, comes as no surprise at all: since the internal market (or, more generally, fostering mobility within the EU) is the aim of the EU, there is no reason to care about the group of non-mobile workers. Situations that remain entirely within national borders are not covered by EU law developments that aim at mobility: it is also a matter of respective competences. In addition, granting rights to workers exercising who choose to cross national borders should not *per se* be a source of tensions or conflicts: non-mobile workers do not lose their own rights because mobile workers obtain the right to equal treatment, for instance. National reports do not contest, for instance, the great achievement that social security coordination represents, to ensure that workers' mobility is not hindered by the risk of losing their right to social protection as a result from moving to another Member state, even if, in practice, coordination can be a source of difficulties[4].

However, it sometimes happens, as political and legal developments have shown, that the perception of a risk of erosion of social rights develops, among nationals, who do not exercise their right to move within the EU. In recent years, workers' access to welfare benefits in the host country has resulted in tough political conflicts[5]. And EU legislation and the Court of justice have no remained inert in the face of a concern[6], which feeds extreme right parties and anti-European feelings. As a result, the principle of equal treatment or non-discrimination on nationality, which is the cornerstone of mobile workers' protection, has been weakened. As national reports show, this principle faces enduring resistance in Member states, and needs to be defended if one wants to avoid further decline[7], even if it is unsure that the EU will be applauded for that by many EU citizens,

[4] The Spanish report mentions for instance the case of migrant workers returning to Spain and facing problems with the Spanish administration, regarding their old-age pensions. These issues led to the first preliminary rulings that originated in Spain in the early 90s.

[5] M. Ruhs and J. Palme, "Free Movement and European Welfare States: Why Child Benefits for EU Workers Should Not Be Exportable", Working paper, RSC 2022/69 (https://cadmus.eui.eu/bitstream/handle/1814/75057/RSC_WP_2022_69.pdf?sequence=1).

[6] Directive 2004/38 allows restriction to equal treatment in case mobile citizens become an unreasonable burden on the social assistance system (art. 14 (1)). The Court of justice follows suit in the *Dano* case (C-333/13, 2014).

[7] For such a defense, see namely the Opinion of AG in *Familienkasse Niedersachsen-Bremen der Bundesagentur für Arbeit*, C-411/20.

nor considered a "social Union" for granting strong protection to mobile workers. Looking at the workers' mobility also requires to take into account the "social" and demographic impact of mobility of workers in their home countries: the brain drain phenomenon, which has been ignored for a long time, can no longer remain out of the picture, as the brain drain phenomenon has become a major concern in a number of Member states. This section considers the brain drain phenomenon, in its second part, (II), after a first part devoted to the limits to equal treatment (I).

I – Enduring limits to equal treatment

In order to explore the limits to equal treatment, we will successively consider:

- The difficulty to move beyond formal equal treatment
- Tensions on equal treatment for family benefits
- The limits to equal treatment of posted workers
- Exclusion of non "economically active" citizens from the benefit of equal treatment
- The existence of discriminations on other grounds than nationality
- The shift from free movement to "fair movement"

1) The difficulty to move beyond formal equal treatment

Since its inception, free movement of workers has been linked to a right to equal treatment, that was conceived extensively, *ratione materiae* and *ratione personae,* both as an incentive to mobility, and as a constitutive element of EU citizenship. Sixty years later, national reports show that equal treatment is formally granted, almost everywhere and in all domains where EU law requires equal treatment, but there are exceptions[8] and a gap, oftentimes, between formal equality, and rights actually granted. In France, for instance, the Defender of Rights noted that it "regularly receives complaints showing that the conditions of the right to residence applicable to European Union nationals are sometimes misunderstood or poorly applied by the prefectures and the bodies responsible for assessing them, which leads to unjustified refusals of benefits"[9].

[8] The Bulgarian report mentions that EU law is not respected, concerning equal treatment in the domain of social benefits.

[9] Défenseur des droits, "Pour une protection effective des droits des personnes Roms", 2021, p. 24 (https://www.defenseurdesdroits.fr).

In Latvia, the underlying idea is that the general legislative framework regulating equal treatment applies, and suffices also for the protection of EU mobile workers: since the Constitution and Labour Law apply to 'everyone', EU mobile workers are supposed to benefit from the same rights as other workers, when working on the Latvian territory. Any discriminatory practice against mobile workers is supposed to fall under the general provisions on non-discrimination, and since a number of EU provisions apply directly, it is considered unnecessary to introduce special rules. But it is not sure equality in substantive terms is achieved, in such a legal framework[10].

A number of national reports mention language, in particular, as a source of indirect discrimination. The Luxembourgish report, for instance, underlines that command of Luxembourgish is not always required for natives but only for non-nationals (which constitutes direct discrimination), and, when it is required for all workers, is also not always necessary to accomplish the activity (which can be considered indirect discrimination). In Latvia, that type of indirect discrimination has been addressed by a statute adopted 2018[11], which was justified by the need to protect workers, who do not know Russian language, since, in many of the largest cities, the knowledge of Russian language had become a *de facto* a criterion for hiring, even where it was not needed for carrying out the activity[12]. This evolution was also grounded on the idea that it might reduce emigration of Latvian workers, especially, since people from the regions do not typically speak or know Russian (and have better knowledge of other foreign languages), and thus are forced to emigrate from the country to find a job. All in all, it does not seem that the protection of mobile EU workers was taken into account, when the legislator addressed the problem of indirect discrimination on language.

[10] Z. Rasnača, "Enforcing Migrant and Mobile Workers' Rights", in "Effective Enforcement of EU Labour law" (Rasnača et al. (eds)), Hart publishing, 2022.

[11] In case there is an indication of indirect discrimination based on language, employer is obliged to prove that the differential treatment was based on objective circumstances and not related to the language proficiency of the employee, and that the proficiency in a specific language was an objective and substantiated precondition for performance of work in the specific position. The law also imposes that in the public sector only the knowledge of Latvian or other EU languages (thus, not Russian) can be asked from job applicants. Finally, it is prohibited to indicate language skills in a specific foreign language in a job advertisement, except where it is reasonably necessary to be able to perform the work duties. In this case, again, the reversal of the burden of proof is applicable whereas employer has to prove that proficiency in a specific language is an objective and substantiated precondition for performance of the respective work or the respective employment.

[12] Annotation for the Draft amendments to the Labour Law, 2018. Available under: https://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/3EB2D0DDA0F48014C2258243002CB418?OpenDocument (last visited 30 Aug 2022).

2) Tensions on equal treatment for family benefits

Concerning the specific issue of equal treatment for child benefits, when children leave abroad, in the country of origin of mobile workers, national reports show that opinions diverge, quite expectedly. Indexation of child benefits to take into account the cost of living in the State of residence of the child has taken place in some Member states[13]. These restrictions led to infringement procedures against Austria and a decision of the Court of justice, in June 2022[14], in which the Court reaffirmed forcefully that family benefits cannot vary according to the country of residence of the children. The solution was an important reminder of the meaning of equal treatment. But, as the Austrian case illustrates, making benefits dependent on the countries where the family resides is far from being rejected by all Member states.

In Germany, for instance, the Europe Department of the German Bundestag debated, in 2014 and 2016, on the compatibility of possible changes to German regulations on child benefit with Union law. In particular, the question arose as to whether it would be in conformity with EU law to decide that, when parents work in Germany and are subject to social security contributions, but children live in another EU countries, child benefit are fixed at a rate "appropriate to their country of origin" instead of the usual applicable rate. The debates were always about paying less child benefit to people from Bulgaria or Romania: the example of child benefit from €18 to €43 per month, for children in Romania was always cited. Remarkably, however, paying higher child benefits to parents whose children live in countries with a higher cost of living, such as Finland, was never mentioned. In 2018, there was a media outcry concerning the amount of child benefits paid abroad. According to the report, 270,000 children, for whom child benefits were paid, lived abroad (in the EU). The outrage was hardly understandable, according to the German report, since it represents less than 2% of the children, for whom there is a child benefit claim in Germany. Nevertheless, there has been loud calls for reforms, especially from local authorities. A survey conducted by the opinion research institute "Civey" on behalf of WELT[15] found that 83% of Germans surveyed rejected the payment of child benefits to families whose children live in other EU countries.

Against this backdrop, it is not very surprising that the German legislator decided, in July 2019, to refuse family benefits to EU citizens who are not gainfully employed for the first three months of their stay in Germany: this legislation made

[13] For an analysis of the situation, see M. Ruhs and J. Palme, cited at note 3.

[14] ECJ, *Commission v Austria*, 16 June 2022, C-328/20

[15] Welt online v. 10.08.2018, www.welt.de/politik/deutschland/article180927774/Kindergeld-83-Prozent-gegen-Zahlungen-an-Kin-der-im-EU-Ausland.html.

the entitlement to child benefits for EU nationals dependent on the existence of a "sufficient right of residence". With this regulation, the legislator pursued the goal of avoiding misuse of social benefits by nationals of other Member states. However, in a decision of August 1, 2022[16], the ECJ ruled that this provision constituted impermissible discrimination against EU citizens, and was therefore incompatible with European law. To be sure, the Court of justice confirmed that Member States may refuse social assistance benefits to "economically inactive EU citizens", but it considered that the child benefit concerned was not a social assistance benefit. A benefit granted in Germany irrespective of individual need, the Court ruled, falls within the scope of Regulation 883/2004 on social security coordination, and should be granted to EU mobile citizens. Corresponding adjustments to the German legal situation are now necessary.

In Luxembourg too, there is a strong opposition to the principle that the country of work of the parent(s) shall be responsible for paying certain types of family allowances, when the child resides elsewhere. This opposition is not growing, according to the report: it has been constant, and slightly decreasing for several decades, and it has led to a series of cases by the Court of Justice, obliging Luxembourg to adapt its legislation. In *Giersch*[17], the so-called "boni pour enfant" allowance was analysed by the Court, which ruled that making the financial aid for higher education studies conditional upon the students' parents or guardians residing in Luxembourg gave rise to a difference in treatment, amounting to indirect discrimination against frontier workers carrying out an activity in that Member State. Although the legislation at issue in *Giersch* was amended so as to – at least prima facie – comply with the Court's ruling, litigation on similar grounds continued in Luxembourg, both before national courts and before the Court of Justice. Indeed, Luxembourg had not fully integrated the conception of equal treatment contained in *Giersch* (and cases decided afterwards). In Luxembourg, equal treatment for frontier workers remains an issue.

In Ireland, full respect of equal treatment for child allowances is not ensured either: Irish law requires a child to be ordinarily resident in the state in order for a parent to receive child benefits. However, administrative practice[18] recognises the

[16] ECJ, Familienkasse Niedersachsen-Bremen, C-411/20.

[17] Judgment of the Court (Fifth Chamber), 20 June 2013, *Elodie Giersch and Others v État du Grand-Duché de Luxembourg*, C-20/12, EU:C:2013:411. See generally, about *Giersch* and the subsequent line of case-law, J. Silga, "Luxembourg Financial Aid for Higher Studies and Children of Frontier Workers: Evolution and Challenges in light of the case-law of the Court of Justice", *European Public Law*, Volume 25, Issue 1 (2019) pp. 13-24. Specifically about *Giersch*, S. O'Leary writes that the Court of Justice "appears to proceed on the basis of the presumption that a frontier worker is not always as integrated in the Member State of employment as a migrant worker who is employed *and* resident in that State" (*Common Market Law Review*, 51, 2014, p. 610).

[18] See gov.ie – Operational Guidelines: Child Benefit (www.gov.ie).

supremacy of Regulation 883/2004 in this respect, and as such, child benefits are paid to the EU worker parents resident in Ireland, of children resident in other EU member states. But the amount payable is subject to a deduction to reflect any benefits to which the claimant is entitled in respect of that child in the member state of the child's residence.

Slovenia is another example of resistance to equal treatment, concerning child benefits. The Slovenian report considers that Slovenian law does not abide by the Court of justice's decision in the Austrian case. Indeed, according to the Parental Protection and Family Benefits Act[19], the right to child allowance is guaranteed to one of the parents (or another person), with permanent or temporary residence in Slovenia, for a child under 18, when the child resides in Slovenia.

3) The limits to equal treatment of posted workers

Posted workers, defined as worker who, for a limited period, carry out their work in the territory of a Member State other than the State in which they normally work[20], constitute a specific category of mobile workers, not covered by free movement of workers. These workers are also in a situation, in which cannot benefit from full equal treatment, even after the adoption of Directive 2018/957, which refers to the objective of ensuring equal treatment between posted workers and workers normally working on the territory of the state, where the former are temporarily exercising their work[21].

Not only is the Directive unable to achieve genuine equal treatment, since it only covers legislation and universally applicable collective agreements, but there are also serious difficulties in practical implementation, when it comes to determining what remuneration includes. This does not mean that Directive 2018/957 does not allow better protection, on the contrary, nor that implementation difficulties cannot be reduced, if not totally abolished, both by cooperation between national authorities and with the support of the European Labour Authority.

However, some reports made clear that the Directive 2018/957 could serve as a pretext for regressive national reforms. In Latvia, for instance, the implementation of the Directive led to a significant reduction of posted workers' rights in comparison with the situation prior to the implementation of the directive[22]. The

[19] Zakon o starševskem varstvu in družinskih prejemkih (Official Gazette RS, No. 26/14 et seq), Article 72.

[20] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1, Art. 2(1).

[21] Recital 6 and Art. 3(1).

[22] See for an earlier situation very similar to this discussed in Rasnaca 'Identifying the (dis)placement of 'new' Member State social interests in the posting of workers: the case of Latvia'.

German report describes situations of exploitation of posted workers, leading to regulation at national level (for the meat sector).

4) Exclusion of non "economically active" citizens from the benefit of equal treatment

According to Directive 2004/38, equal treatment is limited when it applies to EU citizens, who are not workers, especially those who are not "economically active". As the Swedish report mentions, the Directive had adverse consequences for mobile EU citizens. In 2014, the Swedish Population Register Act was amended in order to state that an EU citizen's right to be registered as resident in Sweden depends on the right to reside under the Citizens' Rights Directive[23]. This means that EU citizens seeking to move to Sweden must have sufficient resources to support themselves and comprehensive sickness insurance. Beforehand, an EU citizen who intended to stay in Sweden for more than a year was automatically registered as resident, and benefited from welfare services in Sweden, without any requirement of a comprehensive sickness insurance. The reform has resulted in some people experiencing difficulties in getting registered as resident in Sweden, in part because the concept of comprehensive sickness insurance has been interpreted narrowly by the national administrative courts[24].

In most national reports, this restriction to mobility of non "economically active" citizens is not considered a problem. Rather, in a number of Member states, it seems that hostility to immigration is linked with the right for migrants to benefit from social security benefits or social advantages. It is thus understandable that the reform of social security coordination currently under way[25], that would carve in stone the possibility for Member States to refuse social benefits to economically inactive EU mobile citizens[26], did not prompt much reaction in Member states, according to national reports.

In the Austrian case law, a rather restrictive approach prevails, based on the idea that those exercising their right to freedom of movement and residence should not do so in order to access social benefits elsewhere: there should be no "poverty

[23] Section 4 of the Population Register Act (1991:481).

[24] See for example the Administrative Court of Appeal in Jönköping, case number 1964-17, judgment of 8 December 2017 and the Administrative Court of Appeal in Gothenburg, case number 3622-17, judgment of 3 January 2018.

[25] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, 13.12.2016, COM(2016) 815 final.

[26] Citizens who are not working or actively looking for a job, and who do not have the legal right of residence on the Member State's territory except when they have means of subsistence and comprehensive health coverage.

migration"[27]. The Austrian report indicates that this rather restrictive approach is grounded on the Court of justice's decision in *Brey*[28], which ruled that pensioners from other Member States do not have the right to claim a compensatory supplement intended to augment a retirement pension if they move to Austria without sufficient resources to support themselves so as not to become a burden on the social assistance system[29]. In its recent case law, the Austrian Supreme Court created a difference between legal residence relevant under residence law and legal residence relevant under social law. Even if an economically inactive EU citizen has registered with the relevant authority, and subsequently been issued a document attesting his/her right to residence under Directive 2004/38/EC (e.g. because the person presented a savings book as proof that he/she has sufficient financial resources to support himself/herself), this citizen is not automatically considered to be legally resident for the purposes of social law as this would enable him/her to claim a compensatory supplement[30]. This solution was criticized by academics, namely because it departs too much from the case law of the Court of justice[31].

5) The existence of discriminations on other grounds than nationality

Lastly, discriminations against mobile workers, which can stand in the way of free movement, are not only discriminations on nationality. In France, as the French report indicates, the Roma community suffers important discrimination, which transcends, but overlaps with, discrimination between French and EU citizens and between workers and EU citizens who are not economically active. The Roma community is subject to well-documented discrimination, particularly in relation to access to housing, access to travel areas and, more generally, access to public services. Members of the Roma community are much more often than others denied their rights as European citizens, particularly in relation to freedom of movement and equal treatment. This difference in treatment was reaffirmed, in particular in a statute of 7 March 2016, which made it possible to attach a re-entry ban to expulsions from the French territory. Clearly aimed at the Romanian or Bulgarian Roma community, this law prompted protests from numerous associations as well as the Defender of Rights, who questioned the conformity

[27] OGH 10 May 2016, 10 ObS 15/16b, para 7.

[28] ECJ, 19 September 2013, C-140/12.

[29] OGH 19 July 2016, 10 ObS 31/16f; OGH 10 May 2016, 10 ObS 15/16b; OGH 13.09.2021, 10 ObS 53/21y.

[30] OGH 20 February 2018, 10 ObS 160/17b; OGH 23 October 2018, 10 ObS 106/18p; OGH 26.02.2021, 10 ObS 110/20d; B. Spiegel, 'Neue Wege zur existenzsichernden Sozialleistungen für nicht erwerbstätige Unionsbürger:innen', *DRdA* 2022, 209.

[31] J. Peyrl, 'Zur Möglichkeit des Ausschlusses von aufenthaltsberechtigten UnionsbürgerInnen vom Bezug der Ausgleichzulage', *DRdA* 2021, 496; F. Gamper & F. Markovic, 'Ausgleichszulage und rechtmäßiger Aufenthalt – Ein Bericht aus der täglichen Beratungs– und Vertretungspraxis', *DRdA-infas* 2022, 51.

of this solution with EU law. The German report also states that discriminations in the domain of social security, in Germany, frequently concern persons who receives no or less benefits than applied for, or are sanctioned, on the ground of certain characteristic (such as ethnic origin). These persons are confronted with stereotypes or inappropriate attributions during counseling.

6) A shift from free movement to "fair movement"?

After the 2004 enlargement, many workers from eastern and central Europe moved to western parts of Europe, especially the UK and Germany, a situation that played a substantial role, politically, in the former leaving the EU. As a result, some authors suggested an evolution of free movement of workers: they proposed to substitute "fair movement", also called "managed migration"[32], to free movement. This proposal aimed at giving States the possibility to control migration of EU citizens in order to avoid sudden influx of immigrants. It is said to rely on the recognition of the limits of solidarity, on the "political reality" of people's resistance to it, illustrated namely by the British vote on Brexit. Pragmatism would dictate a narrower conception of free movement, in line with current aspirations of some European governments. This proposal does not seem to have gained much echo in the EU, according to the reports.

Nor does the (very different) idea of a specific (preferential) treatment for some mobile workers, considered essential to the achievement of EU priorities, on whom the COVID-19 crisis shed light[33]: granting support to facilitate the mobility of essential workers in critical occupations (in sectors such as health and care, farming, transportation etc.) was not envisaged as an option, as an idea gaining momentum.

However, the notion of fair mobility has been used to enhance the protection of mobile workers, in Germany: the notion of fair mobility has been referred to in order to prevent precarious employment of migrants, especially when they come from Central and Eastern Europe. The "Fair Mobility" project aims at ensuring that people from Central and Eastern European Member states receive fair wages and benefit from fair working conditions. It was launched in 2011, in close relations with trade unions: advice centers have gradually been set up, where mobile workers can obtain advice on labour law and social law, in their languages of origin. Since August 2020, the German Trade Union Confederation (DGB)

[32] On this concept: C. Barnard and S. Fraser Butlin, Common Market Law Review, vol. 55, 2018, pp. 203–226.

[33] On this idea: S. Robin-Olivier, European Papers, Vol. 5, 2020, n° 1, European Forum, Insight of 16 May 2020, pp. 613.

has been legally entitled to funding from the federal budget to expand the “fair mobility” project.

II – Demographic challenges: the “brain drain” phenomenon

Workers’ mobility is not homogeneous across the EU. In some Member states, a great number of workers, especially the most qualified, use of the right to move to another Member states. EU free movement rules are therefore mostly discussed as a trigger enabling worker exodus from their home country, and “brain drain”. This is expressed, for instance, in the Latvian report, which points at the unfairness against countries of origin, as Latvia, paying for educating doctors and other essential professions for years, who, afterwards, leave for other EU countries to find better paid jobs. In this context, there have been voices demanding that free movement of highly educated people is restricted, or that workers, or the receiving countries, repay the expenses made by the State of origin for their education.

This situation is a source of serious economic and social tensions. The European Parliament underlined, in a recent report[34], that the sharp decline of the population in Eastern and Southern Europe, due to the combination of low fertility rates and net intra-EU migration from these areas, and, in particular, movements of young educated professionals from southern and eastern Europe to north-western Europe, since the beginning of the economic crisis in 2008, has led to a deterioration in the quality of medical care and education, making it difficult, especially in remote, rural areas and in the outermost regions, to access high-quality care and education. This “brain drain” phenomenon divides the EU, as countries are competing for workforce, especially in the medical and para-medical professions, as almost all national reports underline. In Ireland, for instance, the situation of the healthcare sector is a very serious concern: according to the Irish report, 52% of newly qualified doctors reported an intention to emigrate in 2018 – and the factors contributing to that, like unsustainable workloads, can only have been exacerbated by the Covid-19 pandemic. However, intra-EU migration rarely features in this discussion, as the most prominent destination for emigrating healthcare professionals is a third country: Australia.[35]

According to the European Parliament, this phenomenon requires action in sending Member states, to create conditions for retaining younger workers and families[36], using the means provided by cohesion policy. The European Parliament invited

[34] European Parliament, Report on reversing demographic trends in EU regions using cohesion policy instruments, 25.3.2021 (2020/2039(INI)).

[35] For discussion, see: Tracking the leavers: towards a better understanding of doctor migration from Ireland to Australia 2008–2018 | SpringerLink).

[36] Ibid, point 13.

Member State States to take into account the "brain drain" in the design of their national recovery and resilience plans, their national development policies, long-term strategies for sustainable development and tailored cohesion policy programs, correlated with the European Semester goals, with a view to ensure proper financing aimed at tackling depopulation and reversing negative trends and enhancing territorial attractiveness[37]. The European Parliament also called on the local, regional and national authorities in regions at risk of depopulation to focus investments on ways of encouraging young families to settle in those regions, as well as on universal accessibility to quality services and infrastructure, with the participation of SMEs and service management businesses, and a focus on job creation, in particular for young people, reskilling of workers, creating entrepreneurial conditions and supporting SMEs[38]. To transform "brain drain" in "brain gain", return processes for those who had left for a more economically attractive region must also be fostered, with a focus on higher education students in agriculture and rural economics, who should be incentivised to go back to their region after graduation with a view to contributing to the economic viability of their respective sending regions[39].

There are already several initiatives in various Member States, such as incentives for workers with highly specialised skills[40]. Not all of them, however seem to be compatible with the principle of non-discrimination on nationality. In this regard, conditionality of scholarships for higher education to a period of employment in the State where education is provided can be questioned. In Hungary, such a condition is allowed by the Fundamental Law[41]: according to Act CCIV of 2011 on National Higher Education, students receiving a Hungarian state scholarship are obliged to successfully complete their studies within a maximum of one and a half times the normal duration of the program, and to become active in the Hungarian labour market within 20 years of graduation, for a period at least equal to the duration of their state scholarship studies[42]. Students who do not accept these conditions may also participate in higher education, but they have to cover the costs of their studies[43].

In Poland, a programme proposed by the government, in 2014, envisaged paying students' tuition fees at prestigious universities under the condition that they take

[37] Point 41.
[38] Point 42.
[39] Point 53.
[40] Ibid, point 29.
[41] Article XI(3) of the Fundamental Law.
[42] Article 48/A of Act CCIV of 2011.
[43] At the same time, the state provides student loans for fee-paying students. If the student only takes a loan for the amount of the fee to be paid and agrees to the amount being paid directly to the higher education institution, the student loan is completely interest-free.

up employment in Poland after graduation. In Croatia, there are currently pending cases related to the application of EU law concerning the obligation to work (or alternatively compensate for damages) in contracts between health institutions and medical specialists: the reimbursement of the costs of specialist training in cases of termination of specialisation in the health institution, before passing the specialist exam or before the expiry of the employment contract, is at stake. This is particularly important for resident doctors, who want to change jobs before completing their residency, and especially for those who signed contracts with health institutions before 2016, which, in some cases, require them to pay a fee of more than HRK 1 million.

In Latvia, to curb "brain drain" for doctors, the Cabinet of Ministers 'Procedure for admission, distribution and financing of residency'[44] provide that medical residents who do their residency with a stipend financed from the state budget have to work for three years within the next five-year period in their specialty in a public hospital or clinic, state institution, or have to carry out scientific work or continue in doctorate studies at a university in Latvia. Alternatively, they can work in their specialty at an institution that has an agreement with the State concerning employment of medical residents. These rules have been challenged before Latvian courts. First, their initial version was challenged by a resident in a health institution, who did his residency on state budget, then decided to move to work in Germany. Latvian Ministry of Health demanded that he repays the 30 000 EUR that the State spent for his residency. To oppose this demand, the claimant namely argued that he would have worked in Latvia if the salary allowed him to support his family (and four children), which was not the case, even if he took multiple jobs. His claim before first instance courts were successful, but the court did not decide on the exact amount he has to pay due to the difficulties in understanding the actual expenses from the University documents[45]. Even though the applicant referred to his rights to free movement and Article 45(3) TFEU, Latvian courts did not consider the situation from the perspective of EU law. In 2020, the Ministry of Welfare informed that there were more than 200 court cases against medical residents for refund of the state budget expenses but the available case law does not seem to take into consideration EU law. According to the available information, many former residents pay what they owe to the State immediately after moving abroad, or ask the hospital they move to do it[46]. There is also a plan from the Ministry of Welfare to finance all places for residency, which would mean that *de facto* all

[44] Regulations No 685, Article 28.1 and 28.2.

[45] Judgment by Administrative Regional court in case No A420273418, 10 December 2020.

[46] Māra Lībeka, 'Aizbrauci strādāt uz Vāciju? Samaksā 30 tūkstošus eiro! Ministrija no jaunā ārsta grib piedzīt naudu par studijām', LA.LV, 24 July 2020.

future medical residents would have an obligation to work in Latvia for three years following their medical training[47]. Another way for Latvian law to both support workers, and tie them to an employment in Latvia, consists in the possibility for employers (also in the public sector) to cover education costs, even when education is not necessarily needed for the performance of duties under the employment contract. If such an agreement is concluded between a worker and his employer, the latter can demand that the worker works under the contract for at least two years, after finishing education, or he has to repay the education costs from personal means[48].

Financial aid to young researchers has also been used as a method to limit "brain drain", but the compatibility of such program with EU law, when they benefit only to young nationals is doubtful. In Hungary, for instance, the Hungarian Academy of Sciences has been running the "Lendület (Momentum) program" since 2009, which aims to support young researchers boasting outstanding achievements in the national and international academic arena, to reduce the "brain drain" and to increase the competitiveness of the academic research institute network and universities. Each year, 15-20 researchers receive financial support for 5 years and the opportunity to set up and lead their own research group. Within this framework, the 2015-2016 "Come Home, Youth!" program was created by the Government to support young Hungarian graduates working in the UK to start a business in their home country. However, this discriminatory program stopped in 2016: according to the Hungarian report, it did not provide a sufficiently attractive offer for Hungarian workers already working abroad. In the same line, the 'Polish Returns' programme tried to encourage the return of Polish scientists to Poland by creating conditions enabling them to take up employment in Polish universities or research institutes in order to strengthen the potential of these institutions and gradually reverse the "brain drain" phenomenon[49]. Such programmes are not always discriminatory. In Spain, where political concern is growing, as brain drain is considered as a severe obstacle for scientific competition of the country, the most recent measure in this field is the "National Plan for the attraction and retention of scientific and innovative talent in Spain"[50]. It is endowed with €3bn (June 2022 – December 2023) and its main goal is to avoid human capital flight.

[47] LETA, 'Slimnīcas vadītājs: Liedzot augstskolām uzņemt rezidentus par maksu, slimnīcās aizvien vairāk trūks speciālistu', LA.LV, 28 January 2022.

[48] Article 96(2) and (3) Labour Law, and also VII Section in the Law on Remuneration of Officials and Employees of State and Local Government Authorities.

[49] <https://nawa.gov.pl/nawa/aktualnosci/630-wyniki-naboru-w-programie-polskie-powroty>, visited 4 May 2022.

[50] https://www.ciencia.gob.es/InfoGeneralPortal/documento/f5ca8c39-53be-40b2-a658-431c6350a93b

Taxes have also been used as leverage. In Hungary, since 2022, exemption of taxes for young national to avoid labour outflows: although it is discriminatory, the law exempts Hungarians under 25 years from personal income tax. More in line with EU law, Hungary applies low corporate tax rate (9%) as a way to encourage the establishment of businesses, and the Government also provides tax reliefs for companies with significant R&D activities. Similarly, over the last few years, Croatia decided to reduce the tax burden on natural and legal persons, and additional tax benefits for young workers have been proposed to discourage emigration. In Spain, a policy concerning most skilled workers has been included in the "Draft Law on the promotion of the start-up ecosystem"[51], which contains a whole chapter on tax benefits that "international teleworkers" will receive in Spain, not as workers, but as residents.

Another solution envisaged by countries that are victims of brain drain is to seek immigration from third countries. In Croatia, for instance, the government has completely abolished quotas for third-country nationals, and adopted rules to make it easier for businesses to hire third-country nationals. In addition, since its independence in 1991, the Croatian policy has been to grant Croatian nationality to ethnic Croats living abroad, mostly in Bosnia and Herzegovina. This way, Croatia has enabled large immigration from Bosnia and other former Yugoslav republics, consequently increasing its population and automatically enabling all ethnic Croats to have access to the EU internal market.

Immigration from third countries can also be facilitated by free provision of services, as the example given in the Latvian report shows. Latvian courts accepted that the freedom to provide services was used to limit and challenge national immigration rules[52]. An illustration is provided by a case involving a company, which had brought workers from Ukraine to work in shipbuilding. Under Latvian law, third country nationals immigrating for work purposes have to work in Latvia (at least for the majority of their stay). However, in this particular case, the company did not have any business in Latvia, but offered shipbuilding services in other EEZ countries. Accordingly, the Office of Citizenship and Migration Affairs had rejected the requests for work/residence permits, on the basis that worker would not be working in Latvia[53]. When this decision was challenged, the first instance courts decided that due to worker not working in Latvian territory, the permits had been lawfully rejected[54]. But the Supreme Court overturned previous

[51] https://www.digitales.es/wp-content/uploads/2021/12/BOCG-14-A-81-1.pdf

[52] Z. Rasnača, 'Posting before Latvian courts' in Posting of workers before courts (Rasnača and Bernaciak, eds), ETUI, 2020.

[53] Judgment by Administrative district court, Case No A420536110, 2010.

[54] Judgment by Administrative regional court, Case No A420521210, 2012.

decisions, and argued that the fact that workers would not work physically in Latvia is not sufficient to refuse residence permits, if workers are employed by a Latvian shipbuilder[55]. The Supreme Court also held that such refusals created an unjustified restriction of the company's freedom to provide services[56]. The Supreme Court of Latvia referred to the case law of the Court of justice in *Vander Elst*, *Commission v Luxembourg*, *Commission v Germany* and *Rush Portuguesa*. This case law has been upheld in further cases[57]: EU economic law (freedom to provide services) thus supports *de facto* letterbox companies, having no economic activity on Latvian territory.

Section 2– Is something missing in EU protection of social rights?

The institutional report insists on the protection of social rights that EU law guarantees and on the reinvigoration of this protection in the last couple of years. Most national reports underline that these rights have been incorporated in national law, and that they formally apply, without much debate. Inevitably, national laws do not all fully abide by EU law or, if they do, have not all achieved the expected outcomes[58]. But this report is not the place to check if adequate implementation of EU social legislation was achieved in Member states. Rather, we believe it can help identify the elements that shine out of national assessments on how social rights are protected by EU law and the remaining limits. After reading the reports, we found two major issues deserved particular attention: first, looking back, the effects of the *Laval* and *Viking* cases on the perception of EU capacity to protect social fundamental rights (I); second, with a prospective dimension, the situation of self-employed workers, that needs to be addressed (II).

I-Protection of social fundamental rights: the enduring trauma of *Laval* and *Viking*

On the role of social fundamental rights, and of the Charter of fundamental rights, apart from the reactions, mostly hostile, to the reasoning of the Court of Justice in the Viking[59] and Laval[60] cases, national reports are not very much developed. This illustrates that, fifteen years later, the stigma of this case law continue to

[55] Judgment by the Administrative Department of the Supreme Court, Case No A42051110, 2012.

[56] Supreme Court administrative department, 2012, A42051110, SKA-673/201

[57] Ibid.

[58] For instance, the German report mentions that Germany has still made little progress in the area of equality of men and women at work. In particular, the high wage inequality and the low proportion of women in management positions show that measures to achieve equality, especially in working life, have so far shown little practical effectiveness.

[59] ECJ, C-438/05, 2007.

[60] ECJ, C-341/05, 2007.

damage the conception of the EU as a social Union, all the more so when this case law influenced regressive national law developments. In Denmark, for instance, the report mentions that freedom of establishment and the right to conduct a business (Article 16 of the Charter of fundamental rights of the EU) were used to challenge Danish social law, or EU social law, in Danish courts[61]. The recent (although still limited) strengthening of the social provisions of the Charter (Title IV) in the Court of justice's case law[62] has not yet sufficed to overcome the trauma.

In Germany, as the German report indicates, courts often shy away from a closer examination of the substantive content of the guarantees in Title IV of the Charter. They rely on the fact that national law is supposed to be in line with the provisions of the Charter, and also point out that it can only be applied within the scope of application of Union law, which constitutes an important limit. This conception explains why there is no debate on the substantive content of Art. 27 of the Charter (on information and consultation of workers), which in case of doubt can be detrimental to the full effectiveness of the social rights, according to the German report. In particular, the possibility of a horizontal effect, i.e. an indirect third-party effect between private individuals, is not taken into account.

Whereas not much is said on the rise of the right to free enterprise ("the freedom to conduct a business" protected by Article 16 of the Charter of fundamental rights), which could call in question or limit social rights' protection, both at national and European level, all reports insist on the limit to economic freedom resulting from the protection of posted workers according to EU law requirements in Directive 96/71 and Directive 957/2018. In Latvia, however, according to the Latvian report, Directive 957/2008 was used in regressive ways: although formal implementation was achieved, its concrete outcome will lead to a reduction of posted workers' rights.

Rare reports indicate that there is a threat to the right to strike due to economic freedoms protected at EU level. In Latvia, although there are no cases where the right to strike has been evaluated in the light of internal market freedoms, Latvian courts seem to accept economic reasons for restricting the right of strike[63] and are susceptible also to take into account limits stemming from internal market law, according to the Latvian report.

National reports hardly ever mention the European Social Charter as a source of protection of social rights. Latvia is an exception. The report mentions two

[61] See for example, the judgment of the Labour Court in the Ryanair case, AR2015.0083.

[62] In cases concerning Art. 31 of the Charter: CJEU, *Max Planck*, 684/16; *Bauer*, C-569/16 and C-570/16, 2018 and *CCOO*, C-55/18, 2019.

[63] Please see the controversial judgment by Kurzeme District court in Case C-2651-19/6, 17 June 2019 and for more details: Nataļja Mickeviča, 'The right to strike in the public services. Latvia', EPSU/ETUI, April 2021.

interesting cases. In one of them, Latvian supreme jurisdictions expressed their views on compatibility of the level of Latvian minimal retirement pension with Latvian Constitution and the European Social Charter[64]. The Supreme Court, having doubts in this regard, submitted the case to the Constitutional Court. In its referral decision, the Supreme Court included some extracts of Latvian parliamentary debates before their vote to ratify the European Social Charter, concluding that the decision to ratify this document was not just a formality, but made it clear that the State intended to comply with obligations deriving from it[65]. The Constitutional Court decided that the contested provisions of Latvian law were not compatible with the Latvian Constitution, as those provisions did not fulfil a socially responsible state's obligation to guarantee a decent retirement pension level, and also referred *inter alia* to Article 12 (1) of the European Social Charter on the right to social security of workers and their dependents, including self-employed[66]. In another referral to the Constitutional Court decision, the compatibility of provisions of Latvian law on unemployment benefits for persons returning from parental leave with Article 27 of European Social Charter was assessed[67].

Overall, national reports do not allow to conclude that social fundamental rights recognized by EU law, and the Charter of fundamental rights, in particular, have served the protection of workers, at national level, neither in case law or legislation. To be sure, the influence of EU law in this domain may be discreet, if not invisible: it may be the case that national Courts and legislators take these rights into account, without it being formalized and without public information being available. But there is a stark contrast between this invisibility of social fundamental rights stemming from EU law, and the legacy of *Laval* and *Viking*, which no national report denies, even the influence on national law is limited.

II – Rights granted by EU legislation: the need to include self-employed

On the domain of EU social legislation, the questionnaire sent to national rapporteurs asked whether EU social law was considered to encroach too much over national law, or whether it should, on the opposite, extend beyond its current limits. The answers to this question shed light on one very central concern: the

[64] Otherwise, this document is mentioned sometimes in Latvian case law but without any analysis of its force in Latvian legal system or of its content.

[65] Senāta 2019. gada 18.decembra lēmuma lietā Nr. A420271718, SKA-1481/2019, ECLI:LV:AT:2019:1218.A420271718.12.L, 19.-23.punkti.

[66] Latvijas Republikas Satversmes tiesas 2020.gada 10.decembra sprieduma lietā Nr. 2020-07-03, 22.2.punkts. Publicēts: Latvijas Vēstnesis, 240, 11.12.2020.

[67] Senāta 2020. gada 19.jūnija lēmuma lietā Nr. A420150916, SKA-187/2020, ECLI:LV:AT:2020:0619.A420150916.4.L, 26.punkts.

situation of self-employed, remain out of the scope of most social rights, protected by EU legislation. Overall, reports make it clear that the capacity of the social acquis to ensure protection of workers, in changing labour markets cannot be efficiently achieved, if this category of workers continues to be ignored.

Many reports emphasize that national labour law applies only to employees, and that the assignation in this category is eventually solved in courts, on a case-by-case basis, when there is a dispute. In courts, self-employed can be reclassified as employees benefiting from the protection of labour law, in case it turns out that there is a case bogus self-employment. However, the regulatory frameworks for each group are separate, and only rarely overlap.

The German report, in particular, underlines that Germany is one of the worst performers in terms of social protection of self-employed. It adds that there is a need for an EU-wide initiative to protect the self-employed. Although the EU's competences in this area are limited, a coordinated approach by the member states seems necessary, the report insists, in order to shape the living and working conditions of these workers in a socially responsible and sustainable manner. Similarly, the Finish report notes, in relation with the Council Recommendation of 2019 on access to social protection[68], that one of the most important individual areas in need of development are self-employed persons' social security[69]. Underinsurance directly affects self-employed persons' income during their career, as well as after retirement. It also affects the survivor's pension paid to the spouse and children when a self-employed person dies[70]. This loophole concerning the inclusion of self-employed goes along with what is sometimes considered an excess in regulation, in the domain of working time. It is very frequently noted, in national reports, that requirements derived from Directive 2003/88 on the organization of working time and the Court of justice's case law is a source of many litigious situations that national courts have to deal with. The compatibility of national laws with the requirement imposed by EU law is not often mentioned[71], but doubts are expressed on the justification for such a

[68] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed2019/C 387/01, OJ C 387, 15.11.2019, p. 1.

[69] Currently, the system in place is called "YEL": it is a personal insurance for a self-employed persons. YEL insurance is the basis for an entrepreneur's pension and social security, which is statutory, i.e., mandatory. YEL is always personal, not company specific. Workers can thus have several companies, but only one YEL insurance, which covers all entrepreneurial activities.

[70] Finland's national plan under the Council Recommendation 2019/C 387/01 on access to social protection for workers and the self-employed, Ministry of Social Affairs and Health, 20/5/2021, p. 3. <https://valtioneuvosto.fi/documents/1271139/2013549/SUOMEN+KANSALLINEN+SUUNNITELMA_SOSIAALISEN+SUOJELUN+SAATAVUUDESTA.pdf/7401d1b5-783e-1a84-d119-a7db49e3fd33/SUOMEN+KANSALLINEN+SUUNNITELMA_SOSIAALISEN+SUOJELUN+SAATAVUUDESTA.pdf?t=1622184461614>, visited 20.8.2022.

[71] Although the Bulgarian report mentions that EU law is not respected concerning working time in the military.

detailed and demanding legislation. The Croatian report mentions, for instance, that interviews conducted with judges employed at both municipal and county courts in Zagreb, showed that there were hostile reactions regarding EU regulation of paid annual leave. Croatian judges do not agree with the case law of Court of justice, namely because they consider that some rights are set too broadly, in particular the right to transfer annual leave to the following calendar years. In Greece and in France too, Directive 2003/88 has prompted hostile reactions in recent times, namely, when the Court of justice decided that Directive 2003/88 applies to the military[72]. Questions were raised on the margin of discretion that Member States should enjoy, in the organization of working time, and more radically, the justification for regulating working time at EU level. In Hungary, according to the Hungarian report, working time *acquis* and the relevant case law of the Court of justice is often assessed in Hungarian literature with criticism,[73] but without "hostile reactions".

Concerning the situation of self-employed, some reports mention that working time legislation leaves many workers behind, since it does not protect all vulnerable workers, as standard employment declines, in relation namely, but not only, with platform work. As far as the situation of platform workers is concerned, in addition to the recent Directive on transparent and predictable working conditions[74], well described in the Institutional report, the Commission proposed the adoption of a Directive specifically addressing the lack of protection of platform workers[75]. In the meantime, only some Member states have started to regulate platform work, and a number of national courts had to decide on the (mis)classification of platform workers as self-employed. There are, indeed, a number of interesting cases, showing that national law can be inclusive, and bring back workers who are supposed to work as independent workers into the sphere of protection of labour law, which is particularly uneasy for crowdwork (as the German report mentions). However, national reports do not overall insist that EU legislation is needed.

As negotiation are currently taking place between social partners on a new agreement on telework and the right to disconnect, which should be implemented through EU law, the relationship between self-employment and the development

[72] ECJ, *Ministrstvo za obramo,* C-742/19, 2021.

[73] See e.g. Gábor Fodor T., 'A Munka Törvénykönyve munka– és pihenőidő szabályozásának uniós jogi megfelelőségéről', *Magyar Munkajog E-journal*, hllj.hu, 2016/2, pp. 21-36.; Lajos Pál, 'Az egyenlőtlen munkaidő-beosztás és a munkabér elszámolása', *Munkajog,* 2020/1, pp. 71-74.; Péter Sipka & Márton Leó Zaccaria, 'A munka és magánélet közötti egyensúly kialakításának alapvető követelményeiről a 2019/1158 irányelvre figyelemmel', *Munkajog*, 2020/4, pp. 24-30.

[74] Directive 2019/1152.

[75] Proposal for a Directive on improving working conditions in platform work, COM(2021) 762 final, 9 Dec. 2021.

of telework has overall been ignored in national reports, and in the Institutional report, and the question of EU involvement in such an important matter is not addressed.

Finally, some developments of national and the Institutional reports concerned collective bargaining of self-employed. This comes as no surprise, at a time when collective bargaining has become a key concern for the EU, and for the Commission, in particular: on January 25, 2023, the Commission proposed the adoption of a Council Recommendation, setting out how EU countries can further strengthen social dialogue and collective bargaining at national level, and it also presented a Communication on reinforcing and promoting social dialogue at EU level. Social partners were closely involved in preparing these initiatives. This follows other EU law developments insisting on the importance of social dialogue including the Directive on adequate minimum wages in the EU[76], and the Proposal for a Directive on improving working conditions in platform work[77]. Among these recent developments, one text concerns in particular self-employed workers: the guidelines on the application of EU competition law to collective agreements by solo self-employed persons[78]. They clarify the circumstances in which certain solo self-employed people can negotiate collectively to improve their working conditions without breaching EU competition rules. This important evolution, transforming what had been a legal barrier into support for collective bargaining, is not often mentioned in national reports: it is indeed probably too soon to assess the impact of such an instrument on negotiations, and on working conditions, of self-employed.

PART II: NEW TERRITORIES FOR EU SOCIAL UNION

EU social Union has often been seen as ancillary to other EU policies: the internal market, to begin with; the Economic and Monetary Union (EMU), more recently; and, lastly the Green Deal (or Green Transition). This situation is ambivalent. On the one hand, these "other" policies (than the social policy) can justify recognizing social rights at EU level. This was obvious in the framework of free movement of workers, as developments in part one of this report show. On the other hand, they can be a limit to social rights: the *Laval* and *Viking* cases are a good illustration of the regressive effects that internal market law can prompt. The same ambivalence applies to the social impact of the EMU. Regressive social policies,

[76] Directive 2022/2041 of the European Parliament and of the Council on adequate minimum wages in the European Union (OJ L 275, 25.10.2022, p. 33–47).

[77] COM(2021) 762 final.

[78] C/2022/6846 available online.

in the framework of austerity plans imposed on some Member states, namely, did not contribute to EU citizens considering the EU as a social integration. But more recently, the EMU served as a justification, under the Juncker Commission, for revitalizing social Europe. It took the form of the European Pillar of social rights (2017). As for the Green Transition, there is maybe less ambiguity on the social justice dimension of this program, which must be accompanied, according to the Commission Communication on the Green Deal (2019), by measures ensuring that it is fair or just: the concept of "fair transition" aims at ensuring that climate change reforms take into account the most vulnerable, who will be negatively impacted, in order to make the transition socially acceptable. But the concept of "just transition" remains unclear, and its impact on social rights uncertain. As far as the defense of the Rule of Law is concerned, it is not so far focusing much on social rights' protection. But there is no doubt that the relationships between the protection of European democracies and social rights deserves more attention, at EU level.

Although it can be considered regrettable that EU social goals are dependent on other policies, aiming at objectives that are not *per se* "social", the resources and opportunities that they contain have proved quite powerful, often for the worst but also sometimes for the better. What national reports show, quite clearly, is that the negative impact of these policies is very much felt, and criticized, beyond the circles of EU law specialists and social law experts. On the contrary, not many reports point at the positive social outcomes. But why not reverse the perspective, and take the mainstreaming approach of social rights' protection seriously? Using other policies than the social policy (or free movement of workers) positively, in favour of a more social Union, rather than against it, can be seen a way towards a more social Union, and possibly one that EU citizens would be more aware of. The next two sections explore this idea, considering the socialization of, first, EU economic law, and second, the Green Transition and the defense of the Rule of Law.

Section 1– Socializing EU economic law

Using the economic policies of the Union to create a more Social Union means socializing both of the internal market (I) and the EMU (II). In addition, as recent developments show, EU international trade law can also be the vehicle to a more Social Union (III).

I – Socializing the internal market

There are many different ways to socialize the internal market, including, namely, through balancing differently social fundamental rights and economic freedoms. In other words: moving away from the reasoning in *Laval* and *Viking*, *Alemo Herron* or *Aget Iraklis* cases. This, of course, depends on the Court of justice. But the impetus can come from other institutions, from legislative instruments, and other instruments such as the Pillar of social rights.

Another way towards socializing the internal market concerns national and European authorities, when they intervene as actors on the market, in the framework of public procurements. That public procurements can serve to foster social rights is nothing new, to be sure, and many reports have noted that this was often the case, in Member states. In Slovenia, for instance, the government considers socially responsible public procurements to be one of the key guidelines for the development of the public procurement system[79], according to the Slovenian report. Under the Public Procurement Act, when performing public procurements, economic entities must fulfil applicable obligations in the field of environmental, social and labour law, which are set out in EU law, regulations in force in Slovenia, collective agreements or regulations of international environmental, social and labour law[80]. If necessary, the Slovenian Government prescribes that contracting authorities in public procurement procedures take into account social and ethical or environmental aspects and the way of including these aspects in the subject of the procurement, technical specifications, conditions for cooperation, criteria for the award of a public contract and special conditions on the execution of a public contract[81].

II – Socializing the EMU

The impact of EMU on national social policies, since the economic and financial crisis, have often been described, and criticized[82]. As a reaction, the Court of justice's case law evolved, to review acts taken by EU institutions in the framework of the EMU[83], and the European Pillar of Social rights (EPSR) was

[79] Ibid.

[80] Zakon o javnem naročanju (Official Gazette RS, No. 91/15 et seq), Art. 3(2).

[81] Article 71(1) of the Act.

[82] See for instance, D. Roman, "Garantie des droits fondamentaux et contrôle juridictionnel des mesures d'austérité en Europe: les "nouvelles frontières" de l'Europe sociale", in S. Barbou des Places, E. Pataut and P. Rodière (eds.), Les frontières de l'Europe sociale, pp. 93-113 and Commissaire aux droits de l'homme du Conseil de l'Europe, "Protéger les droits de
l'homme en temps de crise économique", Strasbourg, Conseil de l'Europe, 2013.

[83] See, for instance, ECJ, *Florescu*, C-258/14, 2017 and *Associação Sindical dos Juízes Portugueses*, C-64/16, 2018.

proclaimed, in 2017. The objective, content, and impact of the EPSR are very finely described in the Institutional report. The Pillar has been described by the European Commission as a way both to socialize EMU, and revitalize EU social policy. Not many national reports insisted on the first dimension of the EPSR as an instrument to socialize the EMU.

In the Latvian report, two key obstacles are pointed out, against moving European social policy into the EMU. The first one is the imbalance between sanction mechanisms (that exist for the economic arm but not for the social field) and the possible prevalence of economic recommendations over the social ones. The second has to do with the lack of transparency and involvement of citizens in economic policy cycles (the European semester). While the involvement of social partners has improved over the last decade[84], the question still is whether their opinions are sufficiently taken on board and also the opinions of other NGOs.

III – Socializing EU Trade policy

International Trade can affect social rights' protection in different ways. There is indeed a risk that increased international competition entails a race to the bottom, when goods and services are produced at lower labour costs, in least developed countries. Among the different ways to avoid this race to the bottom, the introduction of "social clauses" in international agreements has generalized: EU new generation of trade agreements include a reference to social rights, and the obligation for parties to respect basic rights protected by ILO conventions. This can be considered "socialization" of EU international trade law.

The protection of social rights in the development of free trade has to do with the long-discussed linkage between human rights and trade liberalization. Today, not only the EU, but other important trade powers, such as the US and Canada, embed human and labour-rights provisions in their new trade agreements. For the EU, the objective is not only to promote fundamental rights, and social rights, through external action, but also to avoid regressive pressures on social rights. In addition, the promotion of the European social model can become part of European soft power and geopolitical appeal and clout.

In its "Trade Policy Review" on 18 February 2021[85], the European Commission committed to provide guidance to assist EU businesses on taking appropriate

[84] See the opinion on this by the Latvian Trade Union Confederation: Eiropas semestris – LBAS – Latvijas Brīvo Arodbiedrību Savienība (arodbiedribas.lv)

[85] European Commission Communication, Trade Policy Review -An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final; https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf

measures to address the risk of forced labour in their operations and supply chains, in line with international due diligence guidelines and principles. It then published a document in July 2021 to provide this guidance[86]. Protecting workers in the context of international trade and global supply chain has become a central social issue, that new EU instrument tackle. On 14 December 2022, Directive 2022/2464 concerning corporate sustainability reporting was adopted[87]: it requires all large companies and all listed companies (except listed micro-enterprises) to disclose information on their risks and opportunities arising from social and environmental issues, and on the impacts of their activities on people and the environment. In February 2022, the Commission published a proposal for a Directive on corporate sustainability due diligence[88]. This Directive lays down rules on obligations for large companies, regarding actual and potential adverse impacts on human rights and the environment, with respect to their own operations, those of their subsidiaries, and those carried out by their business partners. It also lays down rules on penalties and civil liability for violating those obligations. These recent developments are a clear signal that EU international trade is more than ever an instrument for the protection of human rights, and is now also taking social rights' protection seriously, not only in trade agreements, but also through other means. These new instruments impose series duties on corporations, which activities rely on global supply chains, to ensure that social rights protection is taken care of throughout the chain of production.

National reports show that, in a number Member states, due diligence had already been imposed on businesses, in order to ensure protection of environmental, human rights and social rights. In France, due diligence (devoir de vigilance) was introduced early on, in a statute adopted in 2017. In Germany, an Act on Corporate Due Diligence in Supply Chains (Supply Chain Act, LkSG) was adopted on July 22, 2021 and came into force on January 1, 2023.

With a lighter touch, since no legal obligations and sanctions for violation of due diligence was introduced yet, the Slovenian Government adopted the National Action Plan on Business and Human Rights[89]. Its aim is to strengthen initiatives to ensure that the UN Guiding Principles on Business and Human Rights are implemented and that human rights are respected in business activities throughout the value chain. The National Action Plan outlines Slovenia's priorities and

[86] https://trade.ec.europa.eu/doclib/docs/2021/july/tradoc_159709.pdf

[87] OJ L 322, 16.12.2022, p. 15.

[88] COM/2022/71 final.

[89] Nacionalni akcijski načrt Republike Slovenije za spoštovanje človekovih pravic v gospodarstvu, November 2018, <www.gov.si/en/topics/business-and-human-rights/>, 31 August 2022.

expectations concerning business activities, and provides guidelines on corporate human rights due diligence[90].

Rare reports mention the role of transnational collective agreements in socializing global supply chains. However, the Spanish report notes that the global branch of INDITEX has signed one of the first global agreements (2007), between the ITGLWF and the Spanish firm. It was developed through several protocols and renewed in 2014 and in 2019[91]. During the entire procedure, according to the report, there was a very strong involvement of the main Spanish trade unions, CCOO and UGT[92]. The main problems pointed out were the difficulties local trade unions had to participate (especially in China and Morocco), and the lack of information about the whole supply chain (that led, in Brazil, to the discovery of "slave work"). But the report also underlines a very positive outcome: the level of wages substantially increased, in all the countries covered by the agreement.

Section 2. Socializing the Green Transition and the defense of the Rule of law

Socializing the Green transition is already coined in a term: "Fair Transition". However, it remains to be seen how "Fair Transition" relates to the protection of social rights (I). Similarly, the role of social rights in the combat for democracy and the rule of law must be further explored (II).

I – A "Fair" Transition

On 11 Dec. 2019, the Commission published a Communication on "the European Green Deal". It is described as a roadmap for making the EU economy sustainable "by turning climate and environmental challenges into opportunities across all policy areas and making the transition just and inclusive for all". According to the Communication, "careful attention will have to be paid when there are potential trade-offs between economic, environmental and social objectives" and "the European Pillar of Social Rights will guide action in ensuring that no one is left behind". The objective of a "just and inclusive" transition has been clearly affirmed, but its impact on social rights is not yet clear.

[90] For further research in this area see, e.g., J. Letnar Černič, A. Strojin Štampar, T. Rozman, *Gospodarstvo in varstvo človekovih pravic*, Nova Gorica, Nova univerza, 2021; J. Letnar Černič (Ed.), Človekove pravice in gospodarstvo, Nova Gorica, Nova univerza, (forthcoming).

[91] https://www.industriall-union.org/sites/default/files/uploads/documents/2019/SWITZERLAND/INDITEX/industriall_inditex_gfa_english.pdf

[92] I. Boix Lluch and V. Garrido Sotomayor, "Balance sindical de los 10 años del Acuerdo Marco Global con INDITEX", Trabajo y Derecho, 10, 2017.

On this question, national reports have remained relatively silent, which can probably be explained by the novelty of the notion of "Fair Transition", especially among labour law specialists. However, the German report mentions that many subsidy programs and tax breaks motivated by climate policy, whether in Germany or elsewhere, do not benefit to the most precarious workers, but rather to the most privileged, while everyone contributes to taxes and levies. It thus suggests that there is still potential to develop and establish measures specifically to ease the burden on the socially disadvantaged. In Finland, according to the Finnish report, although not much attention is paid to the topic of just transition at the moment, unions have emphasized the importance of just transition especially from the employees' perspective[93]. The Nordic co-operation committee of the Nordic Social Democratic parties and trade union (SAMAK) insisted that combatting climate change cannot be achieved effectively without social justice, and that social justice means that the weaker social groups should not be the one to carry the burden of green transition[94]. As an illustration, reduction of carbon emissions must be done socially and regionally in a just way, so that all parts of society are involved[95]. The Union Grand Committee stated that social and regional justice must be taken into account in all actions, and that the implementation of the Green Deal program must take into account Finland's national, regional and local specific characteristics as a northern, sparsely populated country with long distances[96].

The Hungarian report mentions that the government is taking several measures to reduce the energy costs of the population, notably subsidizing electricity and gas prices up to the average consumption level and capping fuel prices for privately owned cars. While poorer households benefit proportionally more from the subsidies on electricity and gas prices, the capped fuel price is in fact a subsidy for the wealthier. The radically rising gas prices have also led the government in August 2022 to increase the amount of firewood that can be harvested from forests, a measure that may possibly temporarily address the heating problems of those in need, but which seriously jeopardizes the interests of future generations and

[93] The statement of SAK, Akava and STTK on the draft of the Governments Proposal for the Climate Change Act <https://akava.fi/lausunnot/palkansaajajarjestojen-sakn-akavan-ja-sttkn-lausunto-luonnoksesta-hallituksen-esitykseksi-uudeksi-ilmastolaiksi/>, visited 6.9.2022.

[94] SAMAK, Oikeudenmukainen vihreä siirtymä – Pohjoismaisia aloitteita ideoinnin ja keskustelun pohjaksi, Tammikuu 2021, p. 10.

[95] Publications by the Finnish Government (Valtioneuvoston julkaisuja) 2019:31, Pääministeri Sanna Marinin hallituksen ohjelma Osallistava ja osaava Suomi – sosiaalisesti, taloudellisesti ja ekologisesti kestävä yhteiskunta 10.12.2019, p. 35.

[96] Statement of the Grand Committee (Suuri valiokunta) SuVL 3/2020 vp Valtioneuvoston selvitys: EU:n komission tiedonanto vihreän kehityksen ohjelmasta (Green deal) 11.12.2019 p. 8.

the common heritage of the nation[97]. While these measures make a significant contribution to ensuring social justice, they do not encourage responsible energy use, which is particularly harmful from a climate change perspective. However, the Hungarian government has used a number of other instruments to help combat climate change, including subsidies for the purchase of electric vehicles, subsidies for the installation of solar panels, and subsidies for the energy modernization of buildings. According to the Hungarian report, these measures are all appropriate to tackle climate change, but they are essentially fragmented in nature and do not fit into a coherent, well thought-out climate policy strategy. A further disadvantage of the measures is that, in practice, the self-financed part, which they require, means that the poorest households are typically unable to take advantage of these options.

II – Social rights in the combat for democracy and the rule of law

What would it mean to "socialize" the actions in favour of the rule of law? The questions sent to national rapporteurs pointed at European social values, underpinning a meaningful Social Europe that should cement the European integration. These social values, we believe, should be more central in the definition and protection of the Rule of Law, by the EU, in order to shed light on the social dimension of EU integration. It would mean putting social rights and social justice at the forefront in the reflections and actions to cope with fragilization of European democracies. So far, the link between the rule of law and the protection of social rights has not been granted much attention.

National reports, on these particular questions, have mostly stressed the role played by education and training on EU values, at different levels, but the very idea of a relationship between the Rule of law and social rights needs to be explored further. The role of EU citizenship in cementing a Social Union was rather hard to get around for rapporteurs, who seemed to be more often experts of labour law, and EU social law, than specialists of EU citizenship and the protection of the Rule of law.

[97] The Hungarian opposite parties asked the Constitutional Court for review the conformity of this Government Decree with the Fundamental Law (Case No. II/1907/2022). As of 30 August 2022, the case is pending.

INSTITUTIONAL REPORT

European Social Union

Sacha Garben[1]

1. Introduction

This report considers the most recent legal developments at EU level pertaining to the questions posed by the General Rapporteur. These developments have been numerous and fundamental, which is a noteworthy finding in and of itself considering the stagnant state of the European Social Union and the 'crisis of regulation'[2] in EU social law that preceded its current reinvigoration. The adoption of the European Pillar of Social Rights has been a turning point in this story; its on-going 'implementation' framing and shaping the now rapidly changing social *acquis*.[3] EU social legislation is once again flourishing. Under the auspices of the non-binding Pillar, several new directives have been adopted, and further high-profile legislative initiatives are currently under negotiation.[4]

However, as also clearly reflected in the General Rapporteur's questionnaire, the story of Social Europe has never been written purely on its own terms, and instead has been – and continues to be – profoundly influenced by other areas of EU law and policy. Sometimes these interactions are synergetic, with notably the free movement of persons long established as a cornerstone of Social Europe (even if, as identified by the questionnaire, there are growing concerns about 'the supply side' of such mobility in terms of brain drain and demographic imbalances). Other times, such interactions have been fraught. Social Europe's previously depressed state was not merely caused by a lack of action under the TFEU's social policy title itself, but even more so by its 'displacement'[5] through decision-making in other areas with profound, and often detrimental,

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[2] Catherine Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' *University of Cambridge Faculty of Law Research Paper*, No. 43, 2014, p. 14.

[3] On the Pillar generally see Sacha Garben, 'The European Pillar of Social Rights: An Assessment of its Meaning and Significance', *Cambridge Yearbook of European Legal Studies*, Vol. 21, 2019, pp. 101 – 127 and Sacha Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?' *European Constitutional Law Review*, Volume 14, No 1, 2018, pp. 210-230.

[4] See Section II below.

[5] Claire Kilpatrick, 'The displacement of Social Europe: a productive lens of inquiry', *European Constitutional Law Review*, Vol. 14, No. 1, 2018, 62-74, and contributions to this special section in the *European Constitutional Law Review.*

effects on EU and national social rights and policies.[6] This notably included economic and monetary policy at the time of the financial and economic crisis. Here again, the Pillar – originally conceived precisely as a social instrument in the context of a deepening EMU[7] – has marked a sharp change in a more social direction. That direction has been followed through in the EU's response to the COVID-19 pandemic. As a result, the European Semester – the EU's yearly cycle of economic policy coordination – is becoming increasingly 'socialized'.[8] Moreover, the Von der Leyen Commission has reinterpreted the Pillar dynamically to look towards future challenges, where increased 'social 'mainstreaming' may be warranted in other areas of EU law and policy, such as trade and the environment.[9] The Pillar has therefore not only reinvigorated EU social law-making, but has furthermore – at least partially – redressed EU Social Union's previous displacement.[10] On the other hand, the Pillar did not fundamentally address the conflict between social rights and economic freedoms that emerged most notably in 2007 in the *Viking* and *Laval* cases.[11] Despite a softened stance in the Court's subsequent case law[12] and a revision of the legislation on posted workers,[13] the clash between social and economic rights continues to be constitutionally disruptive.[14]

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[6] Sacha Garben, The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union, *European Constitutional Law Review*, Vol. 1, No. 1, 2017, pp. 23-61.

[7] European Commission, Proposal for a Interinstitutional Proclamation on the European Pillar of Social Rights, COM(2017) 251 final, p. 4.

[8] Jonathan Zeitlin and Bart Vanhercke coined this term in relation to the European Semester already back in 2014: Jonathan Zeitlin and Bart Vanhercke -, 'Socializing the European Semester? Economic Governance and Social Policy Coordination in Europe 2020', *SIEPS*, No. 7, 2014. See also Jonathan Zeitlin and Bart Vanhercke, 'Socializing the European Semester: EU Social and Economic Policy Co-ordination in Crisis and Beyond'. *Journal of European Public Policy*, Vol. 25, No. 2, 2018, pp. 149–74, and Bart Vanhercke and Amy Verdun, 'The European Semester as Goldilocks: Macroeconomic Policy Coordination and the Recovery and Resilience Facility' *Journal of Common Market Studies*, Vol. 60, No. 1, 2021, pp. 204-223.

[9] In a 2020 Communication the Commission stated: 'The European Pillar of Social Rights is the European answer to these fundamental ambitions. It is our social strategy to make sure that the transitions of climate neutrality, digitalisation and demographic change are socially fair and just. Commission Communication, *Building a Strong Social Europe for Just Transitions,* COM(2020) 14 final. See also Council Recommendation of 16 June 2022 on ensuring a fair transition towards climate neutrality (2022/C 243/04).

[10] Admittedly, as regards this latter finding, somewhat against my own expectations, see n. 2.

[11] Judgment of the Court (Grand Chamber) of 11 December 2007, *Viking*, Case C-438/05, EU:C:2007:772, and Judgment of the Court (Grand Chamber) of 18 December 2007, *Laval*, EU:C:2007:809.

[12] Judgment of the Court (First Chamber) of 12 February 2015, Case C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna*, ECLI:EU:C:2015:86.

[13] Directive (EU) 2018/957 of the European Parliament and of the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ 2018 L 173/16.

[14] See notably the case law concerning the relationship between the internal market freedoms, the freedom to conduct a business, and fundamental social rights: Judgment of the Court (Grand Chamber) of 21 December 2016, Case C-201/15, *(AGET Iraklis),* EU:C:2016:972, Judgment of the Court (Third Chamber), 18 July 2013, *Alemo-Herron*, EU:C:2013:521, discussed in Sacha Garben, 'The 'Fundamental Freedoms' and (Other) Fundamental Rights: Towards an Integrated Democratic Interpretation Framework' in Sacha Garben and Inge Govaere (Eds.), *The Internal Market 2.0,* Bloomsbury Hart Publishing, 2020. See further Section III below.

This report proceeds in two steps. First, it will map the most important[15] recent legal developments in the EU social *acquis* following the adoption of the European Pillar of Social Rights (Section II). Second, it will examine the relevant case law of the Court of Justice, with special attention to the clash between social rights and economic freedoms (Section III). A brief final section concludes.

2. THE EUROPEAN PILLAR OF SOCIAL RIGHTS AND THE FLOURISHING SOCIAL *ACQUIS*

2.1. What is the European Pillar of Social Rights?

In Gothenburg on 17 November 2017, the European Commission, Parliament, and Council signed a 'solemn' Inter-Institutional Proclamation on the European Pillar of Social Rights.[16] This was a remarkably swift follow-up from the Commission's own, unilateral 'launch' of the Pillar on 26 April 2017,[17] itself the speedy outcome of a preparatory phase lasting only a year.[18] As stated by one commentator, the Pillar 'represents the most encompassing attempt to raise the profile of social policy in two decades, since the inclusion of the employment chapter in the Amsterdam Treaty and the formulation of the European Employment Strategy'.[19] It signalled a profound change in political direction after the crisis-years in which, as already mentioned in the Introduction, the EU's social dimension was put under significant pressure. The Pillar entailed, first and foremost, a high-profile political reaffirmation of a set of twenty social rights and principles,[20] and signalled

[15] It bears testimony to the sea-change in EU Social Union that an exhaustive mapping of the wealth of relevant legal initiatives is not within the scope of this paper. There are measures with an important social dimension that will not be discussed, as they are – like for example the European Accessibility Act – not explicitly conceptualised as implementation of the Pillar, or because they are not legally binding – such as the Recommendation on access to social protection.

[16] [2017] OJ C428/10.

[17] European Commission, Proposal for a Interinstitutional Proclamation on the European Pillar of Social Rights, COM(2017) 251 final

[18] European Commission, Communication of 8 March 2016 launching a consultation on a European Pillar of Social Rights, COM(2016)0127.

[19] Ania Plomien, 'EU Social and Gender Policy beyond Brexit: Towards the European Pillar of Social Rights' Vol. 17, No. 2, *Social Policy § Society* 281, 2018, p 292.

[20] Chapter I entitled 'Equal Opportunities and Access to the Labour Market' features the right to education, training and life-long learning, equal treatment between men and women, non-discrimination on grounds of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, and 'active support to employment'. Chapter II is called 'Fair Working Conditions' and contains the rights to 'secure and adaptable employment', fair wages, information about employment conditions and protection in case of dismissals, social dialogue and involvement of workers, work-life balance, and healthy, safe and well-adapted work environment and data protection. Chapter III entitled 'Social Protection and Inclusion' comprises the rights and principles concerning childcare and support for children, social protection, unemployment benefits, minimum income, old-age income and pensions, health care,

an intention to adopt concrete legal measures and policies in order to give further effect to these rights and principles.

As a proclamation – however solemn – the Pillar is not legally binding.[21] This means that the rights and principles it features are not, by virtue of the Pillar, enforceable against either the EU Institutions or the Member States. Most of the rights and principles it contains, however, are legally binding on the EU and/or the Member States by virtue of other measures, such as the EU Charter of Fundamental Rights, the European Social Charter of the Council of Europe, and various Conventions of the ILO. The Commission's explanations indicate that the Pillar 'draws on' these instruments and that nothing in it shall be interpreted as restricting or adversely affecting them.[22]The Pillar:

> reaffirms the rights already present in the EU and in the international legal acquis and complements them to take account of new realities. As such, the Pillar does not affect principles and rights already contained in binding provisions of Union law: by putting together rights and principles which were set at different times, in different ways and in different forms, it seeks to render them more visible, more understandable and more explicit for citizens and for actors at all levels. In so doing, the Pillar establishes a framework for guiding future action by the participating Member States.[23]

In some ways, the Pillar is thus a repackaging or consolidation exercise, in which a range of social rights and principles contained in different instruments with various addressees are assembled in a single document, politically endorsed by the EU Institutions, including the Member States in the Council. While in a legal sense, the Pillar cannot directly affect the meaning of these rights and principles as featured elsewhere, it does provide an indication of how the political institutions at present understand these rights and principles and how they thus may give effect to them in the context of their current policies. Fundamental

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inclusion of people with disabilities, long-term care, housing and assistance for the homeless, and access to essential services.

[21] The Pillar was first launched by means of a Commission Recommendation adopted on the basis of Article 292 TFEU and subsequently endorsed by the Inter-Institutional Proclamation of 17 November 2017. In both of these different manifestations, the Pillar is a soft law instrument. For recommendations, this is stated explicitly in Article 288 TFEU. Proclamations are not mentioned as a legal instrument in the Treaties and their legal status is therefore somewhat more 'obscure'. See on this point: Zane Rasnacă,'Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking' *ETUI Working Paper*, No. 5, 2017, p. 14.

[22] European Commission, Staff Working Document accompanying the Commission Communication establishing a European Pillar of Social Rights, pp. 2 and 3.

[23] European Commission, Communication to the Parliament, Council, the EESC and the Committee of the Regions, Establishing a European Pillar of Social Rights, COM(2017) 250 final. 41European Commission, Staff Working Document accompanying the Commission Communication establishing a European Pillar of Social Rights, p. 3.

social rights depend to an important extent on the legislator and policymaker to take full effect, and the Pillar provides an important indication on the planned 'implementation' of the rights and principles it contains. Moreover, the CJEU may use the Pillar as a source of interpretation of the rights and principles as laid down in other instruments, especially where a new act refers to the Pillar in the preamble or in the preparatory works.[24]

Over the past five years, the Pillar's 'implementation' has entailed – as foreseen – the deployment of the full array of EU governance instruments: regulations and directives,[25] recommendations and communications,[26] the creation of new institutions,[27] funding and country-specific recommendations.[28] As such, the static imagery evoked by the notion of a 'pillar' arguably does not capture the true nature and significance of the initiative, which is dynamic and fluid. An equation of the Pillar with the core set of twenty social rights and principles it proclaims similarly fails to capture its true legal and political significance, which lies mainly in its programmatic nature. In this regard, it has followed in the footsteps of the 1989 Community Charter on the Fundamental Social Rights of Workers with its accompanying Action Programme, on the basis of which an important part of the EU social *acquis* was progressively adopted. Similarly, in the context of the Pillar, a range of important measures has already been adopted, and others are under negotiation.[29]

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[24] Many of the already adopted or currently pending directives do, see discussion in subsection II.2 below.

[25] See below subsection II.2.

[26] For instance Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed, OJ C 387, 15.11.2019, p. 1–8. A proposal for a Council Recommendation on minimum income to effectively support and complement the policies of Member States has been proposed by European Commission in Social Pillar Action Plan. Social NGO's are campaigning to have the initiative be turned from a Recommendation into a Directive. See Social Platform Letter to President von der Leyen of 20 July 2022 making the commitment to a Framework Minimum Income Directive its top claim for 2023.

[27] Regulation 2019/1149, adopted on the basis of Articles 46 and 48 TFEU on the free movement of workers, establishes the European Labour Authority. The preamble, after referring to Articles 3 TEU and 9 TFEU, states that: 'The European Pillar of Social Rights was the subject of a joint proclamation by the European Parliament, the Council and the Commission at the Social Summit for Fair Jobs and Growth, in Gothenburg on 17 November 2017. That Summit emphasised the need to put people first in order to further develop the social dimension of the Union, and to promote convergence through efforts at all levels, as confirmed in the conclusions of the European Council following its meeting on 14 and 15 December 2017.'

[28] There are now systematic references to assessment of national systems (and currently the national recovery and resilience plans) with the European Pillar of Social Rights. Occasionally, this seems to translate into a specific CSR. For instance, referring explicitly to the Pillar, the Commission has proposed to recommend Austria in 2022 and 2023 to 'Boost labour market participation of women, including by enhancing quality childcare services, and improve labour market outcomes for disadvantaged groups'. European Commission, Recommendation for a Council Recommendation on the 2022 National Reform Programme of Austria and delivering a Council opinion on the 2022 Stability Programme of Austria, COM(2022) 601 final.

[29] See also the 2021 European Pillar of Social Rights Action Plan: https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/downloads/KE0921008ENN.pdf.

2.2. New Legislation

2.2.1. Directive 2019/1152 on transparent and predictable working conditions

Directive 2019/1152 on transparent and predictable working conditions is the first successfully adopted legislative measure in the context of the European Pillar of Social Rights.[30] It entails a revision of the Written Statement Directive[31] that dated back from 1991, itself adopted on the back of the back of the 1989 Community Charter on the Fundamental Rights of Workers. The new Directive reinforces the rights granted by the original Directive about the information a worker is entitled to receive in their employment contract. While as regards its *ratione personae*, reference is made to an employment contract or employment relationship as defined by national law, the Directive explicitly requires this to be applied 'with consideration to the case-law of the Court of Justice',[32] suggesting that as soon as the standard features of remuneration and subordination are present in accordance with the Court's settled case law in *Lawrie-Blum*,[33] a worker can rely on the rights provided in the Directive regardless the formal classification of their contract under national law. In this regard it is furthermore notable that the Directive does not allow Member States to exclude from the scope of application of the Directive contracts where no guaranteed amount of paid work is predetermined (0-hours contracts).[34]

Apart from specifying which elements the worker should be informed about, the new Directive defines several core labour standards, such as a

[30] After a reference to Article 31 EU Charter, the preamble states in point 2 that 'Principle No 5 of the European Pillar of Social Rights, proclaimed at Gothenburg on 17 November 2017, provides that, regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training, and that the transition towards open-ended forms of employment is to be fostered; that, in accordance with legislation and collective agreements, the necessary flexibility for employers to adapt swiftly to changes in the economic context is to be ensured; that innovative forms of work that ensure quality working conditions are to be fostered, that entrepreneurship and self-employment are to be encouraged and that occupational mobility is to be facilitated; and that employment relationships that lead to precarious working conditions are to be prevented, including by prohibiting abuse of atypical contracts, and that any probationary period is to be of a reasonable duration.' Point 3 states that 'Principle No 7 of the European Pillar of Social Rights provides that workers have the right to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship, including any probationary period; that prior to any dismissal they are entitled to be informed of the reasons and given a reasonable period of notice; and that they have the right to access to effective and impartial dispute resolution and, in the case of unjustified dismissal, a right to redress, including adequate compensation.'

[31] Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L 288, 32

[32] Article 1(2).

[33] Judgment of the Court of 3 July 1986, Case 66/85, *Lawrie-Blum*, EU:C:1986:284.

[34] Article 1(4).

maximum duration to probatory periods of 6 months.[35] In the case of fixed-term employment relationships, Member States shall ensure that the length of such a probationary period is proportionate to the expected duration of the contract and the nature of the work. In the case of the renewal of a contract for the same function and tasks, the employment relationship shall not be subject to a new probationary period.[36] The Directive bans exclusivity clauses,[37] and requires a minimum degree of predictability for workers with unpredictable work patterns by requiring the indication of reference hours outside which worker does not have to accept work. Furthermore, the Directive obliges Member States that allow the use of on-demand or similar kind of contracts to take measures to prevent abusive practices, consisting of limitations to the use and duration of on-demand or similar employment contracts, a rebuttable presumption of the existence of an employment contract with a minimum number of paid hours based on the average hours worked during a given period, or other equivalent measures that ensure effective prevention of abuse.[38] The Directive furthermore provides several provisions to protect the worker who seeks to enforce their rights under the Directive.

2.2.2. The Work-Life Balance Directive 2019/1158

The Work-Life Balance Directive 2019/1158[39] is the second successfully adopted legislative measure in the context of the Pillar,[40] replacing the 2010 Parental Leave Directive (which in turn had repealed the initial 1996 Directive on parental leave[41]). The Directive lays down 'minimum requirements designed to achieve equality between men and women with regard to labour market opportunities and treatment at work, by facilitating the reconciliation of work and family life for workers who are parents, or carers'.[42] It reflects the on-going shift in approach to the issue of 'work-life balance', from a women-specific concern to a concept of

[35] Article 8. In accordance with paragraph 3, Member States may, on an exceptional basis, provide for longer probationary periods where justified by the nature of the employment or in the interest of the worker.

[36] Article 8(2).

[37] Article 9. In accordance with the second paragraph, Member States may lay down conditions for the use of incompatibility restrictions by employers, on the basis of objective grounds, such as health and safety, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interests.

[38] Article 11.

[39] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

[40] The reference to the Pillar is less prominent than in the case of the Transparent and Predictable Working Conditions Directive, with point 9 of the preamble stating that 'The principles of gender equality and work-life balance are reaffirmed in Principles 2 and 9 of the European Pillar of Social Rights, which was proclaimed by the European Parliament, the Council and the Commission on 17 November 2017.'

[41] 96/34/EC.

[42] Article 1.

parenthood as a shared responsibility[43] – a shift to which at EU level the case law of the Court has been contributed.[44] To this end, the new Directive provides for individual rights related to paternity leave, parental leave and carers' leave and the flexible working arrangements for workers who are parents, or carers. Similar to Directive 2019/1152 on transparent and predictable working conditions, the Directive's *ratione personae* is defined by reference to both national law and the Court's case law.[45] As regards parental leave the Directive makes 2 months thereof non-transferable between parents,[46] and requires payment thereof, which 'shall be defined by the Member State or the social partners and shall be set in such a way as to facilitate the take-up of parental leave by both parents'.[47] The Directive furthermore provides an entitlement to 10 working days of paid paternity leave when a child is born, paid at sick pay level[48], and an entitlement to five days of (unpaid) leave per year per worker to take care of seriously ill or dependent relatives.[49] It will be a crucial matter of interpretation by the Court what in a specific case satisfies the requirement of a level of payment of parental leave that 'facilitates' its uptake.[50]

[43] Elisa Chieregato, 'A Work-Life Balance for All? Assessing the Inclusiveness of EU Directive 2019/1158', *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 36, No. I, 2020.

[44] In Case C-104/09, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*, ECLI:EU:C:2010:561, the Court held that 'the positions of a male and a female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child' and accordingly that Article 2(1), (3) and (4) and Article 5 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, must be interpreted as precluding a national measure which provides that female workers who are mothers and whose status is that of an employed person are entitled, in various ways, to take leave during the first nine months following the child's birth, whereas male workers who are fathers with that same status are not entitled to the same leave unless the child's mother is also an employed person. Earlier judgments already signal a similar approach: see in relation to the position of male and female workers assuming the upbringing of their children, Case C-366/99 *Griesmar* [2001] ECR I-9383, and, in relation to their position as regards use of nursery services, Case C-476/99 *Lommers* [2002] ECR I-2891.

[45] Article 2 provides: 'This Directive applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State, taking into account the case-law of the Court of Justice.'

[46] Article 5(2).

[47] Article 5(2) *jo.* Article 8.

[48] Article 8(2): 'With regard to paternity leave as referred to in Article 4(1), such payment or allowance shall guarantee an income at least equivalent to that which the worker concerned would receive in the event of a break in the worker's activities on grounds connected with the worker's state of health, subject to any ceiling laid down in national law. Member States may make the right to a payment or an allowance subject to periods of previous employment, which shall not exceed six months immediately prior to the expected date of the birth of the child.'

[49] Article 3(1)(c) *jo.* Article 6.

[50] It is reported that currently 'fewer than half of the Member States offer well-remunerated parental leave, which is taken to entail payment at least at 66% of previous earnings (Austria, Czechia, Denmark, Estonia, Finland, Hungary, Lithuania, Luxembourg, Poland, Romania, Slovenia and Sweden)'. Six Member States (Cyprus, Greece, Spain, Ireland, Malta, the Netherlands) do not provide for any payment during parental leave. However, some Member States (*eg* Spain) parents have access to a paid care measure in the form of a longer

2.3. Pending Legislative Initiatives

Apart from the already adopted measures discussed in the previous section, there are several pending initiatives. For a number of these, provisional agreement has already been reached or appears likely between the co-legislators, and which therefore are likely be formally adopted in the near future. For others, the negotiations seem blocked.

The European Pillar of Social Rights was essentially created at the initiative of the (then) President of the Commission Jean-Claude Juncker, who actively led the Pillar's conception, development, and its launch. Although subsequently all three EU Institutions adopted the Pillar, its successful implementation remained dependent on the Commission's commitment, and so its fate under a new Commission was not certain. The Von der Leyen Commission however quickly asserted its intention to carry on the Pillar's course, arguably even stepping up the level of ambition. As one of the most prominent planned actions in that respect, President Ursula Von der Leyen announced an EU minimum wage initiative, aiming at making 'work pay' by developing a 'framework' on fair minimum wages that respects different labour markets.[51]

2.3.1. Proposal for an EU minimum wage directive

The Von der Leyen Commission's proposal for a minimum wage directive was a bold move, politically as well as legally.[52] Politically, the issue of wages – their level and method of setting – is highly sensitive, not in the least because of the important role played therein by the Social Partners in several Member States. Legally, the issue had been considered by many to fall outside the scope of EU social competence in light of the provision in Article 153 TFEU (the main social policy legal basis) that 'the provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs'.[53] The European Pillar of Social Rights had, unlike the EU Charter of Fundamental Rights,

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paid maternity leave, which can be shared between parents. See Elisa Chieregato, 'A Work-Life Balance for All? Assessing the Inclusiveness of EU Directive 2019/1158', *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 36, No. I, 2020, referring to Alison Koslowski et al, 'International Review of Leave Policies and Research 2019',15th ed., 2019. Available at: https://www.leavenetwork.org/annual-review-reports (last accessed 9 October 2022).

[51] Von der Leyen, 'Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission' 16 July 2019. <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_19_4230>.

[52] See further in detail: Ane Fernandez de Aranguiz Chueca and Sacha Garben, 'Combating income inequality in the EU: A legal assessment of a potential EU minimum wage directive' *European Law Review*, Vol. 46(2), 2021, pp. 156-174.

[53] Paragraph 5.

explicitly included the issue of minimum wage,[54] but it was not generally expected that the EU would take legislative action on that point. Unwaveringly, however, the year following the announcement, the Commission proposed a directive on the basis of Article 153 TFEU, with the two-fold objective of promoting collective bargaining and the adequacy of minimum wages.[55]

To that end, the proposal sets out an obligation for Member States that do not have collective bargaining coverage of 70% or higher to produce an action plan, as well as an obligation for Member States that have statutory minimum wages to 'ensure that the setting and updating of statutory minimum wages are guided by criteria set to promote adequacy with the aim to achieve decent working and living conditions, social cohesion and upward convergence'. Member States shall define those criteria 'in accordance with their national practices, either in relevant national legislation, in decisions of the competent bodies or in tripartite agreements', and these criteria 'shall be defined in a stable and clear way'.[56] The criteria shall include at least the following elements: (a) the purchasing power of statutory minimum wages, taking into account the cost of living and the contribution of taxes and social benefits; (b) the general level of gross wages and their distribution; (c) the growth rate of gross wages; and (d) labour productivity developments. On the adequacy of wages, there is – seemingly – no legal obligation of result. Moreover, the proposal contains many derogations for deductions and deviations from adequacy for specific groups of workers.[57]

The provisional agreement reached between the European Parliament and the Council, which has been formally adopted by the European Parliament in September 2022 and is pending the formal adoption of the Council, raises the coverage percentage to be exempt from the action plan on collective bargaining to 80%, replaces the criterion of 'labour productivity developments' by 'long-term national productivity levels and developments'. It now explicitly references 60% of the gross median wage and 50% of the gross average wage as an indicative reference

[54] Principle 6 (Wages): 'Workers have the right to fair wages that provide for a decent standard of living. Adequate minimum wages shall be ensured, in a way that provide for the satisfaction of the needs of the worker and his / her family in the light of national economic and social conditions, whilst safeguarding access to employment and incentives to seek work. In-work poverty shall be prevented. All wages shall be set in a transparent and predictable way according to national practices and respecting the autonomy of the social partners.

[55] Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, COM/2020/682 final.

[56] Article 5.

[57] Article 6 '1. Member States may allow different rates of statutory minimum wage for specific groups of workers. Member States shall keep these variations to a minimum, and ensure that any variation is non-discriminatory, proportionate, limited in time if relevant, and objectively and reasonably justified by a legitimate aim. 2. Member States may allow deductions by law that reduce the remuneration paid to workers to a level below that of the statutory minimum wage. Member States shall ensure that these deductions from statutory minimum wages are necessary, objectively justified and proportionate.'

values to guide the assessment of adequacy (which the proposal merely referenced in the preamble), and narrows the scope for derogations.[58] It furthermore explicitly recognises the role of trade unions in collective bargaining; whereas the Commission proposal had defined collective bargaining as 'all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other' (for determining working conditions and terms of employment; and/or regulating relations between employers and workers; and/or regulating relations between employers or their organisations and a worker organisation or worker organisations), the provisional agreement defines it as 'all negotiations which take place according to national laws and practices in each Member State between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more trade unions, on the other, for determining working conditions and terms of employment'.

As noted by two commentators: 'this is light years away from the pre-Pillar EU'[59]: 'national collective bargaining and trade unions have never been supported in this way by EU law'.[60] Previously, the *acquis* limited itself to information and consultation or rights to bargain adjustments to statutory standards. 'In recognition of the diverse systems of worker representation in the EU for non-bargaining functions, these rights were accorded, moreover, to generic 'worker representatives' or the even more diluted 'management and labour' with no special acknowledgment or protection of trade unions, their representatives and members'.[61] More poignantly, the preceding crisis period saw 'the EU institutions demand the dismantling of national collective bargaining and the overriding of collective agreements especially in Greece'.[62] This change in direction is welcome from a social perspective, all the more in light of the diminished legal force of EU-level collective bargaining following the CJEU's *EPSU* judgement (see Section III below).

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[58] Article 6: '1. Where Member States allow for different rates of statutory minimum wage for specific groups of workers or for deductions that reduce the remuneration paid to a level below that of the relevant statutory minimum wage, they shall ensure that these variations and deductions respect the principles of non-discrimination and proportionality, the latter including the pursuit of a legitimate aim. 2. Nothing in this Directive shall be construed as imposing an obligation on Member States to introduce variations of and deductions from statutory minimum wages.'

[59] Maarten Keune and Philippe Pochet, 'The future of social Europe', Transfer 2-2023, forthcoming.

[60] Ibid.

[61] Ibid. See further, Paul Davies and Claire Kilpatrick, 'UK Worker Representation After Single Channel' *Industrial Law Journal,* Vol. 33, No. 2, 2004, p. 121.

[62] Ibid, see further A. Koukiadaki and C. Kokkinou, 'The Greek system of collective bargaining in (the) crisis' in I. Tavora and M. Martinez Lucio (eds), *Joint Regulation and Labour Market Policy in Europe during the Crisis* (European Trade Union Institute 2016).

2.3.2. Proposal for a directive on the protection of online platform workers (and related measures)

At the end of 2021, the European Commission proposed a new directive on improving working conditions in platform work.[63] The explanatory memorandum references the Pillar in its opening paragraph, where the former states in Principle 5 that 'regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions and access to social protection'. The Directive mainly seeks to address the problem that in the so-called online platform economy, people are often contracted as 'self-employed' by the online platforms, which affects these people's access to labour and social security protections, while their working arrangement with the online platform does possess (at least some) characteristics of employment. National courts have often requalified these relationships as employment relationships, and as regards EU law the CJEU has also been favourable to considering platform worker to be 'workers',[64] but a degree of legal uncertainty continues to surround the situation – to the detriment of online platform workers.[65] The solution now proposed by the Commission is to introduce a 'rebuttable' presumption of employment for online platform workers (that would entail that they qualify for all the social, labour, security, OSH rights for employed persons), unless the employer shows that the relationship is one of self-employment/contracting. The proposed Directive furthermore contains obligations on algorithmic transparency.

In the currently proposed text, the presumption is not triggered automatically for all online platform work, but subject to meeting certain criteria. More specifically, the proposal provides that the 'contractual relationship between a digital labour platform that controls (…) the performance of work and a person performing platform work through that platform shall be legally presumed to be an employment relationship'.[66] 'Controlling the performance of work' shall be understood as fulfilling at least two of the following: (a) effectively determining,

[63] COM(2021) 762 final.

[64] A case in point is the order of the Court in *Yodel Delivery Network*, where it considered that the Working Time Directive allowed the exclusion of independent contractors only under very strict conditions devised to establish genuine self-employment. Order of the Court (Eighth Chamber) of 22 April 2020, Case C-692/19, *Yodel Delivery Network*, EU:C:2020:288. Also relevant are the CJEU's consideration of the control by Uber over the transport services provided by the drivers, leading it to conclude that Uber provides these services itself and is not an information society service in Judgment of the Court (Grand Chamber) of 20 December 2017, Case C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain*, EU:C:2017:981.

[65] See further Sacha Garben, 'Regulatory Approaches to Labour in the Online Platform Economy' in: Jan Drahokoupil and Kurt Vandaele (Eds.), *Modern Guide to Labour in the Platform Economy*, Routledge; 2021, 162.

[66] Article 4(1). To that effect, Member States shall establish a framework of measures, in accordance with their national legal and judicial systems. The legal presumption shall apply in all relevant administrative and legal proceedings. Competent authorities verifying compliance with or enforcing relevant legislation shall be able to rely on that presumption.

or setting upper limits for the level of remuneration; (b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work; (c) supervising the performance of work or verifying the quality of the results of the work including by electronic means; (d) effectively restricting the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes; (e) effectively restricting the possibility to build a client base or to perform work for any third party.[67] This means that under the current formulation, the threshold is quite high for the presumption to be triggered – indeed in many if not most cases national courts would already (re-)qualify the relationship as one of employment in the presence of these conditions – which weighs down its protective potential and questions its added value. It would seem a more effective solution to have the rebuttable presumption apply generally to online platform work, with the mentioned criteria instead providing guidance to national authorities to assess a possible rebuttal of the presumption by an online platform, arguing a lack of control. It would furthermore seem reasonable – also in light of the case law of national courts – that the presence of one of the mentioned criteria may already suffice to establish control/an employment relationship (thus making the rebuttal fail).

This Directive should be seen alongside a range of actions on the highly visible issue of online platform work, such as the already adopted Transparent and Predictable Working Conditions Directive. As discussed above, this Directive applies to those who have an employment relationship with reference to the case law of the Court of Justice. The minimum number of hours to be covered by the Directive is exceptionally low, with anyone working an average of more than 3 hours per week over a four week-period being covered, as well as everyone given no guaranteed hours, with very limited exclusions, and thus will generally cover workers in the online platform economy.[68] The European Commission has furthermore taken an initiative aiming to ensure that EU competition law does not prevent improving working conditions through collective agreements for the solo self-employed,[69] in reaction to the concerns raised in relation to the CJEU's *FNV* ruling[70] especially in relation to the online platform economy. In *FNV*, the CJEU held that the prohibition on agreements between undertakings of Article

[67] Article 4(2).

[68] Article 1(3) and (4). See also Maarten Keune and Philippe Pochet, 'The future of social Europe', Transfer 2-2023, forthcoming.

[69] COM 2022/C 123/01.

[70] Judgment of the Court (First Chamber), 4 December 2014, C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* EU:C:2014:2411.

101 TFEU applied to minimum fees set in collective agreements between self-employed service providers and their contractor, unless the self-employment actually constituted 'false self-employment'. The Court gave further indications as to who could be considered falsely self-employed for these purposes:

> a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking (…). On the other hand, the term 'employee' for the purpose of EU law must itself be defined according to objective criteria that characterise the employment relationship, taking into consideration the rights and responsibilities of the persons concerned. In that connection, it is settled case law that the essential feature of that relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration (…). From that point of view, the Court has previously held that the classification of a 'self-employed person' under national law does not prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional, thereby disguising an employment relationship (…). It follows that the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that persons acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work (…), does not share in the employer's commercial risks (…), and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking (…).[71]

The precise implications of this ruling for online platform workers were not entirely clear, as it suggested that those online platform workers that would be considered self-employed, would not be allowed to enter into collective agreements with the platform to set minimum payment standards. As regards employment conditions other than fees/payment, they could be permitted, falling within the *de minimis* exception to the application of Article 101 TFEU. The *de minimis* exception however does not apply to 'hardcore' restrictions such as price-fixing, which the collective agreement on remuneration would constitute from the perspective of competition law in the case of (genuinely) self-employed. Beyond

[71] See paras 33 – 36 of the judgment.

the question whether it would be appropriate to apply this standard to workers on online platforms, a chilling effect on collective bargaining emanates from the possibility of falling foul of the competition rules – in a sector where conditions are already unfavourable to collective bargaining.[72] As such, the initiative by the Commission to create more certainty about the (in)applicability of competition law to the solo self-employed is a welcome development for the protection of online platform workers, and workers in the sectors with whom the online platforms compete.

2.3.3. Proposal for a directive on gender balance on boards

In the November 2012, the European Commission submitted a proposal for a directive on gender balance among non-executive directors of companies listed on stock exchanges.[73] The directive would be based on Article 157(3) TFEU, on gender equality in employment and occupation. The proposal set the aim of a minimum of 40% of non-executive members of the underrepresented sex on company boards, to be achieved by 2020 in the private sector and by 2018 in public-sector companies. While the European Parliament voted in favour of the Directive, the proposal was blocked in the Council. Not all Member States supported EU-wide legislation and some Member States considered that binding measures at the EU level were not the best way to pursue the objective.[74] Under the Early Warning Mechanism, the national parliaments of Denmark, the Netherlands, Poland, Sweden, the United Kingdom, and the Chamber of Deputies of Czechia submitted reasoned opinions. With the European Pillar of Social Rights, the Commission hoped to revive the Directive. President Von der Leyen indicated a strong commitment to building a majority to unblock the Directive.[75] In January 2022, both the Commission president and the French presidency expressed their determination to move forward with the file,[76] and on 14 March 2022, the Council adopted its general approach. On 23 March 2022, the European Parliament reconfirmed its position, and after three rounds of trilogue negotiations the European Parliament and the Council reached a political agreement on 6 June 2022 – almost a decade after the initial proposal.[77]

[72] See further Sacha Garben, 'Regulatory Approaches to Labour in the Online Platform Economy' in: Jan Drahokoupil and Kurt Vandaele (Eds.) *Modern Guide to Labour in the Platform Economy*, Routledge; 2021, 162.

[73] European Commission, Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM/2012/0614 final.s

[74] See European Parliament, 'Gender balance on boards', available at: https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-gender-balance-on-boards.

[75] Ursula Von der Leyen, Political Guidelines for the next European Commission 2019 – 2024, available at: https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf.

[76] Included in the Joint Declaration on EU Legislative Priorities for 2022

[77] The preamble of the text under provisional agreement refers to the Pillar: 'The European Pillar of Social Rights, jointly proclaimed by the European Parliament, the Council, and the Commission in 2017, incorporates

If adopted, Member States will be required to ensure that listed companies are subject to either of the following objectives to be reached by 30 June 2026: (a) members of the underrepresented sex hold at least 40% of non-executive director positions; (b) members of the underrepresented sex hold at least 33% of all director positions, including both executive and non-executive directors. Member States shall ensure that listed companies which do not meet these objectives adjust the process for the selection of candidates for appointment or election to the director positions,[78] ensuring that, 'when choosing between candidates who are equally qualified in terms of suitability, competence and professional performance, priority is given to the candidate of the underrepresented sex, unless in exceptional cases, reasons of greater legal weight, such as the pursuit of other diversity policies, applied within the context of an objective assessment and based on non-discriminatory criteria, which takes into account the specific situation of a candidate of the other sex, tilt the balance in favour of that candidate'.[79] The latter formulation carefully walks the thin line (or, in the words of a commentator, the 'straightjacket'[80]) of legally permissible positive action as follows from the case law of the CJEU.[81]

2.3.4. Proposal for a pay transparency directive

In addition to revival of the old Gender Balance on Boards Directive, the Commission has proposed a new Directive on pay transparency, based on Article 157(3) TFEU.[82] The initiative aims at tackling the persisting inadequate enforcement of the fundamental right to equal pay and ensuring that this right is upheld across the EU, by establishing pay transparency standards to empower workers to claim their right to equal pay. As the Commission proposal states, transparency of pay 'allows workers to detect and prove possible discrimination based on sex', shining light 'on gender bias in pay systems and job grading that do

among its principles equality of treatment and opportunities between women and men, including regarding participation in the labour market, terms and conditions of employment and career progression.'

[78] The selection shall be carried out on the basis of a comparative analysis of the qualifications of each candidate, by applying in a non-discriminatory manner and throughout the entire selection process, including the preparation of vacancy notices, the preselection, the shortlisting or the establishment of selection pools of candidates, clear, neutrally formulated and unambiguous criteria established in advance of that process.

[79] Article 4a.

[80] Marc De Vos, 'The European Court of Justice and the march towards substantive equality in European Union anti-discrimination law', *International Journal of Discrimination and the Law*, Vol. 20, No. 1, 2020, pp. 62–87.

[81] Judgment of the Court of 17 October 1995, C-450/93, *Kalanke*, EU:C:1995:322, Judgment of the Court of 28 March 2000, Case C-158/97, *Badeck*, EU:C:2000:163, Judgment of the Court (Fifth Chamber) of 6 July 2000, Case C-407/98, *Abrahamsson*, EU:C:2000:367, Judgment of the Court of 11 November 1997, Case C-409/95, *Marschall,* EU:C:1997:533, Judgment of the Court (Second Chamber) of 30 September 2004, Case C-319/03, *Briheche*, EU:C:2004:574.

[82] COM (2021) 93 of 4 March 2021.

not value the work of women and men equally and in a gender-neutral way', 'or that fail to value certain occupational skills that are mostly seen as female qualities'.[83] The initiative thus aims to go beyond traditional pay discrimination, tackling the difficult issue of unconscious bias: 'pay transparency can help raise awareness of the issue among employers and help them identify discriminatory gender-based pay differences that cannot be explained by valid discretionary factors and are often unintentional'.[84]

In line with other recent social directives, the personal scope of the Directive is defined both by reference to 'an employment contract or employment relationship as defined by law, collective agreements and/or practice in force in each Member State' and to 'to the case-law of the Court of Justice'. In accordance with the proposed Article 4, 'Member States shall take the necessary measures to ensure that employers have pay structures in place ensuring that women and men are paid equally for the same work or work of equal value'. As regards pay transparency, the 'employer shall make easily accessible to its workers a description of the (gender-neutral) criteria used to determine pay levels and career progression for workers' and workers are granted 'the right to receive information on their individual pay level and the average pay levels, broken down by sex, for categories of workers doing the same work as them or work of equal value to theirs'. Employers with at least 250 workers are subject to additional reporting duties and a pay assessment (Articles 8 and 9 of the proposal). Importantly, the proposal introduces a shift in the burden of proof: Member States shall take the appropriate measures to ensure that when an affected worker establishes facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the defendant to prove that there has been no direct or indirect discrimination in relation to pay. The claimant shall benefit from any doubt that might remain.[85] The Council adopted a common position on the proposal in December 2021, and the Parliament voted in favour of entering into negotiations in April 2022.

2.3.5. Proposal concerning equal treatment outside the labour market

Finally, and least likely to be adopted soon, should be mentioned the Commission's proposal a Council directive on implementing the principle of equal treatment outside the labour market, irrespective of age, disability, sexual orientation or religious belief,[86] which has been blocked in the Council – where unanimity is required in this case – for more than a decade. The initiative aims at extending protection against discrimination through a horizontal approach. While the

[83] Ibid.
[84] Ibid
[85] Article 16 of the Proposal.
[86] COM/2008/0426 final.

European Pillar of Social Rights has been successful in unblocking a number of important files, such as work-life balance and gender balance on boards discussed above, as regards this pending equal treatment directive it has not been able to achieve such results. On the other hand, a new proposal for a Directive on binding standards for equality bodies is in the pipeline, which will help the enforcement of the obligations that are currently in place.[87] While it remains to be seen whether this latter, new, initiative will be more successful than the stalled Council directive on implementing the principle of equal treatment outside the labour market, the Commission's proposal shows – like the Pillar – a (renewed) commitment to the issue.

3. DEVELOPMENTS IN THE CASE LAW OF THE CJEU

Equally rich as the on-going legislative action in the construction of the European Social Union as described in the previous section, is the Court's case law interpreting the various secondary law instruments of the EU social *acquis*. Over the past decade, the Court has issued hundreds of rulings concerning, *inter alia*, the Fixed-Term Work Directive, the Working Time Directive, the Equal Treatment Directives, and others. The present section of this Institutional Report will not seek to exhaustively map these voluminous general developments but will, instead, focus on 3 issues of particular, constitutional importance: (1) the interpretation of Article 155 TFEU, (2) the direct effect of (the social rights in) the EU Charter of Fundamental Rights, and (3) the relationship (or conflict) between EU fundamental rights and freedoms (here including, as they are so treated by the Court, the internal market freedoms).

3.1. The Interpretation of Article 155 TFEU

Article 155 TFEU provides the infrastructure for the possibilities for the social partners to self-regulate the matters covered by Article 153 TFEU, including through the adoption of binding agreements to be implemented by the EU legislator:

> 1. Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.
> 2. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153,

[87] See: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13098-Equality-bodies-binding-standards_en.

at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.

The Council shall act unanimously where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 153(2).

Article 155 TFEU provides a **unique additional law-making process** in the EU legal order. In *EPSU*, however, the Court held that the Commission is not required to submit a successfully concluded agreement to the Council for adoption.[88] The General Court had previously held in *UEAPME* that after the joint request, the Commission 'resumes control of the procedure and determines whether it is appropriate to submit a proposal to that effect to the Council'.[89] However, in the *UEAPME* judgment, the General Court had referred in particular to the Commission's responsibility to assess the representativeness of the organizations that have concluded the agreement.[90] In light of the mandatory language of the second paragraph of Article 155 ('shall'), the principle of autonomy of social partners laid down in Article 152 TFEU, the General Court's reference in *UEAPME* to representativeness, and the importance of social dialogue from the perspective of fundamental social rights, in particular the right to collective bargaining,[91] it could have been argued that once the procedural conditions of valid social dialogue as set out in the Treaties are fulfilled, the Commission is not entitled to reject the agreement on political grounds. In *EPSU*, however, the Court rejected these arguments.

The CJEU held that the Commission has broad discretion when deciding whether it is appropriate to submit a proposal for a decision implementing an agreement concluded between social partners to the Council.[92] The Court read Article 155(2) in light of Article 17 TEU on the Commission's powers – including its monopoly on legislative initiative – and considered that requiring the Commission to submit a successfully concluded social partner agreement to

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[88] Judgment of the Court (Grand Chamber) of 2 September 2021, Case C-928/19 P, *EPSU*, EU:C:2021:656. For a critical discussion, see Samantha Velluti, 'The European Social Dialogue as a source of EU legal acts following EPSU: Collective bargaining and industrial relations get lost in translation, *Common Market Law Review*, Vol. 59, No 3, 2022, pp. 871 – 888.

[89] Case T-135/96, *UEAPME*, EU:T:1998:128, para 84.

[90] Case T-135/96, *UEAPME*, paras 85–8.

[91] Article 28 EU Charter of Fundamental Rights provides: 'Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

[92] Para 95.

the Council would grant the social partners a power vis-à-vis the Commission which neither the Parliament nor the Council has.[93] Although this is a defensible contextual reading of the provision, it was not the only available approach. The Court could have interpreted Article 155(2) TFEU more forcefully in light of Article 28 of the EU Charter of Fundamental rights. In this respect, the Court holds that:

> … the paramount importance in EU law of the right – enshrined in Article 28 of the Charter of Fundamental Rights of the European Union – to negotiate and conclude collective agreements should be borne in mind (see, to that effect, judgment of 15 July 2010, Commission v Germany, C-271/08, EU:C:2010:426, paragraph 37). In the present instance, that fundamental right was observed at the stage of negotiation by the social partners of the agreement at issue. Consequently, EPSU cannot argue that the interpretation of Article 155(2) TFEU adopted by the General Court, under which the Commission has a decision-making power at the stage of implementation of the agreement at issue if the social partners choose to submit to it a request that that agreement be implemented at EU level, infringes the social partners' fundamental rights.[94]

While it may be true that the reading given by the General Court, confirmed by the CJEU, does not as such 'infringe' the fundamental right to collective bargaining, it could nevertheless have relied on that right to come to a more robust reading of Article 155(2) TFEU. Such a reading would not in turn have 'infringed' Article 17 TEU, which clearly provides that: 'Union legislative acts may only be adopted on the basis of a Commission proposal, *except where the Treaties provide otherwise*'.[95] The deliberate interpretative choice that is made, is one that attaches more importance to the institutional interest of the Commission, than to the interest in European collective bargaining.

3.2. The Direct Effect of the (Social Rights in the) EU Charter of Fundamental Rights

The direct effect of social rights is a theme as old as the original EEC Treaty: arguably the first foundations of the Social Union were laid in the *Defrenne II* judgment, where the Court held that Article 119 EEC (now Article 157 TFEU, on equal pay between men and women) applied 'not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid

[93] Para 63.

[94] Para 67 of the judgment.

[95] Emphasis added

labour collectively, as well as to contracts between individuals'[96] despite of the fact that the provision was 'addressed to the Member States and arguably only the latter and not private individuals were bound by this provision'.[97] As powerful as the direct effect of this Treaty provision has been in the building of Social Europe, the lack of such direct effect in the case of Directives[98] – for which there are, it should be noted, in principle very good reasons of legal certainty and judicial deference to the (unchanged) text of Article 188 TFEU – has at times proven an obstacle to the effectiveness of in particular EU social law. Indeed, in this area the main legal basis (Article 153 TFEU) allows the EU to legislate only by means of Directives and not Regulations (Article 153(2) TFEU), while the rights and obligations contained therein primarily relate to private parties (workers and employers). It is therefore not a coincidence that many of the landmark doctrines that 'compensate' for this lack of direct effect of Directives are social law cases: the doctrine of state liability developed in the *Francovich* case[99] concerned the non-transposition by Italy of a Directive on the protection of workers in case of their employer's insolvency, and the *Mangold*[100] and *Kücükdeveci*[101] judgments where the Court attributed direct effect to a general principle of EU law concerned workers discriminated on grounds of age by their employer.

Against that background the Court's 2012 judgment in *Dominguez*[102] was perhaps a little surprising. The Court interpreted the right to paid annual leave under the Working Time Directive (contained in Article 31(2) of the Charter) to preclude national provisions or practices which make entitlement to paid annual leave conditional on a minimum period of ten days or one month's actual work during the reference period. However, if national law did not provide this right, and could not be interpreted so as to provide this right, and if the employer was not to be considered an 'emanation of the state', the individual worker was left only with the option to seek compensation through state liability under the *Francovich* doctrine. The Court hereby resisted the possibility to use the *Mangold* doctrine in combination with the Charter to make the general right to paid annual leave a horizontally applicable EU right. Contrary to the Advocate General,[103] the Court

[96] Judgment of the Court of 8 April 1976, *Defrenne II*, Case 43-75, EU:C:1976:56, para. 39.

[97] Sacha Prechal, 'Horizontal direct effect of the Charter of Fundamental Rights of the EU' *Revista de Derecho Comunitario Europeo*, Vol. 66, 2020, pp. 407-426.

[98] Judgment of the Court of 26 February 1986, Case 152/84, *Marshall,* EU:C:1986:84.

[99] Judgment of the Court of 19 November 1991, Joined cases C-6/90 and C-9/90, *Francovich and Bonifaci,* EU:C:1991:428.

[100] Judgment of the Court (Grand Chamber) of 22 November 2005, Case C-144/04, *Mangold,* EU:C:2005:709.

[101] Judgment of the Court (Grand Chamber) of 19 January 2010, *Kücükdeveci*, EU:C:2010:21.

[102] Judgment of the Court (Grand Chamber), 24 January 2012, Case C-282/10, *Dominguez,* EU:C:2012:33.

[103] Opinion of Advocate General Trstenjak delivered on 8 September 2011, Case C-282/10, *Dominguez*, EU:C:2011:559.

did not even mention the Charter in this respect. While the Court's subsequent ruling in *AMS* indicated that some provisions of the Charter could have direct effect, the Court denied such effect to Article 27 of the Charter on information and consultation.[104] The Court considered that

Article 27 of the Charter, entitled 'Workers' right to information and consultation within the undertaking', provides that workers must, at various levels, be guaranteed information and consultation in the cases and under the conditions provided for by European Union law and national laws and practices. It is therefore clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law.[105]

This gave the impression that as regards the direct effect of fundamental social rights, non-discrimination occupied a special, privileged position both pre- and post-Charter.[106]

The turning point came with the 2018 Grand Chamber rulings of the same day in *Max-Planck-Gesellschaft*[107] and *Bauer*[108]. The Court held that the right to paid annual leave laid down in Article 31(2) EU Charter could be relied on directly to set aside incompatible provisions of national law also in the case of a private employer. In both cases, it concerned the right to receive an 'allowance in lieu' of annual leave not taken during the employment relationship after the latter's termination, which is a specific expression of the right to paid annual leave but not explicitly contained in the EU Charter provision itself. Instead, this specific provision on allowance in lieu follows from Article 7 of the Working Time Directive 2003/88. The Court held however that that Article 7 of the Working

[104] Judgment of the Court of 15 January 2014, *AMS*, Case 176/12, EU:C:2014:2.

[105] Paras 44 and 45 of the judgment.

[106] In *Egenberger*, the Court held that as regards discrimination on grounds of religion or belief that a national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 4(2) of Directive 2000/78 stablishing a general framework for equal treatment in employment and occupation, to ensure within its jurisdiction the judicial protection deriving for individuals from Articles 21 and 47 of the Charter of Fundamental Rights of the European Union (and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law. Judgment of the Court (Grand Chamber) of 17 April 2018, Case C-414/16, *Egenberger*, ECLI:EU:C:2018:257. In *Cresco*, the Court held that the prohibition of any discrimination on grounds of religion or belief is mandatory as a general principle of EU law and is laid down in Article 21(1) of the Charter and that therefore that prohibition is sufficient in itself to confer on individuals a right which they may rely on as such in a dispute between them and another individual in a field covered by EU law. A national court is thus obliged to guarantee the legal protection afforded under that article in order to ensure the full effect thereof and must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature. udgment of the Court (Grand Chamber), 22 January 2019, Case C-193/17, *Cresco*, EU:C:2019:43.

[107] Judgment of the Court (Grand Chamber) of 6 November 2018, Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V.*, EU:C:2018:874, paras. 72 – 80.

[108] Judgment of the Court (Grand Chamber) of 6 November 2018, Joined Cases C-569/16 and C-570/16, *Bauer and others*, EU:C:2018:871.

Time Directive 2003/88 (and its predecessor) has not itself established the right to paid annual leave, but that it is an essential principle of EU social law mandatory and unconditional in nature, affirmed for every worker by Article 31(2) EU Charter. It does not need to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right, and is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter. Beyond the specific relevance for the right to paid annual leave specifically, and EU social law generally, these cases are important developments concerning the horizontal applicability of Charter rights and raise interesting questions concerning the interplay between EU fundamental rights and secondary legislation, whereby the latter appears to be shaping the content of the former.[109]

3.3. The Relationship (or Conflict) between EU Fundamental Rights and Freedoms

EU primary law currently explicitly recognises a wide range of fundamental rights. Most evidently, the EU Charter of Fundamental Rights features a robust list of both classic and 'newer' political, economic and social rights. A particularity of the EU legal order, furthermore, is that the Treaties feature the so-called 'fundamental freedoms' in the internal market, that – whether or not explicitly conceptualised as such – function in the same way as fundamental rights in terms of their legal effect and hierarchical status.[110] Perhaps partially as a consequence to the peculiar way in which the EU legal order has developed over time, the constitutional theory behind the purpose, status and interpretation of these rights and their inter-relationship is – compared to national constitutional orders – thin,[111] and – regardless of any comparisons to national systems –

[109] See on this issue generally Elise Muir, *EU Equality Law – The First Fundamental Rights Policy of the EU*, Oxford University Press, 2018.

[110] See for an extensive discussion Sacha Garben, 'The 'Fundamental Freedoms' and (Other) Fundamental Rights: Towards an Integrated Democratic Interpretation Framework' in Sacha Garben and Inge Govaere (Eds.), *The Internal Market 2.0,* Bloomsbury Hart Publishing, 2020, also available as a College of Europe research Paper, No 1, 2021, at: https://www.coleurope.eu/sites/default/files/research-paper/researchpaper_1_2021_sacha_garben.pdf.

[111] Cahill points out the 'conceptual dissonance' between European integration and constitutionalism, namely that the latter 'has a long-established and well developed internal connection to orienting ideals of democracy, self-determination, representation, constituent power, separation of powers and fundamental rights, both as legitimating foundations and as outcomes to be achieved' while the former is not sufficiently oriented to these ideals (but instead mostly to integration itself). Maria Cahill, 'European Integration and European Constitutionalism: Consonances and Dissonances' inDaniel Augenstein (Ed.), *'Integration Through Law' Revisited – The Making of the European Polity*, Surrey, Ashgate, 2012, pp. 11-28, 28. See also Joseph Weiler, The

ineffective: testimony to that latter finding being the thorny conflicts outlined in this final subsection of the Institutional Report. Again probably as a consequence of the peculiar way in which the EU legal order has developed over time, it would appear that in these conflicts, economic freedoms are constitutionally more strongly protected in the Court's case law than fundamental social rights are.

3.3.1. The Relationship between Internal Market Rights: (Posted) Workers vs Services

Despite its specificity and arguably limited practical incidence,[112] the rich and complex area of posted work in EU law has become a proxy for the thorny issue of fair mobility in the EU in general, and in that respect, it continues to feed polemic[113] debates. Apart from its explosive political significance, the issue plays a crucial role in scholarly accounts of the EU's social deficit or economic bias and is an important part of the critique of some scholars that EU law would be 'over-constitutionalised'.[114] In light of all this upheaval, it seems almost impossible to think that much of it could have been prevented if the Court had applied the free movement of workers to posted workers and their labour rights, rather than the freedom to provide services, but this is arguably the case.[115] Indeed, at the heart of the controversy lies a conflict between two internal market freedoms – a conflict that could have been resolved differently and, perhaps speaking with the benefit of hindsight, more convincingly. It may well be that when the

Constitution of Europe: do the clothes have an emperor and other essays on European integration, Cambridge, Cambridge University Press, 1999.

[112] U. Batsaikhan, Z. Darvas, and I. Raposo (eds), *People on the Move: Migration and Mobility in the European Union* (2018). Posting is estimated to amount to about 0.4% of total EU employment, and even in those specific Member States where the incidence is highest, such as Luxembourg, it amounts still only to about 6%. See Pacolet and De Wispelaere, 'The Benefits of Posting – Facts and Figures on the Use and Impact of Intra-EU Posting', in J. Arnholtz and N. Lillie (eds), *Posted Work in the European Union – The Political Economy of Free Movement* (2019) 31. Arguing that a broader definition should be adopted to capture a range of related practices and phenomena: Houwerzijl and Bertsen, 'Posting of Workers – From a Blurred Notion Associated with 'Cheap Labour' to a Tool for 'Fair Labour Mobility'? in J. Arnholtz and N. Lillie (eds), *Posted Work in the European Union – The Political Economy of Free Movement* (2019) 147.

[113] Sjoerd Feenstra, 'How Can the Viking/Laval Conundrum Be Resolved? Balancing the Economic and the Social: One Bed for Two Dreams?' in F. Vandenbroucke, C. Barnard, and G. De Baere (eds), *A European Social Union after the Crisis* (2017) 309.

[114] Fritz Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a 'Social Market Economy', 8 *Socio-Economic Review* (2010) 211, Dieter Grimm, The Constitution of European Democracy, Oxford, Oxford University Press, 2017, Susanne Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law*, Oxford University Press, 2018. For a less condemnatory account that nevertheless echoes some of these findings on the European 'economic constitution' and the place of social rights therein, see Miguel Poiares Maduro, We The Court. The European Court of Justice and the European Economic Constitution, Hart publishing, 1998, Miguel Poiares Maduro, 'The Double Constitutional Life of the Charter' in T Hervey et al, Economic and Social Rights Under the EU Charter of Fundamental Rights, Hart Publishing, 2003, p. 285.

[115] For an extensive discussion of this argument, see Sacha Garben, 'Posted Workers are Persons Too! – Posting and the Constitutional Democratic Question of Fair Mobility in the European Union', *Collected Courses of the Academy of European Law* (Oxford: Oxford University Press), in production.

Court of Justice in *Rush Portuguesa*[116] held the freedom to provide services to be applicable to the free movement of posted workers, it did so 'merely' to devise a way to work around the transition period in which after Portugal's accession the free movement of workers was not applicable to Portuguese workers, and that it did not intend to carve posted workers out of the definition, and thus rights, of EU migrant workers under the Treaty.[117] After all, there were so many indications in primary[118] and secondary law[119] that posted workers would – like any other workers[120] in the EU, whether they moved temporarily or not, resided or not, in the host State – be considered 'workers' within the sense of the Treaty and the attendant rights of equal treatment, that Advocate General Van Gerven considered it entirely self-evident.[121] It may also well be that the Member States

[116] Case C-113/89, *Rush Portuguesa,* ECLI:EU:C:1990:142.

[117] For the same supposition that the unfortunate exclusion of posted workers from the provisions on workers and their treatment under the services provision instead (with all aberrant consequences) was borne out of the Court's 'good intent' to find a solution to the transition period applicable to Portuguese workers in *Rush Portuguesa*, see Ales, 'Italy' in 2014. Italy, in M. Freedland and J. Prassl (eds.), *Viking, Laval and Beyond* (2014) 187. See also Lo Faro, 'Diritti sociali e libertà economiche del mercato interno: considerazioni minime in margine ai casi Viking e Laval' *Lavoro e Diritto* (2008) 63.

[118] Article 57 TFEU frames the services provisions as residual to those on the other freedoms: 'services shall be considered to be "services" within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons'.

[119] At the time, Regulation No 1612/68 provided in its preamble that 'the right of all workers in the Member States to pursue the activity of their choice within the Community should be affirmed ... without discrimination (as regards permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services'.

[120] As illustrated by seasonal and frontier workers, See for instance recently Case C-830/18, *Landkreis Südliche Weinstraße v PF and Others*, ECLI:EU:C:2020:275.

[121] Opinion of Mr Advocate General Van Gerven delivered on 7 March 1990, ECLI:EU:C:1990:107, paras 13 and 14: 'The most radical viewpoint in favour of the freedom to provide services is to be found in the observations of Rush. Rush submits in particular that the relevant provisions of the Act of Accession contain no single restriction on the recruitment and employment of Portuguese nationals by a supplier of services. It comes to this conclusion on the basis of the following reasoning. The presence in France of Rush employees has nothing to do with the application of Article 48 of the EEC Treaty: they did not look for work in France and have not entered the French labour market, seeing as they have a contract of employment in Portugal and, in the context of that employment, temporarily come to France in order to perform duties in the service of Rush, without however laying claim to the right to establish themselves for an indefinite period as workers in France. Moreover, their respective employment relationships remain strongly Portuguese in nature. They are paid and charged tax in Portugal and remain subject to the Portuguese social security scheme. From all those circumstances Rush concludes that its employees are not to be regarded as "workers" within the meaning of Regulation No 1612/68, with the result that the provisions contained in the Act of Accession with regard to Portuguese workers do not apply to them. This argument cannot be accepted. The Court has consistently stressed that the Community concept of a "worker" is very broad, and covers any national of a Member State who actually and genuinely performs work in another Member State. In that connection it does not matter whether that work is carried out in the service of an undertaking which is active in other Member States or in the service of an undertaking which is established in the Member State where the work is carried out. In accordance therewith the preamble to Regulation No 1612/68 provides that "the right of all workers in the Member States to pursue the activity of their choice within the Community should be affirmed ... without discrimination (as regards) permanent seasonal and frontier workers and by those who pursue their activities for the purpose of providing services". The rules

intended, with the original Posted Workers Directive adopted as a follow-up from *Rush Portuguesa*, to ensure that all host Member States would apply at least a core number of labour standards to posted workers. All of that being as it may, it is now – since *Finalarte*[122] and *Laval*[123] – seemingly[124] the position that posted workers are not considered 'workers' but instead are – as regards their working conditions – subject to/of their employer's right to free movement, and that EU primary law demands that they are *not* to be treated equally to national workers in EU secondary legislation.[125]

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laid down in Regulation No 1612/68 thus undoubtedly extend to protect workers of a supplier of services such as Rush. As I have said, however, the rules relating to the right of Portuguese workers to accept or carry on salaried employment in the territory of one of the "old" Member States have been restricted until 1993 by Article 216 of the Act of Accession'.

[122] Cases C-49/98 et seq, *Finalarte*, ECLI:EU:C:2001:564,

[123] Case C-341/05, *Laval un Partneri Ltd*, ECLI:EU:C:2007:809.

[124] Although it sometimes seems that the Court is not so sure about this exclusion. In *Kranemann*, the Court held 'temporary civil servants carrying out a traineeship who are posted abroad to a place of their choice' to be workers for the purposes of Article 45 TFEU. See Case C-109/04, *Kranemann*, ECLI:EU:C:2005:187. Moreover, in *Hudziński and Wawrzyniak*, the Court actually does refer to, and treat, a Polish posted worker in Germany as a 'migrant worker', and while it upholds the principle (as laid down in social security coordination Regulation 1408/71) that the home Member State is competent as regards child benefits, it also considers that where the host country provides the granting of the benefit to posted workers it may not apply a rule that excludes that benefit in case of a partial overlap with the benefit provided by the home Member State by application of 'the Treaty rules on the free movement of workers'. The Court notes in that respect that the national rule 'is not designed to avoid the costs and administrative complications which might arise for undertakings from other Member States posting workers in Germany as the result of a change in the applicable national legislation' as 'the benefit at issue in the main proceedings is granted without the undertakings which employ those workers being obliged to contribute to the financing of that benefit or having any administrative formalities imposed on them in that context'. See Joined Cases C-611/10 and C-612/10, ECLI:EU:C:2012:339. This suggests that posted workers are not workers within the meaning of the Treaty unless they bring a case themselves and their treatment as migrant workers is not to the financial or administrative disadvantage of their employer.

[125] Judgment of the Court (Grand Chamber) of 8 December 2020, Case C-620/18, *Hungary v Parliament and Council,* EU:C:2020:1001. Hungary challenged the Revised Posted Workers Directive arguing *inter alia* that it was disproportionate for the RPWD to require almost full application of the host Member State's employment laws in relation to postings exceeding 12 months. The Court replied that 'such rules in relation to a posting for a long period appear necessary, appropriate and proportionate, in order to ensure greater protection in relation to terms and conditions of employment for workers posted for a long period to a host Member State, while distinguishing the situation of those workers from that of workers who have exercised their right to freedom of movement or, more generally, that of workers who reside in that Member State and are employed by undertakings that are established there.' Similarly, in relation to Hungary's argument that, having regard to the fact that posting is temporary, 'the provisions of the contested directive, since their effect is to ensure posted workers equal treatment with workers employed by undertakings established in the host Member State, go beyond what is necessary to achieve the objective of protection of those posted workers', the Court considers that the RPWD's amendments do not 'have the consequence that those workers are placed in a situation that is identical to or analogous to the situation of workers who are employed by undertakings established in the host Member State' and 'do not entail the application of all the terms and conditions of employment of the host Member State, since only some of those terms and conditions are, in any event, applicable to those workers under Article 3(1) of the amended Directive 96/71'. While these statements could be interpreted as simply debunking Hungary's assertions without making any final judgement on what would happen if instead the full 'identical or analogous' treatment were required by a hypothetical directive, they do give the impression that the Court will not allow the EU legislator to 'correct' the Court's fundamental decision to exclude posted workers from the free movement of persons in EU law.

To the foregoing one may be tempted to reply: as problematic as the case law is from the perspective of the free movement of workers, as logical it is from the perspective of the freedom to provide services? Of course, as had been held since *Webb*,[126] limitations and double burdens imposed on service providers from another Member State because they use their staff (also from another Member State) are to be considered as *prima facie* restrictions of the freedom to provide services. The requirements in *Rush Portuguesa* (engagement *in situ* and obligatory work permits) would have qualified as such, and therefore we are in the scope of application of (now) Article 56 TFEU. But this application of Article 56 TFEU does not have to exclude the application of the free movement of workers: the posted worker could be entitled, in principle, to the same rights and advantages as national workers under Article 45 TFEU while their employer should not be subject to double burdens (like licensing, immigration formalities and the like). The application of Article 56 TFEU would quite naturally find its ally, not its enemy, in the application of Article 45 TFEU. This would also be supported by the fact that Article 57 TFEU frames the services provisions as residual to those on the other freedoms: 'services shall be considered to be "services" within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons'. It would thus seem that the issue of posted workers does not reveal an inherent conflict between the two freedoms, as there is a very reasonable way to do justice to both. It is only if Article 56 TFEU is interpreted (i) not to be residual to the free movement of persons (*contra* Article 57 TFEU), and (ii) to prohibit not just direct and indirect discrimination and market access restrictions, but to constitute a right to challenge any rule that makes economic activity less attractive,[127] that the two freedoms would come to bite each other, and that the protection of the one would become a restriction of the other.

[126] Case 279/80, *Criminal proceedings against Alfred John Webb*, ECLI:EU:C:1981:314.

[127] As Advocate General Tizzano emphasised in *CaixaBank France* that such an approach 'would be tantamount to bending the Treaty to a purpose for which it was not intended: that is to say, not in order to create an internal market in which conditions are similar to those of a single market and where operators can move freely, but in order to establish a market without rules. Or rather, a market in which rules are prohibited as a matter of principle, except for those necessary and proportionate to meeting imperative requirements in the public interest'. Opinion of Advocate General Tizzano delivered on 25 March 2004, Case C-442/02, *CaixaBank France* (ECLI:EU:C:2004:187) at point 63. See also Opinion of Advocate General Tesauro in Case C-292/92 *Hünermund and Others* (ECLI:EU:C:1993:863) points 1 and 28, and Opinion of Advocate General Wahl delivered on 5 September 2013, Joined Cases C-159/12, C-160/12 and C-161/12, *Alessandra Venturini v ASL Varese and Others Maria Rosa Gramegna v ASL Lodi and Others and Anna Muzzio v ASL Pavia and Others* (ECLI:EU:C:2013:529). The Advocates General take issue especially with the idea to allow also national operators to challenge national rules, but the argument applies with similar force to the challenging by foreign companies of indistinctly applicable rules that furthermore affect market access in the same way for foreign or domestic operators. The Court of Justice, however, has not heeded these concerns.

3.3.2. The Relationship between Economic Freedoms and Fundamental Social Rights

A) Internal Market Rights and Fundamental Social Rights

The abovementioned *Laval* judgment not only pertained to the specific issue of posted work, but also to the application of companies' internal market freedoms (especially services and establishment) to the fundamental rights of workers to take collective action and strike. Together with the *Viking* ruling,[128] this marked a new and highly problematic chapter in the relationship between the internal market provisions and fundamental (social) rights, where the exercise of the latter was seen as an 'exception' to the former, that therefore had to be justified and – within that analytical framework of rule vs exception – strictly interpreted. The approach met with forceful and convincing criticism from a range of authoritative EU scholars,[129] and was condemned by the International Labour Organisation and Council of Europe.[130] This issue having been treated at length in scholarship and debate, it will not be dealt with in further detail in this Institutional Report, except to note an important recent development: in the *Holship* judgment of 10 June 2021,[131] the European Court of Human Rights explicitly stated that from the perspective of Article 11 of the ECHR, the freedom of establishment is not a counterbalancing fundamental right to the freedom of association but rather one element to be taken into consideration in the assessment of proportionality under Article 11(2) ECHR.[132] The ECtHR thus takes the opposite approach from the CJEU, and places the freedom of association at a higher footing that the freedom of establishment.

[128] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* EU:C:2007:772.

[129] See, for instance, T Novitz, 'The EU and the Right to Strike' (2016) 27(1) King's Law Journal 46; C Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' (2014) 67 Current Legal Problems 199; S Weatherill, 'From Economic Rights to Fundamental Rights', in: S De Vries, U Bernitz and S Weatherill (eds.), The Protection of Fundamental Rights in the EU after Lisbon (Hart: Studies of the Oxford Institute of European and Comparative Law 2013), 26 – 28; C Joerges and F Rodl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval' (2009) 15 ELJ 1; A Davies, 'One Step Forward, Two Steps back? The Viking and Laval cases in the ECJ' (2008) 37 ILJ 126.

[130] See on this issue generally T Novitz, 'The Internationally Recognized Right: A Past, Present, and Future Basis upon Which to Evaluate Remedies for Unlawful Collective Action?' (2014) International Journal of Comparative Labour Law 357; M Rocca, 'Enemy at the (Flood) Gates: EU "Exceptionalism" in Recent Tensions with the International Protection of Social Rights' (2017) 7 European Labour Law Journal 64; S Garben, 'The Problematic Interaction between EU and International Law in the Area of Social Rights' (2018) 7 (1) Cambridge International Law Journal 77.

[131] Application no. 45487/17.

[132] For comment see Hans Petter Graver, The Demise of Viking and Laval, Verfassungsblog, https://verfassungsblog.de/holship/ and Hilde Ellingsen, 'Reconciling Fundamental Social Rights and Economic Freedoms: The ECtHR's ruling in LO and NTF v. Norway (the Holship case)' Common Market Law Review Volume 59, Issue 2 (2022) pp. 583 – 604.

It remains to be seen whether the Court of Justice will in the future amend (or 'soften'[133]) its approach to conform to the case law of the ECHR on this issue, or not.

B) The Freedom to Conduct a Business and Fundamental Social Rights

Article 16 EU Charter provides: 'The freedom to conduct a business in accordance with Community law and national laws and practices is recognised'. The wording indicates that this freedom is inherently relative and can be limited by both regulations and practices, suggesting it is one of the 'weaker'[134] rights in the EU Charter.[135] It is considered to be 'one of the less traditional rights',[136] not generally protected in international human rights instruments. The freedom to conduct a business under Article 16 EU Charter is drawn from the Court's case law and the constitutional traditions common to Member States. It is not traditionally universally present in the national constitutional law of the Member States, with many having only recognized versions this right very recently and some not as a(n enforceable) constitutional right at all.[137] Where the freedom to conduct a business is recognized in national constitutional law, it tends to allow a relatively wide scope of limitation in the public interest and it is generally conceived as a right of individuals to set up an economic activity or join a profession rather than concerning the general exercise of economic activity.[138] As Groussot *et al* state, '[t]hey have in common that they do not constitute unfettered prerogatives and must thus be viewed in the light of their social function'.[139]

To what end and extent does national constitutional law protect this individual autonomy against majoritarian decision-making? The EU Fundamental Rights Agency considers that the 'freedom to conduct a business is about enabling individual aspirations and expression to flourish, about encouraging entrepreneurship and innovation, and about social and economic development'[140]. Applying an approach of democracy and constitutionalism to the purpose of fundamental rights,[141] the freedom to conduct a business has a

[133] Hilde Ellingsen, *op cit*.

[134] X Groussot et al, 'Weak right, strong Court – The freedom to conduct business and the EU charter of fundamental rights' in S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing, 2017) 326-344.

[135] Groussout et al, above.

[136] European Union Agency for Fundamental Rights, 'Freedom to conduct a business: exploring the dimensions of a fundamental right' (2015) Luxembourg, Publications Office of the European Union.

[137] For an overview, see European Union Agency for Fundamental Rights, above n 79.

[138] ibid.

[139] Groussot et al, above.

[140] European Union Agency for Fundamental Rights, op cit.

[141] See further, Sacha Garben, 'The 'Fundamental Freedoms' and (Other) Fundamental Rights: Towards an Integrated Democratic Interpretation Framework' in Sacha Garben and Inge Govaere (Eds.), *The Internal Market 2.0,* Bloomsbury Hart Publishing, 2020, also available as a College of Europe research Paper, No 1, 2021, at: https://www.coleurope.eu/sites/default/files/research-paper/researchpaper_1_2021_sacha_garben.pdf.

certain role in ensuring a robust democracy, to the extent that it helps to empower individuals – especially those who are disadvantaged – through economic activity, to prevent concentrations of (economic) power and equalize societal asymmetries. This would suggest a reading where the right is about fostering the possibility of individual entrepreneurship, in the sense of enabling citizens to set up an economic activity or join a profession, within a broader picture of creating more socio-economic progress and equality in society. This human right would not upon such a constitutional democratic reading provide a 'sword' for companies in the operation of their business against workers, citizens and general public interest standards – that would be a perverse result.

Contrary to these considerations, however, over the past decade the Court has given a markedly forceful interpretation of the freedom to conduct a business in Article 16 EU Charter. First of all, the right has been used in the context of the controversial cases on religious head-coverings. In *Achbita*,[142] the Court considered that 'an employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers'[143] accepting it as objectively justification for an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace. Despite criticism,[144] the Court confirmed its approach to the issue in *IX/WABE*.[145] Even though in the latter judgment the Court puts some emphasis on the need to establish economic loss suffered by the employer,[146] and even if this case law leaves a degree of discretion to the national level to provide a different outcome, the wide interpretation of the potential scope of Article 16 (affecting the attractiveness of economic activity generally) stands (out).

In *Alemo-Herron*,[147] a judgment that according to Stephen Weatherill deserves to be 'consigned to the bottom of an icy lake'[148], the Court used Article

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[142] Case C-157/15, *Achbita*, EU:C:2017:203. A judgment from the same day came to a different conclusion in a case that involved not a generally applicable internal rule but instead 'the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf': Case C-188/15, *Bougnaoui*, EU:C:2017:204.

[143] Paragraph 38.

[144] E. Howard, 'Islamic headscarves and the CJEU: Achbita and Bougnaoui', *Maastricht Journal of European and Comparative Law*, 2017, vol. 24(3), pp. 348 to 366, E. Cloots, 'Safe harbour or open sea for corporate headscarf bans? Achbita and Bougnaoui', *Common Market Law Review*, vol. 55, 2018, pp. 589 to 624, Joseph Weiler, 'Je suis Achbita: à propos d'un arrêt de la Cour de justice de l'Union européenne sur le hijab musulman (CJUE 14 mars 2017, aff. C-157/15)', *Revue trimestrielle de droit européen*, 2019, pp. 85 to 104.

[145] Joined Cases C-804/18 and C-341/19, EU:C:2021:594.

[146] Paragraph 85.

[147] Case C-426/11 *Mark Alemo-Herron and others v Parkwood Leisure Ltd* EU:C:2013:521.

[148] S Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of "freedom of contract"' (2014) 10 *European Review of Contract Law* 167.

16 to read a minimum harmonization Directive adopted on an internal market basis but intended to protect the interests of workers in the event of a transfer of undertakings in a way that it precluded a Member State from providing, in the event of a transfer of an undertaking, that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee. The judgment has been widely criticized on a variety of grounds.[149] Particularly interesting for our purposes, is – firstly – that Article 16 was given an interpretation that goes very much in the direction advocated by Andrea Usai, namely that it should be used to 'push the throttle in favour of an even more developed economic union' by allowing the right to conduct business to be used as a 'safeguard against barriers that the member states may want to put up in the internal market' even in purely internal situations.[150] Secondly, the various fundamental social rights that would be relevant to the case, and that should at least have been used to balance Article 16 EU Charter, such as Article 28 EU Charter on collective bargaining and Article 31 EU Charter on fair and just working conditions. Similarly, in *AGET*,[151] the relevant fundamental social right in Article 30 EU Charter on protection against unjustified dismissal gets a brief mention in passing,[152] while Article 16 EU Charter is actively drawn into the assessment of a restriction of the freedom of establishment. The latter judgment deploys a language more cognizant of the need for public interest restrictions of Article 16 EU Charter, but the asymmetry in the treatment of economic fundamental rights and fundamental social rights is striking, as is the conflation of the freedom of establishment and the freedom to conduct a business.

[149] Ibid; X Groussot, GT Pétursson and J Pierce, 'Weak Right, Strong Court – The Freedom to Conduct Business and the EU Charter of Fundamental Rights' (2014) *Lund University Legal Research Paper* 01/201; J Prassl, 'Freedom of contract as a general principle of EU law? Transfers of undertakings and the protection of employer rights in EU labour law' (2013) 42 *Industrial Law Journal* 434; P Syrpis and T Novitz, 'The EU Internal Market and Domestic Labour Law: Looking Beyond Autonomy' in A Bogg et al (eds), *The Autonomy of Labour Law* (Hart, 2015); M Bartl and C Leone, 'Minimum Harmonisation after Alemo-Herron: The Janus Face of EU Fundamental Rights Review' (2015) 11/1 *European Constitutional Law Review* 140-154.

[150] A Usai, 'The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order' (2013) 14 *German Law Journal* 1871 ff. For discussion see E Gill-Pedro, 'Freedom to conduct a business in EU law: freedom from interference or freedom of domination?' (2017) 9/2 *European Journal of Legal Studies* 103.

[151] Case C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* EU:C:2016:972.

[152] Art 30 is mentioned once, almost as an afterthought, to indicate that Art 16 may be limited, but is not made an integral, let alone equal, part of any 'balancing'. Para 89 of the judgment.

4. Conclusion

As the EU matures further into a constitutional order, it is natural that the social dimension becomes more firmly entrenched both in the hierarchy of its norms and values and throughout the breadth of its exercise of authority. That constitutional maturation will require the fundamental question of the meaning, status and relationship of its social rights and its economic freedoms to be worked out more clearly and more satisfactorily. In this respect, EU primary law does more than adding social objectives to the long list of Union policy areas; it includes solidarity and equality in its core values,[153] socially 'conditions'[154] the internal market as working for 'the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress'[155], and requires the EU to '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, and a high level of education' in the definition and implementation of all its policies and activities.[156] Together with the many social rights and principles enshrined in the EU Charter of Fundamental Rights – which in accordance with Article 52(3) are to be interpreted in meaning and scope in the same way as corresponding rights guaranteed by the ECHR, and which are given concrete expression in the EU social *acquis*, recently boosted by the European Pillar of Social Rights – this means that European Social Union is no longer a question (if it ever was) but part of the EU's constitutional identity, and furthermore crucial for that identity to resonate with European citizens. It could be posited, then, that 'Achieving Social Europe'[157] is the only viable way to Achieving European Union.

[153] Article 2 TEU

[154] Dagmar Schiek, 'Towards More Resilience for a Social EU – the Constitutionally Conditioned Internal Market' (2017) 13(4) *European Constitutional Law Review* 611-640.

[155] Article 3(3) TEU

[156] Article 9 TFEU

[157] Chapter 7 of the questionnaire.

NATIONAL REPORTS

AUSTRIA

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Question 1.a.

Given the direct applicability of Article 45 TFEU and Regulation (EU) No 492/2011, the equal treatment of EU mobile workers is enshrined in Austrian law without the need for any further legislation. Furthermore, under Section 7 of the Labour Contract Law Amendment Act[1], workers who exercise their right to freedom of movement may not have their employment terminated, be dismissed or otherwise discriminated against as a consequence of making a complaint or bringing legal proceedings. In general, national legislation and courts are aware of the right to equal treatment. According to the case law of the Austrian Supreme Court, there is no reason to assume that national judges do not fully comply with the concept of equal treatment and EU workers' rights. This is supported by the high number of preliminary hearings by the CJEU concerning Austrian cases.[2] Nevertheless, freedom of movement is also seen as a challenge for the Austrian labour market.[3] For this reason, access to the Austrian labour market was restricted for Croatian workers until July 2020.

Question 1.b.

EU workers and economically inactive citizens are treated differently by law in Austria. Pursuant to Section 51 of the Settlement and Residence Act[4], EU workers and the self-employed have the right to work and live in Austria without having to satisfy further requirements, whereas economically inactive EU citizens need to have adequate means of subsistence and sufficient health insurance coverage. Furthermore, Austrian case law states that economically inactive EU citizens may only access social assistance benefits if they meet the requirements laid down in Section 51 of the Settlement and Residence Act.[5]

[1] Arbeitsvertragsrechts-Anpassungsgesetz AVRAG, Federal Gazette No. 1993/459.

[2] Recently e.g. Judgment of 5 December 2013, *SALK*, C-514/12, EU:C:2013:799; Judgment of 13 March 2019, *EurothermenResort*, C-437/17, EU:C:2019:193; Judgment of 10 October 2019, *Krah*, C-703/17, EU:C:2019:850; Judgment of 25 November 2021, *job medium*, C-233/20, EU:C:2021:960; see also <https://www.ogh.gv.at/entscheidungen/vorabentscheidungsersuchen-eugh/>.

[3] Die Presse, 'Arbeitnehmerfreizügigkeit: Beschränkungen für Kroatien bis 2020', <https://www.diepresse.com/5449974/arbeitnehmerfreizuegigkeit-beschraenkungen-fuer-kroatien-bis-2020>, visited 11 August 2022.

[4] § 51 Niederlassungs- und Aufenthaltsgesetz NAG (Settlement and Residence Act), Federal Gazette No 2005/100.

[5] E. Brameshuber Kohlbacher, 'Old age benefits and social assistance', *Rivista del Diritto della Sicurezza Sociale* 2016, 289.

Question 2.a.

Economically inactive EU citizens are required to have adequate means of subsistence and sufficient health insurance coverage, so that they do not have to claim social welfare benefits or supplements intended to augment a low retirement pension during their period of residence in the host Member State.[6]

The Austrian case law on this subject can be considered rather restrictive since those exercising their right to freedom of movement and residence should not do so in order to access social benefits elsewhere; there should be no "poverty migration".[7] In its judgment in *Brey*[8], the CJEU ruled that pensioners from other Member States do not have the right to claim a compensatory supplement intended to augment a retirement pension if they move to Austria and do not have sufficient resources to support themselves so as not to become a burden on the social assistance system.[9] In its recent case law, the Austrian Supreme Court created a difference between legal residence relevant under residence law and legal residence relevant under social law. Even if an economically inactive EU citizen has registered with the relevant authority and subsequently been issued a document attesting to his/her right of residence under Directive 2004/38/EC (e.g. because the person presented a savings book as proof that he/she has sufficient financial resources to support himself/herself), the citizen in question is not automatically considered to be legally resident for the purposes of social law as this would enable him/her to claim a compensatory supplement.[10] This case law was criticized by academics because in the individual case the existing financial allowances were not taken into account accordingly and the national case law departs too far from that of the CJEU.[11]

Question 2.b.

In 2018, Austria introduced a mechanism enabling it to adjust the family allowance paid to workers whose children permanently reside in another Member State; this was done under the guise of ensuring conformity with Union law.[12] It was argued

[6] § 51 NAG; see also E. Brameshuber Kohlbacher, 'Old age benefits and social assistance', *Rivista del Diritto della Sicurezza Sociale* 2016, 289.

[7] OGH 10 May 2016, 10 ObS 15/16b, para 7.

[8] Judgment of 19 September 2013, *Brey*, C-140/12, EU:C:2013:565.

[9] OGH 19 July 2016, 10 ObS 31/16f; OGH 10 May 2016, 10 ObS 15/16b; OGH 13.09.2021, 10 ObS 53/21y.

[10] OGH 20 February 2018, 10 ObS 160/17b; OGH 23 October 2018, 10 ObS 106/18p; OGH 26.02.2021, 10 ObS 110/20d; B. Spiegel, 'Neue Wege zur existenzsichernden Sozialleistungen für nicht erwerbstätige Unionsbürger:innen', *DRdA* 2022, 209.

[11] J. Peyrl, 'Zur Möglichkeit des Ausschlusses von aufenthaltsberechtigten UnionsbürgerInnen vom Bezug der Ausgleichzulage', *DRdA* 2021, 496; F. Gamper & F. Markovic, 'Ausgleichszulage und rechtmäßiger Aufenthalt – Ein Bericht aus der täglichen Beratungs- und Vertretungspraxis', *DRdA-infas* 2022, 51.

[12] Erläut RV 111 BGBl I 2018/83, <https://www.ris.bka.gv.at/eli/bgbl/I/2018/83> visited 21 August 2022.

that if the family allowance is not indexed to bring it into line with the purchasing power of people living in the state in which the child resides, it will lead to either unnecessary over-subsidisation or under-subsidisation (if the general public in the country of residence has a higher purchasing power), which would be contrary to the principle of free movement. However, the adjustment of amounts based on price levels was strongly criticised in academia.[13] In this regard, it was argued that Article 67 of Regulation (EC) No 883/2004 clearly states that a person is entitled to family benefits in accordance with the legislation of the competent Member State, including for his family members residing in another Member State, as if they were residing in the former Member State.[14]

In the opinion of the Advocate General *de la Tour*[15] and according to the judgment of the CJEU[16], making a family allowance subject to indexation is in conflict with the relevant provisions of Regulation (EC) No 883/2004 and Regulation (EU) No 492/2011. In the wake of the CJEU judgment, the Austrian Parliament amended the respective national legislation.[17] In those cases where the family allowance was lower than it should have been, subsequent payments will be made. However, if the family allowance paid out was higher than it should have been, the excess will not be recovered. Yet, members of the political parties whose coalition government introduced the adjustment mechanism continue to argue that it would be fairer to change the rule on the place of residence.[18] Besides that, the CJEU judgment is accepted within Austrian politics. The current Social Affairs Minister welcomed the judgment, claiming it would be beneficial to the labour market. This clarification would make Austria more attractive again as a workplace for urgently needed skilled workers not only in the health and care sector, but also in other sectors.[19]

[13] F. Marhold & C. Ludvik, 'Dürfen die Behörden die Indexierung der Familienleistung anwenden? Unionsrechtlicher Anwendungsvorrang und Vorlagerecht bzw –pflicht', ASoK 2018, 202; F. Marhold & C. Ludvik, 'Thoughts About Indexing Family Benefits: Are authorities permitted to apply the Austrian indexation of family benefits? The primacy of EU law and the/obligation to request a ruling from the Court of Justice of the European Union', EJSS 2020, 273-286; S. Mayr, 'Quod licet Iovi, non licet bovi? Die Indexierung der Familienbeihilfe aus unionsrechtlicher Sicht', ZÖR 2018, 317.

[14] F. Marhold & C. Ludvik, 'Dürfen die Behörden die Indexierung der Familienleistung anwenden? Unionsrechtlicher Anwendungsvorrang und Vorlagerecht bzw –pflicht', *ASoK* 2018, 202 (203).

[15] Opinion of the Advocate General Richard de la Tour, C-328/20, EU:C:2022:45.

[16] Judgment of 16 June 2022, *Commission/Austria*, C-328/20, EU:C:2022:468.

[17] Federal Gazette No. 2022/135.

[18] Parliamentary Correspondence No 807 of 30.6.2022, <https://www.parlament.gv.at/PAKT/PR/JAHR_2022/PK0807/index.shtml>, visited 11 August 2022.

[19] Salzburger Nachrichten, 'Indexierung der Familienbeihilfe in Österreich rechtswidrig', <https://www.sn.at/politik/innenpolitik/indexierung-der-familienbeihilfe-in-oesterreich-rechtswidrig-122861860>, visited 11 August 2022.

Question 3.a.

In 2021, around 3.8 million people were working in Austria.[20] Out of a total of 924,000 foreign workers in Austria, around 557,000 were from other EU Member States.[21] Thus, workers from the EU accounted for about 14% of the labour force in Austria. Although no exact figure exists for the distribution of EU workers across different sectors, foreign workers (both EU and non-EU) mostly work in the following sectors: manufacturing/production of goods (141,000); wholesale and retail trade (128,000); and hotels and restaurants (111,000). Occupations suffering from a shortage of workers, as promulgated in the relevant ordinance, can be found in the construction industry (engineers, carpenters, bricklayers, painters, etc.), as well as the medical field (physicians, healthcare assistants) and the hospitality sector (waiters/waitresses, restaurant chefs).[22]

Question 3.b.

In Austria, restrictions affecting the right to freedom of movement are not discussed in light of the concept of 'fair movement'. However, when it comes to access to the Austrian labour market for third country nationals, restrictions are generally considered necessary. Migration from third countries is heavily regulated. Third country nationals need a residence permit if they plan to stay longer than six months in Austria. To obtain a work permit, third country nationals need to apply for a Red-White-Red Card.[23] To be granted a work permit, different factors are considered such as higher education qualifications (e.g. university degree), skills in shortage occupations, language aptitude, and age. Due to the shortage of skilled workers, access to the Red-White-Red Card for workers from third countries was recently further facilitated.[24]

Question 3.c.

The COVID-19 pandemic made the shortage of essential workers in critical occupations, such as health care and farming, more visible. Austrian agriculture relies heavily on Eastern European workers to bring in the harvest. Restrictions on freedom of movement, such as those introduced in the winter of 2020, led

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[20] Österreichische Sozialversicherung, 'Beschäftige in Österreich', <https://www.sozialversicherung.at/cds content/?contentid=10007.821590&portal=svportal>, visited 11 August 2022 (Table 2).

[21] Österreichische Sozialversicherung, 'Beschäftige in Österreich', <https://www.sozialversicherung.at/cds content/?contentid=10007.821590&portal=svportal>, visited 11 August 2022 (Table 27, 29).

[22] FachkräfteVO (Shortage Occupation Ordinance), Federal Gazette II No 2021/573.

[23] § 41 NAG.

[24] Federal Gazette I No 2022/106; see also the request to include French, Spanish and Bosnian, Croatian or Serbian language skill in the assessment, IA 3158/A XXVII. GP)

to temporary shortages of harvest workers[25] and personal carers[26]. After having learnt from the first year of the pandemic, exemptions from restrictions on freedom of movement were provided for essential workers in critical occupations. Apart from specific adjustments regarding access to certain professions, there has been no further discussion in Austria of whether the free movement of workers should be reassessed.

Question 4.a. & 4.b. & 4.c.

"Brain drain" exists in Austria especially among the highly educated.[27] Across university graduates, the highest departure rates are found among doctoral graduates (22%) and Master's graduates (20%). In particular, graduates in the natural sciences, mathematics, statistics, as well as medicine and the social sciences, are more likely to leave Austria after graduation.[28] Nevertheless, the population in Austria is growing due to migration. In 2021, half of the population gain was attributable to people coming to Austria from the EU or EFTA.[29]

Due to proximity, the same language, and different entry exams, many German students come to Austria to study medicine. In 2006, Austria put a quota system in place to restrict access to its higher education system for those who completed their secondary education in other EU Member States but wish to study medicine and dentistry in Austria: 75% of places on such courses are reserved for applicants who completed their secondary education in Austria, 20% for other EU students, and the remaining 5% for students from third countries.[30] Following a long infringement procedure, the Commission considers the measures taken to restrict students from other Member States from accessing courses in medicine at Austrian universities as necessary to protect the Austrian health care system.

[25] Kurier, 'Coronavirus: 5.000 Erntehelfer fehlen, Versorgung gefährdet', <https://kurier.at/chronik/oesterreich/erntehelfer-fehlen-versorgungssicherheit-gefaehrdet/400786721>, visited 11 August 2022.

[26] ORF, 'Maßnahmen gegen Mangel bei 24-Stunden-Pflege, <https://ooe.orf.at/stories/3042403/>, visited 11 August 2022.

[27] Wiener Zeitung, 'Österreich macht es uns unnötig schwer', https://www.wienerzeitung.at/nachrichten/politik/oesterreich/945537-Oesterreich-macht-es-uns-unnoetig-schwer.html, visited 12 August 2022; Der Standard, 'Hochqualifizierte verlassen das Land', <https://www.diepresse.com/1576758/hochqualifizierte-verlassen-das-land>, visited 11 August 2022; Der Standard, 'Die Abwanderung österreichischer Forschungstalente', <https://www.derstandard.at/story/2000073977316/die-abwanderung-oesterreichischer-talente>, visited 11 August 2022.

[28] Statistik Austria, 'Bildung in Zahlen 2020/21', <https://www.statistik.at/services/tools/services/publikationen/detail/1254?cHash=2c47052f167671e421a5240ef028fd25>, visited 11 August 2022.

[29] Statistik Austria, Bevölkerung zu Jahres-/Quartalsanfang (1.1.2022); <https://www.statistik.at/statistiken/bevoelkerung-und-soziales/bevoelkerung/bevoelkerungsstand/bevoelkerung-zu-jahres-/-quartalsanfang>, visited 11 August 2022

[30] Press release form the Commssion from 17 May 2017, 'Free Movement of student: Commission closes infringement case against Austria', <https://ec.europa.eu/commission/presscorner/detail/en/ip_17_1282>, visited 11 August 2022.

Statistics show that 77% of German graduates leave Austria within three years of graduation, whereas only 8% of Austrian graduates subsequently move to a different country.[31] Further, the Austrian Constitutional Court is of the view that the quota system currently in place is in keeping with the case law of the CJEU[32] and Article 21 of the CFR since the provision serves to protect public health from an actual risk and that this measure is to be regarded as suitable, necessary and appropriate to guarantee health care in Austria.[33]

Since 2021, the University Act (*Universitätsgesetz*)[34] allows the Austrian provinces to reserve 5% of all places on medicine courses for those who promise to work as a panel doctor. This ensures that the students awarded a place on a medicine course will actually go on to perform tasks that are in the public interest. Additionally, the social insurance agency also provides for scholarships during the studies, if the student is willing to work as panel doctor for five years.[35] Apart from those limitations regarding studying medicine at university, no other restrictions are evident. Nevertheless, the discussion on further requirements for medicine graduates, such as an obligation to work as panel doctor for some time, is being held again.[36] Any legislative solution will need to comply with existing CJEU case law.[37]

Question 5.a.

The Posting of Workers Directive (Directive (EU) 2018/957) was transposed into national law by the Austrian Anti-Wage and Social Dumping Act.[38] Pursuant to Section 3 para. 3 of the aforementioned Act, workers posted to Austria to perform work are mandatorily entitled, without prejudice to the law governing the employment relationship, to at least the remuneration laid down by statute or ordinance, or the remuneration fixed under a collective agreement. In Austria, pay is typically determined by collective agreement. Since 98% of all employment relationships are covered by collective agreements and social partners have

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[31] Der Standard, 'Drei Viertel der deutschen Medizinabsolventen verlassen nach dem Studium Österreich', <https://www.derstandard.at/story/2000135662891/drei-viertel-der-deutschen-medizinabsolventen-verlassen-nach-dem-studium-oesterreich≥, visited 11 August 2022.

[32] Judgement of 7 July 2005, *Commission/Austria*, C-147/03, EU:C:2005:427.

[33] VfSlg 19955/2015 vom 05.03.2015.

[34] § 71c (5a) Universitätsgesetz 2002 (University Act), Federal Gazette No 2002/120.

[35] ÖGK, 'ÖGK startet Stipendium für Medizin', <https://www.gesundheitskasse.at/cdscontent/?contentid=10007.890087&portal=oegkportal>, visited 27 March 2023.

[36] Der Standard, 'Grüne sind gegen eine Arbeitsverpflichtung für Medizinabsolventen', <https://www.derstandard.at/story/2000144435585/arbeitsverpflichtung-fuer-medizinabsolventen-ist-bei-aerztemangel-rechtlich-moeglich> , visited 27 March 2023.

[37] Judgement of 20 December 2017, *Simma Federspiel,* C-419/16, EU:C:2017:997.

[38] LSD-BG, Federal Law Gazette No. 2021/174; see also D. Niksova, 'Novelle des Lohn- und Sozialdumping-Bekämpfungsgesetztes 2021 (Teil I)', *ZAS* 2021/49, 272; E. Felten, 'Neue Entwicklungen im Entsenderecht am Beispiel der LSD-BG-Novelle 2021', *in* S. Auer-Mayer et.al. (Eds.), *Festschrift Walter J. Pfeil*, Vienna, Manz, 2021, 23.

considerable bargaining power, posted workers are legally entitled to equal pay.[39] Nevertheless, fraud regularly takes place regarding the underpayment of posted workers or non-compliance with social security regulations.[40]

Exceptions to its scope of application are provided for in Section 1 paras. 5 to 8 of the Anti-Wage and Social Dumping Act. For instance, the Act does not apply if the worker is posted to Austria exclusively to perform small, temporary tasks such as attending business meetings, seminars or conferences, for training purposes, or to perform at cultural events, i.e. in the fields of music, dance, theatre, etc. Moreover, the Act is not applicable to mobile workers performing cross-border transportation if the work is performed exclusively in the context of transit traffic. Wage dumping is most problematic in the construction, hospitality, retail, and transportation sectors.[41]

Question 5.b.

Since Austria can be considered one of the high-wage countries, no case similar to the case *Team Power Europe*[42] has come before the national courts. According to Austrian case law (which is not always consistent[43]), a number of factors are relevant when assessing actual temporary agency work.[44] The evaluation must take into account whether the remuneration for the service also depended on the quality of the services rendered, who bears the consequences of non-contractual performance of the stipulated service, i.e. whether a success "suitable for warranty" had been agreed upon, who determined the number of employed workers and from whom they received precise and individual instructions for the performance of their work.

Question 6.a.

So far, freedom of establishment or the right to conduct a business have not been used successfully to challenge national or Union social law in national courts. There were cases where a claimant unsuccessfully tried to use the right to conduct a business to challenge a compensation payment for age discrimination

[39] OECD, 'Collective Bargaining Coverage', <https://stats.oecd.org/Index.aspx?DataSetCode=CBC>, visited 12 August 2022

[40] Kurier, 'Betrug bei Entsendung ausländischer Arbeitskräfte', <https://kurier.at/wirtschaft/betrug-bei-entsendung-auslaendischer-arbeitskraefte-nach-oesterreich/402055009>, visited 11 August 2022.

[41] A. Riesenfelder, 'Lohn- und Sozialdumping bleibt ein Problem – besonders für die Baubranche' <https://awblog.at/lohn-und-sozialdumping-problem-baubranche/>, visited 11 August 2022.

[42] Judgment of 3 June 2021, *Team Power Europe*, C-784/19, EU:C:2021:427.

[43] R. Schindler *in* M. Neumayr & G. Reissner, ZellKomm (Eds.), 3rd ed, Vienna, Manz, 2018, § 16a AÜG par 14.

[44] VwGH 06 September 2016 Ra 2016/11/0110.

committed by the former public entity, which is now a private legal entity following privatisation.[45] However, the freedom to provide services has been used to challenge national law. In the cases *Cepelnik*[46] and *Maksimovic*[47], the freedom to provide services was successfully used to challenge Austrian law, whereas in the case *Dobersberger*[48] the CJEU did not refer to the freedom to provide services in its judgment.

Question 6.b.

The Austrian legal system does not provide for a statutory right to strike. In the absence of specific cases, no case law has developed. Because of the high level of collective bargaining, strikes rarely take place in Austria. In 2020, each worker was statistically on strike for 0.5 minutes.[49] Hence, Austrian industrial action law is purely discussed within academia.[50] Until recently, the prevailing doctrine assumed that there is no suspension of contractual obligations during a strike and that a dismissal can therefore be justified.

The Austrian discussion on the right to strike was revived when the Lisbon Treaty and CFR entered into force. In the literature, it is considered possible that the national courts could use Article 28 CFR as the basis for interpreting the Austrian provisions, especially the right to dismissal. Furthermore, it is widely acknowledged that Article 11 ECHR in line with the Strasbourg Court's case law establishes a fundamental right to strike. Since the ECHR has the rank of constitutional law in Austria, the prevailing doctrine nowadays is that participation in a lawful strike (note, however, that there is still some discussion as to when a strike is lawful) must not lead to dismissal by the employer. The change in values brought about, *inter alia*, by the recognition of the fundamental right to collective action in the CFR and the ECtHR's case law since 2008 should be taken into account when assessing the individual employment contract situation in the course of an industrial dispute. During industrial action, the employee's obligation to provide labour and the employer's obligation to pay remuneration is suspended, according to the prevailing doctrine. Hence, any dismissal on the grounds of participation in a strike would be unlawful. If a strike is considered lawful, the contractual obligations are suspended, which is why the constituent element of the breach of duty to refrain from providing

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[45] OGH 26 February 2020, 9 ObA 146/19i; OGH 27 February 2020, 8 ObA 79/19d.

[46] Judgment of 13 November 2018, *Cepelnik,* C-33/17, EU:C:2018:896.

[47] Judgment of 12 September 2019, *Maksimovic,* C-64/18, EU:C:2019:723.

[48] Judgment of 19 December 2019, *Dobersberger,* C-16/18, EU:C:2019:1110.

[49] WKO Statistik, 'Streik in Österreich', <https://wko.at/statistik/Extranet/Langzeit/Lang-Streiks.pdf>, visited 11.8.2022.

[50] E. Kohlbacher, *Streikrecht und Europarecht*, Wien, Linde, 2014, pp 72-93.

the service or the persistent refusal to provide the services owed is already not fulfilled. Workers who are nevertheless unlawfully dismissed may invoke the fundamental right to collective action.[51]

Question 7.a.

Council Directive 2000/43/EC and Council Directive 2000/78/EC were transposed into national law first and foremost by the Equal Treatment Act (*Gleichbehandlungsgesetz*)[52] and the Disabled Persons Employment Act (*Behinderteneinstellungsgesetz*)[53]. Regarding religious clothing, the Austrian Supreme Court had already decided prior to the *Achbita*[54] case that wearing a veil covering the face can hinder communication and interaction and thus not covering the face with a veil may be an essential and decisive professional requirement. Hence, the case law of the CJEU regarding religious clothing and neutrality policies had no significant impact on national law.

However, the case *Cresco Investigation*[55] led to legislative changes. The CJEU stated that a law under which Good Friday is only a public holiday for employees who are members of certain Christian churches constitutes direct discrimination on the grounds of religion. As a result, the Austrian legislator repealed the provision and, therefore, Good Friday is a public holiday not just for certain groups; every employee, regardless of his/her respective religious denomination, can take a so called "personal holiday".[56]

The right to reasonable accommodation in Article 5 of Council Directive 2000/78/EC was transposed into national law by Section 6 of the Disabled Persons Employment Act, resulting in an increased duty of care owed by the employer to disabled employees to employ them according to their health status. Austrian case law affirms in principle an obligation of the employer to assign other work, but it is limited to the activities agreed upon in the employment contract.[57] The employer is under no obligation to continue to employ a person outside the contractually agreed work if for health reasons the person is no longer able to perform his or her contractually agreed work. However, considering the recent case law of the CJEU[58], the examination of reasonable measures must be carried out on the basis of the area of activity

[51] E. Kohlbacher, *Streikrecht und Europarecht*, Wien, Linde, 2014, pp 389-391.
[52] GlBG, Federal Gazette No. 2004/66.
[53] BEinstG, Federal Gazette No. 1970/22.
[54] Judgment of 14 March 2017, *Achbita*, C-157/15, EU:C:2017:203.
[55] Judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43.
[56] C. Wiesinger, 'Der persönliche Feiertag', *ZAS* 2019, 160.
[57] OGH 29 April 2014, 9 ObA 165/13z.
[58] Judgment of 10 February 2022, *HR Rail SA*, C-485/29, EU:C:2022:85.

specifically agreed upon, but also taking into account other possibilities of employment for the employee. A restriction to the agreed activity as established in Austrian case law might contradict Union law.[59]

Outside of the workplace, the Equal Treatment Act[60] only affords protection against discrimination on the basis of gender and ethnicity. In contrast, the characteristics of age, sexual orientation and religion are not protected outside of the workplace. The Ombud for Equal Treatment has been demanding an equal level of protection to prevent discrimination in all areas ('levelling-up').[61] So far, Austria has only implemented the requirements of the EU Directive, which do not provide the same protection against all forms of discrimination. Only in the case of discrimination on the grounds of disability does Austria provide more protection than is required under the EU Directive. Due to recent incidents, some politicians are also demanding that protection against discrimination be extended.[62]

Question 7.b.

Austria adopted the Working Time Act (*Arbeitszeitgesetz*[63]) and the Act on Rest Periods (*Arbeitsruhegesetz*[64]) to transpose into national law the EU acquis on working time. In addition, more specific standards exist for individual groups of employees, such as the Hospital Working Time Act (*Krankenanstalten-Arbeitszeitgesetz*[65]) for hospital staff, and the Act on the Employment of Children and Adolescents (*Kinder- und Jugendlichen-Beschäftigungsgesetz*[66]) for minors. The statutory laws allow collective agreements to contain deviating provisions within the limits set by law. The administrative authorities (Austrian Labour Inspectorates) carry out checks to ensure that the maximum working hours and minimum rest periods are being complied with. Legal disputes coming before civil courts regarding working time typically concern the question of whether the worker has been paid correctly for the hours he/she has worked; Union law makes no provision for this.

[59] M. Chlestil, 'Angemessene Vorkehrungen nach § 6 Abs 1a BEinstG können auch die Verpflichtung von Arbeitgeber:innen umfassen, den:die Arbeitnehmer:in an einem anderen Arbeitsplatz zu verwenden', *DRdA-infas* 2022, 189; S. Auer-Mayer, 'Kündigung wegen langer Krankheit – Diskriminierungsverbot und Verpflichtung zu „angemessenen Vorkehrungsmaßnahmen', *DRdA* 2015, 110.

[60] Gleichbehandlungsgesetz (GlBG), Federal Gazette No. 2004/66.

[61] Ombud for Equal Treatment, 'Activity Report 2018-2019', <https://www.gleichbehandlungsanwaltschaft.gv.at/dam/jcr:48c5d572-eee7-4f5e-b138-2e4c66e30b2a/201103_GAW_Taetigkeitsbericht_2018-2019_A4_BF.pdf>, visited 11 August 2022.

[62] ORF, 'Politik will Diskriminierungsschutz für Homosexuelle stärken', <https://orf.at/stories/3247122/>, visited 12 August 2022.

[63] AZG, Working Time Act, Federal Gazette No. 1969/461.

[64] ARG, Act on Working Rest, Federal Gazette No. 1983/144.

[65] KA-AZG, Federal Gazette No. 1997/7.

[66] KJBG, Federal Gazette No. 1987/599.

The recent case *job medium* dealt with the Austrian provision which deprives employees – who prematurely terminated their employment contract without cause – of their untaken paid leave.[67] The CJEU ruled that untaken paid annual leave must be paid regardless of the reason for the termination. Consequently, the Austrian Supreme Court decided that the case law of the CJEU only applies to the minimum paid leave of four weeks under Union law, whereas Austrian law provides for five weeks of holiday.[68] If more than four weeks of paid annual leave are granted under national law, there is no implementation of Union law within the meaning of Article 51 CFR. The Member States can therefore decide whether to provide financial compensation for holiday entitlement in excess thereof. Hence, employees receive compensation based on the minimum paid leave of four weeks for the leave not yet taken at the time of termination.[69] The decision of the CJEU was criticized as the creation of a fundamental right to compensation for holiday is said to be the task of politics and should not fall within the CJEU's jurisdiction.[70]

Question 7.c.

So far, platform work is not explicitly regulated by law, so the general rules of Austrian labour law are applicable. Platform workers can be qualified either as workers or as self-employed. In addition, the Austrian legal system provides for a third category, namely 'Arbeitnehmerähnliche', who are generally considered self-employed with the exception that some provisions such as non-discrimination as well as those regarding access to the courts specialised in labour law, amongst others, are applicable. However, the main advantage of this category lies in the area of social insurance, not in labour law (quasi-assimilation to workers, which means in particular that 'employers' need to pay contributions, not the 'Arbeitnehmerähnliche').[71] These persons are legally and personally independent, but economically depend on one or a few clients and do not own significant pieces of equipment.

The main challenge in the platform economy is that there are employees who are legally and personally independent, but economically dependent on their contractual partners. They do not have any substantial operating resources,

[67] Judgment of 25 November 2021, *job medium*, C-233/20, EU:C:2021:960; § 10 Urlaubsgesetz (UrlG, Holiday Act), Federal Gazette No.1976/390.

[68] OGH 11 March 2022, 9 ObA 150/21f; § 2 Urlaubsgesetz (UrlG, Holiday Act), Federal Gazette No.1976/390.

[69] E. Brameshuber, 'Urlaubsersatzleistung bei unberechtigtem vorzeitigen Austritt für die ersten vier Urlaubswochen', *ZAS* 2022, 221.

[70] C. Ludvik, 'Urlaubsverfall bei Arbeitnehmeraustritt', *ASoK* 2022, 2.

[71] F. Marhold, 'Economically-dependent Workers in the EU Member States – Austria', *in* C. Schubert (Ed.), *Economically-dependent Workers,* Munich, C.H.Beck, 2022, 9.

provide the agreed services personally, and do not act in a typically entrepreneurial way on the market. Therefore, platform workers tend to have a weak negotiating position. This results in the contractual conditions being dictated unilaterally by the contractual partner and thus the employment conditions are very often precarious.[72] Platform workers who are considered self-employed are left with little protection under the law. Whether a platform worker is considered self-employed or as a worker depends on the contractual agreement as well as the actual practice. So far, only one case regarding platform work has been tried before the Austrian Supreme Court regarding temporary agency work.[73] To date, no civil suits concerning the legal status of such persons have come before the Supreme Court.

The collective agreement for bike messengers[74], which is the first of its kind anywhere in the world, is probably the most interesting development in Austria.[75] Despite its importance to govern new forms of work, it only provides for limited protection as self-employed riders are not covered. Apart from that, the rise of the platform economy has revived (academic) discussion of whether the national provisions regulating collective bargaining agreements (*Arbeitsverfassungsgesetz* – Labour Constitution Act)[76] could be interpreted in favour of applying them to economically-dependent, employee-like workers, too, thus extending the personal scope of application.[77]

Question 7.d.

So far, the Austrian legislator and the national courts have not taken a position on the relationship between Union law and international labour law. The case law in which the ESC was cited dates back to the time prior to Austria's membership of the EU.[78]

[72] S. Schwertner, 'Arbeitnehmerähnliche Selbständigkeit und Kollektivvertrag', *DRdA* 2022, 126.

[73] OGH 26 May 2011, 9 ObA 55/11w; OLG Wien 23.11.2020, 10 Ra 59/29z; M. Gruber-Risak, 'FahrerInnen von Transportplattformen als überlassene Arbeitskräfte', *DRdA* 2021, 204.

[74] Collective Agreement for Bike Messenger, <https://www.wko.at/service/kollektivvertrag/kollektivvertrag-fahrradboten-2022.html>, 10 August 2022.

[75] Vida, 'Weltweit erster KV für Fahrradboten abgeschlossen', <https://www.vida.at/cms/S03/S03_999_Suche.a/1342616918551/weltweit-erster-kv-fuer-fahrradboten-abgeschlossen>, visited 10 August 2022.

[76] Federal Gazette No 1974/22.

[77] See, e.g., E. Brameshuber, '(A Fundamental Right to) Collective Bargaining for Economically Dependent, Employee-Like Workers', *in* E. Brameshuber/ J. Miranda Boto (Eds), *Collective Bargaining and the Gig Economy: A Traditional Tool for New Business Models,* Oxford, Hart Publishing, 2022, 227-252.

[78] OGH 25 June 1998, 8 ObA 268/97 p; OGH 23 May 1996, 8 ObA 210/96.

Question 8.a.

Since social partnership traditionally plays a crucial role in Austria, the demand for new developments in EU social policy is rather limited. Wage determination, in particular, is one of the main tasks of the social partners. The Commission's proposal for a Directive on adequate minimum wages[79] was initially greeted with scepticism as some took the view that the Austrian system of social partnership regarding wage determination and autonomy in collective bargaining should be preserved.[80] In the end, Austria voted in favour of the new Directive on minimum wages. Furthermore, the right to strike as well as the right to freedom of association are sufficiently safeguarded by national law and practice.

Question 8.b.

In Austria, Union law is only applied to workers – with the exception of anti-discrimination law, which is also applicable to self-employed persons who perform work on behalf of and for the account of certain persons – who are to be regarded as similar to employees due to their economic independence.[81]

Question 9.a.

The European Semester and the Country Specific Recommendations had a limited impact on Austrian social law and policy. One of the 2018 recommendations was to reduce the costs for the administration of health care.[82] Hence, the Commission welcomed the planned merger of the social insurance institutions, which was finally implemented by 2020.[83] Furthermore, the statutory retirement age of 60 for women was highlighted as one of the lowest in the EU. The statutory retirement age for women will only be gradually adjusted from 2024 onwards, with the result that harmonisation with the statutory retirement age for men will not be achieved until 2033. Overall, in view of the ageing population, raising the statutory retirement age and limiting early retirement would contribute to the sustainability of the pension system.[84] Despite this recommendation, an earlier adjustment before 2033 is not planned in Austria.[85]

[79] M. Jira, 'Das Europäische Semester', *SozSi* 2018, 440 (445).

[80] Der Standard, 'Arbeitsminister Kocher sieht EU-Richtlinie zu Mindestlöhnen skeptisch', <https://www.derstandard.at/story/2000127383534/arbeitsminister-kocher-sieht-eu-richtlinie-zu-mindestloehnen-skeptisch>, visited 11 August 2022.

[81] §1 (3) subpara 2 GlBG.

[82] Section 11 of Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Austria and delivering a Council opinion on the 2018 Stability Programme of Austria, 2018/C 320/19.

[83] M. Jira, 'Das Europäische Semester', *SozSi* 2018, 440 (445).

[84] Section 10. of Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Austria and delivering a Council opinion on the 2018 Stability Programme of Austria, 2018/C 320/19

[85] E. Kohlbacher, 'Diskriminierung durch ungleiches Pensionsantrittsalter – wie lange noch?', *ZESAR* 2015, 210; A. Sagan, 'Ungleiches Pensionsalter für Männer und Frauen – keine Vorlage an den EuGH', *ZAS* 2021/27.

Question 9.b. –

Question 10.a.

In 2012, the Austrian Constitutional Court issued its much-debated decision[86] in which it accepted the CFR as a standard of review in proceedings for the review of norms and administrative jurisdiction under certain conditions. Specifically, according to the Constitutional Court, rights from the CFR can be used as a standard of review if they are "similar in their wording and determination" to rights guaranteed under Austrian constitutional law. Hence, not all but at least those rights in the CFR that correspond in their normative content and thus are also suitably precise to be directly applied to the rights deriving from the ECHR (which has constitutional status in Austria) are placed on an equal footing with the ECHR rights regarding their relevance in constitutional court proceedings. However, the impact of this ruling in the subsequent case law of the Austrian Constitutional Court has been very limited.[87] One of the reasons for its limited impact regarding the social rights of the CFR might be the fact that those social rights in the CFR, e.g. protection in the event of unjust dismissal (Article 30 CFR) or fair and just working conditions (Article 31 CFR), do not have corresponding rights under the ECHR.

Question 10.b. & 10.c.

In Austria, not all of the Articles of the CFR are considered "fully effective" rights. The distinction between fundamental rights and principles is of particular importance in light of the Constitutional Court's ruling, which placed the CFR on an equal footing with constitutionally guaranteed rights and made them the standard of review for the Constitutional Court if they are suitably precise for direct application. For this explicit reason, the review does not apply to principles.[88]

Question 10.d. & 10.e.

In the recent cases *Cresco Investigation*[89] and *job medium*[90], the Austrian courts had to respond to the question whether national laws are in violation of the rights deriving from the CFR and if these rights have direct application and thus whether they are relevant in a dispute between individuals. Following the decision

[86] VfGH 14 March 2012, U 466/11 u.a., VfSlg 19.632.

[87] A. Balthasar, 'Sechs Jahre Charta-Erkenntnis – Was bleibt?', *JRP* 2018, 191.

[88] E. Rumler-Korinek & E. Vranes, *in* M. Holoubek & G. Lienbacher (Eds.), GRC-Kommentar 2nd ed., Manz, Wien, Art 52 GRC par 55.

[89] Judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43.

[90] Judgment of 25 November 2021, *job medium*, C-233/20, EU:C:2021:960.

of the CJEU, the national courts applied the rights directly in the dispute between individuals.[91]

Question 11.a.

In award procedures in the field of public procurement, certain ILO agreements are relevant pursuant to Section 93 of the Federal Public Procurement Act 2018 (*Bundesvergabegesetz*).[92] In order to be awarded the contract, the contractor has to comply with those ILO agreements, such as the ban on forced or child labour.[93] If it becomes apparent before the award notice that the provision of services involves violations of international labour law, the tender must be eliminated.[94]

Question 11.b.

Companies of public interest with more than 500 employees must include corporate measures with regard to certain non-financial matters in their annual financial reporting. These include environmental, social and labour law matters, as well as respect for human rights and the fight against corruption and bribery.[95]

Question 11.c.

To date, a transnational collective agreement has not been concluded in Austria.

Question 11.d.

To our knowledge, there have been no civil or criminal proceedings before the Austrian courts regarding a violation of social rights abroad.

Question 11.e.

The Austrian Code of Civil Procedure[96] is tailored to individual proceedings, which is why it does not address the special features of collective legal protection and does not offer an adequate regulatory concept for collective actions for performance. Austrian law allows class actions in the form of a bundled enforcement of rights on the basis of assignment models in combination with an accumulation of claims.[97]

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[91] See critically e.g. E. Brameshuber, 'Urlaubsersatzleistung bei vorzeitigem Austritt für die ersten vier Urlaubswochen', *ZAS* 2022, 221.

[92] Bundesvergabegesetz 2018, Federal Gazette No. 2018/65.

[93] ILO Agreement No. 29, 105, No. 138, 182.

[94] Wiesinger, 'Die Bedeutung der ILO-Abkommen im österreichischen Vergaberecht', *RPA* 2017, 331.

[95] § 243b Unternehmensgesetzbuch (UGB, Business Code), dRGBl 1897/219.

[96] Zivilprozessordnung (ZPO), RGBl 1895/113.

[97] E. Brameshuber & I. Kager, 'Collective access to national courts for labour law and social policy disputes: Austria', *ELLJ* 2021, 1-19; A. Klauser & G. Kodek, 'JN – ZPO' 18th ed. Manz, Vienna, § 227 ZPO; S. Prossinger, 'Kollektiver Rechtschutz: Neue Wege gehen', *ecolex* 2021/142.

Question 11.f.

In 2020, a bill for a Social Responsibility Act (*Sozialverantwortungsgesetz*) was drafted with a view to establishing specific due diligence obligations for importers in the textiles and clothing industry.[98] The aim of the draft act is to prevent the distribution of articles of clothing, including footwear and textiles, where violations of the ban on forced and child labour occur along the production and supply chain.[99] At present, the proposal is still at the draft stage and no further parliamentary consultations have taken place.

Question 12.

To combat the consequences of climate change, the Austrian government envisages a bundle of measures such as the promotion of thermal energy building renovation, a CO2 tax on heating and fuel, and the expansion of public transport. Both climate impacts and policy impacts focus on the following vulnerability characteristics, which are also familiar from inequality research: low income, health limitations, migration background, low education level and age over 65. Population groups with these characteristics should be considered when assessing and mitigating social impacts, together with gender mainstreaming.[100]

Question 13.a. & 13.b. & 13.c.

Adapted to the respective level, the curricula taught in Austrian schools cover the EU and European integration. At primary school, children are taught about Austria's membership of the EU, as well as European awareness and openness.[101] At secondary school, pupils are taught about the fundamental rights and freedoms in a European context, as well as the history of the EU, its most important institutions, and the rule of law.[102] Furthermore, short-term exchange programs in other EU-countries are promoted through the program 'Erasmus+'; pupils as well as kindergarten and school staff may participate.[103]

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[98] Sozialverantwortungsgesetz, 579/A, <https://www.parlament.gv.at/PAKT/VHG/XXVII/A/A_00579/index.shtml>, visited 11 August 2022.

[99] S. Gstöttner & K. Lachmayr, 'Menschenrechtliche Sorgfaltspflichten für die Textilindustrie – europäische oder österreichische Regelungskompetenz?', *juridikum* 2020, 203.

[100] Ministry of Social Affairs, 'Soziale Folgen des Klimawandels in Österreich', <https://www.sozialministerium.at/dam/jcr:514d6040-e834-4161-a867-4944c68c05c4/SozialeFolgen-Endbericht.pdf>, visited 11 August 2022.

[101] Ordinance of the Federal Minister for Education and Cultural Affairs, Federal Gazette No. 1963/267.

[102] Ordinance of the Federal Minister for Education and Cultural Affairs, Federal Gazette No. 1994/895; of the Federal Minister for Education and Cultural Affairs, Federal Gazette No. 1985/88.

[103] Erasmus+, <https://erasmusplus.at/de/schulbildung>, visited 11 August 2022.

Question 14. –

Question 15.

The institutional proclamation of the European Pillar of Social Rights restarted the discussion on the social dimension of European integration.[104] Within academia, the EU is increasingly perceived as a social union, also due to recent legislative actions such as the Directive on Adequate Minimum Wages[105] or the Proposal for a Directive on Improving Working Conditions in Platform Work.[106]

[104] E. Brameshuber, 'Die Europäische Säule Sozialer Rechte. Zur Konstitutionalisierung von Sozialen Rechten', *in* S. Auer-Mayer et.al. (Eds.), *Festschrift Walter J. Pfeil*, Vienna, Manz, 2021, 311; O. Deinert, 'Herausforderungen der Internationalisierung der Arbeitswelt', *DRdA* 2022, 283 (287).

[105] M. Lenglinger, 'Der Vorschlag für eine Richtlinie über angemessene Mindestlöhne in der EU und ihre Bedeutung für Österreich', *ZAS* 2021, 116.

[106] T. Müllensiefen & S. Obrecht, 'Die Verbesserung der Arbeitsbedingungen von Plattformarbeitenden auf EU-Ebene', *DRdA* 2022, 100.

BULGARIA

Nikolay Angelov

Question 1

In Bulgaria, we have a long lasting tradition of equality and non-discrimination, as we are situated on a crossroad between Europe and Asia and there are various races and religions that are living peacefully at the territory of the State. Normally, these principles are fully implemented in the national legislation, which deals with the migrant workers. The Labour Code, the Anti Discrimination Act, and the Trade Act are the main regulations in the sphere of employment and self-employment, which guarantee the right of equal treatment of all persons involved. There is no doubt in the settled case law of the national courts about the application of the regulations from the two Anti-discrimination Directives – 2000/78 and 2000/43 and the principles laid down in Art 19 TFEU. It have to be noted that the preliminary ruling cases in front of CJEU C-250/09 CLI:EU:C:2010:699 and C-83/14 ECLI:EU:C:2015:480 / and the impact of them on the practice of the administrative bodies after the judgments of the national courts applying the principles of anti-discrimination is enormous. Indeed, the level of protection of the unemployed workers is depending on the possibilities of the State's budget and thus the social benefit for that category is not so practical, but in the recent years, the level of unemployment in the country is less than 5 percent, so there is always a way to engage these economically non – active persons into the sphere of services and industry.

There are no known cases from the administrative practice of the Commission of Anti-discrimination or the courts when the migrant workers or economic non -active persons from EU Member States are treated differently.

Question 2

As it comes from the statistics, Bulgaria is the Member State that does not have so much migrant workers from the EU countries or economically non – active persons who wants to live here and try seeking a job. The enormous number of economically non-active persons are pensioners, who received their pension, paid by their national institutions, and reside here without any kind of discrimination issues either by the regional, or by the central authorities. So, it is not surprising that in our country we do not face any kind of problems like in Case C-535/19 ECLI:EU:C:2021:595, or in Case 709/20 ECLI:EU:C:2021:602 concerning the social benefit access of economically non-active persons to the health care system

or the social benefit system in the country. The regulations of these social benefits on national level is with conformity with EU law and the interpretation of CJEU, and the reason for neither support nor opposition of the practice of the Court may be the mere fact that there are no persons from EU seeking for social benefits in our country, which they couldn't find in their own.

Even according to the family benefits, the recent decision of CJEU from June 2022 in Case C-328/20 ECLI:EU:C:2022:468 in the infringement procedure brought by the European Commission against Austria is not affecting the principles laid down in the national legislation that the country of work of the parent is responsible for the payment of child allowances, nor the country of residence of the carer. It is settled in the Social Security Code and the Social Help Act and there is no different administrative or court practice in that matter.

Question 3

The official statistic of the National Institute shows that, for the last three years, a stable number 2019-2021 of approximately 100 000 persons from EU Member States are residing in the country. Having in mind that more than two thirds of this number are pensioners, who are seeking better conditions and bio regime in their life, with the level of pensions from their EU Member States compared to the level of living here, it have to be considered that no more than 30 000 workers from EU member states are working in Bulgaria annually. Usually the need for a labour force here in the field of auto-industry, bicycle industry, chemical industry and pharmacy industry and, of course, touristic industry is a need for not so qualified workers and the entities often look for workers from the former Soviet republics/especially after the war in Ukraine, a lot of women refugees in our country started to work in the hotels and providing services for touristic industry/ and Turkey and South –East Asia in the building industry. The above mentioned industries are the main reporters for a problems in finding work force, and the level of jobseekers in the South and Central region of the country, where are the seats of these entities, is very low.

Indeed the idea of "fair movement" is not even considered by the academics, civil society and politic leaders. Since the COVID crisis there have not been many migrant workers from Bulgaria to the other EU Member States, indeed we are now experience the phenomenon of welcome back these workers. But there is another difficulty – it is the movement of workers from Northern parts of the country to the Southern parts and especially in the Central region, where the great industrial development is seeking for more and more workers. This leads to villages and towns with decreasing population and lack of specialist, especially in the health care services.

The lack of ideas how to manage this situation lead to the large quota of death cases per 100 000 people in EU during the COVID-19 crisis. There were hospitals in the North where the staff was so few, that it was not possible to cope with the crucial situation with COVID-19. Even now, when the crisis is almost over, the salary gap of the medical staff from the North to the South is so big, that there are reported cases when all doctors and nurses are leaving one entity to join the other one, which gives better working conditions and life expectations.

Question 4

There are different economic and political strategies in the ambition to limit the brain drain phenomenon, but they are not fully implemented in any legal regulation and thus have no impact on resolving the issue. Indeed, as a Member State from Eastern Europe the country is exporting young, educated persons who want to pursue their better future within the north-west European countries. Even in the recent National plan for recovery and resilience there are only aims, which will influence the topic, but no decisive measures, nor initiatives to deal with the problem.

a. According to the National Statistical Institute, there is constant flow of approximately 50 000 persons, from the years 2017 to 2022, from Bulgaria to the EU countries, in the spheres of provision of services, medicine, dental services, pharmacy, software engineering. It is a normal decision for every young person, justified by the fact that the average GDP of Bulgaria for this period is half GDP of the coutries from North-West EU Member States. In the last year, we are facing another phenomenon, but it is provoked from the post Brexit reaction – each year – 2021 and 2022 there are a lot of people coming back from the United Kingdom, who want to establish their business in Bulgaria – usually in the sphere of services in the building industries.

As previously mentioned, the profile of the migrant worker is usually at young age with very high level of education. In the country, there is an acting national strategy for demography, but unfortunately, it does not give the expected positive result. The most affected region of the country by this brain drain phenomenon is the North West region, considered the poorest ever in European Union. Unfortunately, none of the programmes of the Union connected with some structural or monetary help did not achieve the positive result – to convince the young and educated people to stay and work at home.

b. There are some measures in the field of education – like easier access to specialisations abroad with the obligation to return and work for 3 to 5 years

in the field of science in Bulgaria,but the success of these measures is not guaranteed. Indeed the facts connected with the lowest GDP in EU, the lowest salaries and the need to improve, it is obvious that national plans will not work out this problem – there has to be intervention at EU level in order to stop the negative demography in this big region of the country and to limit the brain drain phenomenon.

c. Now there have not been any cases or administrative decisions concerning the brain drain phenomenon and its connection with the freedom of movement limitation measures.

Question 5

On national level, the posting of workers is regulated by the Labour Code and the Ordinance on official business trips and specialisations abroad. These acts are in full conformity with the EU acquis in the field of posting and especially the interpretation of posting in art.12 of Regulation 883/2004 and Directive 2018/957. As Bulgaria is a state that usually exports workers, so there are not many cases of posted workers at national level – they almost are limited to the senior managers of EU entities working in Bulgaria. So in that case, there have not been issues like equal pay for equal work" or any kind of sectors with exploitation like the mentioned in the questionnaire.

As to the other situation where Bulgarian workers are posted in other Member States, there have been disputes with the revenue agency about issuing the certificate A1 on the applicable legislation. In several cases, before the administrative courts it was arguable whether these kind of workers are posted and thus it is subject to the Bulgarian social security legislation or they work more than 24 months in other Member State and thus the applicable law is not Bulgarian. Before the decision on case C-784/19 ECLI:EU:C:2016:972 Team Power Europe there were several similar cases before Administrative Court Sofia city decided in the line of interpretation of the CJEU, so afterwards the administrative practice is also with comfort with that interpretation and the cases before the courts are very few if any. There was tension about the posting of workers in the field of transportation and the new mechanism of EU applying the requirements for posting and rest, but on national level no one person has made a legal action before the courts, defending their own social rights. It could be presumed that in few years there will be a lot of such kind of cases, when the transport workers realize that they have lost some of their social benefits during that period. Then there will be applicable the rules from Case C-610/18 ECLI:EU:C:2020:565 that the employer of an international long-distance lorry driver, for the purposes of those provisions, is the undertaking

which has actual authority over that long-distance lorry driver, which bears, in reality, the costs of paying his or her wages, and which has the actual power to dismiss him or her, and not the undertaking with which that long-distance lorry driver has concluded an employment contract and which is formally named in that contract as being the employer of that driver.

Question 6

a. Usually there are no issues arisen in the courts concerning the freedom of establishment or the right to conduct a business, because the first one is often connected with the creation of entity and the second one is connected with the provision of services. The only question that came in the political, not yet the judiciary sphere is the rate of the legal bound expenses for tax purposes of the employed and self-employed persons – in the first case all the expenses are covered and in the second only 25% of it. Surely as the economic and energy crisis are rising there will be disputable questions concerning the protection of the workers in comparison to the self-employed persons. In that light the decision of CJEI on case C-201/15 ECLI:EU:C:2016:972 will have great importance.

b. The employers are obliged to consider the Labour Code and the Settlement of collective labour disputes Act. These rules regulate the right of strike and not surprisingly when used it is usually successful for the workers. In the recent years, there were some local strikes and no more than two or three national strikes, which all were with positive end for the rights of the workers. At national level, according to the regulations of the Labour Code – Art.50-60 there is a possibility to fulfill a collective labour contract on national or branch level. There a several collective agreements in the field of education, coal mine, industry, automobile, railway and air transportation, health care system. Unfortunately, there is no opportunity to strike for the people who are self – employed and who usually are providing services in the country. For such kind of persons – in the fields of medicine, architecture, notaries, bailiffs, lawyers and dentists, provision of services, the regulations, which are applicable to the workers, are not fully effective. For example, there was a situation when the courts found discrimination in the treatment of legally registered trade entities, than self-employed persons in the same sphere of services, who were excluded from the opportunity to take part in programmes connected with the measures post COVID – decision 4016/27.04.2022 on case 12302/2021 of the Supreme Administrative Court.Unfortunately most of the governmental programmes concerning EU funds in other areas are still containing rules, which are discriminatory and there is no reaction from the State to this kind of situation.

Question 7

a. Since 2003, in Bulgaria is in force Protection from Discrimination act /PDA/. In the field of anti-discrimination the EU acquis / Directives 2000/43 and 2000/78/ is transposed thoroughly in the legislation not only in the above mentioned act, but also in the Labor Code, the Act for higher education and the Social Security Code. Since Bulgaria is a Member State to the EU there have not been any cases connected with religious discrimination. Yet, this question is often a topic for debate not only in the political sphere, but also in the judiciary. There is a positive mechanism of the Commission for combating discrimination when there is alleged discrimination on all the grounds stated in Art 19 TFEU and the anti-discrimination directives. According to art.50 PDA proceedings before the Commission shall be instituted on: complaint of the affected persons; initiative of the Commission; signals by individuals and corporate bodies, of state and municipal bodies. The acts of the commission are appealed before the administrative courts. Unfortunately, for a very long period, there were discussions among the judiciary of the question about the competent court for the action for civil liability for discrimination, arising from art.74 from PDA. It is a pity that this question was regulated in a different manner by the courts from 2014 until 2019 when it was ultimately decided by interpretative decision of the Supreme Court of Cassation and the Supreme Administrative Court and now there is a straight line of conduct for the parties about the competent jurisdiction on the matter. It have to be noted that the preliminary ruling cases in front of CJEU C-250/09 CLI:EU:C:2010:699 and C-83/14 ECLI:EU:C:2015:480 / and the impact of them on the practice of the administrative bodies after the judgments of the national courts applying the principles of anti-discrimination is enormous.

b. In the domain of working time in our country, we have a long lasting case law of the Supreme Court of Cassation upon the applicability of Ordinance for working time, rest periods and leaves. Unfortunately, they are civil decisions, which are contrary to the EU Social law and especially art.31 CFR like interpretative decision no.6/2017 from 11.02.2022 of the Supreme Court of Cassation, which is contrary to the ruling of CJEU Grand Chamber on case C-344/19 ECLI:EU:C:2021:182. This ruling, which concerns the limitations of the period for bringing actions for payment of night labour of the servants in the military before courts is not in conformity with Directive 2003/88 on the organisation of working time and the ruling of CJEU on case C-742/19 ECLI:EU:C:2021:597. Hopefully, there is another pending interpretative decision before the Supreme Court of Cassation-case1/2020, which may take

into consideration the EU aquis in that sphere. Since the interpretative decisions are based on the national legal order, if the controversial practice of the courts continues, then the social partners like the syndicates will have to make actions and insist in front of the government for amendments in the Ordinance for working time, rest periods and leaves. It is obvious that the majority of cases before the civil courts are connected with the payment of the extra or night labour and not the other matters in the questionnaire.

c. There is no legal limits for platform work in Bulgaria, as long as it meets the requirements of the Labour Code connected with written and registered contract and observing the rights for 8 hours working time and annual leave for 20 days. There are no cases connected with such kind of work in the courts.

d. Since the Labour Code is in force from 1985 and according to the legal theory when adopting, it was thoroughly supervised by the International Labour Organisation, so most of the regulations have taken the influence of the acts of that organisation. From 2007 until now, there are several amendments of the Code required by adopting the aquis of EU law, but since now, there were no cases when these regulations from the EU law are contradictory to the ones from ILO.

Question 8

As the economic and energy crisis are knocking on the door of EU and especially on Bulgaria's, as our state is considered almost fully dependent on the supplies of Russian gas and petrol, there is always a social tension and demands from the society to compensate the higher inflation rates and the low wages. Considering the possibility to build an EU Social Union and as a follow up from the statements of the European Pillar of Social Rights, we have to bear in mind that on this field the main principle is still coordination and not harmonization. So the demands for new developments should be considered to improve the adequacy of income support by increasing the income of persons lacking sufficient resources. The next step is to improve the coverage and take-up of minimum income by transparent and non-discriminatory eligibility criteria. As the new Council recommendation on adequate minimum income suggests, it will focus on harmonization of the rules of remuneration, even if to the level of the basic minimum needs of the people. The opinion of the people engaged in social assistance shows that the need to grant social benefits not only to the workers, but also to the self-employed persons is getting greater and greater so this could be a possible way to improve the social balance in the system. That will be a way forward to motivate the self – employed persons in various sectors

of economy to be more transparent about their incomes and the ability to pay social contributions to the system and in that way to improve it. A possible step is developing a new mechanism like in Italy and Greece – Citizen's basic income in order to reduce poverty and address unemployment and thus to be the necessary step for a social balance within the society.

Question 9

Non applicable as Bulgaria is not a member of EMU

Question 10

In Bulgaria the Charter for Fundamental Rights has a significant role in all matters concerning social rights. It is not only due to the process from post pandemic years and the effect of Brexit that a great number of Bulgarian citizen came back to reside and work in the country and during the period of unemployment are seeking from the social authorities guarantee for their rights. The recent statistic analysis shows that most of the administrative decisions are contrary to the principles and rights laid down in the Charter and also some of them are in violation of the Regulation 883/2004, but the national court's case law is constant that we have to guarantee the rights of the applicants in accordance with the EU law. In that respect the courts are confident in applying the clarifications to Article 52 paragraph 5 of the CFR, where it is stated that the principles can be applied through legislative and executive acts adopted by the Union within its areas of competence and by the Member States only when applying EU law, therefore they acquire a special importance for the courts only when these acts are interpreted or verified. However, they do not give rise to direct rights to positive action by the institutions of the Union or the authorities of the Member States, which corresponds to the practice of the CJEU. According to this interpretation in the Explanations, the "principles" contain obligations for the public bodies, in particular the legislative ones, to turn them into concrete norms, in contrast to the "rights", which these bodies are obliged to guarantee. Article 52 of the Charter contains a general provision on limitation of rights. Restriction of the exercise of the rights and freedoms recognized by the Charter is allowed under the following conditions:

- it must be provided for in law;
- it must respect the basic content of the same rights and freedoms;
- it must pursue objectives of general interest recognized by the Union or the need to protect the rights and freedoms of other people (legitimate objective);

– in accordance with the principle of proportionality, it must be necessary and actually correspond to the set objectives (principle of proportionality).

So, the national courts did not differentiate the importance of the social rights in comparison to the other fundamental rights – except not in a direction to express any kind of disregarding them instead of others. Up to the time when this report is done, there are no pending cases where the applicants are building their position only to the principles laid down in the CFR and according to art.34 of the CFR and the recent judgment on case C-709/20 CJEU ECLI:EU:C:2021:602 the courts included the element of human dignity as a point to be considered when dealing with matters of social security. Unfortunately, there are no cases in Bulgaria like actions between individuals concerning social rights. Most of such actions are either against an employer concerning the working time, the right for having a leave and the equal payment for equal work, or actions against administration for obtaining social allowances. Sometimes, due to economic reasons the authorities seek to limit the social rights, but as from the case Elchinov C-173/09 CLI:EU:C:2010:581 for the administrative courts is of primary importance to give full effect of the social rights, even when there is a kind of limitation in the national legislation. Of course, they are civil decisions, which are contrary to the EU Social law and especially art.31 CFR like interpretive decision no.6/2017 from 11.02.2022 of the Supreme Court of Cassation, which is contrary to the ruling of CJEU Grand Chamber on case C-344/19 ECLI:EU:C:2021:182. Unfortunately, for a large group of applicants the only effective remedy after that will be the action for civil liability of the State for violation of EU Law.

Question 11

In the recent years, due to the tax conditions and the good business climate a lot of international and EU companies opened their branches in Bulgaria, especially in the field of automobile and air transport and the refrigerator industry. There is constantly need for labour force and many workers are engaged in these big corporations. Indeed, in 2022, there was for the first time since the 90-ties a strike in our country demanding the raising of the salaries with the connection of the yearly inflation in the country. The employers are obliged to consider the Labour Code and the Settlement of collective labour disputes Act. As a result, the strike was successful for the workers. At national level, according to the regulations of the Labour Code – Art. 50-60, there is a possibility to fulfill a collective labour contract on national or branch level. There are a several collective agreements in the field of education, coal mine industry, automobile transportation, air and railway transportation, health care system, but as far the regulations were not

used to the sectors connected with the big corporations. Their impact is strong in the field of minimum wages, long leaves and health security purposes. Neither there is a practice by which the national firms conclude trans-national collective agreements. Even if so, the collective agreement has to be registered in the Labour Inspection agency by the seat of the employer to have effect for the parties. To my knowledge, there has never been a court case – civil or criminal – connected with the violations of social rights abroad. There is a possibility according to art.59 of the Labour Code for collective claims and class actions for violation of the collective agreement. With these claims, the plaintiff wants the employer to fulfill his obligations by the agreement, especially in the field of the social rights. These rights are protected very well on national level – the legislation concerning the labour force, the periods of working time and rests, the periods of leaves and the protection when a person is temporarily ill from various actions of the employer is obligatory for the entities and thus any violation of it leads to sanctions and consequences concerning the possibility to take part in public procurement schemes. So that is how at national level are fostering the social rights – any employer who had been sanctioned for violation of the Labour Code is registered and thus does not have an opportunity to win public procurement.

Question 12

The policy of the state concerning ecology is often criticized because of the larger periods of transition envisaged by Bulgaria to become SO2 neutral. Indeed, there are few issues among them and pending infringement procedures before CJEU by the Commission for violating the green requirements with emphasis with the quality of atmospheric air. The former minister of the environment attempted several times to stop the activity of the old coal mines and electricity companies, but the courts considered that the social rights of the workers, who inevitably will stay jobless and the effect upon the crucial infrastructure of the country in the field of energy have to be taken into account. Thus, the ruling of the Supreme Administrative court from 17/08/2022 on case 7209/2022, and ruling from 08.06.2022 on case 4857/2022 does not take into account the judgment from 12.05.2022 on case C-730/19 of CJEU. It is a pity that Bulgaria does not include any social measures for supporting the workers from such kind of mines in the National Plan for recovery and resilience. At least for the workers in the region whose only hope for any jobs there are the mines, considering the pending infringement procedures against Bulgaria, there has to be developed programmes for adaptation, learning courses for new skills and making new opportunities for jobs in the region.

Question 13

Not long ago after the accession of Bulgaria to the European Union, there has been a change in the programme of the secondary and high education with emphasis on the rights, freedoms and values of the European Union. It was provided that, for each year of the secondary education, the students will have 20 hours dedicated to this topic. As for the high education, specialized curriculum on EU law was established when the negotiations for the accession of Bulgaria to the EU in the 90-ties started, providing 75 hours per year on the matter. After the Bulgarian Presidency of EU in 2018, there was much higher improvements in the field of the curriculum of the Law Faculties. Nowadays, since July 2022, there is a legal basis for augmenting the number of hours – an Ordinance on the minimal requirements for the obtaining a law degree in the universities – by increasing the number of hours dedicated to the EU law from 75 to 120 hours per academic year; and additionally 75 hours per academic year on the subject Human rights with emphasis on the Charter of Human Rights. All these methods are considered to bring the values of EU closer to its citizen and thus made the European integration stronger. As a step in the right direction, it has to be considered the conspectus for the entering the judicial system as a trainee judges and prosecutors has a different exam on European Law, as is the case for the exams of young lawyers, which are governed by the Supreme Bar Association. This method shows the importance of the studying the EU law as a step for the careers of the young students from the universities. In that direction it has to be emphasized the line of conduct of the National Institute of Justice which has a thorough traditions in the initial and continuous training of the judges and prosecutors. Of course, a good practice would be an obligation of the members of the judiciary to take part in EU law training once per year, but this is a goal, which we have to achieve.

Question 14

Since 2004 in our country is in force Protection from Discrimination act which entails all the common values and principles in EU such equality between men and women, the fight against racial and all kinds of discrimination. The Commission for protection from Discrimination and the practice of the courts have enormous positive effect on the perception of the society about those issues. In that respect, it has to be mentioned the importance to the development of the rule of law of the decisions of CJEU on Bulgarian cases/ CJEU C-250/09 ECLI:EU:C:2010:699 and C-83/14 ECLI:EU:C:2015:480 / and the impact of them on the practice of the administrative bodies after the judgments of the national courts applying these principles. Nowadays, the acting legislation in the field of social security – the

Social Security Code,the Act for social services, the Act for health security and the Health Act provides equal access to social services, social and health benefits and housing to all citizens of the Union and third country nationals and with connection with the Refugee Act – to all refugees which are entering and staying in our country.

Question 15

Definitely, in the academic and political sphere in Bulgaria, the EU is considered as a Social Union concerning the basis for the functioning of the Union. As far to the judiciary, we know that the legal base for the Social Union nowadays is the principle of coordination between the Member States and there is only a dream of harmonisation as most of the complaints in the judicial area are connected with the lack of such. To much more extent, the people engaged in the everyday work of the courts realize that the fundamental principles of equality and solidarity are challenged by the economic crisis and often the citizens who want to enjoy their rights and freedoms are not capable of such. So, there is a hesitation in the judicial sphere whether it is possible to build a real EU Social Union based on these principles. Although the practice of the courts and especially the preliminary rulings of the administrative courts in Bulgaria, which provoke the amendments of the legislation, made a step forward of bringing the values of EU Social Union – solidarity and equality as a common principles governing the social system in Bulgaria.

CROATIA

Dunja Duić, Iris Goldner Lang, Matija Kontak, Ana Kršinić[1]

Introduction:

At the time of writing this report, Croatia – the youngest Member State – has just completed nine years of its membership in the European Union (EU). As such, it had to go through the process of alignment of its legal system with the *acquis* only recently, and, in this process, it was closely monitored by the European Commission and EU Member States. Consequently, Croatian laws in the area of EU citizenship and social rights are aligned with the *acquis* and there is scarce case law on national courts, which explicitly relies on EU law in this area, whereas most court judgements use Croatian norms as their legal bases.

The responses to the questions in this questionnaire are based on desk research of relevant EU and Croatian norms and case law, as well as on interviews that have been conducted by the authors with a number of Croatian judges and public officials in different state institutions and bodies.

Chapter 1. Free movement of workers

Question 1

Croatian laws prescribe equal treatment of all EU citizens in Croatia and, generally speaking, national courts are aware of the European conception of equal treatment. However, there are not many cases involving workers from other EU Member States, as Croatia is primarily an emigrating EU Member State.

Question 2

** Inactive mobile EU citizens are those who do not work or who are not actively seeking employment and who do not have the legal right to reside in the territory of Croatia except when they have sufficient funds for maintenance and health insurance.*

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a. Social welfare is organised public-benefit activity aimed at providing assistance to socially disadvantaged groups, as well as persons in unfavourable personal or family circumstances. It is aimed at improving the quality of life through prevention, and helping and supporting individuals, families and groups, as well as encouraging changes and empowering recipients to aid their active inclusion in community life. At the national level, equal treatment is guaranteed to welfare recipients listed in Art. 15 of the Social Welfare Act (OG 18/22, 46/22),[2] the key piece of welfare system regulation. However, the six amendments it has seen since 2011 have brought uncertainties.[3]

The importance of equal treatment in the domain of Croatian social policy is addressed in Croatia's 2020-2024 Government Program. Per the Program, social security is a prerequisite for the evolution of modern society in which everyone is entitled to quality healthcare, social solidarity, equality and equal opportunity. The crises that Croatia faced recently have highlighted the need for strengthening its healthcare system, but also the state's role in preserving jobs, pensions and social benefits, in combatting poverty to establish a social safety net that will ensure that no one is left behind.[4]

b. According to the Croatian Health Insurance Fund, in Croatia, 441,367 persons (and 36,395 of those person's family members) have health coverage based on unemployment. In total, 447,762 people in Croatia qualify for free health coverage on grounds of 'unemployment'. However, per the Croatian Employment Service, there are currently 127,648 unemployed persons. Persons receiving double insurance are deregistered from health insurance in Croatia.[5] Per the latest data of the Croatian National Bureau of Statistics, in the fourth quarter of 2021, of the 3.5 million working-age residents (aged over 15) in Croatia, 1.69 million were employed, 115,000 unemployed and 1.7 million inactive. Of the inactive population, 83,000 want to work but are not actively seeking employment, 1.2 million do not want to work on grounds of

[2] Art. 15. of the Social Welfare Act (OG 18/22, 46/22).

[3] A. Ilijaš & M. Podobnik, „Nestabilnost zakona o socijalnoj skrbi – kako utječe na rad socijalnih radnika u centrima za socijalnu skrb?" ("The instability of the law on social welfare – how does it affect the work of social workers in social welfare centers?"), *Ljetopis socijalnog rada,* Vol. 25, No.3, 2018, pp. 427-450.

[4] Program Vlade Republike Hrvatske za mandat 2020. – 2024 (Programme of the Government of the Republic of Croatia for the mandate 2020-2024), <https://vlada.gov.hr/UserDocsImages/ZPPI/Dokumenti%20Vlada/Program%20Vlade%20Republike%20Hrvatske%20za%20mandat%202020.%20-%202024..pdf>, visited: 20 September 2022.

[5] N. Sučec, *Gotovo pola milijuna ljudi uživa besplatno zdravstveno na temelju nezaposlenosti. Doznali smo kako će HZZO loviti gastarbajtere i brisati ih iz evidencije (*Almost half a million people enjoy free health care based on unemployment. We learned that the HZZO will hunt down guest workers and delete them from the records*)* (tPortal.hr, 21.01.2022) <https://www.tportal.hr/biznis/clanak/imamo-podatke-u-hrvatskoj-gotovo-pola-milijuna-ljudi-uziva-besplatno-zdravstveno-na-temelju-nezaposlenosti-doznali-smo-kako-ce-hzzo-loviti-gastarbajtere-i-brisati-ih-iz-evidencije-foto-20220121>, visited: 20 September 2022.

age, sickness, education etc., and an estimated 7,000 of those actively seeking employment cannot accept it in the next two weeks.[6]

Question 3

a. Up until 2021, the Croatian Government issued decisions setting national quotas for third-country nationals for each year. In the past years, these quotas were never reached, and, over years, there was an increasing demand for foreign workforce. As an example, out of the quota of 78470 places for third-country nationals that was set for 2020, 39385 places remained open/not used. Consequently, due to the lack of workforce, as of 2021, the Croatian Government no longer determines the annual quota of permits for the employment of third-country nationals, as it used to do previously. Instead, when requested, the Croatian Employment Service (HZZ) is expected to perform a labour market test for the respective third-country national within 15 days from the date of the submission of the request. Upon obtaining the positive outcome of the labour market test from the Croatian Employment Service, which confirms the justification of employing a third-country national, the application has to be submitted to the Ministry of Interior, which then requests the Croatian Employment Service to perform the verification of the employer. The Croatian Employment Service will give a positive opinion if the employer carries out a registered activity and properly settles its obligations to the state, has at least one permanent and full-time employee in the last six months from the territory of Croatia and the EEA, and has not been convicted for non-payment of wages. Within 15 days upon acquiring the positive opinion of the Croatian Employment Service, the Police Department in the employer's place of establishment has to issue a work permit, provided all the other conditions are met.

The positive opinion of the Croatian Employment Service does not have to be sought in the following three cases: extension of residence and work permit of the same third-country national for the same employer; seasonal employment of third-country nationals in agriculture, forestry, catering and tourism for up to 90 days during the calendar year and; residence and work permits for key personnel in companies, EU blue card and intra-corporate transferees.

Additionally, due to the lack of workforce in certain sectors, no labour market test in needed for the following occupations: mason, carpenter, rebar, concreter, welder, facade, installer of building elements, operator of construction machinery,

[6] Aktivno stanovništvo u Republici Hrvatskoj u 2021. – prosjek godine (Državni zavod za statistiku, Priopćenje 2022) (Active population in the Republic of Croatia in 2021 – annual average (State Statistical Office, 2022 Press Release))<https://podaci.dzs.hr/2022/hr/29256>, visited: 20 September 2022.

stonemason, crane operator, carpenter, construction worker, pipeline fitter, painter, roofer, plumber, electrician, heating and air conditioning installer, water proofer, metal structure fitter, ceramic tile layer sublayer, insulator, tinsmith, locksmith, electrician, maintenance electrician, lorry driver, driver with trailer, car mechanic, car painter, tinsmith, leather worker, fur and leather tailor, chef of national cuisine, pastry chef, baker, butcher, programmer, interface designer and system administrator.

b. The idea of fair movement is not present in the public/professional discourse.

c. Over the past years, since the accession of Croatia to the EU, considerable numbers of healthcare workers (doctors and nurses) have left Croatia and moved to other, more developed and richer EU Member States. This has created a huge lack of nurses and doctors in Croatia and is creating problems in healthcare.

Question 4

a. In 2018, there were 12.9 million EU migrant workers.[7] Most EU migrant workers come from large Eastern or Southern Member States: Romania (2.5 m), Poland (1.8 m), Italy (1.3 m) and Portugal (1.0 m). However, Croatia was and continues to be one of the countries most impacted by emigration, when measured as the share of mobile citizens relative to the population in the country of origin. In 2018, there were 15% of Croatian nationals living in another EU Member States.[8] Consequently, although Croatia has a long migrant tradition, the large share of its mobile workers is due to recent emigration, which was prompted by its accession to the EU in 2013 and the removal of barriers to free movement of workers to other, richer EU Member States.

Cross-country wage differentials are an important pull/push factor in explaining both skilled and unskilled migration from Croatia. Relocation entails costs and risks. Financial costs of relocation can be covered by higher income, while there are also other administrative barriers and risks related to the integration in another country. Unemployment differentials are another pull/push factor. On the one hand, high levels of unemployment in the origin Member States can encourage the unemployed who are unable to find work at home to look for work abroad.

[7] For a more detailed discussion on the negative effects of free movement of workers in the EU, including the brain and youth drain from Croatia, see Iris Goldner Lang and Maroje Lang, "The Dark Side of Free Movement: When Individual and Social Interests Clash", in S. Mantu, P. Minderhoud and E. Guild (eds.), *EU citizenship and Free Movement: Taking Supranational Citizenship Seriously*, Brill, 2020, pp. 382-409.

[8] Data on the intra-EU migration presented in this sub-section is from Eurostat, 2019. EU citizens living in another Member State – statistical overview, *Statistics Explained*, updated 17 July 2019.

This factor is especially important for younger and more unemployable groups of the population. Often, more educated people in Member States of origin are more likely to find jobs, thus leading to youth and brain drain, which has been taking place in Croatia. Additionally, the removal of obstacles to free movement for Croatian nationals enabled many unskilled and unemployed individuals to move to more developed EU Member States.

Another factor explaining the large emigration from Croatia to other Member States is related to the quality of institutions and the political climate. Often, people decide to emigrate from their country of origin in search of a better life both for themselves and for their children. Emigrants, particularly those with skills, move from countries with weak institutions to those with stronger institutions. Generally speaking, the quality of institutions matters more for skilled migrants, whereas unskilled migrants appear to be attracted more by the social benefits of the receiving countries.[9]

In addition, life satisfaction appears to be an important driver of migration. This includes several dimensions, such as satisfaction with the life standard, opportunities for children, satisfaction with household income, and confidence in national elections and institutions. The European Commission Joint Research Centre's Annual Report 2018 on intentions to migrate finds that being dissatisfied with one's standard of living is associated with a higher probability of desiring and planning to move abroad.[10]

The relevance of life satisfaction, as an important driver of migration, has been confirmed in a number of Member States, such as Croatia. The study of new emigrants from Croatia to Germany finds that the main motives for emigration are not economic, but social and political.[11] The results of the study point to the connectedness of political ethics, weak institutions and emigration. According to the study, the main driver of migration is that in Croatia work ethics and honesty are not valued. The study further finds that the population of migrants are mostly younger people who were previously employed in Croatia and who most often move with their entire families (spouse, children). According to the study, the majority of new emigrants are very satisfied with their decision and do not regret migrating abroad.

[9] Atoyan, R., Christiansen, L., Dizioli, A., Ebeke, C., Ilahi, N., Ilyina, A., Mehrez, G., Qu, H., Raei, F., Rhee, A. and Zakharova, D. 2016. Emigration and Its Economic Impact on Eastern Europe, *IMF Staff Discussion Notes 16/7*, International Monetary Fund.

[10] The European Commission JRC Annual Report 2018.

[11] Jurić, T. 2018. Suvremeno iseljavanje Hrvata u Njemačku: karakteristike i motivi (Contemporary Emigration of Croats to Germany: Motives and Characteristics), Migracijske i etničke teme, 33 (2018), 3 (2017); 337-371 doi:10.11567/met.33.3.4.Jurić, 2018.

A study of the Croatian Employers' Association, conducted on a sample of 661 Croatian emigrants, published on 7 June 2018, confirms these findings.[12] The study shows that there are three groups of reasons why Croatian citizens emigrate. It is striking that the first group of reasons, linked to the emigrants' dissatisfaction with the social and political situation in Croatia, constitutes 65.5% of the grounds for emigration. The most common reasons in this group are: a disorganised state and the lack of political vision; nepotism; corruption; religious intolerance and nationalism and the lack of structural reforms. The second group of reasons – linked to the labour conditions – and the third group of reasons – linked to one's personal situation – constitute the remaining 35%. Here, the most frequent reasons are: the feeling that an individual's work and abilities are not valued; and the low or irregular payment of salaries.

b. EU Member States, such as Croatia, which face high emigration rates, are resorting to different methods of dealing with labour shortages and other negative effects of free movement. Some have introduced tax relief and other fiscal and non-fiscal incentives aimed at reducing the negative effects of free movement. Over the last few years, Croatia decided to reduce the tax burden on natural and legal persons, and additional tax benefits for young workers have been proposed to discourage emigration. Additionally, the Croatian government has completely abolished quotas for third-country nationals and adopted rules to make it easier for businesses to hire third-country nationals. Further, since its independence in 1991, the Croatian policy has been to grant Croatian nationality to ethnic Croats living abroad, mostly in Bosnia and Herzegovina. This way, Croatia has enabled large immigration from Bosnia and other former Yugoslav republics, consequently increasing its population and automatically enabling all ethnic Croats to have access to the EU internal market.

c. In Croatia, there are currently pending cases related to the application of EU law to contracting the obligation to work and the alternative obligation to compensate damages in contracts between health institutions and medical specialists. The proceedings deal with the issue whether the reimbursement of the costs of specialist training in cases of termination of specialisation in the parent health institution, before passing the specialist exam or before the expiry of the employment contract, are in accordance with EU law. This issue

[12] The study of the Croatian Employers' Association, Novi hrvatski iseljenici: Privremeni rad ili trajno iseljenje, Istraživanje među hrvatskim državljanima koji su iselili iz zemlje nakon ulaska u EU (01.07.2013. do 28.02.2018) [New Croatian emigrants: Temporary Work or permanent emigration, A study among Croatian nationals who have emigrated from the country upon the EU accession (1 July 2013 until 28 February 2018)], June 2018. Available at:

<https://www.hup.hr/hup-predstavio-rezultate-istrazivanja-medju-iseljenicima-o-razlozima-odlaska.aspx>, visited: 20 July 2019.

is especially important for resident doctors who want to change jobs before completing their residency, and especially for those who signed contracts with health institutions before 2016, which in some cases obligates them to pay a fee of more than HRK 1 million.

Additionally, there has been a case decided by the High Administrative Court of the Republic of Croatia (Usž-1048/21-2) related to the question whether a Croatian national who was working at an EU institution was obliged to pay contributions in Croatia, based on the rules of the Croatian Pension Insurance Institute. The Croatian High Administrative Court ruled in favour of the concerned individual, by stating that she was insured and acted in accordance with EU law, and that the Croatian Pension Insurance Institute had no right to ask from her to pay contributions to several pension insurance systems.

Chapter 2. Conflicts between fundamental freedoms and social rights

Question 5

a. Directive 2018/957 was transposed into national law as Zakon o upućivanju radnika u Republiku Hrvatsku i prekograničnoj provedbi odluka o novčanoj kazni (Act on posting of workers to the Republic of Croatia and cross-border enforcement of decisions on fines).[13] The principle of equal pay for equal work has been implemented in national law in Art. 6 of the implementing law. This article contains all of the enumerated provisions of the Art 3 of the Directive. However, the equal pay for equal work principle is not used in two cases. First, when a qualified worker is sent to Croatia by an employer for a period shorter than 8 days in order to assemble or initially assemble as part of the contract for the delivery of goods. (Art. 6 (3)) Second, the provisions regarding equal pay do not apply for construction workers, more precisely, construction workers involved in residential construction (Art. 6(4)). It is therefore visible that construction workers working in a highly specified field of construction work are put in a position, which is far less favourable than other posted workers.

Other rights and obligations of posted workers and persons who employ posted workers are scattered through other relevant national legislation. For example, Article 9(1) and 9(6) of the Pensions Insurance Law[14] stipulates that posted

[13] Zakon o upućivanju radnika u Republiku Hrvatsku i prekograničnoj provedbi odluka o novčanoj kazni. (Law on posting of workers to the Republic of Croatia and cross-border enforcement of decisions on fines), NN 128/20, 114/22

[14] Zakon o mirovinskom osiguranju (Pension Insurance Law), NN 157/13, 151/14, 33/15, 93/15, 120/16, 18/18, 62/18, 115/18, 102/19, 84/21, 119/22

workers who are sent to work abroad but are employed by Croatian employers need to have their pension insurance in Croatia. Moreover, Article 35 (2) of the Law on Contributions stipulates that the employer is obliged to calculate and pay all contributions (from and on the basis) for compulsory insurance for insured persons based on the employment relationship and Article 37 of the same law stipulates that the monthly basis for calculating the contribution is the amount determined by the employer, based on the highest monthly salary that the posted worker would earn for the same or similar jobs in the Republic of Croatia, according to the employment contract, labour regulations, collective agreement or special regulation, increased by 20%, and that for full-time work it cannot be lower than the lowest monthly base increased by 20%.

While not all stipulations are enumerated here, it is clear from the above-mentioned examples that posted work is completely regulated in accordance with EU law in the Republic of Croatia.

b. Up until the writing of this Report, there have not been any cases involving posted workers sent to Croatia from another Member State. However, there were some cases of Croatian posted workers working for Croatian employers before the Supreme Court of Croatia. The Court has found in three cases that posted workers, in principle, have the same rights as all other workers, however, while other workers have the right to additional payment for Christmas, this is not the case for posted workers. (Revr 1776/2019-1, 27/2019 and 338/2018) The Court has come to this conclusion by interpreting the national legislation through Article 31 of the European Social Charter and Directive 2018/957 so one could conclude that the interpretation would follow the same line of reasoning in situations concerning temporary agency workers from other Member States.

Question 6

a. No, it is not. According to the research performed for this Report and the information gathered from national courts, there is no case law in which the freedom of establishment and the right to conduct a business are used to challenge national or EU social law.

The only somewhat related case law was when a private bank unsuccessfully invoked multiple arguments from EU law, including the freedom of establishment, in a revision procedure before the Croatian Supreme Court (Vrhovni sud Republike Hrvatske). The Court decided that the matter of the case is not related to the arguments invoked by the bank (Revr 1547/19).

There is no particular case law regarding employment law.

An interviewed judge stressed that Zakon o radu (Labour Law)[15] has long absorbed norms of EU law so that there is not much need to invoke provisions other than from national law, but there is also a certain lack of knowledge and experience of legal practitioners that do not invoke EU law directly.

b. The right to strike is guaranteed by Article 61 of Ustav Republike Hrvatske (Croatian Constitution). This Article further elaborates that the right to strike can be restricted in the armed forces, police, civil service and public services, under conditions prescribed by law.[16] The right to strike is elaborated by Articles 205-220 of Zakon o radu (Labour Law).[17] According to Croatian law, trade unions have the right to call for a strike and carry it out for the economic or social interests of their members and their right to receive compensation.[18] Further rules concern the conditions for carrying out the strike,[19] on lockout, on activities that cannot be interrupted by a strike, on rights of workers on strike and their compensation while on strike, and the role of the courts in questions related to strikes.[20]

As a general evaluation on how the right to strike is treated compared to economic freedoms, an interviewed judge stated that the right to strike is treated at least as equally important compared to economic freedoms, even though, as we stated, there is no particular case law weighing the right to strike against internal market freedoms. Another interviewed judge similarly reported that she does not have the impression that the market freedoms are considered more dominant than the right to strike.

Chapter 3. Social acquis and social "non-acquis"

Question 7

a. Croatian legislation implements the anti-discrimination rules through Zakon o suzbijanju diskriminacije (Law on Suppression of Discrimination),[21] it implements the relevant provisions of directives 2000/78/EC, 2000/43/EC, 2004/113/EC and 2006/54/EC.

[15] Zakon o radu (Labour Law), NN 93/14, 127/17, 98/19.

[16] Article 61(2), Ustav Republike Hrvatske (Constitution of Republic of Croatia), NN 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

[17] Zakon o radu (Labour Law) NN 93/14, 127/17, 98/19.

[18] Article 205, Zakon o radu (Labour Law) NN 93/14, 127/17, 98/19.

[19] ibid.

[20] Articles 213 – 219, Zakon o radu (Labour Law), NN 93/14, 127/17, 98/19.

[21] Zakon o suzbijanju diskriminacije (Law on Suppression of Discrimination), NN 85/08, 112/12

Through interviews with Croatian judges and by looking into the national report of the Croatian Ombudswoman on discrimination,[22] it was found that there is little to no reliance on antidiscrimination law, either EU or national, in the field of religious discrimination. Therefore, recent case of the Court of Justice of the European Union did not have an impact on case law in the area of religious discrimination on national level.

The notion of reasonable accommodation was implemented by two national laws and other national by-laws stemming from the two. These are the Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba s invaliditetom (Law on professional rehabilitation and employment of persons with disabilities)[23] and Zakon o suzbijanju diskriminacije (Law on Suppression of Discrimination).[24] The former prescribes, in Articles 7 and 14, the definition of the term reasonable accommodation and the obligations of employers with regard to reasonable accommodation. The latter law prescribes, in its Article 4, that the omission to reasonably accommodate a workplace is an act of discrimination. There were also a number of cases dealing with the issue of reasonable accommodation before the Croatian Constitutional Court.[25] However, the Constitutional Court rejected all attempts to question the implementation and use of this obligation in practice.

National judges who were interviewed highlighted that the need for development in antidiscrimination law lies in the education of both lawyers and judges who are responsible for the application of antidiscrimination law. Particularly, it was pointed out that there is a need to develop a better understanding of terms used in antidiscrimination law, such as the difference between mobbing and discrimination. It was concluded that these developments do not need to be initiated at EU level but at national level.

b. The aquis is fully implemented in national law through Croatian Labour Law.[26] All relevant provisions regarding working time are implemented in its Articles 60–72. The aquis is most useful to workers in the area of annual paid leave and working time. These are also the two domains, which are most frequently invoked before national courts. The question of working time was invoked before national courts in connection to military work and medical doctors during their specialisation.

[22] Izvješće pučke pravobraniteljice za 2021. (Report of the Ombudsman for 2021), Zagreb, March 2022, available at: <https://www.ombudsman.hr/hr/izvjesca-puckog-pravobranitelja/>, visited: 18 October 2022.

[23] Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba s invaliditetom (Law on professional rehabilitation and employment of persons with disabilities), NN 157/13, 152/14, 39/18, 32/20

[24] ibid. p. 19

[25] U-II/3093/2019, U-II/509/2017, U-III/2263/2016, U-III/2244/2017, U-I/2976/2014, U-III/4141/2018

[26] Ibid, p. 17

Through interviews conducted with judges employed at both municipal and county courts in Zagreb, we were told that there were hostile reactions regarding paid annual leave. Croatian judges do not agree with the case law of CJEU. Namely, there are disagreements, because it is considered that some rights are set too broadly, one such example, which was highlighted by both interviewed judges, was the transfer of annual leave to the following calendar years.

c. Platform work is currently not regulated by Croatian Labour Law, but the process of amending the law to regulate the position of platform workers is currently underway. The public consultation was completed in August 2022, and a chapter regulating platform work will be added to the Labour Law, and it will be in force from the 1st of January 2024.[27] The newly amended law will contain, among others, provisions on the definition of platform work and platform worker, provisions on the protection of privacy and personal data and the assumption of the existence of an employment relationship.[28]

Given that platform work in the Republic of Croatia is a relatively new phenomenon and way of doing business, no practice has been developed regarding platform work. For this reason, it is not known whether there are cases of misclassification of platform work as self-employment. As can be seen from the amount of interaction in the process of public consultation on the position of platform workers, the interest of the public and social partners is significant, and many comments were offered in order to achieve the best way of regulating the position of platform workers in the final version of Croatian Labour Law.

d. Croatian legislators and judges have taken a position on the supremacy of international and EU law over national legislation (Usž-1048/21-2), but the practice related to the conflicts between EU and international law is still in its infancy and there is no relevant developed position taken by the legislator or the courts.

The European Social Charter is not often cited in national case law; there are less than 10 available judgements that directly cite the Social Charter. Based on the interviews with Croatian judges that have been conducted for the purpose of writing this Report and in previous work of its authors, national judges see the citation of the Charter as redundant as it is seen as being fully transposed in

[27] Sjednica Vlade: Saboru upućen Prijedlog zakona o izmjenama i dopunama Zakona o radu te Prijedlog Zakona o sportu (Government session: Draft Law on Amendments to the Labor Law and Draft Law on Sports sent to the Parliament), Zagreb, Septembre 2022, available at: <https://vlada.gov.hr/vijesti/sjednica-vlade-saboru-upucen-prijedlog-zakona-o-izmjenama-i-dopunama-zakona-o-radu-te-prijedlog-zakona-o-sportu/36121>, visited: 18 September

[28] Prijedlog zakona o izmjenama i dopunama zakona o radu (Proposal of the Law on Amendments to the Labour Law), Art. 221. a – 221. p, available at:< https://esavjetovanja.gov.hr/Econ/MainScreen?EntityId=5703>, visited: 18 September

concrete national provisions which are then cited in judgements. It was also noted in interviews that there are not many judges who cite EU law in their judgements and only a few have started to cite the judgements of the European Court of Human Rights, while the case law of the Court of Justice of the European Union is still not being cited in virtually any of the judgements.

Question 8

a. At the moment, there have not been any talks in the public, either by the legislator or by any interest groups, related to EU social policy. None of the relevant actors that have been interviewed have any particular insight on what should be the new frontier of EU social policy. The only relevant observation is that some judges think that the EU, and particularly the CJEU, unnecessarily broaden the rights prescribed in certain directives, more specifically in the area of paid annual leave. Unfortunately, we were not able to get any insight on this topic from interest groups such as syndicates or employer associations. However, as pointed out above, none of these groups have highlighted EU social policy as a relevant topic of their interest at the moment.

It was noted by one of the interviewed judges that, in particular, the right to strike is well-developed in public sectors such as public education and public health (teachers, nurses, doctors), but that there is little to no activity in that domain in the private sector. It is seen as not directly connected to EU actions, but as an area, which has space to develop nationally.

b. The authors were not able to find any relevant judgements or legislation, which would confirm or deny the application of EU law to self-employed persons. The Croatian law on the labour market, Zakon o tržištu rada (Labour Market Law)[29] transposes EU Directives 97/81/EC, 2006/123/EC, 2014/54/EU and the Law itself applies to self-employed persons.

Question 9

Croatia will join the euro area on 1 January 2023. Even though at the time of writing this report Croatia is not yet a euro area Member State, it is subject to the EU's economic governance, which requires the adoption of policies and measures recommended by the Council.[30] In this context, in 2014 excessive macroeconomic

[29] Zakon o tržištu rada (Labour Market Law), NN 118/18, 32/20, 18/22

[30] For a more detailed account of Croatian constitutional obligations related to economic and monetary integration, see Tamara Ćapeta and Iris Goldner Lang, "Croatian Constitution and Economic and Monetary Integration in the EU: Report on Croatia for the Horizon 2020 Project 'EMU Choices: The Choice for Europe since Maastricht", in *EMU Integration and Member States' Constitutions* (eds. S. Griller & E. Lentsch), Hart, 2021.

imbalances identified by the Commission led to strong policy recommendations and the opening of the excessive deficit procedure (hereinafter: EDP) for Croatia on 28 January 2014. The EDP obliged Croatia to correct its excessive deficit by the end of 2016. The EU's recommendations were mostly in line with domestic policy priorities – fiscal consolidation and a return to the path of sustainable growth. Croatia adhered to these recommendations, its deficits consequently dropped below the EU's 3% of GDP reference value, and, on 16 June 2017 the Council decided that Croatia's deficit had been corrected and closed the EDP.[31] In the course of Croatia's EDP, only modest austerity measures were taken, the most visible being the adoption of two laws of a temporary character: the Act on the Denial of Payment of Certain Material Rights to Employees in the Public Service,[32] in force as of 31 March 2015, and the Act on the Denial of the Right to an Increase of Salaries Based on Seniority,[33] in force as of 1 April 2014. The former act denied public servants the right to a 2015 Christmas bonus and regress for using annual leave in 2015, while the latter denied the right to increase the coefficient for the complexity of work in the public service based on the number of years of service, and was also applicable until the end of 2015.

The Act on the Denial of the Right to an Increase of Salaries Based on Seniority was subject to a constitutional review procedure initiated by nine trade unions and a number of Croatian citizens. However, in its judgement, dated 30 March 2015, the Constitutional Court rejected the proposal and declared that the denial of the right to an increase of salaries based on seniority is in accordance with the Croatian Constitution.[34] The Constitutional Court based its judgement on the argument that "there are imperative reasons of public interest which justify its application (correction of excessive deficit in accordance with Council recommendations)".[35] Nevertheless, the Constitutional Court warned that potential further extension of the application of the law in question could turn the measure into a permanent one, which would raise the question of the functioning of the rule of law and the principle of legal certainty and could call into question citizens' confidence in pubic authority.[36] In other words, the Constitutional Court found that the measure had a legitimate aim and that it was proportionate, due to its temporary character. Consequently, in the event of future austerity measures, no matter whether motivated by Croatia's EU obligations or

[31] Council Decision abrogating Decision 2014/56/EU on the existence of an excessive deficit in Croatia, 10000/17 ECOFIN 496 UEM 188, 12 June 2018.

[32] NN 36/15.

[33] NN 41/14, 157/14 and 36/15.

[34] Judgement U-I-1625/2014 and others, U-I-241/2015, U-I-383/2015, U-II-1343/2015, 30 March 2015.

[35] Ibid., para. 66.

[36] Ibid., para. 67.

for purely domestic reasons, further constitutional review procedures could be expected. This constitutional practice seems to be in line with the practice of other Member States' constitutional courts during the recent economic crisis.[37]

Chapter 4. The Relevance and the Importance of the Charter of Fundamental Rights

Question 10

a. There is no national case law on this point, according to the High Administrative Court. The courts (in Croatia) do not explicitly invoke the Charter, but the essence of rights in the Charter is implemented by the court, as an interviewed judge stated.

b. and c. There is no case law that refers to the AMS case or the 'principles' within the meaning of Article 52 of the Charter. One interviewed judge stressed at this point that Croatian courts refer to principles when deciding certain cases, especially when interpreting a point of law, but not the principles in the sense of this question. Another judge stated that there is no recorded administrative court case law, in which a national administrative court had considered principles within the meaning of Article 52(5) of the Charter.

d. Article 52(2) of the Charter is not relied upon by national authorities and courts in order to limit or hamper the scope of social rights of the Charter. In particular, the Croatian High Administrative Court answered: 'National administrative courts, when deciding upon legality of individual legislative acts of administrative bodies, take into account national legislation as well as EU secondary legislation (e.g. case Usž-3990/16 — right to maternity and parental benefits), but there is no case law that correlates social rights of the Charter with secondary legislative sources, nor is it recorded that their content has been contemplated in the sense of Article 52(2).'

e. There are no such cases, to the knowledge of the authors of this Report. Of the most prominent CJEU's cases concerning horizontal situations and social rights, there is a single mention of the *Max Planck* case (C-684/16 ECLI:EU:C:2018:874) in Croatian case law, but in the context of the argument that the worker is generally the weaker party compared to the employer, and that he/she thus deserves greater protection (case Pr-937/2021-3).

[37] Tamara Ćapeta, "The Role of Courts in Economic Governance in the European Union", in F.J. Carrera Hernández (ed.), *Towards a New Government of the Economy in the European Union?* Aranzadi, 2018, 155-189.

Chapter 5. EU Trade policy and social rights' protection

Question 11

a. Social rights are protected within the social rights clauses of the international trade agreements concluded by the EU, which has an exclusive competence regarding international trade.[38]

Secondly, international trade and global supply chains are related to free movement of capital, in particular to foreign direct investment, which is a form of capital movement. Most EU Member States have installed so-called screening mechanisms for foreign direct investment coming from outside of the EU, which allows these Member States to screen and potentially prevent foreign direct investment that could endanger public policy or public security.[39] However, Croatia is still among a small number of EU Member States that does not have a screening mechanism in place. Thus, even though a mechanism for screening foreign direct investment can be considered a form of protection against unwanted consequences of free international trade and complex supply chains, Croatia currently does not employ such a mechanism.

Rules on public procurement in Croatia are used to foster social rights. Croatia has incorporated protection of social rights within the framework of public procurement. Zakon o javnoj nabavi (Public Procurement Law) contains a significant number of provisions, which have the goal of protection of social rights, specifically Article 4(4), Article 254, Article 289 (2) and (5), and Article 295(3).[40] Further, significant are Article 51 and Article 208 of the same Law, as they reserve a special position in public procurement for economic subjects that have the goal of social and professional integration of people with disabilities and other categories of disadvantaged persons. This issue has also been addressed by the case law of the High Administrative Court (Visoki upravni sud RH) (UsII-453/20-7; Usž-1169/21-2; UsII-165/20-8).

b. Multiple companies, especially larger ones, such as banks, have published reports on the sustainability of their business operations, including its social implications.[41] Since the area of social reporting and social due diligence is a

[38] Article 3 TFEU; Article 207 TFEU.

[39] A list of Member States with screening mechanisms: <https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf>, visited: 15 September 2022.

[40] Zakon o javnoj nabavi (Law on Public Procurement), NN 120/16.

[41] An example of such a report by a bank: Hrvatska poštanska banka <https://www.hpb.hr/UserDocsImages/o-nama/odrzivost/Provo%C4%91enje%20postupaka%20dubinske%20analize%20i%20Izjava%20o%20uzimanju%20u%20obzir%20glavnih%20%C5%A1tetnih%20u%C4%8Dinaka%20odluka%20

relatively new requirement of EU law, it is hard to gauge the effects of such practices in Croatia yet.

c. To the authors knowledge and based on the conducted interviews, there are no such trans-national collective agreements concluded by Croatian firms.

d. According to our research and the judges we interviewed, there is no case law on this point.

e. Zakon o parničnom postupku (Civil Procedure Act) envisages the possibility of collective action (tužba za zaštitu kolektivnih interesa i prava).[42] Only qualified entities, such as registered groups for protecting a certain collective interest or a right can bring the action, which may concern a broad array of rights or interests. Zakon o zaštiti potrošača (Consumer Protection Law) contains provisions on bringing action to protect collective rights of consumers,[43] and these provisions act as *lex specialis* in relation to provisions of Zakon o parničnom postupku (Civil Procedure Act) regarding class action. Croatian Government expects that by the end of 2022, a new law, specifically on consumer class action, shall be enacted by the Parliament,[44] implementing the EU Directive on representative actions for the protection of the collective interests of consumers.[45]

f. The Croatian legislative framework includes requirements regarding non-financial reporting for companies, on issues including effects on social rights, fundamental rights and other. Croatia has incorporated EU law on the matter of corporate social responsibility reporting in Zakon o računovodstvu (Law on Accounting).[46] Another source of corporate non-financial reporting (which includes social rights issues) are the Kodeksi korporativnog upravljanja (Codexes of Corporate Governance) that are issued by companies themselves.[47] State-owned enterprises have such a Codex as well, based on a Decision by the

o%20ulaganju%20na%20%C4%8Dimbenike%20odr%C5%BEivosti%20HPB%2030.6.2021..pdf?vel=800265>, visited: 15 September 2022.

[42] Article 502(a), Zakon o parničnom postupku (Civil Procedure Act), NN 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19, 80/22.

[43] Article 114-130, Zakon o zaštiti potrošača (Consumer Protection Law), NN 19/22.

[44] Croatian Government plan for implementation of EU *acquis* in 2022: <https://vlada.gov.hr/UserDocsImages/2016/Sjednice/2021/Prosinac/93%20sjednica%20VRH/Novo/93%20-%209%20a.docx>, visited: 15 September 2022.

[45] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC OJ L 409.

[46] Article 2, Zakon o računovodstvu (Law on Accounting), NN 78/15, 134/15, 120/16, 116/18, 42/20, 47/20, 114/22.

[47] Examples of Codexes of prominent Croatian companies: Podravka, <https://www.podravka.hr/kompanija/investitori/korporativno-upravljanje/>; Adris, <Kodeks korporativnog upravljanja>; Plava Laguna, <https://biz.plavalaguna.hr/hr/korporativne-informacije/plava-laguna/objave/kodeks-korporativnog-upravljanja1>, visited: 15 September 2022.

Croatian Government.[48] Some corporations have conducted environmental and social due diligence as a requirement for getting financing from the European Bank for Reconstruction and Development.[49]

Two recent EU regulations[50] determine how companies must report on issues including social implications of their business. Naturally, this EU legislation is directly applicable in Croatia and it, thus, influences how Croatian companies report in the sphere of, inter alia, their social sustainability. Motivated by these legislative changes, Croatian Financial Services Supervisory Agency (Hrvatska agencija za nadzor financijskih usluga: HANFA) has conducted seminars to inform Croatian listed companies on non-financial reporting regarding sustainable development.[51] HANFA has also published guidelines regarding publishing ESG (environment, social and governance) reports in line with the Sustainable Finance Disclosures Regulation,[52] with the guidelines also available in English.[53] Likewise, the Croatian Chamber of Commerce (Hrvatska gospodarska komora: HGK) organised workshops for companies on how to properly publish ESG information.[54]

The Croatian business environment is furthermore preparing for the upcoming Directive on Corporate sustainability reporting (CSRD).[55] Multiple Croatian businesses specialise in helping other companies with publishing regular corporate reports on environment and social issues, as required by the upcoming CSRD.[56]

[48] Odluka o donošenju kodeksa korporativnog upravljanja trgovačkim društvima u kojima Republika Hrvatska ima dionice ili udjele, NN 132/17.

[49] ARUP, <https://www.arup.com/projects/rijeka-wastewater>, visited: 11 September 2022.

[50] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 *OJ L 198, 22.6.2020, p. 13–43;* Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, OJ L 317, 9.12.2019, p. 1–16 (Sustainable Finance Disclosures Regulation).

[51] *Hanfa donijela Smjernice za nefinancijsko izvještavanje poduzeća prema okolišnim, upravljačkim i društvenim (ESG) ciljevima,* osiguranje.hr (18 March 2022), <https://www.osiguranje.hr/ClanakDetalji.aspx?21133>, visited: 15 September 2022.

[52] HANFA, <https://www.hanfa.hr/vijesti/hanfa-donijela-smjernice-za-nefinancijsko-izvje%C5%A1tavanje-poduze%C4%87a-prema-okoli%C5%A1nim-upravlja%C4%8Dkim-i-dru%C5%A1tvenim-esg-ciljevima/#>, visited: 15 September 2022.

[53] HANFA, <https://www.hanfa.hr/media/5669/guidelines-for-the-preparation-and-disclosure-of-esg-relevant-issuer-information_24-3-2021.pdf>, visited: 15 September 2022.

[54] Presentation by HGK, in Croatian: <https://www.hgk.hr/documents/hgk-radionica-esg-smjernice-za-izdavateljehanfa-12-05-2021609bbc89ee5bf.pdf>, visited: 15 September 2022.

[55] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting COM/2021/189 final.

[56] Bureau Veritas Hrvatska, <https://www.bureauveritas.hr/odrzivost/csrd>; Institut za društveno odgovorno poslovanje <https://idop.hr/dubinska-analiza-odrzivosti/>, visited: 12 September 2022.

Question 12

In order to mitigate the social, economic and environmental consequences of transition, the European Commission proposed, in January 2020, the establishment of the Just Transition Fund, which is part of a billion-euro plan to fund climate action. While all Member States are eligible, funding is earmarked for regions facing the greatest challenges: those with high carbon emissions and heavy use of fossil fuels (coal, lignite, peat and oil shale).[57]

With regard to issues that link climate change and social justice, the Croatian National Recovery Plan sets out to address the challenges of weak investment in energy renovation of buildings, which will increase the renovation rate in Croatia and have it approximate the average EU rate as well as invest funds in comprehensive earthquake restoration, including the strengthening of earthquake and fire safety. Given the shortage of construction industry workforce in Croatia, it will be necessary to train workers with relevant knowledge of "green jobs" required for energy restoration and post-earthquake reconstruction. By the same token, it is necessary to overcome insufficient public awareness, knowledge and participation in building renovation decision making, in order to improve knowledge and accelerate the renovation process. The challenges of the outdated seismological network with insufficient seismological data will be solved by its modernization, which, in addition to the reconstruction process, will also contribute to improvements in spatial planning. In addition to these essential improvements, the reforms will contribute to the boosting of the level of integration of green infrastructure and concepts of space and buildings circular management, in order to reduce the negative impact of the construction sector on climate and the environment.[58]

Question 13

In the school years 2012/13 and 2013/14, the Civic Education Curriculum was experimentally implemented in 12 schools (8 primary and 4 secondary schools). After that, the Ministry of Science and Education abandoned the curricular model and, in 2014, it introduced the Programme of Cross-Curricular and Interdisciplinary Content of Civic Education for primary and secondary schools.[59]

[57] Europski parlament, *Pravedan prelazak na zeleno gospodarstvo za sve europske regije (European Parliament, A fair transition to a green economy for all European regions)* <https://www.europarl.europa.eu/news/hr/headlines/priorities/klimatske-promjene/20200903STO86310/pravedan-prelazak-na-zeleno-gospodarstvo-za-sve-europske-regije>, visited: 20 September 2022.

[58] Vlada RH, *Nacionalni plan oporavka i otpornosti 2021-2026 (National Recovery and Resilience Plan 2021-2026,)*, <https://planoporavka.gov.hr/UserDocsImages/dokumenti/Plan%20oporavka%20i%20otpornosti%2C%20srpanj%202021..pdf?vel=13435491> p. 18., visited: 20 September 2022.

[59] Decision on the Adoption of the Programme of Cross-Curricular and Interdisciplinary Content of Civic Education for Primary and Secondary schools, NN 104/2014-2019.

This Decision was repealed by the Decision on the Adoption of the Curriculum for the Intercurricular Subject "Civic Education and Education and Education for Primary and Secondary Schools in the Republic of Croatia, which was adopted in 2019.[60] The content of Civic Education is implemented cross-curricularly, in primary and secondary schools through six dimensions: social, human-legal, political, (inter)cultural, economic, and ecological. As a result, topics related to EU citizenship and values are partly covered in primary and partly in secondary education, and they are covered in different courses. In primary school education, elements of political education are covered within the framework of the course "Nature and Society", whereas in high school education civic education is covered in a range of courses, such as Sociology, Ethics and Politics and Economy.

As regards civic education of schoolteachers and other professionals working in primary and secondary school, the NGO GONG has since 2012 organised, on a yearly basis, its programme "Civic Literacy Education", which encompassed more than 60 teachers and other professionals from primary and secondary schools.[61] The programme contains four modules of political, media and EU literacy and it enables teachers and other school professionals to improve their knowledge and competencies on democracy, the role of media and the European Union.

Question 14

In Croatia, fundamental social rights are guaranteed under the Constitution. There has been demonstrable progress since Croatia became an independent state in the 1990s, with the greatest upswing occurring immediately before and after accession to the EU (on account of harmonisation with EU legislation). Nevertheless, there remains ample space for improvement and progress.[62]

In her annual reports to the Croatian Parliament, the Ombudswoman has been highlighting continuously the difficulties faced by citizens, especially the elderly, in relation to achieving social security. She has been giving special emphasis to the rights of the unemployed, workers and national minorities. The Ombudswoman has been pointing out to cases of discrimination and to the difficulties encountered by vulnerable categories of the society, especially the availability of social and health services, particularly in rural areas. The Ombudswoman's 2020 report found that one in five persons is at risk of poverty, as is one in two persons over 65 living

[60] Decision on the Adoption of the Curriculum for the Intercurricular Subject "Civic Education and Education and Education for Primary and Secondary Schools in the Republic of Croatia", NN 10/2019-217.

[61] For the information about the programme, see here: <https://gong.hr/baze-znanja/>, visited: 15 October 2022).

[62] V. Puljiz, „Socijalna prava i socijalni razvoj Republike Hrvatske" ("Social rights and social development of the Republic of Croatia") *Revija za socijalnu politiku*, Vol. 11, Br.1, 2004, pp.3-20.

alone. Given the statistics, the welcome introduction of a national benefit for the elderly, dubbed *national pensions*, was announced for 2021, and recommended in the Ombudswoman's report. The Ombudswoman's recommendations are only one of the steps along the way to achieving social justice in Croatia, which she warns about, in nearly all aspects of life – social welfare, health, housing, justice, finance, environmental protection, and others.[63]

Significant progress in the realisation of socio-economic rights has yet to be achieved, according to the Human Rights House Foundation's 2021 Status Report. Compared to 2020, the risk of poverty and social exclusion (AROPE) rate has stagnated, meaning that over a fifth of the Croatian population remains at risk of poverty and social exclusion. Devastatingly, more than half of the over-65 population is at risk of poverty, and more than half of pensions are below the Croatian poverty threshold. Moreover, the quality of life in Croatia continues to be severely affected by the varying quality of public services, regional income inequality, varying access to healthcare, education and social protection, and economic inequality. Of particular concern is the varying availability of social services, which severely affects the exercising of the rights of vulnerable and marginalised groups and individuals.

At the end of 2021, nearly 15 years after signing, Croatia finally ratified the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). Unfortunately, no progress has been recorded regarding the ratification of the European Social Charter (Revised). Similarly, no progress was recorded regarding the acceptance of Article 14 of the ICPPED, due to which citizens still cannot complain individually to the Committee monitoring its implementation.

Croatia has yet to sign the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR). Citizens are therewith denied the possibility of individual complaints to the CESCR, the UN's independent committee responsible for the protection of social, economic and cultural rights. Moreover, Croatia has yet to express its intention to accede to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

Furthermore, Croatia also has yet to establish a functional coordination and preparation system for reporting and implementing recommendations of international mechanisms for human rights. The absence of such a system is directly

[63] Pučka pravobraniteljica, *Smanjivanje nejednakosti put je prema socijalnoj pravdi (Ombudswoman, Reducing inequality is the path to social justice),* <https://www.ombudsman.hr/hr/smanjivanje-nejednakosti-put-je-prema-socijalnoj-pravdi/>, visited: 20 September 2022.

causing the multi-year delays in reporting on the implementation of conventions, as well as the disorganised implementation of the received recommendations. A positive step in this direction is the establishment Government Council for Human Rights. Established in 2021, it is tasked with reviewing international human rights bodies' reports and recommendations. It remains to be seen how the Council will perform its function in the future.

Croatia's multi-year delay in fulfilling international obligations continued even in 2021. In 18 years, Croatia has not submitted the periodic report on the implementation of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. The report on the implementation of the Convention on the Elimination of All Forms of Discrimination against Women is three years late.

Croatia's 17-year late report on the implementation of the International Covenant on Economic, Social and Cultural Rights was at last adopted at the end of 2021. The report on the implementation of the International Covenant on Civil and Political Rights in Croatia – though only one year late in submitting, and adopted at the beginning of 2022 – has yet to be submitted to the UN and made publicly available. Disconcertingly, human rights organisations and defenders were not consulted in the preparation of periodic reports on the implementation of the two international covenants. This was a departure from the current practice of holding interactive dialogues with the civil society before adopting such reports in accordance with international human rights monitoring instruments. By the end of 2021, no progress was made towards translating into Croatian the recommendations and opinions of the UN committees that monitor the implementation of human rights protection conventions, which would make them more accessible to experts and the general public.

The adoption of the 2021-2027 National Plan for the Protection and Promotion of Human Rights and the Suppression of Discrimination has yet to take place, although it was announced for the first quarter of 2021. Notably, as the preceding National Program expired in 2016, Croatia is in its sixth year without a valid fundamental human rights policy.

Additionally, Croatia has not had a valid public policy with regard to gender equality since 2015, i.e., since the expiration of the 2011-2015 National Gender Equality Policy. The 2021-2027 National Plan for Gender Equality was drafted in 2021, but it has yet to be adopted.[64]

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[64] Kuća ljudskih prava Zagreb, *Ljudska prava u Hrvatskoj: Pregled stanja za 2021.* (Human rights in Croatia: Overview of the situation for 2021) <https://www.kucaljudskihprava.hr/2022/04/26/ljudska-prava-u-hrvatskoj-pregled-stanja-za-2021/>, visited: 20 September 2022.

Lastly, the Croatian government adopted the 2021-2027 National Plan for Social Services Development as a medium-term act of strategic planning of national importance. The Plan details the implementation of the goals of the National Development Strategy until 2030. Significant with regard to fundamental social freedoms is its Strategic Goal 5.5 *Healthy, Active and Quality Life*, as is the Priority Area *Social Solidarity and Responsibility*.

Another important outlook of the Strategy is Priority 1. *Making social services available and fostering their balanced regional development by widening the social services scope and developing new services and new worker profiles in accordance with planned priorities at the local level in order to meet the socially sensitive groups' needs, support life in the community, and prevent social exclusion of individuals*. Its focus is to encourage the development of foster care as one of the most appropriate forms of care that allows the exercising of the right to family life.[65] Among others, the quality and sustainable development of social services are listed as priorities. The priority area refers to the improvement of social services management and strengthening the social service providers' capacity. To this end, the plan aims to improve the legal framework, standardise and harmonise conduct and protocols, improve the data collection method for needs, establish an information system for the exchange, monitoring and analysis of data on users and social services, introduce a unique methodology for calculating social services prices, and develop software for price analysis and calculation for a more straightforward and efficient methodology application. Special attention is allocated to the strengthening of the providers' human resources through employing more social services workers, improving the service providers' infrastructural capacities, recruiting social services volunteers, offering educational activities to increase the experts' and foster parents' competence, and training social service providers for sustainable development.[66]

Question 15

In Croatia, the EU is perceived more as an economic than as a Social Union, especially in political discourse. There is focus on the EU's financing of national activities. On the other hand, Croatian judiciary, academia, politicians and the general public perceive social welfare as a strictly national issue, while the European Union is seen as the engine which stimulates this sector financially.

[65] Ministarstvo rada mirovinskoga sustava, obitelji i socijalne politike, *Nacionalni plan razvoja socijalnih usluga za razdoblje od 2021. do 2027. Godine (National plan for the development of social services for the period from 2021 to 2027.)*, <https://mrosp.gov.hr/UserDocsImages/dokumenti/Glavno%20tajni%C5%A1tvo/Godi%C5%A1nji%20planovi%20i%20strate%C5%A1ka%20izvje%C5%A1%C4%87a/Nacionalni%20plan%20razvoja%20socijalnih%20usluga%20za%20razdoblje%20od%20%202021.%20do%202027.%20godine.pdf>, p. 43, visited: 20 September 2022

[66] *Ibid.*, p.45.

This view of the EU is easily traced to the fact that Croatia, as was mentioned in the introduction, is the youngest Member State, and the Europeanisation of the country is still in its early days, as well as the general understanding of EU law by both practitioners and the public. Over time, one can expect that the understanding of the European Union and its role in the general social sphere of the community might change in the direction of EU being also perceived as a union whose aim is the achievement of social optimum, which could not always be achieved by unhindered play of market forces, but where other social interests need to be taken into consideration.

DENMARK

Ruth Nielsen[1]

Chapter 1. Free movement of workers

Question 1

The Directive on Measures Facilitating the Exercise of Rights conferred on Workers in the Context of Freedom of Movement for Workers (2014/54/EU) is not implemented in Denmark. The Directive lays down provisions, which facilitate the uniform application and enforcement of the rights conferred by Article 45 TFEU and by Articles 1 to 10 of the regulation on free movement of workers (492/2011/EU).

Under article 4 of the Directive each Member State shall designate one or more structures or bodies for the promotion, analysis, monitoring and support of equal treatment of EU workers and members of their family without discrimination on grounds of nationality, unjustified restrictions or obstacles to their right to free movement. Denmark has not designated such a body.

The reason why Denmark has chosen not to implement the Directive is that the government and the main labour market organisations think that it is unnecessary and undesirable. The prohibition against nationality discrimination is well established in Danish law. In the Danish tradition, monitoring of labour law is taking care of by the labour market organisations. Designation by the state of a body to monitor the law on free movement for workers would contravene this Danish model for labour market regulation.

a. *Is equal treatment respected, or limited in various ways, through direct, or rather indirect discrimination? Are Danish authorities and courts, in particular, fully aware of the European conception of equal treatment, and EU workers' rights? Are there specific barriers to equal treatment? Who is particularly concerned? Unemployed workers? Precarious workers? What about access to vocational training?*

Danish law respects the right to equal treatment for EU mobile workers and their family. National authorities and courts are fully aware of the European prohibition against direct and indirect discrimination and EU workers' rights. There are no nationality related barriers to equal treatment neither for mobile unemployed

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workers nor for mobile precarious workers. Mobile EU workers have access to vocational training on the same terms as Danish workers.

b. *Are EU workers and EU non "economically active" citizens treated differently?*

Yes – both in EU law and in Danish legislation and administrative practice. It is only EU-citizens residing in Denmark on the basis of Directive 2004/38/EC who enjoy equal treatment with Danish citizens and it is only economically active, students, persons with sufficient resources and their family members who have a residence right. This difference in Danish law which follows from EU law is not contested by academics, the press or political parties.

Question 2

What is the approach, at national level, to equal treatment in the domain of social security benefits?

a. *Is there support or opposition (civil society, political parties, unions, governments, academics…) to the CJEU case law according to which Member States have the right to refuse to grant social benefits to economically inactive EU mobile citizens (citizens who are not working or actively looking for a job, and who do not have the legal right of residence on the Member State's territory except when they have the means of subsistence and comprehensive health coverage)?*

In Denmark there is general support from civil society, political parties, unions, governments and academics to the CJEU case law according to which Denmark has the right to refuse to grant social benefits to economically inactive EU mobile citizens who are not working or actively looking for a job, and who do not have a right of residence on Danish territory.

b. *Is there a growing opposition, in Denmark, to the principle that the country of work of the parent(s) is responsible for paying child allowances, even when the child resides elsewhere?*

No, the EU rule is generally accepted in administrative practice and the public debate.

Question 3

What is the actual situation, and what are the developments envisaged, regarding workers' mobility in Denmark?

a. *On the basis of the available data, how many workers from other Member States work in your Member State? In what sectors/industries? How has this evolved*

over time? Are there any national industries currently reporting that they have problems finding workforce?

There are a total of 138,000 full-time employed people from the Nordics and other EU countries in Denmark (of which approx. 25,000 from the Nordics). People from our neighboring countries – Poland, Sweden and Germany as well as Romania make up the largest groups of foreign workers in Denmark, The number of employed foreigners in Denmark has increased over many years. It's about. 215,000 full-time employed foreign nationals in Denmark, which corresponds to just over 9 per cent of all full-time employees in Denmark.[2]

b. Has the idea of "fair movement" gained support rather than the concept of "free movement" in Denmark, among academics, civil society, economic and politic leaders...?

There is not much discussion of "fair movement" rather than "free movement" in Denmark.

c. *Is the mobility of "essential workers in critical occupations" considered to be an important issue, in your country, requiring a rethinking of the freedom of movement of workers?*

There is a shortage of labour in certain sectors, for example nurses.

Question 4

What is the national reaction to the brain drain phenomenon?

a. *Is there is a significant outflow of workers to other Member States, from Denmark? What are the sectors affected? What is the profile (age, level of education, gender) of the mobile worker? Are certain regions more affected than others? Has this also caused demographic problems?*

There is no significant outflow of workers to other Member States from Denmark.

b. *Are there in Denmark any measures aimed at retaining certain types of workers (for instance, with a certain level and type of qualification)? For example, are there measures which require graduates to work in their Member State of origin, which has financed the studies, for a certain period of time, before being able to migrate? Have there been other measures pursuing the same objective?*

[2] Source: UDENLANDSK ARBEJDSKRAFT PÅ DET DANSKE ARBEJDSMARKED 2018, published by Dansk Arbejdsgiverforening (Danish Employers' Association), December 2018.

No.

c. *Is there in Denmark, case-law or administrative decisions which examine the compatibility with EU law, in particular with the Treaty provisions on freedom movement, of such measures?*

No.

Chapter 2. Conflicts between fundamental freedoms and social rights

Question 5

How does Danish law deal with the situation of posted workers?

a. *Was Directive 2018/957 transposed into national law? How, more specifically, has the principle of equal pay for equal work as manifested in the revised Article 3 of the Directive, been implemented in national law? Are there sectors of activity where 'equal pay for equal work' in the context of posting does not apply? What are the sectors in which exploitation of workers is most problematic (agriculture, meat packing, construction…)?*

In Denmark, the Posting of Workers Directive (96/71/EC) was implemented by the Posting of Worker Act, which was amended in 2016 in connection with the implementation of Directive 2014/67/EU on the enforcement of Directive 96/71/EC.

The Act on the Labor Market Fund for Posted Workers was adopted as part of the Danish implementation of the enforcement directive (2014/67/EU) regarding posting of workers. Article 12 in that directive provides on subcontracting liability that Member States as regards the activities mentioned in the Annex to Directive 96/71/EC, for example in the construction sector shall provide for measures ensuring that in subcontracting chains, posted workers can hold the contractor of which the employer is a direct subcontractor liable, in addition to or in place of the employer, for the respect of the posted workers' rights. The Danish act on the Labor Market Fund for Posted Workers does not impose any responsibility on the contractor at all and therefore does not meet the directive's requirement for effective and proportionate sanctions against the contractor.

According to Article 3 of the first posting of workers directive (96/71/EC) Member States should ensure posted workers the same minimum rates of pay as national workers. By Directive 2018/957 this was replaced by a requirement of equal remuneration. The principle of equal pay for equal work as manifested in the revised Article 3 of the Directive has been fully implemented in Danish law.

There are no sectors of activity where 'equal pay for equal work' in the context of posting does not apply.

b. *Were cases decided at national level, concerning posting of workers by temporary work agencies established in other Member states? How were these cases solved by national courts?*

There are no reported court cases in Denmark concerning posting of workers by temporary work agencies established in other Member states.

Question 6

Is the freedom of establishment and the right to conduct a business (Article 16 of the CFR) used to challenge Danish law or EU social law in Danish courts?

It has happened a few times. See for example, AR2015.0083, the judgment of the Labour Court in the Ryanair case.

a. *If so, which areas of employment law are affected?*

The Ryanair case is about air traffic.

b. *How is the right to strike currently protected in national law, and how is it applied in national (case) law in relation to the freedom to provide services and the freedom of establishment? More specifically, is the right to strike treated as equal to, more important than, or less important than (i.e. as an exception that needs to be proportionate) the internal market freedoms?*

Current law is – both at EU level and Danish level – that the employer's right to freedom of movement according to the rules on free movement of services in article 56 TFEU and the freedom of establishment in article 49 TFEU must be balanced against the workers' fundamental right to collective agreement negotiations and to support demands for a collective agreement with collective action in accordance with article 28 of the Charter on Fundamental Rights.

Chapter 3. Social acquis and social "non-acquis"

Question 7

How is the social acquis implemented in Denmark, and how does it relate to Danish law?

Denmark generally implements EU-directives by adopting legislation but has not implemented the following provisions correctly: the social clause in article 18(2) of the Procurement Directive (2014/24/EU), article 12(2) of the Enforcement Directive regarding Posting of Workers (2014/67/EU) requiring introduction of chain responsibility (subcontracting liability) in the construction sector and lack

of implementation of the Directive on Measures Facilitating the Exercise of Rights conferred on Workers in the Context of Freedom of Movement for Workers (2014/54/EU).

a. *In particular, how is the acquis, in the domain of anti-discrimination law, implemented in Denmark? Have recent developments in CJEU case law have had a significant impact on religious discrimination at national level? Is the notion of reasonable accommodation properly implemented? What are the developments that are still required, in the field of anti-discrimination law, if any? Should such developments be initiated at t EU level?*

Denmark has adopted legislation to implement the Ethnic Discrimination Directive (2000/43/EC), the Equal Treatment in Employment and Occupation Directive (2000/78/EC) and the gender equality directives: Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and Directive 2019/1158/ EU on work-life balance for parents and carers.

Recent developments in CJEU case law have not had a significant impact on religious discrimination in Denmark.

The notion of reasonable accommodation is properly implemented in Denmark.

b. *How is the acquis, in the domain of working time, implemented in Denmark? In which areas is the acquis most useful to workers? In which areas is the acquis invoked most before national courts (limitation of daily or weekly working time? Annual paid leave? Other matters)? Are there hostile reactions to the case law of the CJEU?*

The Working Time directive is implemented by legislation. Working time is an issue that has traditionally been regulated by collective agreements. Most actors on the Danish labour market think that it is not useful to have EU regulation on this subject. The acquis is invoked most before national courts in matters of shift-work. There are no hostile reactions to the case law of the CJEU.

c. Is platform work regulated in Denmark Are there cases on the (wrongful) classification of platform workers as self-employed? What is the role of social partners or other groups in the regulation of platform work, in your country?

There are a few collective agreements on platform work but no legislation.

d. *Have the Danish legislator and the national courts taken a position on the relationship between EU law and international labour law? Have the Danish legislator and the Danish courts taken a position on the relationship between EU law and international labour law? Are there, for instance, conflicts between EU law and international law that courts have had to deal with? Is the European social charter cited often by the legislator or in case law?*

No, the Danish legislator and the Danish courts have not taken a position on the relationship between EU law and international labour law. There have been no cases where courts have had to deal with this issue. The European Social Charter is seldom cited by the Danish legislator or in case law.

Question 8

What should be the new frontier for EU social policy?

a. *Is there a demand for new developments in EU social policy in your country? In which fields? Is the limit of EU competence to harmonize in the domains of remuneration, the right to associate and the right to strike considered to be an obstacle to all EU action in these fields?*

There is no demand for new developments in EU social policy in Denmark.

b. *Is EU law considered to apply strictly to workers, or is it extended to the self-employed persons, in Denmark. In which domains of labour law? Under what circumstances?*

It is the general view in Denmark that part of the EU social law apply both to employment and other aspects of occupation, see for example the discrimination directives mentioned above. Other parts, for example the Working Time Directive apply only to workers.

Question 9

Has EMU affected labour law or social policies in Denmark?

No, Denmark does not participate in the EMU.

a. *What, in general terms, is the impact of the European Semester and the Country Specific recommendations on Danish social law and policy?*

Most Danish actors on the labour market put little weight on them.

b. *What are or would be the problems/advantages of moving European social policy into the EMU?*

Since Denmark is not part of the EMU it wouldn't be relevant for Denmark.

Chapter 4. The Relevance and the Importance of the Charter of Fundamental Rights

Question 10

What is the role and legal force of the Charter's social rights in national case law and administrative practice?

a. *Are these rights "equal" in importance to the other fundamental rights, in particular in the case law of national courts?*

The social rights of the Charter of Fundamental Rights are seldom invoked before Danish courts. There is only one reported case, the Ajos case, see below.

b. *Are they "fully effective" in the language of the Court (CJEU, AMS, C-176/12) or only some of them?*

In the AMS case (C-176/12), the CJEU ruled that Article 27 of the Charter of Fundamental Rights does not have direct horizontal effect. In Denmark it is the general view that only those provisions in the Charter which are clear and precise have direct, horizontal effect.

c. *Are (some of) social rights considered, in the case-law of national courts, as "principles" within the meaning of Art 52(5) of the Charter? If so, what consequences have been drawn from that classification?*

There is no Danish case law discussing whether the social rights in the Charter are 'principles'.

d. *Is Art 52(2) of the Charter relied upon by national authorities and courts in order to limit or hamper the scope of social rights under the Charter?*

No.
In particular, do national courts consider that social rights in the Charter have the same content as under EU secondary legislation, and therefore have no "autonomous" content?

There is no Danish case law on that issue.

e. *How have courts dealt with the matter of social rights under the Charter in actions between individuals ('horizontal actions') in your country?*

There has been one Danish case on direct horizontal effect, the above mentioned Ajos-case (C-441/14), which has given rise to both a judgment from CJEU and from the Danish Supreme Court and to a vivid discussion in academic literature. The Ajos-case concerned a dispute between two Danish private parties Ajos (the

employer) and the legal heirs of the employee (Rasmussen). The dispute concerned the employer's refusal to pay the employee a severance allowance. Rasmussen had been employed by Ajos since 1 June 1984 and was dismissed by Ajos on May 25, 2009, at the age of 60. Rasmussen was, in principle, entitled to a severance allowance equal to three months' salary under section 2a(1) the Act on Salaried Employees (Funktionærloven), which at that time provided that:

> Section 2A 1. In the event of the dismissal of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, the employer shall, on termination of the employment relationship, pay a sum to the employee corresponding to, respectively, one, two or three months' salary. …
> 3. No severance allowance shall be payable if, on termination of the employment relationship, the employee will receive an old-age pension from the employer and the employee joined the pension scheme in question before reaching the age of 50. …

The Danish Supreme Court had established a settled legal practice on the interpretation of section 2a(3) of the Salaried Employees Act in a number of judgments. In those cases, the Supreme Court ruled that an employee was not entitled to severance payment if the employee upon his resignation was entitled to a retirement pension from the employer, regardless of whether the employee had chosen to make use of the right to pension. Rasmussen was entitled to an old-age pension payable by the employer which, due to the previous interpretation of section 2a(3), barred his entitlement to the severance allowance, even though he remained on the employment market after his dismissal from Ajos. Hence, his trade union brought an action on behalf of Rasmussen claiming that Ajos should pay a severance allowance equal to three months' salary, in accordance with section 2a(1) of the Danish Salaried Employees Act.

The Danish Maritime and Commercial Court (the first instance) ruled that Ajos should pay compensation. The Danish Maritime and Commercial Court referred to the Mangold-case and the Kücükdeveci in which the CJEU had concluded that the principle of non-discrimination on the grounds of age was a general principle of EU law and that the national court in horizontal disputes must ensure that the principle of non-discrimination on the grounds of age is respected. Therefore, national courts cannot apply any national measure which is contrary to this principle. The Maritime and Commercial Court also referred to the Ole Andersen-case (C-499/08) in which the CJEU ruled that the Danish Supreme Court's interpretation of section 2a(3) was in violation of the Equal Treatment in Employment and Occupation Directive (2000/78/EC). The Ole Andersen-

case concerned a vertical relation (public employer). Hence, in the Ajos-case, the Danish Maritime and Commercial Court found that the previous national interpretation of section 2a was inconsistent with the general EU principle prohibiting discrimination on grounds of age.

Ajos appealed to the Danish Supreme Court, stating that an interpretation similar to the judgment in the Ole Andersen-case, in a horizontal case as the Ajos-case would be contra legem in the present case. The Danish Supreme Court found it relevant to ask preliminary questions to the CJEU in order to determine the content and scope of the direct effect of the general EU principle prohibiting discrimination on the grounds of age in horizontal cases, and if so, which principle would take precedence: the general EU principle prohibiting discrimination on the grounds of age or the principle of legal certainty and the protection of legitimate expectations.

The CJEU concluded that the general principle of prohibiting discrimination on the grounds of age, as given concrete expression by Directive 2000/78, must be interpreted as applicable in horizontal cases, and thus, in disputes between private parties as in the present case.

The Danish Supreme Court did not follow the judgment of the CJEU in the Ajos-case and reversed the ruling of the Danish Maritime and Commercial Court. The Danish Supreme Court emphasised the established legal practice by the Supreme Court in which the Supreme Court ruled that an employee was not entitled to severance payment if the employee, upon his resignation, was entitled to a retirement pension from the employer, regardless of whether the employee chose to make use of the right to pension.

In regard to the interpretation of general principles in EU law, the Supreme Court stated that the impact of EU rules on Danish law depends on the Act on Denmark's Accession to the European Economic Community from 1972 The Danish Supreme Court concluded, on the basis of the preparatory works, that it was assumed in the bill which proposed the Maastricht amendment to the Accession Act that Article 6(3) TEU on general principles (including the principle of non-discrimination on the grounds of age) was not part of the conferral of power from Denmark to the EU. It is therefore a matter for Danish law and the Danish Supreme Court, as the highest Danish court, to decide whether the principle of non-discrimination on the grounds of age has a direct effect in Denmark with primacy over opposing Danish law in a horizontal dispute. The Supreme Court also generally stated that Denmark had not conferred power to the EU to make the Charter of fundamental Rights directly applicable in Denmark.

The Supreme Court's judgment in the Ajos-case concerned a dismissal made on 25 May 2009. The legal basis – both in Danish law and EU law – is greatly changed since this date. From 02.01.2015, the Salaried Employees Act is amended so that the former section 2a(3) no longer exists. From 1.12.2009, when the Lisbon Treaty entered into force, the EU's Charter of Fundamental Rights, which in Article 21 codifies the general principle of prohibiting discrimination on any ground, for example age, acquired treaty rank, see Article 6(1) TEU.

Chapter 5. EU Trade policy and the protection of social rights

Question 11

What are the ways through which social rights are protected in the context of international trade and global supply chains in your country?

a. *Are rules on public procurement used to foster social rights?*

Yes,
Article 18(2) of the Public Procurement Directive (2014/24/EU) requires Member States to take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to the Directive. Denmark has as mentioned not adopted specific legislation to implement this provision, but when Danish authorities offer a contract for public tender it is usual that the authority inserts a clause in the contract requiring the tenderer to comply with collective agreements.

b. Are private actors, especially corporations, involved? Have codes of conduct or charters been adopted in certain sectors? At company level? What impact do they have?

The above mentioned clause involves private corporations. There are no codes of conduct.

c. *Have trans-national collective agreements been concluded by Danish firms? What obstacles do they face?*

Yes, by Denmark's largest shipping company A. P. Møller Mærsk and Mærsk has announced, to the satisfaction of the International Transport Workers' Federation, ITF, that in future they will consistently demand documentation that there are collective agreements on chartered ships.

d. *Do Danish courts admit civil or criminal claims, when violations of social rights have taken place abroad?*

In principle probably yes, but there is no practice.

e. *Are there possibilities for collective or class actions?*

Yes. Group actions are possible under Danish procedural law.

f. *Does Danish law require social rights due diligence? If so, what are the duties imposed on firms?*

There are no mandatory rules on social rights due diligence.

Chapter 6. Climate change and Social justice

Question 12

How do policies to combat climate change, at Danish level, take social justice into account and what are the methods (the instruments, the judicial actions…) through which the link between climate change and social justice is achieved?

Measures to reduce emission of CO-2 result in some jobs disappearing and new jobs being created, these changes are taking into account in Danish labour market policy.

Chapter 7. Achieving Social Europe: Social rights, democracy and the rule of law

Question 13

What measures, if any, have been taken in Denmark to provide education on EU citizenship and the values set out in the Treaties in mainstream education (primary, secondary and higher education)?

a. *Are these matters covered in the curriculum and how?*

Primary and secondary education give a brief orientation of EU institutions and EU-regulation. At university level there are advanced courses that provide detailed education on EU citizenship and the values set out in the Treaties.

b. *Are there rules or guidelines in that regard?*

No

c. *Are there examples of best practices that can be provided?*

No

Question 14

Which Danish developments (in law and policy) in the area of fundamental social rights can be related to democracy and the rule of law (equality between men and women, the fight against racial discrimination and hate speech, equal access to social services, social benefits and housing…)?

The development of discrimination law.

Question 15

Is the EU perceived as a Social Union in Denmark, in particular in academic, judicial and political discourse? Are common European values, in particular equality and solidarity, laid down in Article 2 TEU, considered to be the constitutional basis for a European Social Union?

Only few Danish academics and politicians have expressed a view on this issue. They see the EU as a Social Union. Constitutional issues are practically never discussed in Denmark.

FINLAND

Kim Hakala

The following questions relate to the development of a Social Europe and the challenges related to social integration.[1]

Chapter 1. Free movement of workers

Question 1

According to the Constitution of Finland (Perustuslaki, 731/1999) Chapter 2, Section 6, Subsection 2 no one shall be put in a different position on the basis of sex, age, origin, language, religion, belief, opinion, state of health, disability or any other personal reason without acceptable justification.

Discrimination is prohibited according to Chapter 3, Section 8 of the Non-discrimination Act (Yhdenvertaisuuslaki, 1325/2014), which states that no one shall be discriminated against on the grounds of age, origin, nationality, language, religion, belief, opinion, political activity, trade union activities, family relationships, health status, disability, sexual orientation or any other personal reason. Discrimination is prohibited regardless of whether it is based on a fact or presumption about one person or another.

Moreover, the employer shall, according to Chapter 2, Section 2, Subsection 1 of the Employment Contracts Act (Työsopimuslaki, 55/2001) treat employees equally, unless such deviation is justified by the duties and status of the employees.

a) As said, discrimination is forbidden under the Constitution of Finland.

Moreover, the Constitution of Finland Chapter 2, Section 18 states that everyone has the right to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice. The public authorities shall take responsibility for the protection of the labour force. The public authorities shall promote employment and work towards guaranteeing for everyone the right to work. Provisions on the right to receive training that promotes employability are laid down by an Act. No one shall be dismissed from employment without a lawful reason.

[1] This report has been commented by prof. Ulla Liukkunen (University of Helsinki) and associate professor Jari Murto (University of Helsinki).

Under Chapter 3, Section 2 of the Non-discrimination Act no one shall be discriminated against on the grounds of grounds of age, origin, nationality, language, religion, belief, opinion, political activity, trade union activities, family relationships, health status, disability, sexual orientation, or any other personal reason.

There are no national barriers that hinder equal treatment for EU mobile workers.

b) The Act on the Conditions for Entry and Residence of Third-Country Nationals on the basis of Research, Study, Internships and Voluntary Activities (Laki kolmansien maiden kansalaisten maahantulon ja oleskelun edellytyksistä tutkimuksen, opiskelun, työharjoittelun ja vapaaehtoistoiminnan perusteella, 719/2018) provides for the conditions for the entry and residence of citizens of third countries for the purpose of research, study, training, voluntary work, student exchange programs or educational projects and working as au pairs as week as the residence permit paperwork and the residence permits based on studies. According to the Government Proposal HE 232/2021 vp. the Act implements equal treatment, the protection of private life, personal data and family life and the right to work.[2]

A part of the regulation that is not included in the aforementioned Act regarding researchers and volunteers and their family members are regulated in the Alien Act (Ulkomaalaislaki, 301/2004).

After the implementation of the Directive 2016/801, those applying for international protection, subsidiary protection, or temporary protection under Directive 2011/95 can no longer apply for residence based on, for example, studies.[3]

According to Section 15, Subsection 3 of the Act on the Conditions for Entry and Residence of Third-Country Nationals on the basis of Research, Study, Internship and Voluntary Activities, when applying for an extended residence permit for a researcher or intern, work or business activity may not be continued if the residence permit application is given a negative decision, to which a change is applied for by appeal. This rule differs from rules concerning all other residence permits, for which the duration of the right to work is regulated in Subsections 1 and 2 of Section 80 of the Alien Act.

According to the subsections in question, a third-country national may continue to work in accordance with the previous permit until a residence permit has been granted due to a new application or a negative decision has become legally

[2] Government Proposal HE 232/2021 p. 17.

[3] Ibid. p. 4-5.

binding, provided that the applicant has applied for an extension permit while the precious permit was valid. Different regulation is not justified from the point of view of equality, and it is perceived as inconvenient by the Immigration Office.[4]

The Programme of Prime Minister Sanna Marin's Government includes several entries for the development of regulations and procedures related to the immigration of students and researchers. The records of the Programme extend to the administrative branches of the Ministry of Labor and Economy, the Ministry of Foreign Affairs, the Ministry of Education and Culture and the Ministry of Social Affairs and Health. For this reason, the mentioned ministries have decided to set up a development project to implement and coordinate the implementation of the government program entries mentioned in the Programme. The development projects consists of a steering group and five sub-working groups, one of which is the sub-working group for reforming the regulations regarding foreign students and researchers.[5]

Another example of further developments stated in the Programme include the facilitation of opportunities for foreign researchers, students and graduates and their families to stay in Finland by reforming the permit practices, streamlining the residence permit processes and reinforcing the connections between higher education and working life. Students will be granted a residence permit for the full period of their studies, and after graduation, it will be extended for a period of two years.[6]

Question 2

Primarily, the evaluation of equality affects within the framework of each type of benefit. However, when drafting legislation equality can be taken into account more broadly.

Nowadays, equality is taken into account in the law drafting process more seriously than earlier. In addition, when the Constitutional Law Committee in the Parliament considers the constitutionality of government proposals submitted to the Parliament, equality of legislation is often an important issue to evaluate when it comes to the issues of social security benefits and when the question concerns equal treatment between women and men.

[4] Ibid. p. 14.

[5] Ibid. p. 5.

[6] Programme of Prime Minister Sanna Marin's Government 10 December 2019. Inclusive and competent Finland – a socially, economically and ecologically sustainable society, <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/161935/VN_2019_33.pdf?sequence=1&isAllowed=y>, visited 15.9.2022, p. 183.

As regards getting social security benefits and their equality, the nature of the benefits and services should be considered: when it is a question of subjective rights, it is an obligation public authority or, i.e., unemployment fund, and when it is a question of appropriation-bound service, decisions should be made equally.

a) Chapter 1, Section 2 in the Act on Social Assistance (Laki toimeentulotuesta, 1412/1997) states that all those in need of support and unable to make a living through paid work, self-employment or other benefits securing a living, or from other income or assets, by being cared for by persons liable to provide them with maintenance, or in some other way, are entitled to social assistance.

According to the Finnish Deputy Ombudsman, a lack of permanent residence permit does not mean that the stay is temporary or that the foreigner is entitled only to emergency social benefit. The nature of the stay and possible other prerequisites needs to be examined case by case.[7]

A report and memorandum published by the Finnish Ministry of Social Affairs and Health endorses the CJEU case law that permits certain restrictions on social benefits for economically inactive EU mobile citizens. This view is supported because, according to the memorandum, there always exist situations where the benefits need to be paid even without any adequate connection between the inactive mobile EU citizen and the host member state. The report emphasizes the importance of "some kind of closest connection" especially in the case of tax-funded social benefits.[8][9]

In addition, legal literature states that the authorities should consider both the matters in favor of as well as the circumstances against when deciding if the

[7] The Deputy Ombudsman's decision, Dnro 4096/4/14, <https://www.oikeusasiamies.fi/r/fi/ratkaisut/-/eoar/4096/2014>, visited 19.5.2022.

[8] Essi Rentola, Sosiaali- ja terveysministeriön raportteja ja muistioita 2014:26: Selvitys Suomen asumisperusteisen sosiaaliturvan ja EU-lainsäädännön vaatimusten yhteensovittamisesta p. 68 <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/72214/RAP%202014_26_asumisperusteinen_sosiaaliturva_korjattu.pdf?sequence=1&isAllowed=y>, visited 28.5.2022.

[9] Despite the supporting views by the Ministry of Social Affairs and Health, the CJEU case law have been criticized by Legislative Counselor Sonya Walkila from the Finnish Ministry of Justice. Walkila stated that the principle of equal treatment was overlooked in the case Commission v. UK, 14.6.2016, C-308/14. Moreover, the ruling was seen to accept indirect discrimination and it ignored the fact that the Brey-case 19.9.2013 C-140/12 was not categorical. Furthermore, the judgement adopted a legal right or residence as an additional condition, even in the context of children, and the judgement disregarded that only individual inspections are acceptable, whereas systematic inspections are not. Finally, the case turned the burden of proof on the defendant, making eventually all financially inactive people "equally worthless". TALOUDELLISESTI EI-AKTIIVISTEN EU-KANSALAISTEN VAPAA LIIKKUVUUS JA OLESKELU – Oikeus sosiaalietuihin 31.3.2017, Legislative Counselor OTT Sonya Walkila, Ministry of Justice. <https://stm.fi/documents/1271139/3276179/Sosiaali_EU_310317_sw+%282%29.pptx/ef35e6d7-3067-4dcf-9a87-c4bb6c8b5671/Sosiaali_EU_310317_sw+%282%29.pptx.pdf>, visited 28.5.2022.

applicant should be granted social benefits. By using such a method of interest balancing, a mobile citizen could be converted by the authorities only if the circumstances against outweighs the circumstances in favor of the stay.[10]

In the decision KHO 2016:75 the Supreme Administrative Court stated that the overall assessment did not reveal any evidence against expulsion as were the case in favor of deportation. Based on the material provided, the facts seemed quite clear. The amount of granted benefits exceeded 30,000 euros and the recourse to social benefits started immediately upon entry and they beneficiaries were non-active EU-citizens. The family's connection to Finnish society was not considered particularly close either. According to the judgement, the weakness of integration is indicated in particular by the fact that the parents of the family have not been financially active at any stage of their stay, although the family had been living in Finland for several years.

b) According to the Child Allowance Act (Lapsilisälaki, 796/1992), Section 1, child benefit is paid from the state funds for the maintenance of a child under the age of 17. This Act applies to a child residing in Finland or being considered as a person residing in Finland in accordance with the Act on Housing-Based Social Security in Cross-Border Situations (Laki asumisperusteisesta sosiaaliturvasta rajat ylittävissä tilanteissa, 16/2019).

The administrative practice of Kela (the social insurance institution of Finland) states that if the child is after the move entitled to social security coverage in another country and one of the parents is entitled to social security coverage in Finland based on employment, Finland is still one of the countries liable to pay child benefit. If the child lives in another EU or EEA country or Switzerland, family benefits are not paid just because one of the parents' lives, but does not work, in Finland.

Since one interrogatory in 2014 to the Finnish Parliament made by a Finnish Member of Parliament in the Finns Party (KK160/2014 vp.[11]) there has been neither much discussion nor public opposition concerning the child allowances when the child resides abroad.

However, according to one opinion expressed in the report 2014:26 by the Ministry of Social Affairs and Health concerning the reconciliation of the requirements of Finnish residence-based social security and EU legislation, child allowances paid abroad might in fact lead to lower costs for the host member state. This is since

[10] Janne Aer, Ulkomaalaisoikeuden perusteet 2016, p. 314–315.

[11] Interrogatory made by Reijo Tossavainen 160/2014 <https://www.eduskunta.fi/FI/vaski/sivut/trip.aspx?triptype=ValtiopaivaAsiakirjat&docid=kk+160/2014>, visited 26.5.2022.

the host member state would be responsible for all the social benefits instead of only the child allowances.[12] This opinion seems to favor the idea of paid child allowances abroad.

At the moment, there are no signs of a growing opposition to the principle that the country of work of the parent(s) is responsible for paying child allowances.

Question 3

In 2019 Finland had 91 123 workers with pension insurance from EU/ETA-countries.[13] There is no available sector-based data concerning the workers from other Member States.

According to a release from 2018 by Ministry of Employment and the Economy the number of industries suffering from a lack of workforce have been increasing. In 2016 there were a total of 15 industries suffering from a lack of workforce, and in 2017 the number was 32. In 2018 the number was 48.[14]

The industries that have a considerable lack of workforce in 2022 according to The Occupational Barometer are as follows:

Practical nurses, nurses, specialists in social work, senior physicians and specialists, doctors, kindergarten teachers, hearing examiners and speech therapists, dentists, housekeepers, and psychologists.[15]

For example, in a meeting in October 2019 in Helsinki held by the EESC employment group the social dimension of a sustainable Europe and the mobility of European labour were at the top of the agenda.[16] The EESC employment group

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[12] Essi Rentola, reports and memorandums by the Ministry of Social Affairs and Health (Sosiaali- ja terveysministeriön raportteja ja muistioita) 2014:26: Selvitys Suomen asumisperusteisen sosiaaliturvan ja EU-lainsäädännön vaatimusten yhteensovittamisesta pp. 47-48 <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/72214/RAP%202014_26_asumisperusteinen_sosiaaliturva_korjattu.pdf?sequence=1&isAllowed=y>, visited 28.5.2022.

[13] Centre for Economic Development, Transport and the Environment (ELY-keskus) Työvoiman liikkuvuus Euroopassa-hanke: Tutkimus työvoiman kansainvälisestä liikkuvuudesta ja kansainvälisestä rekrytoinnista Suomessa, p. 40 <https://www.ely-keskus.fi/documents/10191/57942/Tutkimus_tyovoiman_kansainvalisesta_liikkuvuudesta_ja_rekrytoinnista_Suomessa.pdf/0add8f49-9b2c-d19a-55ed-ee4e6e4ee6ef?t=1623659140178>, visited 18.8.2022.

[14] A release by the Finnish Ministry of Employment and the Economy: työvoimapula-ammattien määrä lisääntynyt (2018) <https://tem.fi/-/ammattiborometri-tyovoimapula-ammattien-maara-lisaantynyt>, visited 28.5.2022.

[15] The Occupational Barometer shows the views of employment and economic development offices on the development prospects of key professions in the near future, "Ammattibarometri: alat, joilla suurin työvoimapula (2022)". <https://www.ammattibarometri.fi/Toplista.asp?maakunta=suomi&vuosi=22i&kieli=>, visited 28.5.2022.

[16] EESC Employment group 9.10.2019 <https://www.eesc.europa.eu/fi/news-media/eesc-info/102019/articles/73676>, visited 28.5.2022.

favored a sustainable internal market that must prevent social dumping and guarantee equal pay for equal work in the same workplace.

The debate focused on how the mobility of workers can be regulated fairly in order to promote mutual trust in the EU and on the role of the European Employment Agency in this context. Participants looked at different aspects of labour mobility and its importance for different groups of workers, with a particular emphasis on the mobility of work-related skills and lifelong learning. These issues were considered as extremely important for the future of work.

Current rapid technological developments, climate change, globalization and other phenomena can lead to corporate restructuring, relocation, or mass layoffs. In such cases, it is important to ensure fair transitions, by, for example, helping employees to update their skills.[17]

The mobility of the essential workers in critical occupations is important, which led to a government proposition allowing for temporary exceptions in traveling during the COVID-19 pandemic. The purpose was to ensure enough workers in critical occupations.[18] According to the statistics published by Statistics Finland, 67% of the workers working in the critical sectors for the functioning of society, such as health and social services as well as education and administration services, are women.[19]

Seasonal workers are commonplace in primary production tasks. In the spring, workers arriving in Finland form a core group in the labour force. For a long time, these seasonal workers have carried out the work required for the start of the growing season and have ensured that it is safe for less experienced workers arriving in the spring and later in the growing season to carry out their work.[20]

The use of foreign seasonal labour is particularly important in tasks requiring expertise gained from previous years' work at the location in question. Alongside foreign seasonal labour, measures are also being prepared by the Ministry of Agriculture and Forestry as well as the Ministry of Economic Affairs and Employment to secure the availability of Finnish labour.[21]

[17] Ibid.

[18] Government Proposal HE 36/2020 "Hallituksen esitys eduskunnalle laeiksi ulkomaalaislain sekä kolmansien maiden kansalaisten maahantulon ja oleskelun edellytyksistä kausityöntekijöitä työskentelyä varten annetun lain väliaikaisesta muuttamisesta".

[19] Statistics Finland Juho Keva, 8.12.2020 67% of workers in critical occupations are women <https://www.stat.fi/tietotrendit/artikkelit/2020/kriittisten-ammattien-tyontekijoista-67-prosenttia-on-naisia/>, visited 28.5.2022, and Employees in sectors critical to the functioning of society, Prime Minister's Office <https://vnk.fi/en/-/yhteiskunnan-toiminnan-kannalta-kriittisten-alojen-henkilosto>, visited 28.5.2022.

[20] Press release by the Ministry of Agriculture and Forestry and the Ministry of Economic Affairs and Employment, published in English on 9.4.2020 <https://tem.fi/en/-/linjaus-valttamattomien-tyotehtavien-maahantulosta-valmistunut>, visited 28.5.2022.

[21] Ibid.

According to the opinion of a group of authorities, essential tasks requiring foreign labour are in the following sectors in particular: 1) agriculture, horticulture and fisheries, 2) the food sector, 3) energy supply, 4) maritime and manufacturing industries, 5) construction, 6) transport and communications, 7) chemical industry, 8) pharmaceutical and health technology industries and 9) the forest sector.[22]

Question 4

a) According to the statistics published in 2017 by Statistics Finland, the outflow of workers has steadily increased between the years 2003-2015. In 2015, 16 304 workers have moved abroad of which 5 040 are highly educated. The outflow of highly educated workers concerns mainly workers of age 25-34.[23]

However, in 2020 the net immigration of Finnish citizens turned profitable by 1109 persons. The immigration increased in all educational groups, and the largest increase was among those who had a higher university degree or doctoral studies (38%).[24]

b) At the moment, there are no national measures that aim to retain certain types of workers that would require, for example, graduates to work in that Member State, which has financed the studies. Other measures pursuing the same objective does not exist.

c) Due to the lack of such measures, there are neither case-law nor administrative decisions which would examine the compatibility of national measures that aim to retain a certain type of workers with EU law. Otherwise, the compatibility with EU law has been addressed.

[22] Authorities' assessment of tasks essential for security of supply or critical for sector operations, 17.4.2020<https://tem.fi/documents/1410877/21605805/Virkamiesten+arvio+v%25C3%25A4ltt%25C3%25A4m%25C3%25A4tt%25C3%25B6m%25C3%25A4st%25C3%25A4+maahantulosta_listaus_EN.pdf/d14ee47a-5d43-abc2-0cb6-6add463ca2fd/Virkamiesten+arvio+v%25C3%25A4ltt%25C3%25A4m%25C3%25A4tt%25C3%25B6m%25C3%25A4st%25C3%25A4+maahantulosta_listaus_EN.pdf?t=1587469591000>, visited 28.5.2022.

[23] Pekka Myrskylä, Statistics Finland 12.10.2017, "Suomen koulutustason heikon kehityksen syitä aivovuoto ja puutteelliset tiedot" <https://www.stat.fi/tietotrendit/artikkelit/2017/koulutustasomme-heikon-kehityksen-taustalla-ja-puuttuvat-tiedot/#start>, visited 16.8.2022.

[24] Statistics Finland.

Chapter 2. Conflicts between fundamental freedoms and social rights

Question 5

a) The Directive 2018/957 was implemented by amending the Act on Posting Workers (Laki työntekijöiden lähettämisestä, 447/2016). The amendments came into force in 1.12.2020.

The principle of equal pay for equal work has been implemented in various laws such as the Non-discrimination Act as well as the Act on Equality between Women and Men (Laki naisten ja miesten välisestä tasa-arvosta, 609/1986).

According to studies published by The European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI), exploitation of foreign labour in Finland occurs especially in labour-intensive sectors where temporary foreign workforce is used a lot, such as in the restaurant industry or industries with long chains of subcontractors such as construction, cleaning and agriculture.[25]

b) There are no cases that deal with posting of workers by temporary work agencies established in other Member States.

Question 6

a) The right of establishment and the right to conduct business has been challenged in national courts, especially in situations that deals with professional practice rights and licenses. The Supreme Administrative Court of Finland stated in its ruling KHO 2010:82 that the legislation of the European Union does not prevent the granting of a charger's certificate from considering the applicant's personal characteristics in the manner stipulated in Section 2 subsection 1 of the Charges act (Panostajalaki 219/2000).

The Supreme Administrative Court had to take a stand on a situation where the taxi driver's license application had been rejected by the Finnish Transport and Communications Agency Traficom, because the applicant had mistakenly driven a car registered as a light-weight truck for five kilometers with a driver's license entitling to drive a sedan.

[25] Anni Lietonen & Natalia Ollus, Työperäinen hyväksikäyttö ja julkiset hankinnat – Opas riskien huomioimiseen Suomessa, HEUNI Report Series No 98a, p. 15 <https://heuni.fi/documents/47074104/0/y%C3%B6per%C3%A4isen+hyv%C3%A4ksik%C3%A4yt%C3%B6n++torjunta+30112021_WEB+(1).pdf/9c18846d-58d0-8e1c-bac8-3c068a33f867/Ty%C3%B6per%C3%A4isen+hyv%C3%A4ksik%C3%A4yt%C3%B6n++torjunta+30112021_WEB+(1).pdf?t=1638427841349>, visited 19.8.2022.

According to the Act on Professional Qualifications of Taxi Drivers (Laki taksinkuljettajien ammattipätevyydestä, 695/2009), being guilty of driving a vehicle without the rights during the five years prior to applying for a license is an absolute bar to obtaining a driver's license. The restriction on the rights to conduct business in question could clearly not be considered necessary to guarantee another fundamental right, i.e., to achieve traffic and customer safety, the law regulating the license had to be left inapplicable in this case.

b) According to the Constitution of Finland (Perustuslaki, 731/1999) Chapter 2, Section 13 everyone has the right to organize and participate in meetings and demonstrations without obtaining a permit. Furthermore, the right to assembly is regulated in the Assembly Act (Kokoontumislaki, 530/1999).

According to the opinion of the Constitutional Law Committee the right to industrial action is related to the freedom of association protected in Chapter 2 Section 13 and subsection 2 of the Constitution of Finland.[26]

The Supreme Court has in its rulings KKO 2020:50 and KKO 2018:61 stated that any economic losses as such, either to the parties involved in the strike or any third party are not a sufficient reason to limit the fundamental right to strike. It has also been established in prior case law[27] that an industrial action can be prohibited mainly when the use of such a measure is expressly restricted in national legislation or European Union law, in a manner where the restriction can be invoked in a relationship between private parties.

In situations where the industrial actions would be contrary to law or good practice or discriminatory or lead to unreasonableness in terms of implementation, goals, or consequences the industrial actions can be hindered by temporary safeguard actions at the request of the other party.

Question 7

a) Section 8 of the Non-discrimination Act prohibits discrimination on the basis of age, origin, nationality, language, religion, belief, opinion, political activity, trade union activity, family relationships, state of health, disability, sexual orientation or other personal characteristics. Discrimination is prohibited, regardless of whether it is based on a fact or assumption concerning the person him/herself or another.

[26] Statement PeVL 12/2003 vp. of the Constitutional Law Committee <https://www.eduskunta.fi/FI/vaski/Lausunto/Documents/pevl_12+2003.pdf>, visited 31.8.2022.

[27] Ruling KKO 2000:94 by the Supreme Court of Finland.

Subsection 2 in the aforementioned Act states that refusal to reasonable accommodations is considered to be discrimination. The general content of the concept is nationally defined in Section 15, Subsection 1 in the Non-discrimination Act. According to the regulation, reasonable accommodations mean those measures that are appropriate and related to the individual situation and that are necessary, so that the disabled person can achieve an equal status with non-disabled people in society. In the context of working life, reasonable accommodations can mean, for example, measures related to the working environment and working conditions, such as installing ramps, improved lighting, ergonomics, or adjusting working hours.[28]

The Supreme Administrative Court's ruling (KHO 2021:189) dealt with a situation where a disabled person whose knee was stiffened during surgery had to buy three adjacent seats on a flight. The fact that Finnair Oyj had arranged three seats next to each other for a physically disabled person could not be considered a sufficient measure, because the person had to pay almost three times the price for his flights compared to a non-disabled passenger. Due to the company's internal safety regulations, Finnair Oyj could not arrange sufficiently spacious seating for a physically disabled person during the flight, therefore it was necessary to assess whether Finnair Oyj could be imposed an obligation to grant a discount on the price of additional seats based on the provision of reasonable accommodations. According to the Supreme Administrative Court, there were no grounds for interpreting the provision of the Equality Act regarding reasonable accommodations in such a way that a price reduction or other measures affecting the price of commodities or services could not be considered as a way of implementing reasonable accommodations. Instead, a price reduction or other changes in the price may be the most justified or even the only way for the parties to make such reasonable accommodations that make the product or service equally accessible to a disabled person.[29]

In accordance with the legislative proposals concerning anti-discrimination measures in the government proposal HE 19/2014, the field of use of compensation to be paid for discrimination and countermeasures have been expanded and the

[28] Government Proposal HE 44/2003 "Eduskunnalle laiksi yhdenvertaisuuden turvaamisesta sekä eräiden siihen liittyvien lakien muuttamisesta", p. 33, 35.

[29] See also the ruling of the Supreme Administrative Court KKO 2020:60 which considered the right to free school transport to another school than the closest one. Taking into account the report on B's illness and its effects on his behaviour, the city's estimate of school transport costs, and the fact that the school trip from B's home to Y's elementary school was approximately as long as Z's elementary school, the city could not require that, in order to receive free school transport, B would have to change schools. The Supreme Administrative Court considered that B should be granted free school transportation to Y's elementary School as a reasonable accommodation as referred to in Section 15 of the Equality Act.

upper limit of the compensation has been removed in the Non-Discrimination Act Chapter 5, Section 23 and 24. The proposal aimed to improve legal protection of those who have been discriminated against. The removal of an upper limit of compensations due to discrimination is thus similar to the ECJ-case law.[30]

According to the legislative proposals in the government proposal HE 19/2014 for a new Equality Act, the prohibition of discrimination would cover, as in the preceding Non-discrimination Act, direct and indirect discrimination, harassment, and instructions and orders to discriminate. In addition, denying the reasonable adjustments necessary to implement equal treatment of disabled people would be discrimination. The prohibition of discrimination would also be clarified by explicitly stipulating in the law that it also includes the so-called discrimination-based assumptions and the so-called discrimination. These provisions, based on the case law of the ECJ and the ECHR would clarify that even unfavourable treatment based on a false assumption, for example, about a person's sexual orientation is discrimination.[31]

The ECJ case-law dealing with equality has had an impact at national level. Especially the cases of HK Danmark (joint cases C-335/11 and C-337/11, 11.4.2013), Coleman (C-303/06 17.7.2008), Timishev (12.12.2005) as well as Wolf (C-229/08) were considered in the Government Proposal HE 19/2014 vp. for the now valid Equality Act.

The Non-Discrimination Ombudsman publishes a quarterly report[32] to the Parliament concerning required developments in the field of anti-discrimination. According to the most recent report (year 2022), the required developments according to the Ombudsman are among others:

The enhancement of legal protection and legal remedies for the person discriminated against by granting the National Non-Discrimination and Equality Board powers to order compensation. These powers should be extended to situations related to discrimination in the working life. Furthermore, the obligation of planning for equal measures should be extended to cover early childhood education. Finally, school, or other organizers of educational training should be obliged to intervene when they notice harassment towards pupils or students. This obligation should be regulated by law.[33]

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[30] Government Proposal HE 19/2014 p. 38.

[31] Ibid. p. 37.

[32] Yhdenvertaisuusvaltuutetun kertomus eduskunnalle 2022, K 7/2022 vp. <https://www.eduskunta.fi/FI/vaski/Kertomus/Documents/K_7+2022.pdf>, visited 20.8.2022.

[33] Ibid. p. 41-43, 106.

Alongside the legal protection, structures that aim at collecting information about discrimination must be created and secured according to the report. And a multi-channel nature of services offered in officials is required, this means that services should not be offered only digitally.[34]

Aims that are targeted to improve fundamental and human rights of foreigners include amendments in the Alien Act in a way that the application of the law must not lead to decision that conflict with the best interests of the child.

In addition, according to the report the Aliens Act should consider the overall situation of the applicant. [35]

Those who arrived in Finland before 2017 and the legal status of those still residing here without a residence permit should be formalized by a separate law.[36]

According to the report of the Ombudsman for Equality for Parliament in 2022 legislation prohibiting discrimination alone is not enough to eliminate discrimination in the labour market and in recruitment situations. Policy actions and changes to recruitment practices are also needed. [37]

These developments include, among others, the scope of compensation according to the Equality Act should be expanded to also cover the following discrimination solutions: discrimination in official activities, discrimination prior to the employment decision, and such discriminatory practices of the used company occurring in temporary employment that affect continuation of the worker's employment.

According to the report of the Ombudsman for Equality for Parliament in 2022, anonymous job search should include provisions on how the Equality Act can be considered on the promotion of equality between women and men and merit comparisons required by the prohibition of discrimination between female and male applicants.

The compensation penalty should likewise to the report be extend to discrimination that occurs before the selection decision during the hiring process.

Furthermore, the report proclaims provision defining what is the Equality Act means with the concept of equal work.[38]

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[34] Ibid. p. 52, 106.
[35] Ibid. p. 85-86, 106.
[36] Ibid. p. 107.
[37] K/1 2022 vp Tasa-arvovaltuutetun kertomus eduskunnalle 2022, p. 47.
[38] K/1 2022 vp Tasa-arvovaltuutetun kertomus eduskunnalle 2022, p. 121.

Non-urgent medical procedures for intersex children should be, according to the report mentioned above, withheld until the child has the opportunity to give informed consent. The effective implementation of rights would be to be protected by law.[39]

b) Working hours are regulated by the Working Time Act (Työaikalaki, 872/2019), which entered into force on 1 January 2020. The law repealed the Working Hours Act (Työaikalaki, 605/1996). The Working Hours Act applies to workers in the private and the public sector as well as to civil servants. The Finnish Working Time Act has considered the working time directives issued by the Council of the European Union (93/104/EC, 2000/34/EC and 2003/88/EC).

Section 33 of the Working Time Act contains a mandatory provision. By this, any agreement that reduces the employee's benefits according to the Act is void. Thus, it is not possible to agree on overtime and not compensating for it with an employment contract. The provision in question is intended to protect the employee.[40]

There have not been any "hostile" reactions to the case law of the CJEU. The Committees'[41] expert opinions regarding the governments proposition HE 86/2019 vp. for a new Working Time Act were positive.[42]

c) In Finland, the legal nature of the employment relationship is determined by evaluating the characteristics of the employment relationship included in the scope provision of the Employment Contracts Act (Työsopimuslaki 55/2001) Chapter 1, Section 1. The form of the legal relationship is decided by an overall assessment, if individual criteria cannot be used to decide whether a person works in an employment relationship or, for example, as an entrepreneur. The overall assessment is made based on the actual working conditions, taking into account the intention of the parties as well as the working conditions agreed in the employment contract.

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[39] Ibid. p. 122.

[40] Ruling KKO 2007:50 of the Supreme Court stated that a provision in a contract where the worker waived his right to compensation for overtime and Sunday work after the work was done was void under Section 39 of the previous Working Hours Act.

[41] The Committees include experts from the Ministry of Employment and the Economy, The Finnish Hospitaly Association MaRa Ry, PAM (Service Union United PAM is a trade union for people working in private service sectors. PAM has almost 200,000 members and 75% of them are women. The majority of PAM's members work in retail trade, property services, security services as well as tourism, restaurant and leisure services. PAM negotiates collective agreements for service sectors and safeguards its members' interests at workplaces), the Central Organisation of Finnish Trade Unions in industry, the public sector, transport, and private services in Finland (SAK), The Regional State Administrative Agency for Southern Finland (Etelä-Suomen AVI), National, regional and local advocacy for small and medium entrepreneurs (Suomen Yrittäjät), Finnish Confederation of Professionals in both private and public sectors STTK and Service Sector Employers PALTA.

[42] The Committees' expert opinions for government proposal HE 86/2019 vp. <https://www.eduskunta.fi/FI/vaski/KasittelytiedotValtiopaivaasia/Sivut/HE_86+2019_asiantuntijalausunnot.aspx>, visited 31.8.2022.

In two legally non-binding statements by the Labour Council (Työneuvosto, lausunnot TN 1482-20 and 1482-20), the Council, after an overall assessment, considered that the food couriers in question working through a platform were to be considered as workers, and not as entrepreneurs.[43]

The Finnish Institute of Occupational Health published a report of the project "Models of fairness in platform work" (REIMA) that investigated the central elements that cause experiences of fairness to platform workers. According to the findings of REIMA project, platform workers experience many benefits and problems of fairness. Besides key players of platform work – clients, workers and the platform – also public administration, labour market and other organizations, and private sector are needed to collaboratively develop the fairness of platform work.[44]

According to the opinion by Suomen Yrittäjät (National, regional and local advocacy for small and medium entrepreneurs) solutions regarding platform work can be implemented nationally, without the need for EU-level solutions. This is due to the principle of subsidiarity. The EU regulation would not solve the problems arising from different national regulations in various Member States. The platform companies must nonetheless adapt their operations regarding the targeted Member State. Suomen Yrittäjät believes also that the EU should not restrict new types of business-related artificial intelligence or algorithms. The EU must not remain a bystander in the introduction of new technology and global competition thereof.[45]

d) The European social charter has been cited in case law, but not often. It was cited, for example, in cases TT 2017:161 and TT 1998:17 by the Labour Court of Finland.

The national courts have not had to deal with conflicts between EU law and international labour law.

[43] Statement TN 1481-20 by the Labour Council <https://tem.fi/documents/1410877/0/Ty%C3%B6neuvoston+lausunto+1481-20+(%C3%A4%C3%A4n.+6-3)+(1).pdf/026f9634-5566-c47f-dd8b-54565b4c3aa9/Ty%C3%B6neuvoston+lausunto+1481-20+ (%C3% A4% C3%A4n.+6-3)+(1).pdf?t=1629103482691>, visited 18.8.2022.

[44] Finnish Institute of Occupational Health, Näkökulmia alustatyön reiluuteen, Reiluuden mallit alustatyössä – hankkeen loppuraportointi 2022. <https://www.julkari.fi/bitstream/handle/10024/144098/TTL-978-952-391-017-1.pdf?sequence=1>, visited 20.8.2022.

[45] Statement by Suomen Yrittäjät "Lausunto Euroopan sosiaalisten oikeuksien pilaria koskevasta toimintasuunnitelmasta" <https://www.yrittajat.fi/lausunnot/lausunto-euroopan-sosiaalisten-oikeuksien-pilaria-koskevasta-toimintasuunnitelmasta/> 26.4.2021, visited 8.9.2022.

Question 8

a) In relation to the Council Recommendation 2019/C 387/01, Finland's most important individual areas in need of development are self-employed persons' social security and the insurance under YEL[46], which determines it. This insurance is outside the scope of the social security reform committee. Underinsurance directly affects self-employed persons' income during their career, as well as after retirement. It also affects the survivor's pension paid to the spouse and children when a self-employed person dies.[47]

A long-term social security reform is the key measure regarding the Council Recommendation. The social security reform aims for a clearer and better functioning system that stays involved through changes in people's lives and enables the reconciliation of work and social security. The focus in reforming social security is on securing social justice and on ensuring income security for people who are facing social risks. When reformed, the social security system will better help create opportunities for employment, entrepreneurship, active individual initiative, social participation, and lifelong learning.[48]

b) In general, different pieces of EU legislation are implemented so that their scope of application is considered. The starting point of the definition of an employment contract is the Employment Contracts Act.

Question 9

a) Country Specific Recommendations (CSR) have an impact on national social policy and even perhaps on social law. The recommendations tend to be so general, multi-dimensional and economy-related in their nature, that it is difficult to describe and evaluate the impact of these recommendations. They are nonetheless important in the achievement of the primary goals of the European semester of economic policy because the plans are to a significant part aligned to the CSRs.[49]

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[46] YEL insurance is a self-employed person's personal insurance. YEL insurance is the basis for an entrepreneur's pension and social security, which why it is statutory, i.e., mandatory. YEL is always personal, not company specific. You can thus have several companies, but you need only one YEL insurance which vocers all your entrepreneurial activities.

[47] Finland's national plan under the Council Recommendation 2019/C 387/01 on access to social protection for workers and the self-employed, Ministry of Social Affairs and Health, 20/5/2021, p. 3. <https://valtioneuvosto.fi/documents/1271139/2013549/SUOMEN+KANSALLINEN+SUUNNITELMA_SOSIAALISEN+SUOJELUN+SAATAVUUDESTA.pdf/7401d1b5-783e-1a84-d119-a7db49e3fd33/SUOMEN+KANSALLINEN+SUUNNITELMA_SOSIAALISEN+SUOJELUN+SAATAVUUDESTA.pdf?t=1622184461614>, visited 20.8.2022.

[48] Ibid. p. 5.

[49] Bryssel 23.5.2022 COM(2022) 611 final, p. 2.

What can be said is that the performance of the CSRs has probably been influenced to some extent by the social policy and the issues that advance in politics or that are brought up for discussion. The extent to which the impact has been based specifically on the recommendations given by the EU is difficult to say, as well as the extent to which the recommendations have influenced national legislation. There is no unequivocal information about it.

As one example, the special report (16/2020) made and published by the European Court of Auditors (ECA) stated that more than two thirds of the CSRs have seen at least 'some progress' in implementation, but the rate of full substantial CSR implementation by Member States is low.[50] The reasons for this are, according to the ECA, the lack in monitoring the CSR implementation as well as the insufficient link between EU budget spending and CSR implementation.[51]

b) There has not been much public discussion about moving European social policy into the EMU. The opinions that have been made public tend to emphasis the problems by pointing out, for example, that moving the European social policy into the EMU could cause fear that these actions will grant the EU and the Commission an opportunity to intervene in matters that fall under the jurisdiction of the Member States. This concern is not dispelled by the fact that the Commission has set up a long-term goal of strengthening cross-border solidarity by increasing the EU budget and creating centralized revenue transfer mechanisms. This is seen as the Commission presents, albeit indirectly, a centralized unemployment insurance system as one concrete measure.[52]

Question 10

The Charter of Fundamental Rights is binding as primary law in both national case law and administrative practice.

a) Due to the status of the Charter as primary law, the rights in the Charter are equal in importance to other fundamental rights in the case law of national courts.

b) The fundamental rights in the Charter are "fully effective" as stated in the CJEU case AMS C-176/12, 2014.

[50] ECA special report 16 pursuant to Article 287(4), second subparagraph, TFEU, 2020, p. 22-23.

[51] Ibid. p. 24-25.

[52] Pasi Korhonen "EMU:n sosiaalinen ulottuvuus – lentääkö se?" blog <https://finlandabroad.fi/web/eu/ajankohtaista/-/asset_publisher/cGFGQPXL1aKg/content/emu-n-sosiaalinen-ulottuvuus-lentaako-se-/384951>, visited 8.9.2022.

d) According to a memorandum by the Ministry of Justice, the rights in the Charter have primacy over national legislation regardless of its hierarchy. This principle derives from the CJEU case Melloni 399/11, 2013. National rules or regulations cannot reduce the effectiveness of EU law.[53]

In the interpretation of Article 52(2) of the Charter, national authorities must consider the explanations relating to the Charter of Fundamental Rights.[54]

e) In the literature, it has been considered that from the viewpoint of national courts, limiting the applicability of the provisions of the Charter to the application of EU law may cause problem in identifying when the case is about EU law and its application. EU law is structurally based on provisions that still require national implementation. With regard to national legislation, the question of which Union-level provisions the law is possibly based on is not clear in all situations.[55]

Question 11

a) The Act on Public Procurement and Concession Contracts (Laki julkisista hankinnoista ja käyttöoikeussopimuksista, 1397/2016) secures that procurements are transparent and non-discriminatory. However, they do not regulate what or how the officials should procure services or goods. The Act on Public Procurement and Concession Contracts enables purchasers to take into account factors related to employment, working conditions, the position of disadvantaged persons or corporate social responsibility.

According to the Discretionary exclusion criteria mentioned in Chapter 10 and Section 81 and Subsection 5, the contracting entity may decide to exclude from competitive tendering a candidate or tenderer that has infringed the environmental, social and labour law obligations, Finnish or European Union legislation, collective agreements, or the international treaties listed in Annex C, where the contracting entity can prove the infringement.

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[53] Memorandum VN/8127/2020 by the Ministry of Justice, published 1.4.2020, p. 17-18, <https://oikeusministerio.fi/documents/1410853/4734373/EUROOPAN+UNIONIN+PERUSOIKEUSKIRJAN+TULKINTA+JA+SOVELTAMINEN.pdf/b388bdd9-0740-e783-ebe8e0c307b0eb23/EUROOPAN+UNIONIN+PERUSOIKEUSKIRJAN+TULKINTA+JA+SOVELTAMINEN.pdf?t=1638200961820>, visited 3.9.2022.

[54] EUVL C 303, 14.12.2007, p. 17-35, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007X1214(01)&from=FI>, visited 3.9.2022.

[55] Tero Kujala, Euroopan unionin perusoikeuskirja – perusoikeudet ja lainkäyttö, Helsingin hovioikeuden julkaisu 2012, p.135.<https://oikeus.fi/hovioikeudet/helsinginhovioikeus/material/attachments/oikeus_hovioikeudet_helsinginhovioikeus/julkaisut/painetutjulkaisut/perus-jaihmisoikeudetrikosprosessissa2012/MBNM0tzdX/07_Euroopan_unionin_perusoikeuskirja_-_perusoikeudet_ja_lainkaytto_Tero_Kujala.pdf>, visited 2.9.2022.

Moreover, Section 98, Subsection 1 in the aforementioned Procurement Act states that the contracting entity may impose special terms and conditions on the implementation of a procurement agreement, provided that the said terms and conditions are linked to the procurement in the manner referred to in section 94. The terms and conditions may relate to the financial or social aspects of the procurement, or to its innovative, environmental and employment aspects. The special terms and conditions of the procurement agreement shall be indicated in the contract notice, in the invitation to negotiate or in the documents of the call for tenders.

The Ministry of Economic Affairs and Employment of Finland has published a guidebook for socially responsible public procurements.[56] For example, Espoo's city government has outlined social goals of its public procurements. The primary goal is promoting the employment of young people, immigrants, and disabled people. According to the city policy, all units should promote the employment of people with difficulties to find employment in the procurement process.[57]

b) One project organized by the Ministry of Economic Affairs and Employment, Status of Human Rights Performance of Finnish companies (SIHTI)[58], aimed at producing comprehensive and in-depth information on the human rights performance of Finnish companies in relation to the expectations and standards concerning their policies, processes, practices and responses to harmful human rights impacts, set for companies in the UN Guiding Principles.

According to the publication, a majority of Finnish companies are generally committed to respecting human rights, and the majority are also committed to respecting the ILO Fundamental Principles and Rights at Work. However, there are still several companies that are not explicitly committed to these rights in their own business operations and supply chains. It should also be noted that only a small proportion of Finnish companies are publicly committed to remedy if they find that they have caused or contributed to adverse human rights impacts.[59]

c) At the moment, there are no transnational collective agreements that would have been concluded by national firms.

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[56] Opas sosiaalisesti vastuullisiin julkisiin hankintoihin, TEM oppaat ja muut julkaisut 3/2017 The Ministry of Economic Affairs and Employment of Finland<https:// julkaisut.valtioneuvosto.fi/bitstream/handle/10024/80010/3_2017_Opas_Sosiaalisesti_vastuulliset_hankinnat_31052017_WEB.pdf>,visited 20.8.2022.

[57] Opas sosiaalisesti vastuullisiin julkisiin hankintoihin, TEM oppaat ja muut julkaisut 3/2017 The Ministry of Economic Affairs and Employment of Finland, p. 11.

[58] Status of Human Rights Performance of Finnish Companies (SIHTI) Project Report on the status of human rights performance in Finnish companies published by the Ministry of Economic Affairs and Employment 2021:17 <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/162936/TEM_2021_17.pdf?sequence=1&isAllowed=y>, visited 8.9.2022.

[59] Ibid. p. 93.

d) National courts do not admit civil claims for violations of social rights when they have taken place abroad. At the moment, there is no possibility for collective or class actions for international or national violations of social rights as the Act on Class Actions (Ryhmäkannelaki, 444/2007) applies only on consumer related matters.

f) National law does not require social rights due diligence, but the contracting entity may, according to The Act on Public Procurement and Concession Contracts Chapter 10 Section 81 and Subsection 4 decide to exclude from competitive tendering a candidate or tenderer if the contracting entity can prove, otherwise than by legally final decision or judgment, to have defaulted on a duty to pay the taxes or social security contributions of Finland or of its country of establishment.

Question 12

Social partners have had a minor role in the recent reform of the Climate Change Act (Ilmastolaki, 423/2022). The concept of just transition was not implemented in the law; not in a way it is in the UN's Paris agreement and the guidelines of ILO just transition.

At the moment, there is not much attention paid to the topic of just transition in Finland. However, the labour unions have emphasized the importance of the just transition, especially from the employees' perspective.[60]

According to the Finnish Constitution, Finland is obliged to respect fundamental and human rights, according to which everyone has the right to freedom and to fulfil their basic needs. For these needs to be fulfilled, just climate policy is necessary. This is since everyone must be able to afford energy, food, and mobility. The freedom to choose a place of residence, profession, and livelihood, along with the right to one's own language and culture are notable rights from both the viewpoints of personal identity and social connections.[61]

According to SAMAK (the Nordic co-operation committee of the Nordic Social Democratic parties and trade union LOs) effective combat of climate change cannot be achieved without social justice. And justice is seen to be far away if only

[60] The statement of SAK, Akava and STTK on the draft of the Governments Proposal for the Climate Change Act <https://akava.fi/lausunnot/palkansaajajarjestojen-sakn-akavan-ja-sttkn-lausunto-luonnoksesta-hallituksen-esitykseksi-uudeksi-ilmastolaiksi/>, visited 6.9.2022.

[61] The Finnish Climate Change Panel, Publication 5/2021: Discussion paper: How to consider justice in climate policy (pdf), p. 10 <https://www.ilmastopaneeli.fi/wp-content/uploads/2021/12/Finnish-Climate-Change-Panel_how-to-consider-justice-in-climate-policy_publication-5-2021.pdf>, visited 16.8.2022.

the weaker social groups carries the burden.[62] One example is to reduce emissions socially and regionally in a just way, so that all parts of society are involved.[63] The Grand Committee stated that social and regional justice must be taken into account in all actions and it must be ensured that the implementation of the program takes Finland's national, regional and local special characteristics into consideration as a northern, sparsely populated country with long distances.[64]

Question 13

The Ministry of Education and Culture has appointed a steering group to support the development of democracy and human rights education in elementary schools and secondary education nationwide.

In accordance with Prime Minister Sanna Marin's government program, the goal is to strengthen democracy and human rights education and participation in schools and educational institutions, and to take care of student and student activities.

In addition, the purpose is to strengthen the social educational mission of schools and increase interaction between parties, civil society, and schools to support the active citizenship of children and young people.

According to Eeva-Riitta Pirhonen, the chairperson of the steering group and the director-general of the Ministry of Education and Culture, democracy and human rights education are well considered in the current curricula, but support is needed for their implementation.

The government program entries are implemented within the framework of the national democracy program, the national youth work and policy program (VANUPO) and the Right to Learn development program. The Ministry of Education and Culture acts as the ministry primarily responsible for the implementation. The measures are planned in cooperation with other ministries, actors in the administrative sector, the research community, and non-governmental organizations.[65]

a) According to the fundamentals of primary education curriculum the students grow up in a world that is culturally, linguistically, religiously, and ideologically diverse. A culturally sustainable lifestyle and working in a diverse environment

[62] SAMAK, Oikeudenmukainen vihreä siirtymä – Pohjoismaisia aloitteita ideoinnin ja keskustelun pohjaksi, Tammikuu 2021, p. 10.

[63] Publications by the Finnish Government (Valtioneuvoston julkaisuja) 2019:31, Pääministeri Sanna Marinin hallituksen ohjelma Osallistava ja osaava Suomi – sosiaalisesti, taloudellisesti ja ekologisesti kestävä yhteiskunta 10.12.2019, p. 35.

[64] Statement of the Grand Committee (Suuri valiokunta) SuVL 3/2020 vp Valtioneuvoston selvitys: EU:n komission tiedonanto vihreän kehityksen ohjelmasta (Green deal) 11.12.2019 p. 8.

[65] News published 1.9.2020 by the Ministry of Education and Culture <https://oikeusministerio.fi/-//1410845/ohjausryhma-tukemaan-demokratia-ja-ihmisoikeuskasvatuksen-kehittamista>, visited 12.9.2022.

require cultural competence based on respect for human rights, skills of appreciative interaction and ways to express oneself and one's views.

In primary education, students are guided to recognize and appreciate the cultural meanings of the environment and to build their own cultural identity and a positive relationship with the environment. Students are guided to see cultural diversity as a fundamentally positive asset. At the same time, they are guided to recognize how cultures, religions and views affect society and everyday life, how the media shapes culture, and to consider what kinds of things cannot be accepted as violating human rights.

Students are guided to put themselves in the other person's position and look at issues and situations from different perspectives. Knowledge and appreciation of human rights, especially children's rights, and actions in accordance with them are systematically promoted in schoolwork. Respect and trust towards other groups of people and nations is strengthened in all activities, including international cooperation.[66]

b) There are principles that guide the preparation of the local curriculum.[67]

c) Liisa Jääskeläinen and Tarja Repo made a handbook in 2011 based on the project "as a global citizen in Finland" (Maailmankansalaisena Suomessa) that has been published by the Finnish National Agency for Education.[68]

The handbook provides examples from various schools in Finland on how they have provided education on various values in the Treaties such as sustainable development and human rights.

Question 14

According to the Government of Finland Report on Human Rights Policy, the rule of law, democracy and fundamental and human rights are closely interlinked. Together they form the foundation of Finnish society. Finland promotes on a broad scale the aligned and mutually reinforcing realization of fundamental and human rights as well as the rule of law nationally, in the EU and internationally.[69]

[66] Fundamentals of primary education curriculum 2014 <https://eperusteet.opintopolku.fi/#/en/perusopetus/419550/vuosiluokkakokonaisuus/428781>, visited 15.9.2022.

[67] Principles that guide the preparation of the local curriculum <https://eperusteet.opintopolku.fi/#/en/perusopetus/419550/tekstikappale/424809>, visited 15.9.2022.

[68] Liisa Jääskeläinen ja Tarja Repo Handbook "Koulu kohtaa maailman – Mitä osaamista maailmankansalainen tarvitsee" 2011:16 published by the Finnish National Agency for Education <https://www.oph.fi/sites/default/files/documents/138412_koulu_kohtaa_maailman_0.pdf>, visited 14.9.2022.

[69] Government of Finland Report on Human Rights Policy, Publications of the Finnish Government 2022:10, p. 11 <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/163838/VN_2022_10.pdf?sequence=4&isAllowed=y>, visited 14.9.2022.

Strengthening inclusive, peaceful, and democratic societies is one of the four priorities of Finland's development policy. The aim is to strengthen the capacity of the judicial system, transparency in public administration and the influencing opportunities of civil society. Finland's engagement emphasizes the rights and participation opportunities of women and persons in the most vulnerable positions. Strengthening the role of women in peace mediation and peace solutions is a key competence area of Finland's foreign policy.[70]

Political cooperation between states defending human rights and democracy has intensified. Nordic cooperation is important for Finland and active in contexts such as promoting gender equality and the rights of sexual and gender minorities. Several intergovernmental as well as multi-stakeholder organizations and initiatives have been launched to defend issues such as democracy as well as freedom of expression and media freedom. Finland has joined several such groups of likeminded countries, but emphasizes the activities of the UN and regional, intergovernmental treaty organizations as the primary option.[71]

According to the Programme of Prime Minister Sanna Marin's Government, there are several national developments in the area of fundamental social rights that can be related to democracy and the rule of law.

Chapters 3.3. and 3.3.1 in the Programme focus especially on the strengthening of rule of law by aiming at a well-functioning democracy and high-quality legislation that promotes the realization of fundamental and human rights. Moreover, well-functioning judicial proceedings and legal protections (including access to justice irrespective of socio-economic status and the length of judicial proceedings) are also aims that relate to the rule of law. Furthermore, a safe and secure Finland is built on the rule of law, meaning a reliable criminal sanctions system by, for example, revising the legislation related to restraining orders to better protect the rights of the victims, and improving the position of crime victims by, for example, enacting an act on assistance to victims of human trafficking so that local authorities can assist the victims. A reference to victims of human trafficking will be added to the acts that concern healthcare and social welfare. The Act on the Reception of Persons Applying for International Protection and on Identifying and Assisting Victims of Trafficking in Human Beings will be updated so that it will no longer be so closely connected to the criminal procedure, as required by international obligations.

The improvement of fundamental and human rights related to democracy is achieved, for example, by eradicating hate speech and online harassment and by

[70] Ibid. p. 35.
[71] Ibid. p. 17.

taking particular account of the rights of the most vulnerable population groups and promotes the strengthening of democratic society that is open for all.[72] In terms of equality the reform of the Criminal Code (Rikoslaki, 39/1889) to include gender as a ground for aggravation.[73]

According to the Government of Finland Report on Human Rights Policy, the functioning of the rule of law is facing pressure also in Finland. Attitudes towards minorities have hardened and hate speech and public shaming have increased. To make sure that Finland can continue to be a safe and stable state governed by the rule of law, Finland needs to ensure that fundamental and human rights are implemented in an equal manner and legal protection is guaranteed for everyone. Furthermore, Finland must strengthen good relations between population groups, social inclusion, and participation rights. Rule of law must work in an efficient and effective manner to combat inequality, marginalization, and insecurity in a society.[74]

Question 15

According to the Report on Human Rights Policy by the Government of Finland, the European Union (EU) is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These common values of the EU must be upheld strictly in the Union. Finland actively promotes the realisation of fundamental and human rights as a cross-cutting issue within the EU and in the activities of the Union.[75]

For example, Finnish Confederation of Professionals in both private and public sectors STTK, a non-political Finnish central organization of trade unions representing different fields, think that the social rights are overshadowed by economic development in the EU. This is since measuring social development as part of economic management has been found problematic. The process has been dominated by economic development, in which case the development of working life and social issues has remained secondary. Partly this is because, at the Union Level, there is binding legislation on the balance of the public finances and the sustainability of member countries' debts.[76]

[72] Government of Finland Report on Human Rights Policy, Publications of the Finnish Government 2022:10, p. 89 <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/163838/VN_2022_10.pdf?sequence=4&isAllowed=y>, visited 8.9.2022.

[73] Government Proposal HE 7/2021 vp.

[74] Government of Finland Report on Human Rights Policy, Publications of the Finnish Government 2022:10, p. 89 <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/163838/VN_2022_10.pdf?sequence=4&isAllowed=y>, visited 8.9.2022.

[75] Ibid, p. 10.

[76] Blog by STTK, 15.10.2020 <https://finunions.org/sosiaaliset-oikeudet-jaavat-eussa-talouskehityksen-varjoon/>, visited 3.9.2022.

According to FinUnions, the EU representative of SAK (the Central Organisation of Finnish Trade Unions in industry, the public sector, transport, and private services in Finland) and STTK representing 1.4 million workers in Finland, other important topics from the view of working life are the goal of full employment, combating the growth of inequality, promoting collective bargaining, promoting equality, and preventing discrimination. Without forgetting occupational well-being. These themes are the most current in Finland, but they all have a European perspective due to our EU membership. The solutions are therefore not only found in the national debate, but in joint discussion with other member countries. Common solutions are also required in areas where the EU does not have jurisdiction, and that Finnish employee organizations have nevertheless considered it important that the framework of the EU's current jurisdiction is respected. Similarly, it is stated that the protection of the Finnish social security system is an important goal for Finnish wage earners, but also, for example, adding a social protocol to the basic agreements to ensure that economic freedoms in EU law do not take precedence over fundamental social rights and social development is a long-term goal of the trade union movement.[77]

According to the Confederation of Finnish Industries (EK), the leading business organization in Finland, developing the social dimension requires Europe to have a vibrant economy and high employment. Competitive companies, a dynamic labour market and a strong public economy create the basis for new jobs and the sustainability of social security.[78]

The main goals of EK are to preserve the main responsibility of social affairs at the national level. Possible EU-tools are, for example, the social scoreboard included in the European Semester and the CSRs. Moreover, it would be essential to take care of uniform implementation of the existing EU regulation instead of adding more. Finally, effective solutions require the participation of labour market partners in the decision-making.[79]

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[77] Blog by FinUnions, 14.12.2021 <https://finunions.org/eun-tulevaisuutta-linjataan-nyt/>, visited 3.9.2022._

[78] The Confederation of Finnish Industries (EK), EU ja työelämäasiat <https://ek.fi/tavoitteemme/eu-ja-kauppapolitiikka/eu-ja-tyoelama/>, visited 14.9.2022.

[79] Ibid.

FRANCE

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Question 1

1.a.

L'exigence de non-discrimination figure à l'article L. 1132-1 du Code du travail. Cette disposition est extrêmement large et renvoie de façon explicite aux concepts de discrimination directe et indirecte au sens du droit de l'Union européenne. L'article dispose ainsi que:

"Aucune personne ne peut être écartée d'une procédure de recrutement ou de nomination ou de l'accès à un stage ou à une période de formation en entreprise, aucun salarié ne peut être sanctionné, licencié ou faire l'objet d'une mesure discriminatoire, directe ou indirecte, telle que définie à l'article 1er de la loi n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations (...) en raison de son origine, de son sexe, de ses mœurs, de son orientation sexuelle, de son identité de genre, de son âge, de sa situation de famille ou de sa grossesse, de ses caractéristiques génétiques, de la particulière vulnérabilité résultant de sa situation économique, apparente ou connue de son auteur, de son appartenance ou de sa non-appartenance, vraie ou supposée, à une ethnie, une nation ou une prétendue race, de ses opinions politiques, de ses activités syndicales ou mutualistes, de son exercice d'un mandat électif, de ses convictions religieuses, de son apparence physique, de son nom de famille, de son lieu de résidence ou de sa domiciliation bancaire, ou en raison de son état de santé, de sa perte d'autonomie ou de son handicap, de sa capacité à s'exprimer dans une langue autre que le français, de sa qualité de lanceur d'alerte, de facilitateur ou de personne en lien avec un lanceur d'alerte (...)".

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Les liens entre droits français et droit européen de la non-discrimination sont donc parfaitement explicites, le premier procédant du second.

Le droit français de la non-discrimination est d'autant plus large que le principe de non-discrimination doit être complété par un autre principe, celui relatif à l'égalité de traitement. Le principe d'égalité de traitement, en effet, est désormais un principe général du droit français, qui a été explicitement consacré par la Cour de cassation en 2008[4]. Dans la conception française, ce principe d'égalité de traitement va au-delà de la seule non-discrimination, en ce qu'il permet de sanctionner des différences de traitement qui ne sont fondées ni directement ni indirectement sur un motif discriminatoire, comme le sexe, l'âge ou l'origine ethnique. Ce principe d'égalité de traitement a pris une grande ampleur en droit français, il est limité simplement par l'accord collectif, puisque la Cour de cassation a admis, par trois arrêts controversés, qu'une différence de traitement consacrée par une convention collective était présumée justifiée[5]. Il n'en reste pas moins que c'est justement au nom du droit de l'Union européenne que cette présomption ne saurait être étendue à l'excès. Selon les termes forts de la Cour de cassation:

"La reconnaissance d'une présomption générale de justification de toutes différences de traitement entre les salariés opérées par voie de conventions ou d'accords collectifs, de sorte qu'il appartient à celui qui les conteste de démontrer que celles-ci sont étrangères à toute considération de nature professionnelle, serait, dans les domaines où est mis en œuvre le droit de l'Union, contraire à celui-ci en ce qu'elle ferait reposer sur le seul salarié la charge de la preuve de l'atteinte au principe d'égalité et en ce qu'un accord collectif n'est pas en soi de nature à justifier une différence de traitement"[6].

Non-discrimination et égalité de traitement suscitent un contentieux relativement abondant, notamment autour de trois critères principaux: la discrimination syndicale, la discrimination par l'âge et la discrimination entre les hommes et les femmes. Elle fait aussi l'objet d'une attention particulière de la part des institutions françaises, telles que le Conseil économique, social et environnemental[7], le Ministère de la justice[8] ou, bien sûr, le Défenseur des droits[9], qui est une autorité administrative indépendante, créée par la révision constitutionnelle du 23 juillet 2008 et instituée par la loi organique du 29 mars 2011. Les attributions

[4] Soc, 30 janvier 2008, n°06-46447.

[5] Soc, 27 janvier 2015, n°13-14733, 13-22179 et 13-25437.

[6] Soc., 3 avril 2019, 17-11.970,

[7] CESE, *Bilan de l'application des dispositions promouvant l'égalité professionnelle entre femmes et hommes*, 2012.

[8] L. Pecaut-RIvolier, "Lutte contre les discrminations au travail: un défi collectif", *Rapport au Ministère de la Justice*, 2013.

[9] Sur l'ensemble, v. S. Latraverse, "La lutte contre la discrimination au travail par le défenseur des droits", *Dr. Soc.* 2020. 288.

du Défenseur des droits sont larges, et comprennent notamment la lutte contre les discriminations, qui est au cœur de sa mission. Tous les ans, le Défenseur des droits publie un rapport qui rend compte des difficultés spécifiques relevant de son domaine d'intervention et, en particulier, des discriminations. Le rapport 2021 souligne en particulier la place de la discrimination par le handicap, dont la Défenseure des droits actuellement en poste souhaite faire une priorité politique et juridique[10].

La situation des publics en situation de fragilité (sans papiers, indigents, travailleurs précaires...) est aussi soulignée dans la mesure où les personnes concernées sont plus susceptibles que les autres non seulement de souffrir d'une discrimination, mais encore de se voir dénier toute possibilité de lutter contre celles-ci. Dans ce cadre, la Défenseure des droits a créé une plateforme dédiée, en lien avec les syndicats et les associations spécialisées. Cette plateforme (accessible par un numéro de téléphone spécifique et un site internet) rend aisée la saisine et l'instruction d'une situation de discrimination dont serait victime une personne. Elle a pour objet d'améliorer le taux de recours. En décembre 2021, soit dix mois seulement après sa création, la plateforme comptabilisait 14 000 sollicitations et plus de 1 200 acteurs associatifs et institutionnels partenaires recensés sur tout le territoire. En moins d'une année d'activité, elle a permis le doublement du nombre d'appels pour des situations de discrimination adressées à l'institution et une augmentation de 22,2% des saisines sur cette thématique.

Il est aussi préconisé d'améliorer les différentes procédures existantes, notamment par le développement de méthodes alternatives, type médiation.

Les mécanismes de promotion de l'égalité en droit du travail français par la non-discrimination et l'égalité de traitement procèdent donc directement du droit de l'Union européenne, qui a, en cette matière, joué un rôle moteur (v. aussi, sur ces points, *Infra*, question n°7).

1.b.

La différence de traitement entre travailleurs et inactifs étant consacrée par le droit de l'Union et notamment par la directive 2004/38, celle-ci se retrouve incontestablement dans le droit français. On verra en particulier que certains partis politiques importants sont opposés à l'égalité de traitement entre Français et étrangers, sans distinction entre ressortissants d'États tiers et citoyens européens, notamment en matière d'accès à la protection sociale (v. *infra*, question 2).

[10] Défenseur des droits, *Rapport annuel d'activité 2021*, disponible sur le site internet de l'institution: https://www.defenseurdesdroits.fr/, pp. 44 et s.

Une discrimination importante est celle dont souffre en France la communauté rom, qui transcende mais recoupe la discrimination entre Français et citoyens européens et entre travailleurs et inactifs. Cette communauté fait l'objet de discriminations bien documentées, notamment en ce qui concerne l'accès au logement, l'accès aux aires de voyages et, plus généralement, l'accès aux services publics. La Délégation interministérielle pour l'hébergement et l'accès au logement (DIHAL), en coordination avec le Défenseur des droits, a mis en place en la matière une "Stratégie française sur l'égalité, l'inclusion et la participation des Roms"[11]. Il est souligné en particulier que les Roms voient, beaucoup plus souvent que d'autres, niés leurs droits en tant que citoyens européens, notamment en matière de liberté de circulation et d'égalité de traitement. Cette différence de traitement apparaît dans la loi, notamment dans la loi du 7 mars 2016 qui a permis d'assortir des mesures d'éloignement du territoire français d'interdiction de revenir. Manifestement destinée à la communauté Rom de nationalité roumaine ou bulgare, cette loi avait suscité les protestations de nombreuses associations ainsi que du Défenseur des droits qui avait contesté la conformité de cette solution avec le droit de l'Union[12].

Question 2

2. a.

L'arrêt *Dano* de la Cour de justice[13], et les décisions qui ont suivi ont fait en France l'objet de nombreux commentaires spécialisés, à la tonalité généralement critique[14].

Il a été remarqué que si la solution de la Cour était conforme au texte de la directive, elle n'en marquait pas moins un net durcissement par rapport à d'autres temps où elle n'avait pas manqué de faire preuve d'une sévérité bien plus grande à l'égard des États[15], y compris, d'ailleurs, peu de temps avant lorsqu'elle condamnait un droit national qui, de façon beaucoup trop automatique et en toute circonstance, refusait un complément de retraite à un citoyen européen aux trop faibles ressources[16]. La Cour semblait donc bien marquer un changement d'époque: celle-ci ne semblait plus désormais à la prise en charge la plus large et la plus généreuse possible des indigents ; plutôt au rappel ferme des limites des engagements des États membres. Ainsi, les juristes, tout particulièrement,

[11] V. Les rapports de Défenseure des droits, "Gens du voyage: lever les entraves aux droits", 2021 et "Pour une protection effective des droits des personnes Roms", 2021

[12] Défenseur des droits, Avis 16-02 du 15 janvier 2016.

[13] CJUE 11 nov. 2014, aff. C-333/13, *Dano*.

[14] E. Aubin, "L'arrêt Dano de la CJUE: quand sonne le glas de la citoyenneté sociale européenne ?", *AJDA* 2015. 821 ; E. Pataut, "Les limites de la solidarité en Europe – A propos de l'arrêt Dano", *RDT*. 2015. 161.

[15] CJUE, 7 septembre 2004, aff. C-456/02, *Trojani*.

[16] CJUE, *Brey*, 19 septembre 2013, aff. C-140/12.

ont pu regretter la relative volte-face que semblait réaliser la Cour de justice en matière de protection des plus vulnérables.

Le débat a certes débordé du seul cénacle des juristes spécialisés [17] et l'arrêt *Dano* a été parfois brièvement commenté dans la presse[18]. La discussion n'en reste pas moins relativement limitée dans les médias et dans la société civile.

En revanche, la question de l'accès à la protection sociale française pour les étrangers est incontestablement un marqueur politique fort. Plusieurs partis politiques, notamment tous les partis politiques d'extrême droite (Rassemblement National, Reconquête, Debout La France) mais aussi le parti conservateur (Les Républicains), font du refus d'accès à la protection sociale des étrangers un élément important de leur programme. Ainsi par exemple du parti Les Républicains qui propose de: "*conditionner l'accès aux allocations sociales à un minimum de trois années de cotisations*"[19]. Plus explicitement encore, le Rassemblement national propose depuis plusieurs années de réserver aux Français l'accès au système de protection sociale et souhaite ainsi: "*Réserver les aides sociales aux Français, et conditionner à 5 années de travail en France l'accès aux prestations de solidarité*"[20].

Dans ce cadre, Marine Le Pen, présidente du Rassemblement national, s'était réjouie de l'arrêt Dano, dans lequel elle avait vu "une victoire politique".

Il n'en reste pas moins qu'il est très frappant de constater qu'aucune distinction n'est faite, dans ces programmes, entre les ressortissants des États tiers et les citoyens européens, encore moins entre les citoyens actifs et les citoyens inactifs. Ces positions politiques sont la conséquence d'une hostilité globale à l'immigration, sans que soit soulignée la profonde différence de régime juridique entre les citoyens européens et leur famille et les étrangers extra-européens.

Dans cette mesure, l'approbation qui avait été donnée par ces partis à la jurisprudence de la Cour de justice ne doit probablement pas être sur-interprétée. La solution donnée par la Cour en l'espèce permet simplement aux partis de répéter une position globale, hostile à l'immigration et hostile à l'accès des étrangers à la protection sociale française. En revanche, il n'est fait dans la presse généraliste et dans le monde politique que très peu de référence à la situation particulière des ressortissants européens en situation de mobilité et dépourvus de ressources.

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[17] v. p. ex. A. Hiltunen, "Le contrôle de l'accès aux prestations sociales pour les citoyens européens démunis à la suite des arrêts *Dano*, *Alimanovic* et *Garcia-Nieto*", *Informations sociales* 2016/3 (n° 194), p. 96.

[18] *Le Monde*, 11 novembre 2014.

[19] https://republicains.fr/nos-propositions/immigration/

[20] https://rassemblementnational.fr/22-mesures

Il n'en reste pas moins clairement établi que la reconnaissance des droits sociaux des ressortissants de l'Union, et tout particulièrement des ressortissants inactifs, pose souvent d'importantes difficultés pratiques, devant les caisses de sécurité sociale ou les organismes sociaux français. La Défenseure des droits a ainsi noté être "*régulièrement saisi de réclamations faisant apparaître que les conditions du droit au séjour applicables aux ressortissants de l'Union européenne sont parfois méconnues ou mal appliquées par les préfectures et les organismes chargés de les apprécier, ce qui conduit à des refus de prestations injustifiés*"[21].

2. b.

La question du paiement des allocations familiales au travailleur installé en France lorsque la famille est restée dans le pays d'origine a fait l'objet d'une longue bataille juridique en France, qui s'est traduite par l'affaire *Pinna*[22].

Sous l'empire du règlement 1408/71, en effet, les prestations familiales relevaient de la loi de l'État du lieu de travail, sauf pour la France, qui avait obtenu une dérogation permettant à la sécurité sociale française de ne verser à la famille restée sur le territoire d'un autre État membre du travailleur européen que des prestations à hauteur de ce qui aurait été versé en application du droit de cet autre État membre. La solution a été condamnée par la Cour de justice de façon très ferme. La singularité de la position française fut écartée parce qu'elle introduisait une discontinuité de traitement analysée comme une entrave à la liberté de circulation des travailleurs et comme une discrimination indirecte. La condamnation sans appel n'a toutefois pas suffi à rétablir M. Pinna dans ses droits, faute de modification immédiate des textes. Il a donc fallu un second arrêt *Pinna* pour imposer l'application immédiate de cette règle, sans attendre la modification du règlement. La Cour de cassation en avait, à l'époque, tiré les conséquences en rétablissant M. Pinna dans ses droits[23].

Cette longue opposition du gouvernement français a permis à la fois de maintenir le principe d'unité de la loi applicable, tout en consacrant une certaine idée d'aide ou de solidarité entre l'État d'emploi et l'État de résidence de la famille[24]. Cette solution ne semble plus discutée aujourd'hui en France.

Elle le reste toutefois en Europe tant les États rechignent parfois à donner sa pleine mesure à l'articulation des régimes et à la solidarité qui l'accompagne. En

[21] Défenseur des droits, "Pour une protection effective des droits des personnes Roms", 2021, p. 24. Disponible sur le site internet: https://www.defenseurdesdroits.fr.

[22] CJCE, 15 janvier 1986, aff. 41/84, *Pinna (I)* et CJCE, 2 mars 1989, aff. 359/87, Pinna (II), *Rev. trim. dr. eur*. 1989, p. 297, obs. P. Rodière.

[23] Soc., 24 mai 1989, *Bull. Civ.* V, n°379.

[24] P. Rodière, "Coordination européenne des sécurités sociales et conflit de lois (quelques observations)", *RDSS*. 2016. 1.

témoigne les difficiles négociations visant à la réforme du règlement 883/2004 qui se heurtent, entre autres, aux réticences étatiques à servir les prestations familiales à des familles restées dans le pays d'origine [25]. En témoigne surtout la récente condamnation de l'Autriche, dans laquelle la Cour a réaffirmé avec vigueur que les prestations familiales ne pouvaient varier en fonction du pays de résidence des enfants[26]. La Cour a en l'espèce réaffirmé le principe selon lequel une telle solution était constitutive d'une discrimination.

Selon elle en effet, la solution autrichienne, "*qui repose sur le critère de la résidence à l'étranger des enfants pour déterminer le montant des prestations familiales et des avantages sociaux et fiscaux, affecte davantage les travailleurs migrants (...) [et] constitue donc une discrimination indirecte fondée sur la nationalité*" (n°103).

Une telle solution montre donc que la solution est loin d'être acquise en Europe, où la solidarité en matière familiale continue à se heurter à de fortes oppositions politiques. Depuis la ferme condamnation de l'affaire *Pinna*, toutefois, le droit français s'est mis en concordance avec le droit de l'Union.

Plus précisément, l'article L. 512-1 du Code de la sécurité sociale introduit une distinction entre les ressortissants européens (al. 1) et les autres (al. 2 et 3). Seuls les ressortissants extra-européens voient le versement des prestations familiales subordonné à la résidence en France de la famille.

Question 3

3.a

Les informations les plus précises se trouvent sur le site de l'Institut national de la statistique et des études économiques (INSEE)

D'après la dernière étude en date, "*en 2018, 4,8 millions d'étrangers et 6,5 millions d'immigrés vivent en France, soit respectivement 7,1% et 9,7% de la population totale. L'immigration en France est un phénomène ancien. La répartition des immigrés par origine a changé au cours des quarante dernières années. La proportion des immigrés originaires d'Europe du Sud (Espagne, Italie, Portugal) a ainsi fortement diminué: elle est passée de 49% en 1975 à 17% en 2018. Cette baisse s'explique par les décès sur cette période et par un solde migratoire très faible en provenance de ces pays, tandis que de nouveaux flux migratoires ont émergé. La part des immigrés originaires des autres pays d'Europe (hors ex-URSS) est, quant à elle, restée stable depuis les années 1980. Les immigrés originaires du Maghreb représentaient 26% de la population*

[25] I. Omarjee, *Droit européen de la protection sociale*, Bruylant, 2018, pp. 231 et s.

[26] CJUE, 16 juin 2022, aff. 328/20, *Commission c/ Autriche.*

immigrée en 1975. En 2018, cette part atteint 29%. Les origines des immigrés se sont surtout diversifiées tout au long de la période avec l'émergence de flux migratoires en provenance d'Afrique subsaharienne (2% de la population immigrée en 1975 contre 17% en 2018) et également d'Asie (4% de la population immigrée en 1975 contre 14% en 2018, hors ex-URSS)"[27].

"*Plus précisément, la proportion de femmes a aussi augmenté: en 2018, les femmes représentent 52% de la population immigrée contre 44% en 1975. Cette féminisation est particulièrement visible parmi les immigrés originaires d'Afrique (Maghreb et Afrique subsaharienne). En 2018, 49% des immigrés africains sont des femmes contre 29% en 1975. Le niveau de diplôme a fortement augmenté dans l'ensemble de la population immigrée entre 1975 et 2018. La part des immigrés peu ou pas diplômés est passée de 88% à 42% en 40 ans. Si cette part reste élevée comparée à celle de la population non immigrée (25%), elle a* diminué *dans des proportions très proches. En 1975, seuls 3% des immigrés étaient titulaires d'un diplôme du supérieur ; ils sont 28% en 2018. Dans les années 1970, les immigrés étaient pour la plupart arrivés jeunes et peu diplômés. À l'inverse, les immigrés arrivés récemment sont de plus en plus diplômés et d'âge actif*".

"*En 2018, le taux de chômage des étrangers non originaires de l'Union européenne (22%) est 2,6 fois plus élevé que celui des personnes de nationalité française (8%). Cette différence est un peu plus marquée pour les femmes (24%, contre 8% pour les femmes de nationalité française)*".

"*Environ 7% des actifs sont étrangers. Ces derniers sont surreprésentés parmi les ouvriers (12% sont étrangers) et les artisans, commerçants et chefs d'entreprises (8%). Ils sont au contraire sous-représentés parmi les professions intermédiaires (3%) et les cadres (5%)*".

La part des travailleurs étrangers a donc progressivement augmenté en France. Certains métiers en tension, notamment dans le bâtiment, ont massivement recours à la main d'œuvre étrangère.

3. b et 3. c

L'idée de "circulation équitable" peut être comprise de plusieurs manières, qui sont abordées de façon très différente.

Une première occurrence y voit la possibilité d'un régime contrôlé par l'État d'accueil et distinct en fonction du statut ou de l'origine des intéressés, ("fair movement"). Cette discussion, ouverte en Grande Bretagne, a pris une certaine

[27] INSEE, Tableaux de l'économie française 2020, disponible sur le site: www.insee.fr.

importance dans ce pays au moment de la discussion sur le Brexit[28]. Dans la mesure où elle constituerait une remise en cause profonde de la liberté de circulation en Europe, elle ne semble pas avoir eu d'impact majeur sur la France[29]. En France, la doctrine reste, dans son ensemble, attachée au caractère très large de la liberté de circulation qui serait remise en cause par une telle conception de la circulation équitable[30].

En revanche, deux autres acceptions de la circulation équitable font l'objet de vigoureuses contestations.

De nombreuses voix, notamment universitaires, tout d'abord, contestent les limites de la liberté de circulation et l'interprétation restrictive qu'en donnent les institutions administratives ou juridictionnelles françaises[31]. Il s'agit ici essentiellement de contester la condition de ressource ou l'atteinte à l'ordre public, qui restent au cœur de la liberté de séjour, particulièrement lorsque celui-ci est inférieur à 5 ans. Ces conditions sont critiquées comme conduisant à une stigmatisation excessive des personnes dépourvues de moyens[32], notamment par le biais d'une interprétation parfois exagérément restrictive de l'ordre public[33].

C'est aussi dans ce cadre qu'a été discutée, cette fois au-delà des seuls cercles académiques, la question des discriminations spécifiques à l'encontre des Roms. La loi du 7 mars 2016 a ouvert la possibilité d'assortir les mesures d'éloignements du territoire français fondées sur la menace à l'ordre public ou l'abus de droit d'interdictions de circuler (et donc de revenir) sur le territoire pour une durée déterminée. À l'occasion des débats législatifs portant sur ces dernières dispositions, le Défenseur des droits avait émis des réserves quant à leur conformité au droit européen tout en déplorant que ces dispositions, certes applicables à tous les ressortissants européens, semblent en réalité, compte tenu des circonstances dans lesquelles elles avaient été adoptées, viser plus particulièrement les citoyens roumains et bulgares, d'origine "Rom", réelle ou supposée[34].

Enfin, sous cette acceptation, il est aussi possible de traiter de la question, cette fois très largement débattue en France, des effets négatifs de la mobilité des travailleurs sur les salaires et l'emploi. A ce titre, le débat porte essentiellement sur le

[28] C. Barnard & S. Butlin, "Free movement vs fair movement: Brexit and managed migration", *Common Market Law Review*, 2018, p. 203.

[29] A. Iliopoulou-Penot, "Le Brexit et les droits des citoyens", *RFDA* 2020. 420.

[30] V. p. ex. P. Rodière, *Droit Social de l'Union Européenne*, 3e éd., LGDJ. 2022, pp. 261 et s.

[31] V. part. K. Parrot, *Carte Blanche*, ed. La Fabrique, 2019.

[32] V. Réveillère, "L'éloignement des pauvres: la conditionnalité du droit de séjour", *RTDEur*. 2021. 724.

[33] E. Aubin, "Citoyen européen mendiant en France: ne circulez plus, il n'y a rien à voir !", *AJDA* 2015 p.64 ; sur la position du Conseil d'État, v. part. CE, 1er octobre 2014, n°365054.

[34] Défenseur des droits, Avis 16-02 du 15 janvier 2016, disponible sur le site internet: https://juridique.defenseurdesdroits.fr.

détachement de travailleurs (v. aussi *Infra*, question n°5). La discussion en France sur les effets délétères du détachement, qui entraînerait concurrence déloyale, tensions sur les salaires et violation des droits fondamentaux des travailleurs, a pris une importance considérable dans le débat politique français. En témoigne la figure contestable du "plombier polonais" apparu lors du débat référendaire de 2005 sur la constitution européenne. En témoigne encore l'importance prise par cette question dans le débat présidentiel de 2017, la réforme de la directive détachement faisant partie des promesses de campagne du candidat Macron qui a joué un rôle important, une fois élu, dans la révision de la directive détachement.

C'est à ce sens de l'idée de circulation équitable que s'est référée le Conseil économique et social européen dans son avis 32/16 du 29 avril 2016: "Rendre la circulation plus équitable pour tous", qui appelle à un renforcement de l'inspection du travail, à une meilleure coordination des régimes de sécurité sociale pour les travailleurs mobiles et à une meilleure protection des travailleurs détachés.

En France, le régime du détachement est très fréquemment discuté comme étant l'un de ceux qui peuvent conduire à d'importantes difficultés, notamment sous l'angle de l'égalité de traitement des travailleurs[35]. Il est même parfois noté que la liberté de circulation ouvre la voie à des situations portant de graves atteintes aux droits fondamentaux du travail. En conséquence, il est parfois suggéré de réfléchir à une interdiction ciblée de tout détachement dans certains domaines économiques[36].

Le cœur du débat politique et juridique sur la mobilité des travailleurs en France semble bien s'être concentré sur le travail détaché. Pour autant, en l'état actuel du droit français, le régime de liberté de circulation des travailleurs détachés reste strictement dans le cadre de la directive.

Il reste enfin à préciser que le droit français a créé un titre de séjour "compétence et talent" qui permet d'accorder un droit au séjour spécifique aux étrangers dont le métier apparaît particulièrement nécessaire ou pertinent pour l'économie française.

Question 4

4.a.

Le phénomène de fuite des cerveaux, quoique fréquemment invoqué en France dans la grande presse ou dans le discours politique, semble très difficile à

[35] M. Rocca, "Détachement 2022: la longue marche de la quasi-égalité", *RTD eur*. 2022. 163.

[36] S. Robin-Olivier, Le marché du détachement international de travailleurs dans l'Union européenne: une institution esclavagiste ?", *Mélanges en l'honneur de Marie Ange Moreau*, Bruylant, 2022. 521.

quantifier, voire même à établir[37]. Un rapport du sénat soulignait il y a déjà 20 ans que le flux était difficile à mesurer et que les statistiques disponibles étaient ou bien manquantes ou bien contestables[38].

En toute hypothèse, un relatif consensus semble limiter le phénomène aux Français diplômés du supérieur, dont l'expatriation est évaluée à environ 4%, ce qui situerait la France dans la moyenne basse de l'Union européenne[39]. Le phénomène est confirmé par le fait qu'au vu de la population française totale, la proportion des personnes disposant d'un diplôme de l'enseignement supérieur est plus élevée parmi les Français en âge de travailler qui vivent dans un autre pays de l'UE que parmi les Français en France: 62,5% des Français vivant dans un autre État membre ont un diplôme de l'enseignement supérieur, contre 34,6% pour la population résidente en France[40].

Le phénomène est plus important, mais en baisse, dans ce qui est convenu d'appeler dans le système français les "Grandes écoles" (Écoles normales supérieures, Écoles d'ingénieurs, Écoles de commerce...). L'enquête annuelle de la Conférence des grandes écoles semble montrer une baisse tendancielle de la proportion de diplômés des grandes écoles faisant le choix de l'expatriation, passé d'environ 16% en 2015 à environ 11% en 2022, soit environ un diplômé sur 9. Parmi ceux-ci, 43% sont expatriés dans l'Union européenne[41].

Il s'agit donc bien d'une mobilité limitée, qui ne semble pas toucher une région ou un sexe plutôt qu'un autre, mais bien plutôt être concentrée sur les plus diplômés des Français.

4. b.

Les mesures visant à limiter l'expatriation des étudiants formés en France sont extrêmement rares.

Quelques écoles françaises, comme les Écoles normales supérieures ou l'École Polytechnique, rémunèrent leurs élèves et, en contrepartie, posent des obligations pour ceux-ci de s'engager non pas en France, mais au service de l'État pendant une durée de 10 ans. Ces exigences sont toutefois limitées à plusieurs égards.

[37] C. Garcia-Penalosa et E. Wasmer, "Préparer la France à la mobilité internationale croissante des talents", *Notes du conseil d'analyse économique*, vol. 31, no. 4, 2016, pp. 1-12.

[38] J. François-Poncet, "La fuite des cerveaux: mythe ou réalité ?", *Commission des affaires économiques du Sénat*, Rapport d'information 388 (1999-2000).

[39] R. Ennafaa R. et S. Paivindi, "Fuite ou mobilité des cerveaux", *Formation Emploi*, n° 103, juillet 2008.

[40] Source Eurostat – 2018: https://ec.europa.eu/eurostat/documents/2995521/8926081/3-28052018-AP-FR.pdf/82925403-a813-4419-abf8-7c783b4aedae

[41] Conférence des Grandes Ecoles, "Enquête Insertion – 2022", https://www.cge.asso.fr/publications/enquete-insertion-cge-2022-infographie/.

D'une part, en ce qui concerne l'Ecole polytechnique, cette situation particulière est limitée aux étudiants de nationalité française, d'autre part, cette obligation de travailler au service de l'État peut être rachetée par l'étudiant ou par l'entreprise, française ou étrangère, qui l'embauche[42]. En pratique, donc, le remboursement des frais engagés par l'État peut délier le bénéficiaire de son obligation de travailler au service du public.

En ce qui concerne les études universitaires, aucune mesure particulière n'est prévue pour les étudiants de nationalité française ou pour les citoyens européens. Pour les ressortissants d'États extérieurs à l'Union, il est au contraire extrêmement difficile de rester sur le territoire français en raison des règles relatives à l'entrée et au séjour des étrangers. Il est en effet fréquemment remarqué que le passage du statut d'étudiant à celui de travailleur est difficile à obtenir et, à ce titre, constitue une véritable contre-incitation à rester en France[43]. Cette situation est fréquemment dénoncée non seulement par les spécialistes de droit des étrangers, mais encore par de nombreux économistes, qui soulignent la relative incohérence politique qui consiste à financer des études par l'impôt tout en empêchant la France de bénéficier du résultat de cet effort de formation [44].

4. c.

A notre connaissance, il n'existe pas, à l'heure actuelle, de difficultés juridiques relatives à la compatibilité entre ces différentes mesures et les libertés de circulation garanties par le droit de l'Union. Il faut d'ailleurs noter que les obligations de travailler au service de l'État qui existent dans certaines écoles ont été étendues aux institutions de l'Union européenne[45]. Les rares limites professionnelles imposées aux étudiants français ou étrangers ont donc été modifiées pour intégrer les exigences du droit de l'Union.

Question 5

5.a

La directive 2018/957 a été transposée par l'ordonnance du 20 février 2019 portant transposition en droit français de la directive (UE) 2018/957[46]. Le principe de

[42] Décret n° 2015-566 du 20 mai 2015 *relatif au remboursement des frais d'entretien et d'études par certains élèves de l'Ecole polytechnique*, *JO* n°0118 du 23 mai 2015.

[43] H. Jamid, M. Makki, R. Mercon, "Statut étudiant: regards croisés d'immigrés, *Plein droit* 2021/3 (n° 130), p. 19.

[44] C. Garcia-Penalosa et E. Wasmer, *ibid*.

[45] Décret n° 2013-1140 du 9 décembre 2013 *relatif à l'Ecole normale supérieure*, *JO* n°0287 du 11 décembre 2013

[46] JORF n°0044 du 21 février 2019.

l'égalité de rémunération pour un travail égal a été transposé à l'article L. 1262-4 du Code du travail. A notre connaissance, il n'y a pas de secteurs d'activité dans lesquels le principe "à travail égal, rémunération égale" ne s'applique pas dans le cadre du détachement d'un salarié.

En France, selon la Direction Générale du Travail, les travailleurs détachés sont à 34% dans l'industrie, 34% dans la construction, 20% dans les services et 9% dans l'agriculture[47]. Il ressort clairement des études que les secteurs les plus problématiques sont ceux de l'industrie et celui des BTP[48].

5.b

Effectivement, des affaires concernant le détachement de travailleurs par des entreprises de travail intérimaire établies dans d'autres États membres ont été traitées au niveau national. Il est possible de citer l'affaire dite de *Flamanville* de 2020 qui portait sur le détachement de salariés et la législation applicable en l'absence de certificat E101/A1[49]. Selon la Cour de cassation "*en l'absence de certificat E101/A1 résultant d'un refus de délivrance ou d'un retrait par l'institution compétente, seule trouve à s'appliquer la législation de l'État membre où est exercée l'activité salariée*". Dès lors, les articles L. 8222-2, 3°, et L. 8222-5, alinéas 1 et 2, du code du travail, doivent être interprétés en ce sens qu'il appartient à l'entreprise utilisatrice, informée de l'intervention de salariés, employés par une entreprise de travail temporaire, en situation irrégulière au regard des formalités mentionnées aux articles L. 8221-3 et L. 8221-5 de ce code, d'enjoindre aussitôt à celle-ci de faire cesser sans délai cette situation. À défaut, elle est tenue solidairement avec l'entreprise de travail temporaire au paiement des indemnités pour travail dissimulé.

Il convient de noter un arrêt du 8 décembre 2021 selon lequel en dehors des situations de détachement de travailleurs sur le territoire français, relevant de la directive 96/71/CE du Parlement européen et du Conseil du 16 décembre 1996 concernant le détachement de travailleurs effectué dans le cadre d'une prestation de services, la législation française sur la durée du travail ne constitue pas une loi de police au sens de l'article 9, § 1, du règlement (CE) n°593/2008 du Parlement européen et du Conseil du 17 juin 2008 sur la loi applicable aux obligations contractuelles (Rome I), mais relève des dispositions auxquelles il ne peut être dérogé par accord au sens de l'article 8, § 1, de ce règlement[50].

[47] https://dares.travail-emploi.gouv.fr/publication/qui-sont-les-travailleurs-detaches-en-france

[48] https://www.vie-publique.fr/parole-dexpert/21975-le-travail-detache-en-france-et-dans-lunion-europeenne

[49] Cass. soc., 4 novembre 2020, n°18-24.451 (15 affaires jointes) et 19-22.460 (43 affaires jointes).

[50] Cass. soc. 8 déc. 2021, n° 20-14.178

La Cour de cassation a également pu traiter des affaires portant sur des infractions à la législation sur le travail temporaire. C'est notamment le cas avec un arrêt de la chambre criminelle du 28 mars 2017[51]. Dans cette affaire, une société française avait employé des travailleurs détachés, mis à disposition par une société d'intérim de droit polonais, en méconnaissance des règles régissant le travail temporaire, notamment en renouvelant certains contrats de travail plus d'une fois ou sans respecter les délais de carence entre deux missions, pourvoyant ainsi des postes permanents pour une durée de trois ans et plus. Pour la société, les dispositions du code du travail incriminant le marchandage et le prêt illicite de main-d'œuvre n'étaient pas applicables aux opérations de détachement temporaire de salariés par une entreprise non établie en France, lesquelles relèvent de règles spécifiques. La cour estime que la société s'est rendue coupable de marchandage et prêt illicite de main-d'œuvre. Ce type d'affaires n'est pas isolé comme le montrent des arrêts de la chambre criminelle rendus notamment en 2018[52] ou 2019[53].

Dans une affaire de 2021, la chambre criminelle de la Cour de cassation a pu se prononcer sur l'irrecevabilité de la constitution de partie civile d'un URSSAFF dans le cadre de poursuites pénales pour travail dissimulé. La Cour de cassation a estimé que l'existence de certificats E101 et A1 ne fait pas obstacle à une condamnation pour travail dissimulé pour avoir omis de procéder à la déclaration préalable à l'embauche[54]. Il résulte de l'article 2 du code de procédure pénale que l'action civile n'appartient qu'à ceux qui ont personnellement souffert du dommage directement causé par l'infraction. La cour d'appel avait accepté la constitution de partie civile de l'URSSAF d'Aquitaine et condamné le prévenu à lui verser des dommages-intérêts. Pour les juges, l'URSSAF d'Aquitaine avait subi un préjudice résultant de l'ampleur de sa mission de contrôle et des démarches judiciaires qu'elle a dû engager. Or, la Cour de cassation a décidé de censurer la cour d'appel puisque selon elle, les organismes de protection sociale nationaux ne sauraient prétendre avoir subi un préjudice lorsque, comme en l'espèce, la validité du certificat ne peut être contestée, faute de retrait dudit certificat par l'organisme qui l'a émis, ou faute d'établissement de la preuve d'une fraude. Dès lors, les salariés ne peuvent pas être regardés comme étant régulièrement affiliés au régime de sécurité sociale de l'État ayant émis le certificat. Une telle approche a été confirmée par la Cour dans deux arrêts du 4 janvier 2022 portant sur une dissimulation d'activité[55].

[51] Cass. crim., 28 mars 2017, n°15-84.795.
[52] Cass. crim., 30 octobre 2018, 17-86.601.
[53] Cass. crim., 8 janvier 2019, n°17-87.246.
[54] Cass. crim. 12 janvier 2021, n°17-82.553 et 17-86.757, FS-P+B+I.
[55] Cass. crim. 4 janv. 2022, n°s 20-84.023 et 20-84.029. En ce sens: v. aussi.: Crim. 2 mars 2021, n° 19-80.991.

Dans un autre arrêt de 2021, la Cour s'est prononcée sur une affaire portant sur du travail dissimulé et les certificats de détachement[56]. Pour la Cour de cassation, les juges justifient leur décision, sur le fondement des articles L. 8221-1 et L.8221-3 du code du travail, lorsqu'ils sanctionnent pénalement le défaut d'enregistrement au registre français du commerce et des sociétés d'une société étrangère tenue à cette formalité en vertu des dispositions des articles L. 123-1, l, 3°, L. 123-11 et R.123-35 du code de commerce, bien qu'elle soit déjà enregistrée dans un autre État membre de l'Union européenne, dès lors qu'elle ouvre un premier établissement dans un département français, c'est-à-dire lorsqu'elle y établit une agence, une succursale ou une représentation. En se prononçant de la sorte, cela ne contrevient pas aux dispositions des articles 49 à 54 du Traité sur le fonctionnement de l'Union européenne garantissant le principe de liberté d'établissement. La Cour précise également que si les dispositions du code de commerce français ne sont pas applicables aux sociétés dont le siège social n'est pas situé en France, il est de jurisprudence constante que la législation française s'applique si le siège social réel de la société est situé en France ou si la société réalise l'essentiel de son activité en France et dispose d'un local d'exploitation sur le territoire national.

Dans une affaire du 17 mai 2022, la chambre criminelle s'est prononcée sur l'incidence de l'intervention volontaire de la DIRECCTE (Directions régionales de l'économie, de l'emploi, du travail et des solidarités) à l'occasion d'un procès pénal[57]. Cette affaire portait sur des poursuites contre une société pour travail dissimulé par dissimulation d'emplois salariés et pour s'être soustraits aux déclarations auprès des organismes sociaux et fiscaux au moyen d'un montage juridique frauduleux en ayant recours à des entreprises sous-traitantes étrangères (portugaises). Plus précisément, elle a dû se prononcer sur les contours de l'obligation au recours à un interprète assermenté ainsi que la portée de la saisine de l'autorité nationale étrangère compétente d'une demande de retrait de certificat A1. En l'espèce, elle censure la cour d'appel qui a entendu sans prestation de serment le représentant de la DIRECCTE, dès lors qu'une administration, fût-elle à l'origine des poursuites, ne peut, en dehors des cas où la loi le prévoit expressément, être considérée comme une partie intervenante au procès pénal.

Question 6

Oui, la liberté d'établissement et la liberté d'entreprise sont utilisées pour contester le droit national ou européen devant les tribunaux nationaux.

[56] Cass. crim. 2 mars 2021, n°19-80.991.
[57] Cass. crim. 17 mai 2022, n°21-85.246, F-B.

6.a

Dans un arrêt du 2 mars 2021, la liberté d'établissement a été utilisée pour contester des poursuites pénales pour travail par dissimulation d'activité et abus de biens sociaux[58]. Les juridictions du fond ont reconnu les prévenus coupables de travail par dissimulation d'activité pour défaut d'immatriculation de la société au registre français du commerce et des sociétés français. En effet, celle-ci disposait en France d'un centre effectif de direction et y exerçait une activité stable et continue, alors qu'elle était enregistrée en Slovaquie. C'est pour cette même raison que les prévenus ont été reconnus coupables d'abus de biens sociaux et recel de cette infraction au préjudice d'une société régulièrement immatriculée en Slovaquie, au seul constat que cette immatriculation aurait présenté un caractère fictif dès lors que l'intégralité de son activité était réalisée en France et depuis ce pays. Cependant, les prévenus estiment qu'une telle condamnation est contraire aux articles 49 et 54 du TFUE.

Conformément à sa jurisprudence, la Cour estime qu'en l'absence de règles de droit de l'Union, la procédure d'enregistrement d'une société dans l'État membre d'accueil est régie par le droit de ce dernier, les autorités de cet État étant obligées, en vertu du principe d'effectivité, de tenir dûment compte, lors de l'examen d'une demande d'enregistrement de cette entreprise, des documents émanant des autorités de l'État membre d'origine attestant que cette société s'est effectivement conformée aux conditions de celui-ci, pour autant qu'elles soient compatibles avec le droit de l'Union. Partant, les juges peuvent sanctionner pénalement le défaut d'enregistrement au registre français du commerce et des sociétés d'une société étrangère tenue à cette formalité en vertu des dispositions des articles L. 123-1, l, 3°, L. 123-11 et R.123-35 du code de commerce, bien qu'elle soit déjà enregistrée dans un autre État membre de l'Union européenne, dès lors qu'elle ouvre un premier établissement dans un département français, c'est-à-dire lorsqu'elle y établit une agence, une succursale ou une représentation.

La liberté d'entreprendre (article 16 de la Charte sur les droits fondamentaux) a également été utilisée par un employeur pour contester un arrêt qui a prononcé la nullité du licenciement d'une salariée en raison de ses convictions religieuses. C'est ce que montre un arrêt rendu par la chambre sociale de la Cour de cassation du 14 avril 2021[59].

Pour l'employeur, le port du voile religieux n'est pas conforme à l'image que la société avait choisi de donner à sa marque et aussi de la conception que la société se faisait de la féminité, dans le cadre de l'usage normal de sa liberté d'entreprise.

[58] Cass. crim. 2 mars 2021, n°19-80.991.

[59] Cass. soc., 14 avril 2021,n°19-24.079.

Ainsi la salariée n'avait pas une "présentation correcte" par rapport à la finalité de l'entreprise conformément au règlement intérieur de l'entreprise. En effet, pour l'employeur, la Cour d'appel a violé le principe de la liberté d'entreprendre, reconnu à l'article 16 de la Charte des droits fondamentaux de l'Union européenne, dès lors que le port d'un foulard religieux apparaissait comme contraire aux identités préétablies que l'employeur jugeait comme essentielles au développement de son activité commerciale assise sur une conception de l'image de la femme. Il n'en demeure pas moins que la Cour de cassation n'adhère pas à cet argument puisqu'elle considère que l'interdiction faite à la salariée de porter un foulard islamique caractérisait l'existence d'une discrimination directement fondée sur les convictions religieuses de l'intéressée.

6.b

Le droit de grève est un droit fondamental reconnu par l'alinéa 7 du préambule de la Constitution du 27 octobre 1946. Cette disposition précise que celui-ci doit *"s'exercer dans le cadre des lois qui le réglementent"*. La spécificité du droit de grève a été consacrée par une décision du Conseil constitutionnel en 2007[60].

A notre connaissance, les juridictions nationales n'ont pas eu à connaitre de litiges portant sur le droit de grève en relation avec la libre prestation des services et la liberté d'établissement.

Question 7

7.a.

Concernant l'acquis européen, pendant longtemps, il n'a posé aucune difficulté, car la législation sociale française était plus favorable que les textes européens et le droit social français plus protecteur des salariés que les règles minimales adoptées par compromis entre des Etats dotés d'une tradition sociale moins progressiste. Cette donne a changé depuis les années 2000, en raison des restrictions budgétaires imposées par la gouvernance économique et les réformes sociales libérales qui déconstruisent en profondeur le modèle social français.

Le droit européen concernant la non-discrimination est plutôt bien intégré en France. Les difficultés tiennent plus à certains motifs de discrimination comme la religion et plus spécialement, la question du foulard islamique confrontée au principe de laïcité qui est un pilier du droit français, traditionnellement tourné vers des principes républicains d'intégration, de neutralité et d'égalité plus que vers

[60] Cons. const., 16 août 2007, n° 2007-556 DC, Loi sur le dialogue social et la continuité du service public dans les transports terrestres réguliers de voyageurs, cons. 13.

des droits des minorités et des reconnaissances des différentes communautés. En droit du travail, les contentieux concernant le port du voile ont été nombreux et impliquent une mobilisation des règles européennes. Ainsi, l'affaire Bougnaoui concernait une salariée portant le foulard islamique qui avait été licenciée à la suite d'une plainte d'un client de l'employeur chez qui elle était affectée. L'employeur lui avait demandé de ne plus porter le voile en réaffirmant le principe de neutralité à l'égard de sa clientèle, ce qu'elle avait refusé. La salariée avait alors été licenciée au motif que le port du voile avait entravé le développement de l'entreprise et avait empêché la poursuite de son intervention chez le client. La Cour de cassation française a demandé à la CJUE si l'interdiction faite à une salariée de porter le foulard islamique pour tenir compte du souhait d'un client pouvait être considéré comme une exigence professionnelle essentielle et déterminante selon de la directive européenne 2000/78/CE du 27 novembre 2000. Depuis, la loi n°2016-1088 du 8 août 2016, dite Loi Travail, a introduit un article L. 1321-2-1 dans le Code du travail qui permet aux employeurs d'inscrire dans le règlement intérieur des "*dispositions inscrivant le principe de neutralité et restreignant la manifestation des convictions des salariés si ces restrictions sont justifiées par l'exercice d'autres libertés et droits fondamentaux ou par les nécessités du bon fonctionnement de l'entreprise et si elles sont proportionnées au but recherché*". La disposition renforce le pouvoir des employeurs pourvu que les interdictions soient justifiées. Restera à apprécier la proportionnalité et la légitimité des restrictions.

Concernant la protection des discriminations envers les handicapés, la Convention internationale relative aux droits des personnes handicapées (CIDPH), adoptée par l'Assemblée générale des Nations unies en 2006 et ratifiée par la France en 2010, interdit toutes les discriminations fondées sur le handicap. Selon l'article 2 de la CIDPH, "*la discrimination fondée sur le handicap comprend toutes les formes de discrimination, y compris le refus* d'aménagement raisonnable". La CIDPH définit "l'aménagement raisonnable" comme "les modifications et ajustements nécessaires et appropriés n'imposant pas de charge disproportionnée ou indue apportés, en fonction des besoins dans une situation donnée, pour assurer aux personnes handicapées la jouissance ou l'exercice, sur la base de l'égalité avec les autres, de tous les droits de l'homme et de toutes les libertés fondamentales". Le principe d'aménagement raisonnable est présenté par la CIDPH comme un élément du principe de non-discrimination. A la différence des mesures d'action positive, l'obligation d'aménagement raisonnable ne constitue pas une simple faculté pour les États, mais une obligation à laquelle ils ne peuvent déroger. Elle ne vise pas à conférer un traitement préférentiel aux personnes handicapées, considérées en tant que groupe défavorisé, mais à garantir à chaque personne handicapée, une égalité réelle dans une situation concrète de travail.

L'article L5213-6 a transposé dans le Code du travail français le concept d'aménagement raisonnable en "mesures appropriées": "Afin de garantir le respect du principe d'égalité de traitement à l'égard des travailleurs handicapés, l'employeur prend, en fonction des besoins dans une situation concrète, les mesures appropriées pour permettre aux travailleurs (handicapés), d'accéder à un emploi ou de conserver un emploi correspondant à leur qualification, de l'exercer ou d'y progresser ou pour qu'une formation adaptée à leurs besoins leur soit dispensée. Ces mesures sont prises sous réserve que les charges consécutives à leur mise en œuvre ne soient pas disproportionnées, compte-tenu de l'aide prévue à l'article L5213-10 [une aide allouée par l'Agefiph] qui peuvent compenser en tout ou partie les dépenses supportées à ce titre par l'employeur. Le refus de prendre des mesures au sens du premier alinéa peut être constitutif d'une discrimination (...)".

L'aménagement raisonnable induit par exemple une obligation de reclassement des salariés: l'employeur est tenu de chercher par tous moyens à préserver l'emploi du salarié, notamment en prenant des mesures de transformation du poste ou d'aménagement du temps de travail. Cette obligation de recherche de reclassement est rigoureuse dans la mesure où elle s'impose même si le médecin du travail a déclaré le salarié inapte à tout emploi dans l'entreprise[61], faute de quoi un éventuel licenciement serait nul[62] (et non sans cause réelle et sérieuse)[63].

Les notions de "mesures appropriées" et de "charge disproportionnée" constituent les deux piliers de l'obligation d'aménagement raisonnable en matière de discrimination fondée sur le handicap et d'adaptation de l'emploi pour des motifs de santé ou de handicap des salariés. En revanche, les transformations importantes qu'implique[64] l'aménagement raisonnable semblent plus difficiles à mettre en œuvre dans d'autres domaines, en raison de l'existence de dispositifs juridiques proches, qui se juxtaposent sans cohérence d'ensemble. Étendre cette obligation à d'autres domaines que le handicap semble difficile, car les autres motifs discriminatoires n'impliquent pas les mêmes sources de difficultés. On sait par ailleurs que la discrimination positive est difficilement justifiable en droit européen et que par exemple, pour les discriminations fondées sur l'origine, le fichage ethnique est illégal en France.

[61] Soc. 16 sept. 2009.

[62] Soc. 28 mai 2014 et sur renvoi Cour d'appel d'Agen, 13 jan. 2015

[63] Une décision du 21 décembre 2012, de la Cour d'appel de Douai procède d'une conception extensive du droit de la non-discrimination, puisque pour la Cour une obligation d'adaptation du poste du salarié en situation de handicap s'impose et l'absence d'adaptation et la dégradation des conditions de travail caractérise une discrimination à raison du handicap.

[64] Critère du raisonnable ou appréciation de la proportionnalité des demandes des salariés, évolution du domaine des aménagements requis, en particulier.

En matière d'emploi, les différences de traitement fondées sur un critère de discrimination prohibé, tel que le handicap, sont autorisées dès lors qu'elles constituent des exigences professionnelles essentielles et déterminantes pour l'emploi considéré et à condition que l'objectif de ces différences de traitement soit légitime et que les moyens d'y parvenir soient proportionnés. Une exigence professionnelle est considérée comme effectivement essentielle et déterminante si: elle est prévue par la loi ; elle répond à une situation concrète ; elle poursuit un objectif légitime ; elle pose des exigences proportionnées au but recherché ; elle est justifiée par la nature de l'activité ou les conditions de son exercice. Ainsi, le Défenseur des droits a considéré que le refus d'embauche opposé à une personne malentendante postulant à un emploi d'assistant de vie à domicile constituait une discrimination fondée sur le handicap au sens des articles L. 1132-1, L. 1133-3 et L. 5213-6 du Code du travail[65]. En revanche, lorsque le handicap d'un candidat à un emploi est incompatible avec les exigences professionnelles essentielles et déterminantes, appréciées de façon objective au regard des conditions de performance du poste à pourvoir, il ne saurait être exigé de l'employeur qu'il effectue une recherche d'aménagement raisonnable afin de pouvoir écarter la candidature du travailleur handicapé. Dans ce cas, le travailleur handicapé se trouve dans une situation comparable à un travailleur non handicapé qui ne remplirait pas les exigences professionnelles essentielles du poste à pourvoir et qui pourrait se trouver légitimement écarté de la procédure de recrutement, sans être discriminé.

Afin de mieux lutter contre les discriminations, il faudrait sans doute adopter une approche intersectionnelle des discriminations dans l'emploi. En effet, certains groupes sociaux sont particulièrement exposés aux processus de stigmatisation et d'exclusion dans l'emploi, du fait de l'interaction entre différentes caractéristiques socioéconomiques (sexe, âge, statut dans l'emploi, niveau d'éducation, religion, origine, lieu de résidence, vulnérabilité économique). Par exemple, les discriminations vécues par les personnes non-blanches en raison de leur origine ou nationalité peuvent se conjuguer ou se cumuler avec d'autres discriminations fondées sur l'âge, le sexe, la religion ou l'orientation sexuelle. Cette approche pourrait être impulsée au niveau européen.

Par ailleurs, il est difficile de mesurer l'ampleur des discriminations, car il ne faut pas seulement observer leur fréquence, mais également les effets à long terme.

[65] L'employeur avait rejeté la candidature car le poste nécessitait de pouvoir communiquer par téléphone et il considérait cela comme une exigence essentielle et déterminante. Or, la candidature de la réclamante a été écartée sans avoir recherché, avec le médecin du travail, si des mesures d'aménagements permettant à la réclamante d'exercer ses fonctions à égalité de traitement avec les autres salariés étaient envisageables, Décision du Défenseur des droits n°MLD-2013-228 du 15 janvier 2014.

Ainsi, en 2021, lorsqu'on les interroge sur leurs conditions de travail, près de 90% des jeunes âgés de 18 à 34 ans en France métropolitaine déclarent avoir déjà connu au moins une situation de dévalorisation au cours de leur vie professionnelle[66]. Mais les discriminations, du fait de leur caractère systémique et répété, produisent des effets durables et délétères sur la carrière, la santé et les relations sociales des individus (perte de confiance en soi, autocensure, démissions ou licenciements, mesures de rétorsion, altération de la santé mentale, etc.). Il conviendrait donc de mettre en place des outils de repérage et de suivi plus effectifs. Depuis la loi Égalité et Citoyenneté du 27 janvier 2017, toutes les personnes en charge du recrutement dans les entreprises de 300 salariés et plus mais aussi tous les collaborateurs de cabinets ou entreprises spécialisés, doivent par exemple se former à la non-discrimination à l'embauche tous les cinq ans. Inscrite dans un nouvel article L 1131-2 du Code du travail, cette obligation mériterait cependant de faire l'objet d'un suivi et d'une évaluation afin de veiller à sa mise en œuvre concrète dans les entreprises concernées.

7.b

La Directive n° 2003/88/CE du Parlement européen et du Conseil du 4 novembre 2003 qui a pour objet la protection du droit au repos des travailleurs démontre l'influence du droit européen dans un sens favorable à la protection des travailleurs, notamment en matière de temps de travail, et dans tous ces aspects (temps de travail, congés payés, heures supplémentaires, forfait jours…). Cette référence est présente dans les décisions par lesquelles la Cour de cassation a fait peser sur l'employeur la charge de la preuve du respect des seuils légaux en matière de durée de travail. Par exemple, elle a posé récemment[67] le principe selon lequel le dépassement de la durée moyenne maximale de travail hebdomadaire de 48 heures prévue par la directive de 2003, en ce qu'il prive le travailleur d'un repos suffisant et porte donc atteinte à sa sécurité et à sa santé lui cause, de ce seul fait, un préjudice, par référence à la jurisprudence de la CJUE[68]. Le droit interne aurait pu suffire pour justifier la solution, ce qui prouve l'influence déterminante du droit européen rappelée dans cette décision, car elle juge que l'article L 3121-35 (devenu L 3121-20) du Code du travail doit être interprété à la lumière de l'article 6-b de la directive 2003/88/CE du 4 novembre 2003 "*aux termes [de l'article L. 3121-35, alinéa 1er du Code du travail, dans sa rédaction antérieure à la loi nº 2016-1088 du 8 août 2016, interprété à la lumière de l'article 6 b) de la Directive nº 2003/88/CE du Parlement européen et du Conseil du 4 novembre*

[66] https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/et_res-oit14-num-01.12.21_access.pdf.
[67] Soc 26 janvier 2022, n° 20-21.636.
[68] CJUE14 octobre 2010, C-243/09, Fuß c. Stadt Halle, point 54.

2003], au cours d'une même semaine, la durée du travail ne peut dépasser quarante-huit heures" "il résulte de la jurisprudence de la Cour de justice de l'Union européenne que le dépassement de la durée moyenne maximale de travail hebdomadaire fixée à l'article 6, sous b), de la Directive 2003/88 constitue, en tant que tel, une violation de cette disposition, sans qu'il soit besoin de démontrer en outre l'existence d'un préjudice spécifique"[69].

Un point de non-conformité peut être relevé suite à l'arrêt du 13 janvier 2022, la CJUE a jugé que l'article 7 de la directive s'oppose à une convention collective selon laquelle, afin de déterminer si le seuil des heures travaillées donnant droit à majoration pour heures supplémentaires est atteint, les heures correspondant à la période de congé annuel payé pris par le travailleur ne sont pas prises en compte en tant qu'heures de travail accomplies. A travers cette décision, la notion même de temps de travail effectif, telle qu'elle est envisagée par l'article L. 3121-28 du Code du travail est impactée. Les heures supplémentaires sont celles effectuées au-delà de la durée légale de travail de 35 heures. Elles ouvrent droit à une majoration de rémunération. Pour décompter ces heures supplémentaires, il convient de tenir compte du temps travail effectif qui est défini comme le temps pendant lequel le salarié est à la disposition de l'employeur et se conforme à ses directives sans pouvoir vaquer librement à des occupations personnelles[70]. La Cour de cassation en déduit que, sauf dispositions conventionnelles plus favorables, les congés payés, bien que rémunérés, ne doivent pas être pris en compte pour le déclenchement des heures supplémentaires[71]. Le droit français est ainsi manifestement contraire au droit européen, mais cette opposition découle d'une jurisprudence continue de la Cour de cassation et non du libellé de l'article L. 3121-28. La réception en droit français devrait en être facilitée via l'obligation des juges de procéder à une interprétation conforme du droit interne au regard des directives, même dans des contentieux entre particuliers[72]. Ainsi, même si la directive européenne de 2003 n'a pas d'effet direct horizontal à l'égard des particuliers, et que face à l'employeur, un salarié ne peut pas se prévaloir de ce texte ni de l'interprétation qu'en fait la CJUE[73], les juges doivent trancher le litige en interprétant le droit national à la lumière des normes européennes et conformément à l'interprétation qu'en fait la CJUE[74]. Notons que lorsqu'il s'agit d'un employeur "public" ou "assimilé", la directive prime sur le droit national: lorsque l'employeur est public, le salarié peut

[69] Soc 26 janvier 2022, n° 20-21.636.

[70] C. trav., art. L. 3121-1.

[71] Cass. soc., 1er déc. 2004, n° 02-21.304 ; Cass. soc., 4 déc. 2012, n° 10-10.701 et Cass. soc., 25 janv. 2017, n° 15-20.692.

[72] CJCE, 13nov. 1990, aff. C-106/89.

[73] Cass., soc. 13 mars 2013, n° 11-22.285.

[74] Cass., soc., 15 sept. 2021, n° 20-16.010.

se prévaloir directement du texte européen[75]. La directive de 2003 est donc, sauf certains points très spécifiques mentionnés[76], plutôt bien appliquée en France.

7.c

La loi du 8 août 2016 (dite "Loi travail") a introduit dans le Code du travail des dispositions pour les "Travailleurs utilisant une plateforme de mise en relation par voie électronique". En forçant la qualification de travailleurs indépendants et en leur octroyant un embryon de droits sociaux (en matière d'accidents du travail, de formation professionnelle et de droits à action collective, articles L 7342-1 à L7342-7). La Loi n° 2018-771 du 5 septembre 2018 pour la liberté de choisir son avenir professionnel prévoyait une Charte avec une présomption limitant le pouvoir de requalification des juges, puisque son établissement ne pouvait *"caractériser l'existence d'un lien de subordination juridique entre la plateforme et les travailleurs*". La loi "Mobilités" (LOM) du 24 décembre 2019 prévoit également que les éléments de subordination prévus dans une charte élaborée par les plateformes et homologuée par l'administration ne pouvaient pas caractériser une relation de travail subordonnée devant les juges. Les juridictions viennent souvent requalifier la relation contractuelle entre les travailleurs et les plateformes, car ils apprécient *in concreto* la relation entre le travailleur et la plateforme. Ainsi un arrêt Cass. Soc. *Take Eat Easy* du 28 novembre 2018 examine s'il existe un pouvoir de contrôle et un pouvoir de sanction qui caractérise un lien de subordination, ce qui est le cas en l'espèce. De même dans un arrêt Cass. Soc. *Uber* du 4 mars 2020 les juges se fondent sur les éléments caractérisent un lien de subordination emportant la qualification de contrat de travail. Le faisceau d'indices pour une requalification utilisé dans le cas *Uber* sont l'intégration dans un service de transport entièrement organisé par Uber ne conférant pas de liberté dans l'organisation de son activité, la recherche de clientèle ou le choix de ses fournisseurs ; une absence de liberté dans la fixation des tarifs et dans les conditions d'exercice de la prestation de transport – notamment le choix du trajet ; un contrôle de la société sur l'acceptation des courses: désactivation du compte pour inciter les chauffeurs à rester connectés à l'application, temps limité à quelques secondes pour accepter une course ; un pouvoir de sanction caractérisé par la possibilité de déconnecter temporairement le compte des chauffeurs, de corriger les tarifs des courses et de fermer leur compte en cas de comportements problématiques ou de taux d'annulation trop fréquents.

[75] Cass. soc., 22 juin 2016, n° 15-20.111, Cass. soc., 2 mars 2022, n° 20-22.214.
[76] Et la question du forfait jours développée plus loin, voir *infra*.

La situation actuelle est cependant encore soumise à des divergences avec des décisions qui refusent la requalification sur la base d'une appréciation des éléments de fait[77] et d'autres qui l'acceptent[78].

Sur le plan des droits collectifs des travailleurs de plateformes, une ordonnance du 21 avril 2021 relative aux modalités de représentation des travailleurs de plateformes vise à imposer certaines obligations de transparence et de dialogue social aux plateformes. L'ordonnance a aussi créé une "Autorité des relations sociales des plateformes d'emploi" (ARPE). Sa première mission a consisté à organiser un scrutin national en vue de déterminer les organisations professionnelles représentatives des travailleurs de ce secteur. Les premières élections ont été organisées en mai 2022 et se soldent par un échec: seuls 3088 chauffeurs VTC et livreurs à deux-roues ont finalement voté pour élire leurs représentants sur les 123593 inscrits (39313 chauffeurs et 84280 livreurs). Mais cette faible participation n'empêche pas les désignations, car aucun quorum n'avait été prévu pour valider les résultats. Le scrutin était divisé en deux collèges, le premier rassemblant les chauffeurs VTC, le second les livreurs de marchandises. Dans le collège des VTC, les sept organisations candidates (syndicat ou association) ont toutes dépassé les 5% qui devaient être requis à titre minimal pour ce scrutin originel. L'Association des VTC de France (AVF) a dominé avec près de 42,81% des voix, puis l'Union-indépendants, soutenue par la CFDT (11,51%) et l'Association des chauffeurs indépendants lyonnais (11, 44% respectivement). Les autres groupements ont aussi obtenu des scores entre 5 et 10%: FO (9,19%), FNAE (8,98%), CFTC (8,84%) et Unsa (7,23%). Dans le collège des livreurs, la Fédération nationale des autoentrepreneurs et micro-entrepreneurs (FNAE) est en tête (28,45%), devant la CGT (27,28%). Arrivent ensuite l'Union-indépendants (22,32%) et la Fédération SUD commerces et Services – Solidaires (5,69%). Les cinq autres organisations – la Fédération nationale des transports routiers (FNTR), l'Unsa, FO, la Confédération nationale des travailleurs – Solidarité ouvrière (CNT-SO) et la CFTC – ont été écartées, en raison de scores inférieurs à 5%. Un arrêté du Directeur général de l'ARPE du 24 juin 2022 a fixé la liste des organisations représentatives compétentes pour désigner des représentants au sein de l'ARPE. Pour les livraisons de marchandises sont reconnues représentatives la FNAE, la CGT, Union-indépendants et Sud commerces et services solidaires. Pour les VTC, sont représentatives AVF), l'Union-indépendants-CFDT et l'Association des chauffeurs indépendants lyonnais ainsi que FO, FNAE, CFTC et Unsa.

[77] CA Lyon 15 janvier 2021, *n° 19/08056*; CA Paris 7 avril 2021.

[78] CA Paris, pôle 6, ch. 8, 12 mai 2021, n° 18/02660 avec la requalification du contrat d'un chauffeur Uber en contrat de travail.

7.d

L'exemple le plus illustratif d'un conflit entre le droit de l'Union et le droit international en France est un peu ancien et concerne le travail de nuit des femmes. Une loi du 2 novembre 1892, reprise par l'article L.213 (ancien) du Code du travail instaurait un principe général d'interdiction de tout travail de nuit aux femmes. Elle était sur ce point conforme aux Conventions n°4, 41 et 89 de l'Organisation Internationale du Travail (OIT) mais pas à la Directive 76/207/CEE du 9 février 1976 sur l'égalité professionnelle entre hommes et femmes telle qu'interprétée par la Cour de justice. Dans l'arrêt Stoeckel du 9 février 1991 (CJCE, 25 juillet 1991, arrêt C-345/89, Rec. I 4062 à I. 4068), la Cour de Justice s'était prononcée sur la légalité de la norme française à l'occasion d'une question préjudicielle, la Cour avait décidé que le souci de protection qui avait inspiré à l'origine l'interdiction, n'apparaissait plus fondé, en dehors des cas de grossesses ou de maternité. La Commission avait mis en demeure la France d'accorder son droit national au droit européen le 18 décembre 1991. La France a dénoncé la convention 89 de l'OIT en février 1992. Cette dénonciation est effective depuis février 1993. Dans l'arrêt Levy du 2 août 1993, la Cour a confirmé que le juge national doit laisser inappliquée toute disposition "*contraire à l'article 5 de la directive de 1976*" en précisant "*sauf si l'application d'une telle décision est nécessaire pour assurer l'exécution par l'Etat membre concerné d'obligations résultant d'une convention conclue antérieurement à l'entrée en vigueur du traité CEE avec des Etats tiers*". Ces arrêts ont eu pour conséquence que le juge national était tenu, lorsqu'il était saisi d'une affaire concernant le travail de nuit des femmes dans l'industrie, d'écarter la loi nationale au profit du respect de la directive européenne. Cette situation est stabilisée depuis la loi du 9 mai 2001 qui a supprimé les interdictions générales du travail de nuit des femmes.

Dans la situation actuelle, concernant l'invocabilité de la Charte sociale ou des conventions internationales dans les contentieux en France, il faut distinguer l'approche judiciaire de la position des juridictions administratives.

Concernant les juridictions judiciaires, il faut illustrer le système avec l'exemple de l'ordonnance du 22 septembre 2017 qui a établi, à l'article L. 1235-3 du code du travail, un barème déterminant l'indemnité que doit verser l'employeur à un salarié lorsqu'il le licencie sans cause réelle et sérieuse. Ce barème, fixé au regard du salaire du salarié, tient compte de l'ancienneté de ce dernier dans l'entreprise. Le niveau d'indemnisation est strictement encadré et la somme pouvant être versée

est soumise à un plancher et à un plafond. *Dans une décision du 11 mai 2022*[79]*, la Chambre sociale de la Cour de cassation statuant en formation plénière* a jugé que le barème d'indemnisation du salarié licencié sans cause réelle et sérieuse n'est pas contraire à l'article 10 de la convention n°158 de l'OIT qui prévoit qu'en cas de "licenciement injustifié" car le juge peut ordonner le versement d'une indemnité "adéquate" au salarié. Le juge français ne peut écarter, même au cas par cas, l'application du barème au regard de cette convention internationale. Cette notion de licenciement "injustifié" correspond, en droit français, au licenciement "sans cause réelle et sérieuse", mais aussi au licenciement "nul"[80]. Or, l'indemnisation des licenciements nuls n'est pas soumise au barème lequel tient compte de l'ancienneté du salarié, de son niveau de rémunération et dépend de la gravité de la faute commise par l'employeur. La Cour de cassation juge donc ce barème compatible avec l'article 10 de la Convention n°158 en raison de cette marge d'appréciation laissée aux États et de l'ensemble des sanctions prévues par le droit français en cas de "licenciement injustifié".

Par ailleurs, la loi française ne peut faire l'objet d'un contrôle de conformité à l'article 24 de la Charte sociale européenne, qui n'est pas d'effet direct. En effet, le contrôle du respect de cette Charte est confié au Comité européen des droits sociaux (CEDS). Si des réclamations peuvent être portées devant cette instance, sa saisine n'a pas de caractère juridictionnel: les décisions qu'elle prend n'ont pas de caractère contraignant en droit français. Le CEDS a cependant déjà, à plusieurs reprises, rendu des avis de non-conformité du droit français au droit de la Charte sociale ou de la CEDH. Il a condamné par exemple le régime français des astreintes et des forfaits en jours. Le forfait en jours, qui consiste à remplacer le décompte précis de la durée du travail par un simple décompte du nombre annuel de jours travaillés, peut aboutir à une charge de travail considérable. Le CEDS a déclaré que ce système est contraire à la Charte car il permet des durées de travail considérables (jusqu'à 78 heures par semaine), et que les différents mécanismes protecteurs institués par la loi et la jurisprudence françaises, même s'ils permettent un contrôle des conditions d'exécution de la convention de forfait par les juridictions, sont insuffisants pour une garantie effective de durées raisonnables de travail pour l'ensemble des travailleurs concernés[81]. De même, le CEDS a condamné le système français des astreintes[82], en ce qu'il assimile complètement ces périodes, hormis les interventions effectives, à des périodes de repos. Du fait des contraintes pesant

[79] Pourvois n°21-14.490 *et* n°21-15.247.

[80] Un licenciement est "nul" s'il est prononcé en violation d'une liberté fondamentale, en lien avec une situation de harcèlement moral ou sexuel ou décidé de manière discriminatoire.

[81] CEDS, 19 mai 2021, Réclamation n° 149/2017, publiée le 10 novembre 2021.

[82] Les astreintes sont des périodes non travaillées, mais au cours desquelles le travailleur doit être joignable pour intervenir si nécessaire.

sur le travailleur il faudrait, pour que le dispositif soit conforme à la Charte, que l'astreinte soit automatiquement assimilée, même lorsque le salarié n'est pas sollicité, au moins partiellement à une période de travail effectif.

En revanche, concernant les juridictions administratives, depuis l'arrêt *Fischer* du 10 février 2014, le juge administratif admet l'effet direct de certaines dispositions de la Charte sociale européenne. Cela depuis le revirement de jurisprudence *Gisti et Fapil* du 11 avril 2012 par laquelle le Conseil d'État a précisé et assoupli les critères de l'effet direct des traités internationaux: une stipulation de convention internationale est d'effet direct si elle n'a pas pour objet exclusif de régir les relations entre les Etats et ne demande pas l'intervention d'actes complémentaires pour produire des effets à l'égard des particuliers[83]. Pourtant, ces critères ne font pas l'objet d'une application claire et objective, ce qu'illustre la jurisprudence relative à la Charte. La question se repose ainsi de la pertinence de ces critères et du maintien de la condition d'effet direct en général. Ces différentes incohérences sont l'objet de critiques récurrentes par la doctrine française[84].

Question 8

8.a.

En général, il n'y a pas de demande d'évolution de la part de la majorité des auteurs, à l'exception des rares spécialistes de droit social européen. La question européenne est peu évoquée à part pour critiquer parfois la position historiquement libérale qui confine l'Union européenne aux questions de concurrence et de marché intérieur[85]. Il y a en revanche une mobilisation de la thématique au niveau politique voire économique en faveur d'une harmonisation des rémunérations ou du moins d'une limitation des distorsions de concurrence causée par des différences de revenus au sein de l'Union européenne. Peu de revendications sur les thèmes du droit de grève ou d'association sont faites, en revanche sur les rémunérations, thème plus mobilisé, on peut s'étonner de leur exclusion du domaine des compétences dans le Traité alors que la modération salariale est une préconisation très courante dans les recommandations faites

[83] Voir C. Nivard, "L'effet direct de la Charte sociale européenne devant les juridictions suprêmes françaises", RLDF, 2012, Chr. n°28.

[84] Voir notamment C. Nivard, "L'effet direct de la Charte sociale européenne devant le juge administratif – Retour sur la question évolutive de l'effet direct des sources internationales", RDLF 2016, chron. n°22 (www.revuedlf.com), https://hal-normandie-univ.archives-ouvertes.fr/hal-02391209/document, D. Roman, "La justiciabilité des droits sociaux ou les enjeux de l'édification d'un État de droit social", *La Revue des droits de l'homme* [En ligne], 1 | 2012, mis en ligne le 27 mars 2014, consulté le 22 août 2022. URL: http://journals.openedition.org/revdh/635 ; DOI: https://doi.org/10.4000/revdh.635

[85] E. Mazuyer, "Les règles du marché intérieur – L'exception sociale ?" in E. Carpano, G. Marti, (Dir), *L'exception en droit de l'Union*, PUR, Rennes, 2019, pp. 171-183.

aux Etats dans le cadre du semestre économique européen. Ce dédoublement semble préjudiciable car opaque.

Cela étant dit, les décisions CJUE du 8 décembre 2020[86] rejetant le recours en annulation introduit par la Pologne et la Hongrie contre la directive 2018/957 sur le détachement des travailleurs depuis le 30 juillet 2020 réaffirment le principe d'égalité de traitement pourraient signer un renouveau dans l'Europe sociale. En effet, la Cour extrait la question des salaires des avantages concurrentiels acceptables au profit de la productivité ou des autres facteurs de production. Budapest et Varsovie invoquaient une mauvaise base juridique, une violation du principe de la libre prestation des services et une méconnaissance du règlement sur la législation applicable au contrat de travail dit Rome I. La Cour a estimé que le législateur européen avait le droit de procéder à une réévaluation des intérêts des entreprises bénéficiant de la libre prestation des services et de ceux de leurs travailleurs détachés, compte tenu de l'évolution du marché intérieur consécutive aux élargissements successifs de l'UE. Elle a considéré que cette directive ne supprime pas l'éventuel avantage concurrentiel dont bénéficieraient les prestataires de services de certains États membres dans la mesure où "elle n'a aucunement pour effet d'éliminer toute concurrence fondée sur les coûts". Si cette voie est poursuivie, ce serait une évolution longtemps attendue vu que le cout du travail est souvent la principale variable d'ajustement de compétitivité avec tous les effets délétères actuels (dumping social, rejet du projet européen, impossibilité d'avoir des politiques sociales exigeantes…).

8.b

La France connaît, comme la plupart des États européens, la binarité travail salarié et travail indépendant (à laquelle s'ajoute un droit applicable uniquement aux fonctionnaires – le droit de la fonction publique, qui a une importance non négligeable en droit interne). Les critères du salariat sont équivalents à ceux retenus par la Cour de justice (les trois éléments du contrat de travail à savoir une prestation de travail effective, une rémunération et un lien de subordination) et les indices utilisés pour caractériser la subordination sont à peu près identiques aux critères européens (voir Ordonnance Yodel pour l'indépendance[87] et la proposition de directive des travailleurs de plateformes pour la subordination[88]).

[86] Affaires C-620/18 et C-626/18https://curia.europa.eu/juris/document/document.jsf?text=&docid=235182&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=16765507.

[87] Ordonnance CJUE du 22 avril 2020 n° C-692-19

[88] Proposition de directive relative à l'amélioration des conditions de travail dans le cadre du travail via une plateforme, COM (2021) 762 final, 9 décembre 2021.

Ce sont les juges qui *in fine* et *in concreto* peuvent requalifier la nature de la relation contractuelle entre un travailleur et un employeur, même si le législateur a pu s'immiscer dans cette qualification en créant des assimilations (voir les mannequins, les représentants de commerce ou les journalistes relevant du droit du travail ou *a contrario* les travailleurs de plateformes dont le législateur veut depuis 2016 garantir le statut de travailleur indépendant).

Il n'y a pas de lien établi entre le droit européen et le régime des travailleurs en France même si on note une tendance à suivre l'influence européenne vers une application homogène des droits fondamentaux pour les salariés et pour les indépendants (santé et sécurité, congé maternité et parental par exemple) ainsi qu'une meilleure protection sociale pour les autoentrepreneurs qui va vers une diminution des oppositions entre les deux régimes.

Question 9

9.a

On peut dire que l'impact du Semestre européen est très important puisque la plupart des réformes sociales en sont des préconisations. Ainsi, les recommandations européennes ont prôné et justifié les projets de réformes des retraites ou du système chômage.

- La réforme des retraites

On peut lire dans le dernier plan à destination de la France que "*la simplification du système de retraite, par l'uniformisation des différents régimes, contribuerait à améliorer la transparence et l'équité de celui-ci, tout en ayant des effets positifs sur la mobilité de la main-d'œuvre et l'efficience de la distribution du travail, et pourrait renforcer la viabilité des finances publiques*". Dans ce cadre, en 2018, le gouvernement français a entamé un processus de réformes pour uniformiser les règles des régimes de retraite. La réforme a été interrompue par l'apparition de la pandémie de COVID-19. Lors de la présentation des objectifs du plan pour la reprise et la résilience de la France, le gouvernement a confirmé son engagement à mener une réforme ambitieuse du système de retraite, afin d'en améliorer l'équité et la viabilité.

- La réforme des allocations chômage

Préconisée pour la France dans les recommandations du semestre européen[89], la réforme des allocations chômage a été mise en œuvre en 2021 pour "renforcer les

[89] https://ec.europa.eu/info/sites/default/files/2022-european-semester-country-report-france_fr.pdf

incitations au travail et décourager le recours excessif aux contrats de courte durée". La réforme fixe des règles d'éligibilité plus strictes pour les allocations chômage et modifie la méthode de calcul du salaire journalier de référence. Des mesures visent la reconversion professionnelle des travailleurs puisque les pénuries de main-d'œuvre sont réputées dues à un manque de qualification. Les difficultés de recrutement seraient plus importantes dans les emplois nécessitant des compétences techniques, notamment dans les secteurs de la transition écologique (industrie, construction). Un compte de formation individuel modernisé et le plan "1 jeune, 1 solution" ont été mis en place ainsi qu'une "modernisation de l'offre de formation" dans le plan "France 2030". Les évaluations soulignent les difficultés spécifiques des personnes peu qualifiées qui bénéficieront d'une orientation renforcée et d'un accès aux formations qualifiantes.

9.b

La première chose à indiquer, avant même d'évoquer l'intégration de la politique sociale dans l'UEM est que la dissociation actuelle (gouvernance économique vs compétences dans le cadre du Traité) entraine souvent une sorte de schizophrénie qui se révèle négative pour le fonctionnement et la transparence de l'Union européenne, et par là-même, augmente l'incompréhension des citoyens et d'une partie de la doctrine face aux incohérences voire aux contradictions qu'elle amène. Par exemple, le fait que la question des rémunérations soit exclue des compétences sociales de l'article 153 TFUE, alors qu'elle est très fréquemment visée dans le cadre des préconisations de la Commission et du Semestre économique européen est problématique[90].

Par ailleurs, la juxtaposition entre questions économiques et monétaires et questions sociales existent dans d'autres cadres de l'Union européenne (Traités, jurisprudence de la Cour de justice, Charte des droits fondamentaux etc.) et pour autant cela n'empêche nullement les premières de primer sur les secondes tant que l'axe de l'intégration européenne repose sur le marché intérieur, la libre concurrence et les obligations budgétaires.

Les préoccupations sociales ne sont pas prioritaires, ou ont un moindre statut, quelle que soit la disposition applicable, face aux préoccupations économiques.

Enfin, la majorité de l'acquis européen en matière sociale a été élaboré dans les années 1970 et 80 dans un cadre juridique et institutionnel qui n'était pas forcément adapté (compétences sociales limitées voire inexistantes, règle de

[90] E. Mazuyer, "Les compétences-frontières en matière sociale: quels moyens d'action pour les Etats membres et les partenaires sociaux ?", *in* S. Barbou des Places, E. Pataut, P. Rodière, *Les frontières de l'Europe sociale*, Cahiers Européens, n° 11, IREDIES, Paris I, Ed. Pedone, Paris, 2018, pp. 51-73.

l'unanimité…). Cela signifie que la volonté politique peut être plus importante que le cadre juridique.

Question 10

Le juge national est le juge de droit commun du droit de l'Union européenne (UE). Il joue un rôle essentiel pour assurer la garantie du respect des droits fondamentaux. Depuis 2009, la Commission européenne publie tous les ans un rapport sur l'application de la Charte des droits fondamentaux de l'UE (CDFUE). Dans son rapport de 2018[91], la Commission a ainsi souligné une évolution s'agissant de la référence à la CDFUE par les juridictions nationales dans leurs décisions. Les droits procéduraux, tels que le droit à un recours effectif et le droit d'accès à un tribunal impartial, contenus dans la CDFUE sont mobilisés en priorité. Au contraire, les autres droits garantis par la Charte sont moins souvent utilisés. La France ne fait pas exception. En effet, si l'invocation de la CDFUE par les parties et son application par les juridictions nationales sont en croissance constante, des obstacles demeurent néanmoins en raison des conditions d'application de la Charte qui peuvent s'avérer complexes. En application de l'article 51§1 de la CDFUE, les dispositions de celles-ci ne sont applicables qu'"aux Etats membres uniquement lorsqu'ils mettent en œuvre le droit de l'Union". Toutefois, dans plusieurs décisions, la Cour de cassation a mentionné la Charte sans examiner son applicabilité[92]. En outre, les articles 51§1 et 52§5 opèrent une distinction entre "les droits" et "les principes". Selon "les explications"[93] de la Charte, les droits visent les droits subjectifs qui peuvent directement être invoqués devant les juges dans un litige entre particuliers pour écarter par exemple toute disposition de droit national contraire au droit de l'Union. Au contraire, les principes sont programmatiques, ce sont des guides pour l'action politique, des objectifs que les institutions de l'Union et les États membres sont libres de réaliser. Ils peuvent être mis en œuvre par le biais d'actes législatifs ou exécutifs. Il découle alors de cette distinction que les dispositions consacrant des principes ne produisent pas d'effet direct, contrairement aux dispositions consacrant des droits subjectifs.

Ces "dispositions générales régissant l'interprétation et l'application de la Charte" sont très rarement mentionnées dans les décisions des juridictions nationales. Ainsi, le Conseil d'Etat, dans une décision de 2013[94], a implicitement

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[91] Commission européenne, *Rapport 2018 sur l'application de la Charte des droits fondamentaux de l'Union européenne*, publié en 2019.

[92] Soc. 14 avril 2010 n°09-60.426 et 09-60.429, Civ. 2ème 10 octobre 2013, n°12-22.507 et Civ. 2ème 4 mai 2016, n°15-18.957.

[93] Explications relatives à la Charte des droits fondamentaux, *JO* C n° 303, du 14 décembre 2007, p. 17.

[94] CE, 13 mars 2013, n°352393.

considéré que l'article 21§1 de la Charte devait être qualifié de principe[95]. Aussi, dans un arrêt du 11 avril 2012 concernant l'affaire *Association de médiation sociale*[96], l'article 52§5 de la Charte n'a pas été cité de façon précise par la chambre sociale de la Cour de cassation dans un arrêt du 11 avril 2012. Elle s'est contentée d'affirmer que les articles 51 et 52 de la Charte "ne comportent aucune limitation de l'invocation des dispositions de la Charte, que celles-ci contiennent des principes ou des droits, aux litiges de nature horizontale"[97]. Néanmoins, cette affaire a été l'occasion pour la Cour de cassation de poser une question préjudicielle à la CJUE sur l'éventuel effet horizontal de l'article 27 de la Charte qui garantit le droit à l'information et à la consultation des travailleurs au sein de l'entreprise[98]. En 2013[99], la chambre sociale de la Cour de cassation avait également posé une question préjudicielle à la CJUE afin de préciser la notion de "travailleur" au sens de l'article 31 de la Charte et de se prononcer sur l'effet direct horizontal de l'article 31§2. Ces dernières années, l'influence du droit de l'UE, plus précisément de la CDFUE, est particulièrement visible dans les décisions de la Cour de cassation portant sur les congés payés[100]. Toutefois, cette influence de la Charte n'est pas toujours clairement affirmée par la Haute juridiction qui privilégie désormais la méthode de l'interprétation conforme, évitant ainsi de mentionner l'article 31§2 de la Charte dans sa motivation[101].

Question 11

L'effondrement d'un immeuble, le 24 avril 2013, à Dacca, au Bangladesh, regroupant plusieurs usines de confection pour diverses marques internationales, a tragiquement mis en lumière les conséquences sociales des nouvelles formes d'organisations du travail et des stratégies des entreprises transnationales dans une économie globalisée, marquées par le développement des chaînes d'approvisionnement mondiales. Cette catastrophe humaine et industrielle, qui a entraîné la mort de plus de 1000 travailleurs, a rappelé la nécessité d'un encadrement juridique des activités des entreprises transnationales et la possibilité d'engager leur responsabilité en cas d'atteinte aux droits sociaux fondamentaux, par le biais notamment de filiales ou sous-traitants. En matière de respect des

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[95] *Ibidem*. Le Conseil d'Etat a ainsi souligné: "Considérant que l'article 21 paragraphe 1 de la Charte des droits fondamentaux de l'Union européenne, qui peut être invoquée devant le juge pour l'interprétation des actes pris par les institutions de l'Union mettant en œuvre les principes qu'elle contient, interdit toute discrimination fondée notamment sur l'âge".

[96] Soc. 11 avril 2012, n°11-21.609.

[97] *Ibidem*.

[98] CJUE, gr.ch., 15 janvier 2014, *Association de médiation sociale*, aff. C-176/12.

[99] Soc., 29 mai 2013, n°11-22.376.

[100] V. Soc., 15 sept. 2021 n°20-16.010 ; Soc., 22 sept. 2021 n°19-17.046 ; Soc, 1er décembre 2021 n°19-24.766.

[101] Soc., 1er déc. 2021 n°19-24.766.

droits sociaux, les entreprises françaises ont adopté, depuis les années 1990, dans le cadre de la responsabilité sociale des entreprises, des codes de conduites ou encore des accords-cadres mondiaux signés entre la direction et une fédération syndicale internationale telle que *IndustriALL Global Union*. C'est le cas d'*Engie*, d'*EDF*, de *PSA Peugeot Citroën*, de *Renault* ou encore de *Total*. Ces accords expriment le plus souvent des exigences en matière de respect des droits humains dans le cadre de sa chaîne de production. Il s'agit d'une responsabilisation volontaire. S'agissant de la responsabilité transnationale des personnes morales pour violation des droits sociaux, la France fait néanmoins figure de pionnière depuis 2017. En effet, si certains Etats européens ont imposé un devoir de vigilance portant sur une thématique précise, la France a opté pour un devoir de vigilance générale lors de l'adoption de la loi du 27 mars 2017[102]. En effet, cette loi impose un devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, envisagé comme une obligation de prévenir les atteintes aux droits humains et environnementaux dans le cadre des activités des entreprises françaises en France et à l'étranger. La loi permet aussi aux victimes d'obtenir réparation en cas de préjudice. Ce devoir implique, selon l'article L.225-102-4 du code de commerce, l'obligation pour certaines grandes entreprises françaises, d'établir, de mettre en œuvre et de publier un plan comportant "des mesures de vigilance raisonnable" [103]concernant l'activité de la société et de l'ensemble des filiales ou des sociétés se trouvant sous son contrôle. Le plan doit notamment inclure et présenter les résultats d'une cartographie des risques en matière de droits humains. En outre, dans le cadre de sa mise en œuvre, la loi de 2017 prévoit, d'une part, la possibilité pour toute personne justifiant d'un intérêt à agir de mettre en demeure l'entreprise de se conformer à ses obligations. A défaut de s'y conformer dans un délai de trois mois à compter de la mise en demeure, le juge compétent peut être saisi afin d'enjoindre, le cas échéant sous astreinte, l'entreprise à les respecter. D'autre part, toute personne justifiant d'un intérêt à agir peut désormais engager, sur le fondement de l'article L.225-102-5 du code de commerce, la responsabilité civile de l'entreprise sur le fondement des articles 1240 et 1241 du code civil, en cas de manquement à son devoir de vigilance. Dans cette hypothèse, l'entreprise est tenue de réparer le préjudice que l'exécution de ces obligations aurait permis d'éviter. Depuis sa promulgation, des recours ont été engagés par des associations et des ONG de défense des droits humains à l'encontre d'entreprises françaises, notamment contre les groupes TOTAL dans le cadre de ses activités en Ouganda et YVES ROCHER dans le cadre des activités d'une filiale turque. En application de

[102] Loi n°2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF 28 mars 2017.

[103] Article L.225-102-4 du code de commerce.

l'article L.211-21 du code de l'organisation judiciaire, issu de la loi du 22 décembre 2021[104], le tribunal judiciaire de Paris est compétent pour connaître des actions relatives au devoir de vigilance fondées sur les articles L.225-102-4 et L.225-102-5 du code de commerce.

Enfin, les contrats de marchés publics peuvent intégrer des clauses sociales. Dès 2007, l'Etat français a communiqué sur les clauses sociales dans la commande publique en publiant des guides[105]. S'agissant de la responsabilité du pouvoir adjudicateur dans la définition préalable du besoin à couvrir par le marché, l'ordonnance n°2015-899 du 23 juillet 2015 a imposé de prendre en compte les objectifs de développement durable dans la définition des besoins et donc de concilier la protection de l'environnement, l'efficacité économique et le progrès social. En outre, l'article 38 de cette même ordonnance a précisé que les conditions d'exécution du marché public peuvent prendre en compte "*des considérations relatives à l'économie, à l'innovation, à l'environnement, au domaine social ou à l'emploi, à condition qu'elles soient liées à l'objet du marché public*". Ainsi, les cahiers des clauses administratives générales peuvent prévoir l'obligation pour le titulaire de réaliser une action d'insertion sociale qui permet l'accès ou le retour à l'emploi des personnes présentant des difficultés sociales et/ou professionnelles. Les clauses sociales peuvent aussi "constituer un critère d'attribution du marché", en application de l'article R.2152-7 du code de la commande publique, à condition que les critères soient "objectifs, précis et liés à l'objet du marché public ou à ses conditions d'exécution".

Question 12

Un réchauffement climatique supérieur à 3°C à l'horizon 2100 aura pour conséquence d'accroître les inégalités entre les pays, les populations et les secteurs d'activités qui pourront les affrontés et ceux qui ne le pourront pas. Lors de la signature de l'Accord de Paris le 12 décembre 2015, 96 Etats, dont la France, se sont engagés à limiter le réchauffement climatique à un niveau inférieur à deux degrés[106]. Les conséquences du changement climatique se manifestent avec une intensité croissante, concernant particulièrement les Etats et les populations les plus pauvres. Dans cette lutte contre le réchauffement climatique, l'Etat français s'est engagée vers une "transition écologique" en tentant d'intégrer les enjeux sociaux dans les mesures d'adaptation au changement climatique. Toutefois, les transitions

[104] Loi n°2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire, JORF 23 décembre 2021.

[105] Ministère du travail, Ministère de l'économie et des finances et Ministère de l'action et des comptes publics, *Guide sur les aspects sociaux de la commande publique*, juillet 2018.

[106] V. not. Loi n°2019-1147 du 8 novembre 2019 relative à l'énergie et au climat, JORF 9 novembre 2019.

engendrent elles-mêmes des inégalités. En ce sens, l'annonce par le Premier ministre français, Edouard Philippe, de l'augmentation de la taxe carbone pour 2019, a été le principal élément déclencheur du mouvement des "Gilets jaunes", apparu à la fin de l'année 2018. En effet, ce mouvement dénonçait l'injustice de ce système qui pénalisait davantage les individus contraints de prendre leur voiture quotidiennement pour se rendre au travail que les entreprises. Des revendications en faveur d'une justice climatique ont été menées par des ONG et des syndicats dans l'objectif de prévenir les conséquences de ces transformations sur les travailleurs et plus largement d'éviter que le réchauffement climatique n'accroisse les inégalités.

En réponse, le Président de la République, Emmanuel Macron a mis en œuvre, lors du premier trimestre 2019, un "grand débat national" pour recueillir les souhaits des français concernant en particulier la transition écologique. En avril 2019, la création d'un conseil de défense écologique et d'une convention citoyenne pour le climat, organisée par le Conseil économique, social et environnemental, ont été annoncés par le chef de l'Etat. Les 150 citoyens tirés au sort ont alors été chargés de définir des mesures "susceptibles de réduire d'au moins 40% les émissions de gaz à effet de serre d'ici 2030 par rapport à 1990, dans un esprit de justice sociale", en cohérence avec les engagements pris lors de l'Accord de Paris. L'objectif annoncé était d'engager une réflexion sur un mode de développement plus solidaire, empêchant l'accroissement des inégalités.

Dans son rapport de juin 2019, le Haut Conseil pour le Climat a ainsi rappelé la nécessité d'une "transition juste"[107]. En juin 2020, la Convention a remis au gouvernement un rapport contenant 149 propositions regroupées en cinq thèmes: consommer, produire et travailler, se déplacer, se loger, se nourrir[108]. Parmi ces propositions figure la réduction du temps de travail sans diminution du salaire dans un objectif de sobriété, de justice sociale et de réduction de gaz à effet de serre. Dans la continuité, les propositions ont fait l'objet de concertations avec des parlementaires, des collectivités territoriales, des entreprises, des syndicats et des organisations non gouvernementales. Le projet de loi "climat et résilience", présenté en Conseil des ministres en février 2021, a repris une partie des propositions. La loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets est promulguée le 24 août 2021[109]. Elle doit permettre d'atteindre les objectifs fixés au niveau national et international, dans un esprit de justice

[107] Haut Conseil pour le Climat, rapport annuel 2019, *Agir en cohérence avec les ambitions*, 25 juin 2019.

[108] Convention citoyenne pour le climat, *Les propositions de la Convention citoyenne pour le climat*, juin 2020.

[109] Loi n°2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets, JORF 24 août 2021.

sociale. Dans l'objectif de renforcer la protection judiciaire de l'environnement, cette loi a instauré un délit de mise en danger de l'environnement, un délit général de pollution des milieux ainsi qu'un délit d'écocide pour les atteintes les plus graves commises intentionnellement à l'environnement.

Question 13

13.a

Oui, de diverses manières, décrites ci-dessous.

1. Le parcours citoyen

Le Ministère a mis en place le "parcours citoyen de l'élève", présenté comme une "véritable action éducative de longue durée qui s'inscrit dans le projet global de formation", qui vise à faire prendre conscience à l'élève "de ses droits, de ses devoirs et de ses responsabilités".

2. L'enseignement moral et civique (EMC).

L'EMC est enseigné dès le cycle 2 (trois premières années scolaires de l'école élémentaire, CP, CE1, CE2) jusqu'à la fin du lycée, où il fait désormais, à compter de cette année, l'objet d'une évaluation dédiée au baccalauréat. Il ne bénéficie toutefois que d'un volume horaire réduit: une heure hebdomadaire à l'école élémentaire et une demi-heure au collège et au lycée (soit, au lycée, 18 h annuelles, ce qui est assez intéressant notamment quand elles sont regroupées par bloc). Les développements spécifiques au droit et à la justice – son fonctionnement, son organisation – existent, mais ils ne sont pas suffisamment développés, tant les thèmes sont nombreux.

3. La classe de terminale et l'option "Droit et grands enjeux du monde contemporain" (DGEMC)

En terminale, la notion de justice figure dans les programmes de philosophie mais elle y est essentiellement appréhendée de manière conceptuelle (en tant que valeur, idéal moral et besoin social). D'autres disciplines et enseignements de la voie générale peuvent se servir du droit et de la justice, sans pour autant proposer un enseignement structuré du droit ni assurer une véritable initiation au droit: l'histoire, les sciences économiques et sociales, l'enseignement de spécialité histoire-géographie-géopolitique-sciences politiques. Dans les voies technologique et professionnelle, le droit est au cœur de certaines formations, en lien avec les métiers du droit ou avec l'économie-gestion. C'est dans le cadre de l'option "Droit et grands enjeux du monde contemporain" (DGEMC) que les

élèves de terminale générale et technologique bénéficient d'un vrai enseignement sur le droit et la justice. À l'occasion de la réforme du baccalauréat général, les trois filières (L, ES, S) ont été supprimées. En 2021-2022, 31 373 élèves avaient choisi l'option DGEMC, soit 8,3% des élèves de terminale générale.

13.b

Aux termes de l'article L. 111-1 du code de l'Education nationale "L'éducation est la première priorité nationale". Cet article dispose qu'"Outre la transmission des connaissances, la Nation fixe comme mission première à l'école de faire partager aux élèves les valeurs de la République" et se réfère aussi à "l'acquisition d'une culture générale" [110]. L'article L. 111-2 de ce même code prévoit que "Tout enfant a droit à une formation scolaire qui, complétant l'action de sa famille, concourt à son éducation". Il décrit ce que doit contenir cette formation de l'enfant et se réfère, notamment, à "l'exercice de ses responsabilités d'homme ou de femme et de citoyen ou de citoyenne". Permettre aux élèves d'acquérir certaines connaissances sur la justice, son fonctionnement, son articulation avec le droit fait ainsi partie de la mission de l'Education nationale.

L'ensemble de la communauté éducative "a la responsabilité de construire et de faire vivre le parcours citoyen, en assurant la convergence, la continuité et la progressivité des enseignements, des dispositifs et des projets" et, notamment, en tissant des liens avec les territoires[111].

Le Préambule du programme DGEMC donne quelques lignes directrices pour l'enseignement de l'option.

Le site Vie publique.fr rassemble dans un dossier l'ensemble de ses ressources utiles pour suivre l'option "Droit et grands enjeux du monde contemporain"[112].

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[110] Article L111-1 du code de l'Education nationale.

L'éducation est la première priorité nationale. (…)

Outre la transmission des connaissances, la Nation fixe comme mission première à l'école de faire partager aux élèves les valeurs de la République. Le service public de l'éducation fait acquérir à tous les élèves le respect de l'égale dignité des êtres humains, de la liberté de conscience et de la laïcité. (…)

Le droit à l'éducation est garanti à chacun afin de lui permettre de développer sa personnalité, d'élever son niveau de formation initiale et continue, de s'insérer dans la vie sociale et professionnelle, d'exercer sa citoyenneté. (…)

L'acquisition d'une culture générale et d'une qualification reconnue est assurée à tous les jeunes, quelle que soit leur origine sociale, culturelle ou géographique.

Article L111-2

(…) La formation scolaire (…) développe les connaissances, les compétences et la culture nécessaires à l'exercice de la citoyenneté dans la société contemporaine de l'information et de la communication.

[111] Actions éducatives | Ministère de l'Education Nationale de la Jeunesse et des Sports ; circulaire n° 2016-092 publiée au BOEN du 23 juin 2016.

[112] Droit et grands enjeux du monde contemporain DGEMC | Vie publique.fr (vie-publique.fr)

13.c

Des associations agréées peuvent intervenir en milieu scolaire. Les avocats sont particulièrement impliqués dans les établissements scolaires, que ce soit à travers le Conseil national des barreaux ou des associations, notamment Initiadroit. Cette association d'avocats bénévoles, reconnue d'utilité publique, créée en septembre 2005, dont la mission est d'ouvrir le droit aux jeunes, intervient dans les collèges et lycées à partir de cas pratiques présentés par les avocats. Elle rassemble plus de 1 000 avocats répartis sur 26 barreaux. 37 000 élèves rencontrent ainsi chaque année des avocats de l'association, et plus de 2 200 heures d'intervention d'avocats sont assurées en classe chaque année. Une convention cadre a été signée en 2008 et renouvelée en 2018 entre l'association et les ministères de la Justice et de l'Éducation nationale. Cette convention est en cours de renouvellement, afin de renforcer ces initiatives. Des journées consacrées au droit et à la justice existent depuis longtemps, en des formats variés. Elles se sont multipliées et bénéficient d'un soutien fort des juridictions, grâce à des acteurs professionnels engagés.

Pour marquer le 60e anniversaire de la Constitution de 1958, le ministère chargé de l'Éducation nationale a lancé une "Journée du droit dans les collèges", à l'attention des élèves de 5ème. Le thème de cette journée change tous les ans. Après l'égalité entre les hommes et les femmes en 2019 et les libertés en 2020, elle a été consacrée aux injustices en 2021113.

Un concours "découvrons notre Constitution" est organisé par le ministère chargé de l'Éducation nationale et le Conseil constitutionnel. (https://www.education.gouv.fr/concours-decouvrons-notre-constitution-9839). Il est ouvert aux élèves du CM1 à la terminale. Les élèves sont invités à exprimer, par la réalisation d'un travail collectif, la façon dont ils appréhendent les grands principes constitutionnels de la République française. La cérémonie de remise des prix a lieu au Conseil constitutionnel à l'occasion de la fête de la Constitution.

La Nuit du droit, créée en 2017, a pour objectif de mieux faire connaître le droit, ses principes, ses institutions, ses métiers. Cet événement prend date au soir du 4 octobre, jour anniversaire de la Constitution française du 4 octobre 1958, sauf si ce jour est un vendredi, un samedi ou un dimanche. Les juridictions judiciaires et administratives, les facultés de droit et les institutions publiques se mobilisent à cette occasion pour organiser des conférences, des pièces de théâtre, des projections de films suivies de débats, ou encore des procès fictifs, permettant au public de découvrir les multiples branches du droit et le fonctionnement des instances judiciaires de manière pédagogique ou ludique

[113] Journée du droit dans les collèges (journeedudroit.fr)

Focus sur une autre bonne pratique (prévue à titre expérimental 2022/2023): le passeport Educdroit

Un passeport d'éducation budgétaire et financière, le "Passeport EDUCFI" a été mis en place auprès des élèves de cycle 4[114]. Un dispositif similaire va être mis en place, d'abord à titre expérimental, pour le droit.

A la suite de cette courte formation (quelques heures), un questionnaire (quiz) par les élèves permet de vérifier l'acquisition de certaines notions et le passeport leur sera remis. Ce passeport contiendrai des pages destinées à être remplies dans le cadre du "parcours citoyen", mais aussi après le lycée, pour assurer le continuum élève/étudiant/citoyen.

3 propositions "européennes", qui pourraient être mises en place par des associations de juristes et d'étudiants européens.

i. Dans le cadre des mobilités Erasmus+ pour les personnels de l'enseignement scolaire et plus particulièrement de la mise en place du Module Europe, il serait possible de bâtir un module sur la citoyenneté et un autre module sur le droit et la justice, avec une partie commune sur le droit de l'UE et les juridictions européennes, et une partie spécifique à chaque pays.
ii. Un enseignement sur le droit et la citoyenneté européenne pourrait être dispensé dans les lycées (dernières années) ou dans les universités (L1 ou L2), pour tous les étudiants qui souhaitent partir en Erasmus. Des professeurs d'autres Etats membres pourraient en enseigner des parties, lors des échanges organisés dans le cadre d'Erasmus+. L'enseignement serait sanctionné par l'obtention d'un "crédit ECTS" que les élèves/étudiants pourraient faire valoir à leur arrivée à l'université dans le pays étranger de leur choix. Le deuxième volet de cette formation se tiendrait dans l'université d'accueil: les étudiants étrangers arrivant dans le pays de la destination choisie, pourraient, au cours d'une semaine d'accueil ou prérentrée, se voir proposer un module sur la culture et les institutions du pays, et profiter de cette semaine pour créer des partenariats avec les étudiants du pays d'accueil (parrainages) et des institutions impliquées dans le projet.
iii. Un nouvel enseignement innovant, commun et européen, construit à partir de l'option DGEMC, mais dont la dimension européenne serait plus poussée pourrait être conçu puis proposé, en tant que crédit ECTS, aux élèves des établissements membres des alliances européennes, quelle que soit la discipline majeure (ou même mineure) étudiée.

[114] Éducation économique, budgétaire et financière | éduscol | Ministère de l'Éducation nationale, de la Jeunesse et des Sports – Direction générale de l'enseignement scolaire (education.fr)

Question 14

L'appréciation des liens entre accès aux droits, droits fondamentaux et démocratie n'est sans doute nulle part si bien mise en évidence que dans les avis et rapports du Défenseur des droits. Dans son dernier rapport (Juillet 2022) Mme Hédon, actuelle Défenseure, souligne avec raison à quel point les difficultés ou l'absence d'accès aux droits, la discrimination ou l'absence de possibilité de recours fragilisent considérablement le lien entre les citoyens et les institutions publiques, alimentant défiance et contestation[115]. Certains points en particulier font l'objet d'une attention particulière de la part de la Défenseure des droits.

Ainsi de la *dématérialisation* qui conduit d'une part à "un report systémique sur l'usager de tâches et de coûts qui pesaient auparavant sur l'administration" et d'autre part à un "renversement d'un des trois principes du service public, l'adaptabilité, qui devient une qualité attendue de l'usager pour qu'il puisse accéder à ses droits, plutôt qu'une exigence incombant aux services publics eux-mêmes" ; une telle solution, comme le note justement la Défenseure, "met en danger notre cohésion sociale et notre sentiment d'appartenance à une nation commune"[116]. Un tel constat rejoint notamment celui qui est fait depuis plusieurs années par les associations de défense des étrangers, en particulier le GISTI et la Cimade, qui montrent que la dématérialisation des procédures administratives se traduit, concrètement, par un déni toujours plus fort de toute possibilité d'accès aux droits pour les étrangers[117].

Ainsi encore de la question lancinante et bien identifiée du *non-recours*. Il est en effet désormais bien établi qu'une grande partie des bénéficiaires potentiels du filet social mis en place par le droit français n'y ont pas recours, faute pour eux de maîtriser la procédure[118]. Ce phénomène est encore accentué par la dématérialisation dans l'accès aux droits, particulièrement difficile pour un public fragile[119]. Il est ainsi estimé, par exemple, que le tiers des allocataires potentiels du Revenu de Solidarité Active n'en bénéficient pas. Le même constat peut être établi en matière de santé[120]. A nouveau, ces situations sont extrêmement problématiques, en ce qu'elles concernent en premier lieu un public en grande

[115] Défenseur des droits, *Rapport annuel d'activité 2021*, disponible sur le site internet de l'institution: https://www.defenseurdesdroits.fr/.

[116] Ibid, p. 14 ;

[117] V. p. ex. https://www.lacimade.org/dematerialisation-des-demandes-de-titre-de-sejour-de-quoi-parle-t-on/.

[118] Défenseur des droits, *Rapport annuel*, *op. cit*., p. 18.

[119] P. Mazet, "Les conditionnalités implicites de l'accès aux droits à l'ère numérique", 2021. Halshs-03218656.

[120] H. Revil, "Le non-recours aux soins de santé", *La vie des idées*, 2014, https://laviedesidees.fr/Le-non-recours-aux-soins-de-sante.html.

difficulté, auquel les injonctions à la responsabilisation et à l'autonomie et le refus ou la réticence des administrations à les assister dans la réalisation de leurs démarches administratives sont à la fois inefficaces et contreproductives.

Ainsi enfin, toujours au cœur de la démarche de la Défenseure des droits, figure bien sûr la question de la discrimination. L'atteinte au contrat social que constitue la discrimination est extrêmement importante[121] et chaque année soulignée par la Défenseure des droits, mais aussi par toutes les institutions chargées de lutter contre les discriminations. A cet égard, on notera avec intérêt la progressive admission de l'idée de discriminations "intersectionnelles", c'est-à-dire de discriminations qui se trouvent au croisement de plusieurs critères prohibés (sexe, origine ethnique, religion, notamment)[122]. Le droit de l'Union européenne et le droit français semblent aujourd'hui suffisamment développés et souples pour pouvoir accueillir cette forme de lutte contre les discriminations, comme l'a montré une récente étude sur le travail domestique[123].

Ces quelques exemples montrent qu'il ne fait guère de doute que la promotion des droits sociaux fondamentaux fait partie des conditions de maintien du lien social et, plus largement, du renfort de la démocratie. A cet égard, droit de l'Union et droit national peuvent se compléter, et il faut se féliciter de ce qui semble être un certain renouveau de l'Europe sociale après tant d'années d'immobilisme.

Question 15

Non, elle est plutôt perçue comme un marché intérieur[124], une union économique et monétaire, surtout depuis la crise financière et la gouvernance économique qui en a résulté.

Ainsi l'inscription de la règle d'or budgétaire au sein de la Constitution française en 2013 interroge. La France vivait déjà un certain rejet du projet européen avec des référendums populaires ayant réussi de justesse pour approuver le traité de Maastricht avec 51% d'approbation et glisser vers le rejet à 55% des suffrages exprimés en mai 2005 du Traité pour le projet de constitution européenne avec des votes des jeunes, des sympathisants de gauche majoritaires pour ce rejet, ce qui aurait dû être un signal fort d'alerte pour la physionomie de l'Union européenne[125].

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[121] D. Schnapper, "La lutte contre les discriminations et le lien social", in: D. Paugam (dir.), *Repenser la solidarité*, PUF, 2015.

[122] M. Mercat-Bruns, "La discrimination intersectionnelle et sa critique: quel intérêt ?", *RDT* 2022. 289

[123] M. Mercat-Bruns, "Travail domestique et discriminations intersectionnelles", *Dr. Soc*. 2022. 716.

[124] E. Mazuyer, "Les règles du marché intérieur – L'exception sociale ?" in E. Carpano, G. Marti, (Dir), "*L'exception en droit de l'Union*", PUR, Rennes, 2019, pp. 171-183.

[125] Parmi les exemples de critique doctrinale, voir E. Dockès. "L'Europe antisociale", *Revue de Droit du Travail*, Dalloz, 2009, pp.145.

Or en 2013, suite au Traité budgétaire, "la règle d'or" fixant à 3% du PIB la limite supérieure du déficit public a été inscrite dans la Constitution française. Cette règle est contraignante: si un pays s'éloigne de la trajectoire d'équilibre de son budget, il doit mettre en œuvre les mesures prévues par la Commission européenne qui **visent à corriger ces écarts**, notamment des réformes structurelles. Ce qui entraine une austérité prolongée et une perte de souveraineté nationales dans certains domaines. Si cette règle d'or n'est pas respectée et si aucune mesure structurelle n'a été engagée pour retrouver le chemin de l'équilibre budgétaire, la Cour de justice européenne peut infliger des amendes à un État, dans la limite de 0,1% de son PIB. Il faut savoir que si cette règle avait été en vigueur lors de la crise de 2008, les plans de relance n'auraient pas pu être mis en œuvre. Depuis lors, la plupart des réformes sociales (flexibilisation du CDI, barèmes de licenciement, réduction des indemnités chômage, adaptabilité des travailleurs avec la formation professionnelle, décentralisation de la négociation collective au niveau de l'entreprise, réformes des retraites…) ont été entreprises suite aux recommandations du semestre économique européen. Tant que cette règle sera en vigueur, il semble très difficile d'entrevoir l'Union européenne comme une Union sociale.

De plus, la dichotomie entre les principes sociaux et les droits économiques telle que résultant de la Charte des droits fondamentaux est critiquable et critiquée. Cette prédominance économique et financière est accentuée par le programme REFIT qui soumet tous les textes au critère de la performance économique et de la moindre contrainte pour les acteurs économiques, critère qui ne peut que désavantager les normes à visée protectrice des travailleurs.

Seul le Socle Européen des Droits Sociaux a reçu un accueil plutôt favorable de la part des auteurs, un peu dubitatifs au départ[126], mais de plus en plus convaincus suite à la réelle relance de l'Europe sociale, basée sur la volonté de la Commission européenne d'en faire son programme de travail et l'adoption récente de directives sociales importantes (conditions transparentes, détachement des travailleurs, protection des travailleurs de plateformes, salaire minimum européen…).

L'égalité et la solidarité sont plutôt envisagées comme des devises nationales, constitutionnelles et républicaines, là où les libertés sont sûrement plus associées à l'Union européenne.

[126] E. Mazuyer, "Le retour du mythe de l'Europe sociale ?", *Revue de Droit du Travail,* 2017, pp. 91-102.

GERMANY

Gabriele Buchholtz

Kapitel 1. Freizügigkeit der Arbeitskräfte

Frage 1:

Unionsbürger haben grundsätzlich das Recht, sich in der EU frei zu bewegen, in jeden anderen Mitgliedstaat einzureisen und sich dort aufzuhalten. Das folgt aus Art. 21 des Vertrags über die Arbeitsweise der Europäischen Union (AEUV). Die Arbeitnehmerfreizügigkeit nach Art. 45 AEUV räumt Unionsbürgern überdies das Recht ein, sich in jedem Mitgliedstaat wirtschaftlich zu betätigen, d.h. unselbständig oder selbständig, dauerhaft oder vorübergehend. Gemäß Art. 45 Abs. 2 AEUV ist die Diskriminierung von EU-Arbeitnehmern aufgrund ihrer Staatsangehörigkeit verboten. Unzulässig sind damit auch alle sozialen oder steuerlichen Vergünstigungen wegen der Staatsangehörigkeit. Ebenfalls verboten ist eine mittelbare („versteckte") Diskriminierung, also jede Maßnahme, die typischerweise Ausländer gegenüber Inländern benachteiligt, ohne dass die Maßnahme konkret am Merkmal der Staatsangehörigkeit anknüpft. Eine mittelbare Diskriminierung liegt etwa vor, wenn ein Arbeitgeber für eine Stelle in Deutschland deutsche Sprachkenntnisse verlangt, diese aber objektiv gar nicht erforderlich sind. Sind dagegen deutsche Sprachkenntnisse tatsächlich erforderlich, darf der Arbeitgeber für diese Stelle auch einen Nachweis der Sprachkenntnisse verlangen.

Die Ausübung des Freizügigkeitsrechts erfolgt gemäß den Durchführungsvorschriften, insbesondere der Freizügigkeits-RL 2004/38/EG. Umgesetzt wird diese hierzulande durch das Freizügigkeitsgesetz/EU (FreizügG/EU). In den Anwendungsbereich des Gesetzes fallen alle Unionsbürger und ihre Familienangehörigen (§ 1 FreizügG/EU). Bemerkenswert ist, dass das Freizügigkeitsrecht für Unionsbürger bereits bei Vorliegen der unionsrechtlich determinierten Voraussetzungen besteht; anders verhält es sich bei Drittstaatsangehörigen, deren Aufenthaltsrecht erst mit Erteilung des Aufenthaltstitels entsteht (für Drittstaatsangehörige ist der Aufenthaltstitel somit konstitutiv). Für einen Aufenthalt von bis zu drei Monaten benötigen Unionsbürger lediglich einen gültigen Personalausweis oder Reisepass. Für einen Aufenthalt von mehr als drei Monaten ist ein Aufenthaltsgrund erforderlich, vgl. § 2 Abs. 2 FreizügG/EU. Ein solcher Grund liegt vor bei Arbeitnehmern und Personen, die

sich in der Berufsausbildung befinden; bei Personen, die sich zur Arbeitssuche in Deutschland aufhalten (bis zu sechs Monate); bei Selbstständigen oder Dienstleistungserbringern; bei Nichterwerbstätigen (Rentnern oder Studierenden) mit ausreichenden Existenzmitteln und Krankenversicherungsschutz; bei Unionsbürgern mit einem Daueraufenthaltsrecht (nach fünf Jahren) und schließlich bei Familienangehörigen dieser Unionsbürger. Dahinter steht die Überlegung, dass Unionsbürger bei einem Aufenthalt von mehr als drei Monaten ihre Lebensgrundlage selbstständig sichern können sollen.

Frage 2:

Geht es um die Gleichbehandlung von Unionsbürgern bei den Sozialleistungen, bestehen naturgemäß gewisse Spannungen zwischen der unionsrechtlichen Freizügigkeit einerseits und dem Schutz der mitgliedstaatlichen Sozialhilfesysteme andererseits. Der EuGH hat dieses Spannungsverhältnis mehrfach adressiert. Nach Auffassung der Luxemburger Richter dürfen die Mitgliedstaaten nicht erwerbstätigen mobilen EU-Bürgerinnen und Bürgern (die weder arbeiten noch aktiv nach einem Arbeitsplatz suchen und die kein Aufenthaltsrecht im Hoheitsgebiet des Mitgliedstaats haben, es sei denn, sie verfügen über Mittel zur Sicherung des Lebensunterhalts und eine umfassende Krankenversicherung) die Gewährung von Sozialleistungen verweigern.[1] Diese Rechtsprechung findet hierzulande Niederschlag in § 7 Abs. 1 Satz 2 des Sozialgesetzbuchs Zweites Buch (SGB II). Demnach erhalten Unionsbürger in den ersten drei Monaten ihres Aufenthalts keine Leistungen (§ 7 Abs. 1 Satz 2 Nr. 1 SGB II und § 23 Abs. 3 Satz 1 Nr. 1 SGB XII). Ferner erhalten Personen keine Leistungen, die kein Aufenthaltsrecht haben (§ 7 Abs. 1 Satz 2 Nr. 2a SGB II) und solche, „deren Aufenthalt sich allein aus dem Zweck der Arbeitssuche ergibt" (§ 7 Abs. 1 Satz 2 Nr. 2b SGB II). Diese Rechtslage hat das Bundessozialgericht (BSG) jüngst weiter verschärft, indem es die Anforderungen an den „Arbeitnehmerstatus" (der zur Begründung des Aufenthaltsrechts erforderlich ist) zugespitzt hat, damit der Leistungsausschluss schneller greift.[2] In dieser Entscheidung setzte sich das BSG mit dem Ausschluss von Unionsbürgern von Leistungen nach dem SGB II auseinander. Konkret ging es um die Arbeitnehmereigenschaft einer Spülhilfe. Das BSG entschied, dass die Beschäftigung als Spülhilfe keine Arbeitnehmereigenschaft begründe. Es handele sich um eine nur untergeordnete und unwesentliche Tätigkeit. Ob eine Person als Arbeitnehmer zu qualifizieren sei, hätten die nationalen Gerichten im Rahmen einer Gesamtbewertung insbesondere anhand der Kriterien

[1] EuGH, Urt. v. 11.11.2014 – C-333/13 (Dano); EuGH, Urt. v. 15.09.2015 – C-67/14 (Alimanovic).
[2] BSG, Urt. v. 29.03.2022 – B 4 As 2/21 R.

Arbeitszeit, Inhalt der Tätigkeit, Weisungsgebundenheit, wirtschaftlicher Wert der erbrachten Leistung, Vergütung, Inhalt des Arbeitsvertrags und der Beschäftigungsdauer zu beurteilen. Die Leistungsausschlüsse in § 7 Abs. 2 Nr. 2 SGB II und § 23 Abs. 3, 3a SGB XII seien verfassungskonform. Es bestehe, so das BSG weiter, kein verfassungsrechtlicher Anspruch auf voraussetzungslose Sozialleistungen. Angesichts des Nachrangprinzips existenzsichernder Leistungen sei ein Leistungsausschluss zulässig, wenn einem Antragsteller die Ausreise und Rückkehr in sein Heimatland möglich und zumutbar sei. Aus der Rechtsprechung des Bundesverfassungsgerichts (BVerfG) zum Anspruch auf existenzsichernde Leistungen durch das Asylbewerberleistungsgesetz (AsylbLG) für Asylbewerber lasse sich nicht herleiten, dass auch Unionsbürger unter allem Umständen existenzsichernde Leistungen erhalten müssten. Der Ausschluss von Leistungen nach dem SGB II greife bereits dann, wenn das Freizügigkeitsrecht als Arbeitnehmer materiell nicht gegeben sei. Einer entsprechenden Feststellung seitens der Ausländerbehörde bedürfe es daher nicht.

Bemerkenswert ist insofern allerdings eine Entscheidung des EuGH vom 6. Oktober 2020 in der Rechtssache „Jobcenter Krefeld".[3] Hier hat der EuGH entschieden, dass ein EU-Bürger trotz Verlusts seines Arbeitsplatzes einen Anspruch auf Sozialleistungen habe, wenn seine Kinder in Deutschland zur Schule gingen und somit ein Aufenthaltsrecht bestehe. In diesem Fall gründe sich das Aufenthaltsrecht auf den Schulbesuch der Kinder. Daraus folgt nun, dass das Aufenthaltsrecht nicht automatisch mit dem Eintritt der Arbeitslosigkeit endet, sondern aus anderen Gründen fortbestehen kann (etwa bei Schulpflicht der Kinder). Relevant ist die Entscheidung insbesondere auch für die vielen Werkvertragsarbeiter in Deutschland, die im Zuge der Covid-19-Pandemie ihre Arbeit verloren haben. Wenn sie schulpflichtige Kinder haben, besteht weiterhin ein Aufenthaltsrecht und ein Anspruch auf Sozialleistungen.

Dass Unionsbürger gemäß § 7 Abs. 2 Satz 2 SGB II von Sozialleistungen ausgeschlossen sind, stößt bei Teilen der Literatur schon seit Langem auf Kritik. So wird etwa bezweifelt, ob der Leistungsausschluss im SGB II europarechtskonform ist.[4] So heißt es, dass die Unionsbürgerschaft auch einen sozialrechtlichen Gehalt habe, der sich zu einer „social citizenship" auf europäischer Ebene hin entwickele. Zudem ergebe sich das Recht auf Inländergleichbehandlung von Unionsbürgern bereits aus dem Diskriminierungsverbot nach Art. 18 AEUV, ohne dass es auf

[3] EuGH, Urt. v. 06.10.2020, C-181/19.

[4] K. Dienelt, in: J. Bergmann/K. Dienelt (Hrsg.), Ausländerrecht, 14. Aufl. 2022, § 4 FreizügG/EU, Rn. 48 ff. mit weiteren Nachweisen; kritisch auch C. Janda, Familienförderung nur für „Marktbürger"?, Neuordnung der Kindergeldberechtigung im Lichte des Europa- und Verfassungsrechts, ZRP 2019, 94; T. Oberhäuser/E. Steffen, Rechtswidriger Leistungsausschluss für Unionsbürger, ZAR 2017, 149.

die Teilnahme am Erwerbsleben ankomme. Überdies sei auch fraglich, ob die Leistungsausschlüsse für Unionsbürger in § 7 Abs. 1 Satz 2 Nr. 1 und 2 SGB II im Einklang mit dem in Art. 4 VO 883/2004/EG normierten Diskriminierungsverbot stünden. Das Diskriminierungsverbot des Art. 4 VO 883/2004/EG stelle ein „lex specialis" zu Art. 18 AEUV dar. Es stehe Regelungen entgegen, die Leistungsansprüche im Anwendungsbereich der Verordnung an die inländische Staatsangehörigkeit knüpften, ohne Unionsbürger von diesen Ausschlussklauseln auszunehmen.[5] Auch die Sozialgerichte haben die Leitungsausschlüsse nach § 7 Abs. 1 Satz 2 SGB II mehrfach als unvereinbar mit Art. 4 VO 883/2004/EG gewertet.[6]

Sofern es um das Kindergelt geht, das formal betrachtet allerdings keine Sozialleistung, sondern eine steuerliche Ausgleichszahlung ist, gilt hierzulande Folgendes: Freizügigkeitsberechtigte Unionsbürger haben einen Anspruch auf Kindergeld, wenn sie gemäß § 62 Abs. 1 Nr. 1 Einkommenssteuergesetz (EStG) einen Wohnsitz oder ihren gewöhnlichen Aufenthalt in Deutschland haben oder nach § 62 Abs. 1 Nr. 2 EStG aus anderen Gründen unbeschränkt einkommensteuerpflichtig in Deutschland sind. Im Juli 2019 normierte der Gesetzgeber in § 62 Abs. 1a EStG zudem einen Leistungsausschluss für nicht erwerbstätige Unionsbürger für die ersten drei Monate ihres Aufenthalts in Deutschland.[7] Damit machte der Gesetzgeber den Kindergeldanspruch für Staatsangehörige eines anderen EU-Mitgliedstaats vom Bestehen eines „ausreichenden Aufenthaltsrechts" abhängig. Nicht jeder Grund für die Inanspruchnahme des Freizügigkeitsrechts, so die Gesetzesbegründung, reiche für die Inanspruchnahme von Kindergeld aus.[8] Mit dieser Regelung verfolgte der Gesetzgeber das Ziel, einen Sozialleistungsmissbrauch durch Staatsangehörige anderer EU-Mitgliedstaaten zu vermeiden.[9] Allerdings entschied der EuGH mit Urteil vom 1. September 2022 im Rahmen eines Vorabentscheidungsverfahrens, dass diese Vorschrift eine unzulässige Diskriminierung von Unionsbürgern darstelle und also mit Europarecht unvereinbar sei.[10] Dieser Entscheidung war

[5] Siehe insbesondere K. Dienelt, in: J. Bergmann/K. Dienelt (Hrsg.), Ausländerrecht, 14. Aufl. 2022, § 4 FreizügG/EU, Rn. 48 ff.

[6] LSG Bln-Bbg, Beschl. v. 30.11.2010 – L 34 AS 1501/10 B ER; LSG Blb-Bbg, Beschl. v. 29.11.2010 – L 34 AS 1001/10 B ER; HessLSG, Beschl. v. 14.07.2011 – L 7 AS 107/11; so auch LSG LSA, Beschl. v. 14.11.2011 – L 5 AS 406/11 B ER; LSG Bremen, Beschl. v. 11.08.2011 – L 15 AS 188/11 B; LSG Bln-Bbg, Beschl. v. 30.09.2011 – L 14 AS 1148/11 B ER; LSG BW, Beschl. v. 24.10.2011 – L 12 AS 3938/11 ER/B; SG Berlin, Urt. v. 24.05.2011 – S 149 AS 17644/09.

[7] BT-Drs. 19/8691; kritisch dazu C. Janda, Familienförderung nur für „Marktbürger"?, Neuordnung der Kindergeldberechtigung im Lichte des Europa- und Verfassungsrechts, ZRP 2019, 94.

[8] BT-Drs. 19/8691, S. 63.

[9] So ausdrücklich die Einleitung zur Gesetzesbegründung, BT-Drs. 19/8691.

[10] EuGH, Urt. v. 01.08.2022 – C-411/20.

die Klage einer Unionsbürgerin mit drei Kindern vorausgegangen, die sich vor dem zuständigen deutschen Finanzgericht Bremen gegen die Ablehnung ihres Kindergeldantrags für die ersten drei Monate nach Begründung ihres Aufenthalts in Deutschland wehrte. Die Familienkasse vertrat die Ansicht, dass die Antragstellerin nicht die Voraussetzungen des § 62 Abs. 1a EStG erfüllte, um als Unionsbürgerin während der ersten drei Monate ihres Aufenthalts Kindergeld beziehen zu können, da sie in dieser Zeit keine „inländischen Einkünfte" erhalten habe. Daraufhin hat das Finanzgericht Bremen dem EuGH die Frage vorgelegt, ob diese unterschiedliche Behandlung mit Unionsrecht vereinbar ist.[11] Dies verneinte der EuGH.[12] Zur Begründung verwiesen die Luxemburger Richter darauf, dass Mitgliedstaaten „wirtschaftlich nicht aktiven Unionsbürgern" Sozialhilfeleistungen zwar verweigern dürften, allerdings sei das Kindergeld keine Sozialhilfeleistung in diesem Sinne, da es in Deutschland unabhängig von der individuellen Bedürftigkeit gewährt werde. Demnach können Unionsbürger entgegen § 62 Abs. 1a EStG auch in den ersten drei Monaten ihres Aufenthalts in Deutschland Anspruch auf Kindergeld haben, wenn ihr tatsächlicher Lebensmittelpunkt dauerhaft in Deutschland ist. Entsprechende Anpassungen der deutschen Rechtslage sind nun notwendig.

Die Kindergeldthematik hat eine lange Vorgeschichte in Deutschland: Schon 2014 und 2016 gab es Rechtsgutachten des Fachbereichs Europa des Deutschen Bundestages[13] über die Vereinbarkeit möglicher Änderung der deutschen Regelungen zum Kindergeld mit dem Unionsrecht. Insbesondere stellte sich die Frage, ob eine Regelung unionsrechtskonform sei, wonach Eltern, die in Deutschland sozialversicherungspflichtig arbeiten, deren Kinder aber im EU-Ausland leben, nur noch Kindergeld in einer „ihrem Herkunftsland angemessenen Höhe" erhalten statt des in Deutschland üblichen Satzes. In den Debatten ging es stets darum, Menschen aus Bulgarien/Rumänien weniger Kindergeld zu zahlen; als Beispiel wurde stets ein Kindergeldanspruch von 18 bis 43 € monatlich für Kinder in Rumänien angeführt. Bemerkenswerterweise wurde allerdings nicht darüber gesprochen, Eltern, deren Kinder in Ländern mit höheren Lebenshaltungskosten leben, wie z.B. Finnland, ein höheres Kindergeld zu zahlen. Im Jahr 2018 gab es einen medialen Aufschrei, da ein neuer Höchststand an Kindergeldzahlungen ins Ausland festgestellt wurde.[14] Danach lebten 270.000 Kinder, für die

[11] FG Bremen, Beschl. v. 20.08.2020 – 2 K 99/20 (1).

[12] EuGH, Urt. v. 01.08.2022 – C-411/20.

[13] Gutachten des Fachbereichs Europa vom 25.03.2014 (PE 6 – 3000 – 08/14) und vom 29.04.2016 (PE 6 – 3000 – 71/16).

[14] Spiegel online v. 09.08.2018, „Koalition will Kindergeld-Regeln für EU-Ausländer ändern", online unter: www.spiegel.de/politik/deutschland/kindergeld-koalition-will-regeln-fuer-eu-buerger-aendern-a-1222408.html; Merkur v. 09.08.2018, „So viele ausländische Kindergeld-Empfänger wie nie zuvor: Nahles lädt

Kindergeld gezahlt wurde, im EU-Ausland. Die Empörung ist allerdings wenig nachvollziehbar, zumal es sich dabei um weniger als 2% der Kinder handelt, für die ein Kindergeldanspruch in Deutschland besteht. Dennoch gab es vor allem von Seiten der Kommunen laute Forderungen nach Reformen.[15] Eine repräsentative Umfrage, die das Meinungsforschungsinstitut Civey im Auftrag von WELT durchgeführt hatte,[16] ergab, dass 83% der befragten Deutschen eine Auszahlung von Kindergeld an Familien, deren Kinder im EU-Ausland leben, ablehnten. Zum Urteil des EuGH gegen Österreich, das der Indexierung des Kindergeldes zuletzt am 6. Juni 2022 erneut eine Absage erteilt hatte,[17] gab es dagegen wenig mediale Aufmerksamkeit – dies mag allerdings daran liegen, dass derzeit andere Themen in den Fokus der politischen Auseinandersetzungen gerückt sind.

Frage 3:

1. Statistische Erhebungen zur Beschäftigung von EU-Ausländern in Deutschland

JAHRESZAHLEN (JUNI DES JEWEILIGEN JAHRES)

Berichtsjahr (Juni des jeweiligen Jahres)	Beschäftigte
2011	1.095.040
2012	1.248.790
2013	1.399.500
2014	1.606.610
2015	1.827.610
2016	2.036.430
2017	2.208.740
2018	2.383.760
2019	2.496.210
2020	2.484.590
2021	2.605.280

Statistik 1. Quelle: Bundesagentur für Arbeit, online unter: https://statistik.arbeitsagentur.de/DE/Navigation/Statistiken/Interaktive-Statistiken/Migration-Zuwanderung-Flucht/Migration-Zuwanderung-Flucht-Nav.html.

zu Spitzentreffen ein“, online unter: www.merkur.de/politik/rekordzahl-an-auslaendischen-kindergeld-empfaengern-staedtetag-fordert-reform-zr-10105220.html; reuters v. 10.08.2018, „Städtetag fordert Debatte über Kindergeld-Betrug“, online unter: www.reuters.com/article/deutschland-migration-kindergeld-idDEKBN1KV0J7; Spiegel online v. 10.08.2018, „EU-Kommission lehnt Neuregelung von Kindergeld ab“, online unter: www.spiegel.de/wirtschaft/soziales/kindergeld-eu-kommission-lehnt-indexierung-ab-a-1222494.html.

[15] Anekdotisch Bezirksbürgermeister Krönke des Duisburger Bezirk Hamborn in der Deutschen Welle v. 09.08.2018, online unter: https://www.dw.com/de/muss-das-kindergeld-in-deutschland-reformiert-werden/a-45018481.

[16] Welt online v. 10.08.2018, „83 Prozent der Deutschen gegen Kindergeld-Zahlungen ins EU-Ausland“, online unter: www.welt.de/politik/deutschland/article180927774/Kindergeld-83-Prozent-gegen-Zahlungen-an-Kinder-im-EU-Ausland.html.

[17] EuGH, Urt. v. 16.06.2022 – C-328/20.

Berufssegment	Insgesamt	EU-Osterweiterung	Ältere Mitgliedstaaten
Bau- und Ausbauberufe	6%	12%	6%
Berufe in Unternehmensführung und -organisation	13%	4%	10%
Fertigungsberufe	6%	8%	7%
Fertigungstechnische Berufe	11%	8%	10%
Handelsberufe	10%	4%	9%
IT- und naturwissenschaftliche Dienstleistungsberufe	4%	1%	4%
Land-, Forst- und Gartenbauberufe	2%	7%	1%
Lebensmittel- und Gastgewerbeberufe	6%	12%	13%
Medizinische u. nicht-medizinische Gesundheitsberufe	10%	6%	7%
Reinigungsberufe	4%	11%	8%
Sicherheitsberufe	1%	1%	1%
Soziale und kulturelle Dienstleistungsberufe	8%	4%	7%
Unternehmensbezogene Dienstleistungsberufe	8%	2%	5%
Verkehrs- und Logistikberufe	10%	20%	12%
Keine Angabe	1%	1%	1%

*Statistik 2. Quelle: C. Pfeffer-Hoffmann, Berufssegmente der Beschäftigten in Deutschland nach Ländergruppen, Stichtag 30.06.2020. Darstellung nach Bundesagentur für Arbeit, in: EU-Migration nach Deutschland, Analysen zu Arbeitsmarktteilhabe und gesellschaftlicher Partizipation von EU-Bürger*innen in Deutschland, 2021, S. 85, online unter: https://minor-kontor.de/wp-content/uploads/2021/12/Minor_EB_EU-Migration-nach-Deutschland_2021.pdf.pdf.*

Statistik 1 zeigt, dass sich die Zahl der Beschäftigen aus dem EU-Ausland zwischen 2011 und 2021 mehr als verdoppelt hat. Während die Zahl der Beschäftigten aus dem EU-Ausland im Jahr 2011 noch bei 1,09 Millionen lag, waren im Jahr 2021 rund 2,6 Millionen EU-Ausländer in Deutschland beschäftigt. Dies ist vor allem auf die recht günstige Wirtschaftslage in Deutschland zurückzuführen.

Statistik 2 lässt erkennen, dass EU-Zugewanderte unterschiedlich stark in einzelnen Branchen des deutschen Arbeitsmarktes repräsentiert sind: Beispielsweise gehen lediglich 2% der Beschäftigten aus Mitgliedstaaten der EU-Osterweiterung und 5% derjenigen aus älteren Mitgliedstaaten einer Tätigkeit im Bereich „unternehmensbezogene Dienstleistungsberufe“ nach (im Vergleich: 8,0% der in Deutschland Beschäftigten sind in diesem Sektor tätig). Wenig vertreten sind EU-Zugewanderte auch in medizinischen und nicht-

medizinischen Gesundheitsberufen, in Berufen der Unternehmensführung und -organisation, in sozialen und kulturellen Dienstleistungsberufen sowie im Bereich der Fertigungstechnik und des Handels. In anderen Berufsfeldern sind EU-Zugewanderte hingegen stark überrepräsentiert: So arbeiten 12,0% der Beschäftigten aus Mitgliedstaaten der EU-Osterweiterung und 13,0% der Personen aus den älteren Mitgliedstaaten im Lebensmittel- und Gastgewerbesektor (im Vergleich: durchschnittlich sind 6,0% der in Deutschland Beschäftigten in diesem Sektor tätig). Auch in Reinigungsberufen sowie Verkehrs- und Logistikberufen sind EU-Zugewanderte stark vertreten. Die Unterschiede fallen jedoch insbesondere bei Beschäftigten aus Ost-Mitgliedstaaten groß aus: So arbeiten diese Menschen weniger als der Gesamtdurchschnitt und als Staatsangehörige aus älteren Mitgliedstaaten in Handelsberufen, in der Informationstechnik und in den Naturwissenschaften. Hingegen sind sie in Bau- und Ausbauberufen, im Sektor Land, Forst und Gartenbau sowie in Verkehrs- und Logistikberufen klar überrepräsentiert.[18]

Zudem zeigt sich, dass EU-Zugewanderte in Berufsfeldern stark vertreten sind, die besonders hohe Anteile an atypischen Beschäftigungsverhältnissen aufweisen. Im Schnitt arbeiten 54% der Beschäftigten in Gastgewerbe- und Lebensmittelberufen in Teilzeit oder auf Basis eines Minijobs; dieser Wert liegt 16,7 Prozentpunkte über dem Durchschnitt. Bei Reinigungsberufen beträgt der Anteil der Minijobber 40%, er liegt damit 28,2 Prozentpunkte über dem Durchschnitt. In Land, Forst- und Gartenbauberufen, in denen Zugewanderte aus den Ost-Mitgliedstaaten überproportional häufig vertreten sind, liegt der Anteil der Minijobbern 12,2 Prozentpunkte über dem Durchschnitt.

Überdies sind die Löhne, in den Berufsfelder, in denen EU-Zugewanderte überwiegend tätig sind, in der Regel sehr gering. In der Reinigungsbranche etwa verdienen die Beschäftigten 41,6% weniger als der Gesamtdurchschnitt, in Lebensmittel- und im Gastgewerbeberufen beträgt die Differenz 35,2%, im Bereich Land, Forst und Gartenbau liegt der Unterschied bei 27,8%, in Verkehrs- und Logistikberufen bei 22,0%. Davon betroffen sind insbesondere Unionsbürger aus den Mitgliedstaaten der EU-Osterweiterung, die in diesen Berufssegmenten stark vertreten sind. Bemerkenswert ist weiterhin, dass Staatsangehörige aus Mitgliedstaaten der EU-Osterweiterung in allen Berufsfeldern geringere Löhne erhalten als der Durchschnitt. Am geringsten sind die Lohnunterschiede bei den Gesundheitsberufen (- 6,0%) und in den Reinigungsberufen (- 6,0%), am größten sind sie in fertigungstechnischen Berufen (- 33,0%) sowie in

[18] C. Pfeffer-Hoffmann, EU-Migration nach Deutschland, Analysen zu Arbeitsmarktteilhabe und gesellschaftlicher Partizipation von EU-Bürger*innen in Deutschland, 2021, S. 84.

sozialen und kulturellen Dienstleistungsberufen (- 27,0%). Beschäftigte aus älteren Mitgliedstaaten arbeiten demgegenüber häufiger in gut bezahlten Berufen – so z. B. im IT- und naturwissenschaftlichen Bereich, wo die Löhne 40,8% über dem Gesamtdurchschnitt liegen. Außerdem werden sie in vielen Berufsfeldern besser bezahlt als der Durchschnitt – insbesondere dort, wo die Durchschnittslöhne per se schon hoch sind. So verdienen Zugewanderte aus den älteren EU-Mitgliedstaaten in der IT-Branche und naturwissenschaftlichen Berufen sowie in unternehmensbezogenen Dienstleistungsberufen 7,0% mehr als der Durchschnitt, im Bereich der Unternehmensführung und -organisation sogar 15,0% mehr. In den Lebensmittel- und Gastgewerbeberufen sowie in Sicherheitsberufen, wo unterdurchschnittliche Löhne gezahlt werden, verdienen sie jedoch weniger als der Durchschnitt (Lebensmittel- und Gastgewerbeberufe -7,0%; Sicherheitsberufe -8,0%).[19]

2. Fachkräftemangel in Deutschland

Seit geraumer Zeit ist in Deutschland ein großer Fachkräfte-Mangel zu verzeichnen.[20] Im März 2022 erreichte die Zahl der offenen Stellen, für die es in Deutschland keine entsprechend qualifizierten Arbeitslosen gibt, in allen Berufsbereichen mit über 1,5 Millionen einen Höchstwert. Im Vergleich zum Vorjahresmonat März 2021 stieg die Zahl der offenen Stellen um etwa 473.000 (45,3%). Zum ersten Mal lag dieser Wert im November 2021 über dem bis dato gültigen saisonbereinigten Höchstwert. Im ersten Quartal des Jahres 2022 stieg die Zahl der offenen Stellen um 5,3%. Dabei nahm die Zahl der offenen Stellen für akademisch qualifizierte Experten mit 9,2% am stärksten zu. Einen ähnlich hohen Anstieg verzeichnete die Zahl der offenen Stellen für Spezialisten mit Fortbildungs- oder Bachelorabschluss (+ 8,0%). Offene Stellen für Fachkräfte mit Berufsausbildung mehrten sich ebenfalls, und zwar um 5,7%. Für Helfer ohne formale Qualifikation stieg die Anzahl der offenen Stellen um 2,8%.[21] Zugleich sank die Zahl der Arbeitslosen im Vergleich zum März 2021 um etwa 461.000 (-16,7%) auf 2,3 Millionen. Somit lag die Zahl leicht über dem Wert, der zu Beginn der Corona-Pandemie im März 2020 verzeichnet wurde. Im Laufe des ersten Quartals 2022 nahm die Zahl der Arbeitslosen um 4,7% (- 113.000) ab. Insgesamt ist der Fachkräftemangel für Unternehmen zunehmend problematischer, da

[19] C. Pfeffer-Hoffmann, EU-Migration nach Deutschland, Analysen zu Arbeitsmarktteilhabe und gesellschaftlicher Partizipation von EU-Bürger*innen in Deutschland, 2021, S. 84–87.

[20] Die meisten Statistiken sind Fachkräftemangel-Analysen und schließen Helfertätigkeiten (d.h. Tätigkeiten, die nicht mindestens zwei Jahre qualifizierte Ausbildung voraussetzen) aus. Für diese Bereiche scheint es wenig aussagekräftige Statistiken zu geben.

[21] H. Hickmann/L. Malin, KOFA Kompakt – Fachkräftereport März 2022 – Offene Stellen und Fachkräftelücke auf Rekordniveau, 2022.

dem Anteil an offenen Stellen eine deutlich sinkende Zahl an Arbeitslosen gegenübersteht. Mit Blick auf formal Qualifizierte (ohne Helfer) übersteigt der Anteil an offenen Stellen sogar die der Arbeitslosen um ca. 283.000.[22]

Besonders groß ist der Stellenzuwachs im Bereich „Rohstoffgewinnung, Produktion und Fertigung" mit 9,7%. Ähnlich verhält es sich im Sektor „Unternehmensorganisation, Buchhaltung, Recht und Verwaltung" mit 8,6%; hier ist die Anzahl an offenen Stellen im Vergleich zum Beginn der Corona-Pandemie im März 2020 am stärksten gestiegen (46,3%). Die höchste Stellenüberhangsquote ist im Bereich „Gesundheit, Soziales, Lehre und Erziehung" zu verzeichnen. In diesem Bereich konnten im März 2022 nur sechs von zehn Stellen mit passend qualifizierten Arbeitslosen besetzt werden. Gegenüber dem Niveau vor der Corona-Pandemie im März 2020 stieg die Zahl der offenen Stellen hier zwar weniger als in anderen Bereichen (6,4%), allerdings ist das Ausgangsniveau in diesem Bereich schon seit Langem hoch.

Angesichts dieser Situation folgerte der Chef der Bundesagentur für Arbeit Detlef Scheele bereits im Jahr 2021, dass jährlich 40.000 Zuwanderer benötigt würden, um die Lücken auf dem Arbeitsmarkt zu schließen. Er rief die Bundesregierung dazu auf, mehr Zuwanderer anzuwerben. Durch die demografische Entwicklung nehme die Zahl der potenziellen Arbeitskräfte im typischen Berufsalter um fast 150.000 ab (Stand 2021), in den kommenden Jahren werde es noch „viel dramatischer". Das Problem lasse sich nur mit einer deutlich höheren Zuwanderung lösen. Wichtig sei allerdings eine gezielte Migration, um die Lücken im Arbeitsmarkt zu schließen.[23]

3. Freie und faire Mobilität

Neben das Schlagwort der „freien Mobilität" tritt in der öffentlichen Auseinandersetzung zunehmend das der „faire Mobilität".[24] In der Praxis werden mobile Beschäftigte jedoch teils unter prekären Bedingungen beschäftigt. Hieraus folgt der Bedarf, die Mobilität fair zu gestalten und die prekäre Beschäftigungssituation von Migranten, insbesondere aus Mittel- und Osteuropa, zu verhindern. „Faire Mobilität" soll dafür sorgen, dass Menschen aus den mittel- und osteuropäischen Mitgliedstaaten gerechte Löhne erhalten

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[22] H. Hickmann/L. Malin, KOFA Kompakt – Fachkräftereport März 2022 – Offene Stellen und Fachkräftelücke auf Rekordniveau, 2022, S. 1 f.

[23] Spiegel online v. 24.08.2021, „Arbeitsagentur-Chef: Deutschland braucht 400.000 Zuwanderer – pro Jahr", online unter: https://www.spiegel.de/wirtschaft/arbeitsagentur-chef-detlef-scheele-deutschland-braucht-400-000-zuwanderer-pro-jahr-a-09e57364-5114-4471-91d6-b7002e202da0.

[24] Siehe Deutscher Gewerkschaftsbund (DGB), „Faire Mobilität", online unter: https://www.faire-mobilitaet.de.

und faire Arbeitsbedingungen vorfinden. Als gewerkschaftsnahes Projekt startete „faire Mobilität" im Jahr 2011. Im Zuge dessen hat man hierzulande schrittweise Beratungsstandorte aufgebaut, wo mobile Beschäftigte in ihren Herkunftssprachen arbeitsrechtliche und sozialrechtliche Beratung erhalten. Seit August 2020 hat der Deutsche Gewerkschaftsbund (DGB) einen gesetzlichen Anspruch auf Finanzmittel aus dem Bundeshaushalt, um das Projekt „faire Mobilität" fortführen und ausbauen zu können.[25]

Frage 4:

Deutschland ist im Vergleich zu anderen EU-Mitgliedstaaten nur wenig vom Phänomen der Fachkräfteabwanderung, des sog. Braindrains, betroffen. Nur eine geringfügige Fachkräfteabwanderung insbesondere nach Österreich, in die Schweiz und in die USA ist zu beobachten.[26] Des Weiteren ist eine Binnenmigration (von Ost- nach Westdeutschland) von Fachkräften zu verzeichnen.[27] Vereinzelt hat die Bundesrepublik Förderprogramme initiiert, um ausgewanderte Hochqualifizierte zurückzugewinnen, wie z.B. mit der Initiative GAIN (German Academic International Network),[28] die sich auf deutsche Wissenschaftler, die in den USA arbeiten, konzentriert.

Frage 5:

1. Allgemeines zur rechtlichen Situation von entsandten Arbeitskräften

Die Umsetzung der RL (EU) 2018/957 in nationales Recht erfolgt durch das Gesetz zur Umsetzung der RL (EU) 2018/957 des Europäischen Parlaments und des Rates vom 28. Juni 2018 zur Änderung der RL 96/71/EG über die Entsendung von Arbeitnehmern im Rahmen der Erbringung von Dienstleistungen.[29] Das Artikelgesetz ist am 30. Juli 2020 in Kraft getreten. Es enthält in Art. 1 Änderungen am Arbeitnehmer-Entsendegesetz (AEntG), in Art. 2 Abs. 1 Änderungen am Mindestlohngesetz (MiLoG), in Art. 2 Abs. 2 Änderungen am Gesetz zur Sicherung von Arbeitnehmerrechten in der Fleischwirtschaft und in Art. 2a und

[25] Siehe Deutscher Gewerkschaftsbund (DGB), „Faire Mobilität", online unter: https://www.faire-mobilitaet.de. Evaluation des Projekts durch das BMAS, Evaluation des Projektes „Faire Mobilität", Abschlussbericht, September 2022, online unter: https://www.bmas.de/SharedDocs/Downloads/DE/Publikationen/Forschungsberichte/fb-546-pdf-faire-mobilitaet.pdf;jsessionid=F36C89334F5A0EC1F8499689F15388DF.delivery1-replication?__blob=publicationFile&v=2.

[26] Neue Zürcher Zeitung v. 09.12.2019, „Laufen Deutschland die Akademiker davon?", online unter: https://www.nzz.ch/wirtschaft/droht-brain-drain-76-der-deutschen-auswanderer-sind-akademiker-ld.1526958.

[27] Deutschlandfunk v. 07.12.2016, „Braindrain aus Ostdeutschland", online unter: https://www.deutschlandfunk.de/braindrain-aus-ostdeutschland-100.html.

[28] Homepage des GAIN, online unter: www.gain-network.org/de/ueber-uns/mission.

[29] Gesetz vom 10.07.2020 – BGBl. I 2020, Nr. 35, S. 1657.

2b Änderungen an der Werkstätten-Mitwirkungsverordnung.

Das nationale Umsetzungsgesetz verankert auch das Lohngleichheitsprinzip (equal-pay-Grundsatz). Von Bedeutung ist insbesondere § 2 Abs. 1 Nr. 1 AEntG. Darin heißt es: „Die in Rechts- oder Verwaltungsvorschriften enthaltenen Regelungen über folgende Arbeitsbedingungen sind auch auf Arbeitsverhältnisse zwischen einem im Ausland ansässigen Arbeitgeber und seinen im Inland beschäftigten Arbeitnehmern und Arbeitnehmerinnen zwingend anzuwenden: 1. die Entlohnung einschließlich der Überstundensätze ohne die Regelungen über die betriebliche Altersversorgung." Der Begriff „Entlohnung" erfasst nach § 2a AEntG „alle Bestandteile der Vergütung, die der Arbeitnehmer oder die Arbeitnehmerin vom Arbeitgeber in Geld oder als Sachleistung für die geleistete Arbeit erhält. Zur Entlohnung zählen insbesondere die Grundvergütung, einschließlich Entgeltbestandteilen, die an die Art der Tätigkeit, Qualifikation und Berufserfahrung der Arbeitnehmer und Arbeitnehmerinnen und die Region anknüpfen, sowie Zulagen, Zuschläge und Gratifikationen, einschließlich Überstundensätzen. Die Entlohnung umfasst auch Regelungen zur Fälligkeit der Entlohnung einschließlich Ausnahmen und deren Voraussetzungen." § 2 Abs. 2 AEntG enthält eine Klarstellung zum Geltungsbereich des Gesetzes für die Arbeitnehmerüberlassung: Demnach gilt das Gesetz nicht nur, wenn der Verleiher mit Sitz im Ausland Arbeitnehmer grenzüberschreitend an Entleiher mit Sitz in Deutschland verleiht, sondern auch dann, wenn der Entleiher mit Sitz im Ausland einen Leiharbeitnehmer hierzulande einsetzt. Diese Regelung soll Betrugsfällen vorbeugen.[30]

§ 2 Abs. 1 Nr. 1 AEntG fordert die Lohngleichheit von Arbeitnehmern, die hierzulande in einem Arbeitsverhältnis sind (Inlandsarbeitsverhältnis) und solchen Arbeitnehmern, die entsendet wurden. Die Lohngleichheit bezieht sich auch auf den Mindestlohn, der im MiLoG geregelt ist. Der Begriff der Entlohnung geht allerdings über den Mindestlohn hinaus, da nicht nur die unterste Lohnstufe, sondern die ganze Lohnstufenstruktur eines Tarifvertrages auf die entsandten Arbeitnehmer zu übertragen ist.[31] Zu beachten ist insofern § 1 Abs. 3 MiLoG: Demnach gehen Regelungen des AEntG, des Arbeitnehmerüberlassungsgesetzes und der auf ihrer Grundlage erlassenen Rechtsverordnungen den Regelungen des MiLoG vor, soweit die Höhe der auf ihrer Grundlage festgesetzten Branchenmindestlöhne die Höhe des Mindestlohns nicht unterschreitet. Dies bedeutet, dass der Mindestlohn nach dem MiLoG nur subsidiär zur Anwendung kommt. Die Gleichstellung gilt überdies auch für Auszubildende, die gemäß § 17

[30] BT-Drs. 19/19371, S. 25.

[31] BeckOK Arbeitsrecht/Gussen, § 2 AEntG Rn. 5.

Abs. 2 Berufsbildungsgesetz (BBiG) einen Mindestverdienst erhalten; auch dies ist Entlohnung i.S.d. § 2 Abs. 1 Nr. 1 AEntG.[32]

Ferner erweitert § 13b AEntG den Anwendungsbereich des AEntG über den Arbeitslohn hinaus auf alle Arbeitsbedingungen. Die Vorschrift basiert auf Art. 3 Abs. 1a RL 96/71/EG und sieht vor, dass Arbeitgeber mit Sitz im Ausland Arbeitnehmern, die sie länger als zwölf Monate in Deutschland beschäftigen, grundsätzlich nicht nur denselben Arbeitslohn zahlen müssen, sondern alle Arbeitsbedingungen bieten müssen, die in Deutschland in Rechts- oder Verwaltungsvorschriften oder in allgemeinverbindlichen Tarifverträgen festgelegt sind.

Mit dem neuen Gesetz ist der Anwendungsbereich des AEntG auch insofern erweitert worden, als nunmehr allgemeinverbindliche Tarifverträge sämtlicher Branchen einbezogen sind: Nach § 3 AEntG finden Tarifverträge auch im Fall der Arbeitnehmerentsendung Anwendung, wenn der jeweilige Tarifvertrag gemäß § 5 TVG für allgemeinverbindlich erklärt wurde oder auf einer Rechtsverordnung i.S.d. § 7 AEntG beruht. Die grenzüberschreitende Entsendung von Arbeitnehmern bringt es mit sich, dass zahlreiche Arbeitnehmer aus sog. Niedriglohnländern zu den Arbeitsbedingungen ihres Herkunftsstaates in der Bundesrepublik Deutschland tätig werden.[33] Um dies zu verhindern, kann die Entsendung per se nicht untersagt werden; im Gegenteil: sie ist vertragsrechtlich zulässig und vom Gewährleistungsgehalt der Dienstleistungsfreiheit in Art. 56 ff. AEUV umfasst. Damit jedoch ausländische Unternehmen keinen Wettbewerbsvorteil daraus ziehen, dass sie ihre Mitarbeiter zu Niedriglöhnen beschäftigen, schreibt das AEntG vor, dass (unter bestimmten Voraussetzungen) die Vorschriften eines deutschen Tarifvertrages anzuwenden sind, auch wenn eine ausländische Rechtsordnung für das jeweilige Arbeitsverhältnis gilt. Das AEntG fungiert insofern als eine international-privatrechtliche Eingriffsnorm.[34]

Das AEntG gilt grundsätzlich für alle Branchen (siehe Wortlaut, der keine Einschränkung vorsieht: „auch auf Arbeitsverhältnisse zwischen einem im Ausland ansässigen Arbeitgeber und seinen im Inland beschäftigten Arbeitnehmern und Arbeitnehmerinnen zwingend anzuwenden“). Vom Anwendungsbereich ausgenommen ist lediglich der Straßenverkehrssektor, allerdings nur so lange, bis die Änderung der Richtlinie 2006/22/EG (Richtlinie über Mindestbedingungen für die Durchführung der Verordnungen EWG Nr. 3820/85 und EWG Nr. 3821/85 des Rates über Sozialvorschriften für Tätigkeiten im Kraftfahrverkehr sowie zur

[32] Erfurter Kommentar Arbeitsrecht/Franzen, § 2 AEntG Rn. 2.
[33] Zum Ganzen BeckOK Arbeitsrecht/Gussen, § 2 AEntG Rn. 1 f.
[34] A. Junker, Neuere Entwicklungen im Internationalen Arbeitsrecht, RdA 1998, 44.

Aufhebung der Richtlinie 88/599/EWG des Rates) in Kraft tritt.[35] Bis dahin ist nach § 27 AEntG die bisherige Fassung des Gesetzes anzuwenden. Gleiches gilt für den grenzüberschreitenden Schienenverkehr bei der Durchreise in Deutschland.[36]

2. Situation von entsandten Arbeitnehmern in Fleischwirtschaft und Bauwesen

Dass die Covid-19-Pandemie wie ein „Brennglas" wirkt und schon länger bestehende Probleme der Arbeits- und Lebensbedingungen verstärkt, hat sich insbesondere in der Fleischwirtschaft gezeigt.[37] Gerade hier sind prekäre Arbeitsverhältnisse häufig anzutreffen; zahlreiche Fälle hat die Presse insbesondere während der Covid-19-Pandemie aufgedeckt. Infolgedessen wurde das Gesetz zur Sicherung von Arbeitnehmerrechten in der Fleischwirtschaft geschaffen (GSA Fleisch).[38] Das Gesetz sieht in § 6a (Einschränkung des Einsatzes von Fremdpersonal) vor, dass Unternehmer in Betrieben der Fleischwirtschaft im Bereich der Schlachtung einschließlich der Zerlegung sowie der Fleischverarbeitung nur noch eigene Arbeitnehmer einsetzen dürfen.[39] Die Übertragung dieser Tätigkeiten an Nachunternehmer auf der Grundlage von Werkverträgen nach § 631 des Bürgerlichen Gesetzbuchs (BGB) ist innerhalb des jeweiligen Produktionsstandortes ausgeschlossen. Dies gilt ab dem 1. April 2021 für die Arbeitnehmerüberlassung. Auch der Fremdpersonaleinsatz innerhalb von Konzernen oder Unternehmensgruppen ist insoweit unzulässig.[40]

Auch im Bauwesen ist eine Ausbeutung entsandter Arbeitnehmer zu beobachten. Die Arbeitsbedingungen der entsandten Arbeitnehmer sind durch lange Arbeitszeiten und häufig auch durch eine Entlohnung unter den tariflichen oder ortsüblichen Standards gekennzeichnet. Um den Beschäftigten Lohnbestandteile vorzuenthalten, werden unterschiedliche Mechanismen genutzt: Es werden sozialversicherungsrechtliche Bestimmungen des Sitzlandes nicht eingehalten, Überstunden nicht oder nur teilweise vergütet oder es gibt unverhältnismäßig hohe Abzüge für Verwaltungskosten, Unterkunft und Transport.[41] Problematisch

[35] BeckOK Arbeitsrecht/Gussen, § 2 AEntG Rn. 1.

[36] EuGH, Urt. v. 19.12.2019 – C-16/18, NZA 2020, 225, 227.

[37] So die Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration, Gleichbehandlungsstelle EU-Arbeitnehmer, „Auswirkungen der Corona-Krise auf mobile Beschäftigte", online unter: https://www.eu-gleichbehandlungsstelle.de/eugs-de/aktuelles/veranstaltungen/auswirkungen-der-corona-krise-auf-mobile-beschaeftigte-1935822.

[38] BGBl. I S. 2541, 2572.

[39] BT-Drs. 19/25141, S. 30.

[40] BT-Drs. 19/21978, S. 36.

[41] I. Wagner, Arbeitnehmerentsendung in der EU: Folgen für die Arbeitsmarktintegration und soziale Sicherung, WSI-Mitteilungen 5/2015, S. 341, online unter: https://www.wsi.de/data/wsimit_2015_05_wagner.pdf.

sind die Bedingungen auch im Pflegesektor: Insbesondere hinsichtlich der Arbeitszeit gibt es bei sog. „Live-Ins“ Probleme; das sind Personen, die bei den zu Pflegenden wohnen und eine 24-Stunden-Betreuung leisten. Die schlechten Arbeitsbedingungen sind kaum mit der Fürsorgepflicht in § 618a Abs. 2 BGB und zahlreichen anderen Arbeitsschutzregelungen zu vereinbaren.[42]

3. Rechtsprechung zur Entsendung von Arbeitskräften

Ein Urteil das Bundesarbeitsgerichts (BAG), das sich mit der Entsendung von Arbeitskräften durch Leiharbeitsunternehmen mit Sitz in anderen Mitgliedstaaten befasst, stammt aus dem Juni 2021.[43] Der Entscheidung liegt folgender Sachverhalt zu Grunde: Die bulgarische Klägerin war seit April 2015 bei dem beklagten Unternehmen mit Sitz in Bulgarien als Sozialassistentin tätig. Im Arbeitsvertrag war eine Arbeitszeit von 30 Std. pro Woche festgelegt, Samstag und Sonntag waren arbeitsfrei. Es war eine Nettovergütung von 950 € vorgesehen. Die Klägerin wurde nach Berlin entsandt. Dort arbeitete sie im Haushalt einer über 90-jährigen zu betreuenden Person. Die Klägerin bewohnte dort auch ein Zimmer. Die Klägerin erledigte Haushaltstätigkeiten, die Grundversorgung und soziale Aufgaben. Sie klagte im Jahr 2018 und verlangte unter Berufung auf das MiLoG weitere Vergütung, da sie nicht nur 30 Stunden pro Woche, sondern Tag und Nacht gearbeitet habe bzw. die ganze Zeit in Bereitschaft gewesen sei. Die Beklagte dagegen meinte, sie schulde keinen weiteren Lohn, da arbeitsvertraglich nur 30 Wochenstunden und nicht auch der Bereitschaftsdienst vereinbart worden sei; sofern die Klägerin mehr gearbeitet haben, sei dies nicht auf Veranlassung der Beklagten geschehen. Das LAG hat der Klage weitgehend entsprochen und schätzte die Arbeitszeit auf ca. 21 Stunden am Tag. Hiergegen richteten sich die Revision der Beklagten und die Anschlussrevision der Klägerin zum BAG. Das BAG entschied mit Urteil vom 24. Juni 2021,[44] dass die Verpflichtung zur Zahlung des gesetzlichen Mindestlohns nach § 20 MiLoG i.V.m. § 1 MiLoG auch für ausländische Arbeitgeber gelte, wenn sie Arbeitnehmer nach Deutschland entsendeten. Auch Bereitschaftsdienstzeit sei mit dem vollen Mindestlohn zu vergüten.

[42] A. Deckert-Regui/T. Liessneck, Arbeitsrechtschutz für Live- In Pflegekräfte aus der EU in Deutschland. Die aktuelle Lage der Umgehung von Arbeitsschutzgesetzen durch die polnischen Verträge und der A1-Bescheinigung, 2020, S. 3 ff., online unter: http://hlcmr.de/wp-content/uploads/2021/02/WP28_Arbeitsrechtschutz-f%C3%BCr-Live-In-Pflegekr%C3%A4fte-aus-der-EU-in-Deutschland-1.pdf , S. 3 ff.; B. Emunds, Menschenunwürdige Pflegearbeit in deutschen Privathaushalten, 2016, S. 207, 208 ff., online unter: https://www.boeckler.de/pdf_fof/99891.pdf.

[43] BAG, Urt. v. 24.06.2021 – 5 AZR 505/20.

[44] BAG, Urt. v. 24.06.2021 – 5 AZR 505/20.

Kurze Zeit darauf erging eine weitere Entscheidung des BAG zu dieser Thematik.[45] Wichtig sind vor allem der Tenor und die Entscheidungsgründe. Das BAG urteilte: Werde ein Leiharbeitnehmer mit Tätigkeiten beschäftigt, die nach § 8 Abs. 3 AEntG a.F. und den einschlägigen Tarifverträgen in den Geltungsbereich der Sozialkassen fielen, habe der Verleiher die tariflich vorgeschriebenen Arbeitsbedingungen zu gewähren und die Sozialkassen-Beiträge zu zahlen. Das gelte auch dann, wenn der Betrieb des Entleihers – so wie hier – nicht in den fachlichen Geltungsbereich des Tarifvertrags falle. Dem Wortlaut, der Systematik und dem Telos des § 8 Abs. 3 AEntG a.F. sei zu entnehmen, dass neben Beitragspflichten auch Erstattungsansprüche für Arbeitgeber entstünden. Hintergrund sei, dass nicht in die Leistungsbeziehung zwischen der Sozialkasse und den begünstigten Arbeitnehmern eingegriffenen werden solle. Das liefe dem Zweck des AEntG zuwider, Mindestarbeitsbedingungen von Leiharbeitnehmern zu sichern. Zu Gunsten der betroffenen Leiharbeitnehmer sei sicherzustellen, dass mindestens die in einem der in § 8 Abs. 3 AEntG a.F. genannten Tarifverträge vorgeschriebenen Arbeitsbedingungen gälten. Daraus folge, dass den Leiharbeitnehmern Ansprüche gegen die gemeinsamen Einrichtungen der Tarifvertragsparteien zustünden. In der Leistungsbeziehung zwischen der gemeinsamen Einrichtung und den (Leih-)Arbeitnehmern fungiere der Arbeitgeber als zwischengeschaltete Zahlstelle. Mit dieser Entscheidung klärte das BAG die Leistungsbeziehungen des Sozialkassenverfahrens beim Einsatz von Leiharbeitnehmern mit baulichen Tätigkeiten insofern, als der Erstattungsanspruch des Verleihers in seiner Funktion als Zahlstelle in die Leistungsbeziehung zwischen der gemeinsamen Einrichtung und den durch das Gesetz geschützten Leiharbeitnehmern folgt. Die Entscheidung ist begrüßenswert, weil sie Rechtssicherheit schafft.

Frage 6:

1. Verankerung des Streikrechts in Art. 9 Abs. 3 GG

Die Koalitionsfreiheit in Art. 9 Abs. 3 GG umfasst das Recht, „zur Wahrung und Förderung der Arbeits- und Wirtschaftsbedingungen Vereinigungen zu bilden". Das Streikrecht ist in der Verfassung nicht explizit genannt, es wird aber aus der Koalitionsfreiheit hergeleitet.[46] Es ist einfach-gesetzlich nicht geregelt, sondern im Wesentlichen durch die Rechtsprechung des BAG geprägt. Streik ist per Definition eine gemeinsam und planmäßig durchgeführte Arbeitseinstellung einer größeren

[45] BAG, Urt. v. 08.12.2021 – 10 AZR 101/20.

[46] Grundlegend zur normativen Verankerung des Streikrechts in Art. 9 Abs. 3 GG siehe BAG GS, Beschl. v. 21.04.1971 – GS 1/68; siehe auch G. Buchholtz, Streiken im europäischen Grundrechtsgefüge, 2014, S. 12 ff.

Anzahl von Arbeitnehmern zur Erreichung eines bestimmten Kampfziels.[47] Die prägenden Merkmale des Streiks sind also zum einen das „kollektive Erscheinungsbild“ und zum anderen „die Zurückhaltung von geschuldeter Arbeitsleistung zum Zweck der Druckausübung“.[48] Insbesondere hinsichtlich des zu erreichenden Ziels stellt die Rechtsprechung hohe Anforderungen, um die Funktionsfähigkeit der Tarifautonomie zu sichern. Vor allem muss der Streik ein tariflich regelbares Ziel verfolgen.[49] Ausgeschlossen vom Streikrecht sind Beamte. Das Beamtenstreikverbot ist in Deutschland ein hergebrachter Grundsatz des Berufsbeamtentums gemäß Art. 33 Abs. 5 GG. Diese Auffassung hat das BVerfG mit Urteil vom 12. Juni 2018 zuletzt wieder bestätigt.[50] Anlass zur Beschäftigung mit dieser Frage hatte das BVerfG unter anderem, weil der Europäische Gerichtshof für Menschenrechte (EGMR) in Straßburg zwei Entscheidungen erlassen hatte,[51] die Zweifel an der Vereinbarkeit des deutschen Beamtenstreikverbots mit Art. 11 der Europäischen Menschenrechtskonvention (EMRK) hatten aufkommen lassen.[52] Diesen Zweifel hat das BVerfG nun eine Absage erteilt.

2. Verhältnis zwischen Streikrecht und Niederlassungsfreiheit

Zum Verhältnis zwischen Dienst- und Niederlassungsfreiheit mit dem Streikrecht existiert hierzulande kaum Rechtsprechung. Lediglich die Entscheidung des BAG vom 25. August 2015[53] betraf am Rande das Verhältnis zwischen Streikrecht und Dienstleistungsfreiheit. Das BAG entschied, dass die von einem Streik der Fluglotsen am Stuttgarter Flughafen betroffenen Fluggesellschaften gegen die streikende Gewerkschaft der Flugsicherung e.V. keinen Schadensersatzanspruch wegen ausgefallener, verspäteter oder umgeleiteter Flüge hätten. Gewerkschaften könnten von nicht bestreikten Unternehmen grundsätzlich nicht für Folgekosten – wie etwa durch ausgefallene Flüge – in Haftung genommen werden. Die Vorinstanzen haben die auf die Zahlung von Schadensersatz aus unerlaubter Handlung gerichteten

[47] Siehe etwa BAG GS, Beschl. v. 28.01.1955 – GS 1/54.

[48] O. Ricken, MünchHdbArbR, Bd. 3, Kollektives Arbeitsrecht I, 5. Aufl. 2022, § 265, Rn. 5.

[49] So etwa BAG, Urt. v. 26.07.2016 – 1 AZR 160/14, NZA 2016, 1543, 1549, Rn. 52; BAG, Urt. v. 20.11.2012 – 1 AZR 179/11, NZA2013, 448, 462, Rn. 111.

[50] BVerfG, Urt. v. 12.06.2018 – 2 BvR 1738/12, 2 BvR 1395/13, 2 BvR 1068/14, 2 BvR 646/15.

[51] EGMR, Urt. v. 12.11.2008 – 34503/97 (Demir und Baykara/Türkei), AuR 2009, 269; EGMR, Urt. v. 21.04.2009 – 68959/01 (Enerji Yapi-Yol Sen/Türkei), AuR 2009, 274.

[52] VG Kassel, Urt. v. 27.07.2011 – 28 K 1208/10.KS.D; VG Düsseldorf, Urt. v. 15.12.2010 – 31 K 3904/10.O; aufgeh. durch OVG Münster, Urt. v. 07.03.2012 – 3d A 317/11.O; BVerwG, Beschl. v. 02.01.2013 – 2 B 46/12; VG Osnabrück, Urt. v. 19.08.2011 – 9 A 1/11 (Parallelentscheidung 9 A 2/11), NVwZ-RR 2012, 323, aufgeh. durch OVG Lüneburg, Urt. v. 12.06.2012 – 20 BD 7/11, 20 BD 8/11; VG Bremen, Urt. v. 03.07.2012 – D K 20/11. Letztinstanzlich BVerwG, Urt. v. 27.02.2014 – 2 C 1/13.

[53] BAG, Urt. v. 25.08.2015 – 1 AZR 754/13.

Klagen der Fluggesellschaften abgewiesen. Auch die Revisionen vor dem BAG waren erfolglos. Einen Schadensersatzanspruch aus § 823 Abs. 1 BGB wegen einer widerrechtlichen Eigentumsverletzung durch eine erhebliche Nutzungsbeeinträchtigung an den Flugzeugen gebe es nicht, urteilten die Erfurter Richter. Auch das Recht am eingerichteten und ausgeübten Gewerbebetrieb als sonstiges Recht i.S.d. § 823 Abs. 1 BGB sei nicht verletzt. Der Streik stelle schon keinen Eingriff in die Gewerbebetriebe der Fluggesellschaften dar. Auch die Voraussetzung einer sittenwidrigen Schädigung der Fluggesellschaften gemäß § 826 BGB durch den Streik liege nicht vor.

Zur Begründung ihrer Schadensersatzansprüche hatten die klagenden Fluggesellschaften darauf verwiesen, dass die Einschränkungen der von ihnen erbrachten Luftverkehrsleistungen in den Anwendungsbereich der Dienstleistungsfreiheit nach Art. 56, 57 AEUV fielen. Allerdings, so das BAG, sei der Anwendungsbereich von Art. 56, 57 AEUV nicht eröffnet, da die Dienstleistungsfreiheit durch Art. 58 Abs. 1 AEUV eingeschränkt werde, wonach für den freien Dienstleistungsverkehr im Bereich des Verkehrs die Bestimmungen des Titels über den Verkehr gelten. Dazu zählt nach Art. 100 Abs. 1 AEUV auch die Luftfahrt: Der freier Dienstleistungsverkehr auf diesem Gebiet unterliegt besonderen Regelungen. Im Übrigen urteilte das BAG, dass ein „sonstiges Recht" i.S.d. § 823 Abs. 1 BGB nicht aufgrund von Art. 17 GRCh dahingehend auszulegen sei, dass den nur mittelbar betroffenen Klägerinnen die Schäden zu ersetzen seien, die durch die Ankündigung der Arbeitskampfmaßnahmen entstanden seien. Der Anwendungsbereich der GRCh sei nicht eröffnet; das Unionsrecht enthalte keine Regelungen zur rechtlichen Stellung von Luftverkehrsunternehmen bei Beeinträchtigungen ihres Gewerbebetriebs wegen von Einschränkungen der Flugsicherungsleistungen. Im Ergebnis klärt diese Entscheidung daher nicht abschließend, ob das Streikrecht hier als Ausnahme bzw. Einschränkung der Dienstleistungsfreiheit verstanden wird. Auf die Entscheidungen „Viking"[54] und „Laval"[55], mit denen der EuGH der Niederlassungs- und Dienstleistungsfreiheit im konkreten Fall einen Vorzug gegenüber dem Streikrecht eingeräumt hatte, musste das BAG folglich ebenfalls nicht eingehen.

[54] EuGH, Urt. v. 11.12.2007 – C-438/05 (Viking), NZA 2008, 124.
[55] EuGH, Urt. v. 18.12.2007 – C-341/05 (Laval), NZA 2008, 159.

Frage 7:

1. Allgemeines zum Antidiskriminierungsrecht

Die EU-Richtlinien zur Gleichbehandlung, namentlich die RL 2000/43/EG vom 29. Juni 2000 zur Anwendung des Gleichbehandlungsgrundsatzes ohne Unterschied der Rasse oder der ethnischen Herkunft (Antidiskriminierungs-RL), die RL 2000/78/EG vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf (Gleichbehandlungs-Rahmen-RL), die RL 2002/73/EG vom 23. September 2002 zur Änderung der Richtlinie 76/207/EWG zur Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen hinsichtlich des Zugangs zur Beschäftigung, zur Berufsbildung und zum beruflichen Aufstieg sowie in Bezug auf die Arbeitsbedingungen (Gender-RL) und die RL 2004/113/EG vom 13. Dezember 2004 zur Gleichstellung der Geschlechter außerhalb des Erwerbslebens (Unisex-RL), hat der deutsche Gesetzgeber seit 2006 im Allgemeinen Gleichbehandlungsgesetz (AGG)[56] umgesetzt.[57] Das AGG schützt vor Benachteiligungen auf Grund der sog. „Rasse“, wegen der ethnischen Herkunft, des Geschlechts, der Religion, der Weltanschauung, einer Behinderung, des Alters und der sexuellen Identität. Der Anwendungsbereich des Gesetzes erstreckt sich auf den Zugang zu Beschäftigung und Beruf (§ 2 Abs. 1 Nr. 1–4 AGG) sowie den Zugang zu und die Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen (§ 2 Abs. 1 Nr. 8 AGG). Erfasst sind auch Bereiche wie der Sozialschutz, einschließlich der sozialen Sicherheit und die Gesundheitsdienste gemäß § 2 Abs. 1 Nr. 5 AGG; diese Vorschrift ist wortgleich mit Art. 3 Abs. 1 lit. e) der Antidiskriminierungs-RL. Im Übrigen erklärt das AGG in § 2 Abs. 2 AGG, dass für Leistungen nach dem Sozialgesetzbuch die speziellen Benachteiligungsverbote in § 33c SGB I und § 19a SGB IV anzuwenden sind. Demnach sind für bestimmte Diskriminierungskategorien und Sozialleistungen Benachteiligungen verboten: Gemäß § 33c SGB I darf bei der der Inanspruchnahme sozialer Rechte niemand aus Gründen der Rasse, wegen der ethnischen Herkunft oder einer Behinderung benachteiligt werden. Überdies hat der Sozialgesetzgeber mit § 19a SGB IV eine Ergänzung zum AGG vorgenommen; seitdem existiert ein weiteres Diskriminierungsverbot, das ausschließlich für die Arbeitsverwaltung gilt und alle Kriterien des AGG einbezieht hinsichtlich der „Berufsberatung, der Berufsbildung, der beruflichen Weiterbildung, der Umschulung einschließlich

[56] AGG v. 14.08.2006, BGBl. I, S. 1897.

[57] Vgl. BT-Drs. 16/1780, S. 1.

der praktischen Berufserfahrung".[58] Dieses Diskriminierungsverbot wird durch § 36 SGB III ergänzt; die Vorschrift enthält ein Diskriminierungsverbot, das den Kriterien des AGG entspricht und auch für die Stellenausschreibung der Arbeitsvermittlung gilt.

Insgesamt zeigt sich, dass der Diskriminierungsschutz im Sozialrecht lückenhafter ist als im Arbeitsrecht.[59] Gerade das Sozialrecht ist allerdings ein sensibler Bereich, da die benachteiligungsfreie Erbringung sozialer Dienst- und Geldleistungen von großer praktischer Relevanz ist. Betroffen sind in der Regel Menschen, „die sich aus unterschiedlichen Gründen in schwierigen Situationen befinden und deshalb die Hilfe des staatlichen Sozialsystems in Anspruch nehmen".[60] Häufig anzutreffende Benachteiligungsfälle im Sozialrecht sind: Eine Person erhält keine oder weniger Leistungen als beantragt oder wird wegen eines bestimmten Merkmals (etwa der ethnischen Herkunft) sanktioniert oder bei der Beratung mit Stereotypen oder unangemessenen Zuschreibungen konfrontiert. Die Sozialgesetzgebung selbst differenziert etwa nach dem Lebensalter (siehe etwa § 31a Abs. 2 SGB II) und nach dem Aufenthaltsstatus (siehe etwa § 1 Abs. 7 Bundeselterngeld- und Elternzeitgesetz (BEEG)). Oftmals kritisiert wird beispielsweise die sozialversicherungsrechtliche Privilegierung von sog. Minijobs; davon sind Frauen überwiegend betroffen und ihre Existenzsicherung wird damit gefährdet.

Angesichts zunehmend komplexer Diskriminierungsszenarien ist darüber nachzudenken, den Merkmalskatalog in § 1 AGG offener zu gestalten, um weitere Kriterien aufzunehmen: Zu denken ist etwa an den familiären oder ökonomischen Status, der häufig Grund für Diskriminierungen ist.[61]

2. Rechtsprechung zur Diskriminierung aus Gründen der Religion

Bisher hat der EuGH beim Verbot religiöser Symbole am Arbeitsplatz eine eher arbeitgeberfreundliche Haltung vertreten:[62] Zwar könne darin grundsätzlich eine mittelbare Diskriminierung liegen. Dies sei allerdings nicht der Fall, wenn der Arbeitgeber damit das berechtigte Anliegen verfolge, seinen Kunden den

[58] Das AGG erklärt in § 2 Abs. 2 AGG, dass für Leistungen nach dem Sozialgesetz buch die speziellen Benachteiligungsverbote des § 33c SGB I und § 19a SGB IV gelten. Demnach sind für bestimmte Diskriminierungskategorien und Sozialleistungsarten Benachteiligungen verboten.

[59] So auch: M. Brussig/B. Frings/J. Kirsch, Diskriminierungsrisiken in der öffentlichen Arbeitsvermittlung, Antidiskriminierungsstelle des Bundes, 2. Aufl., 2018, S. 102.

[60] Antidiskriminierungsstelle des Bundes, Handbuch „Rechtlicher Diskriminierungsschutz", 2014, S. 139 ff.

[61] Überblick zur wissenschaftlichen Auseinandersetzung zu diesem Thema bei: Antidiskriminierungsstelle des Bundes, Rechtsexpertise zum Bedarf einer Präzisierung und Erweiterung der im Allgemeinen Gleichbehandlungsgesetz genannten Merkmale, 2019, insbesondere S. 92 ff.

[62] Siehe etwa EuGH, Urt. v. 14.03.2017 – C-157/15 (G4S Secure Solutions).

Eindruck von Neutralität zu vermitteln und es sich dabei um eine unterschiedslos anzuwendende Regelung handele, die angemessen und erforderlich sei. Mit der Entscheidung vom 15. Juli in der Rechtssache WABE und MH Müller Handel hat sich der EuGH zuletzt erneut mit Vorschriften des Arbeitgebers über das Tragen von politischen, philosophischen oder religiösen Zeichen am Arbeitsplatz auseinandergesetzt.[63] Der EuGH hat seine bisherige Linie bestätigt, jedoch striktere Rechtfertigungsanforderungen gestellt. Er geht zunächst von einem weiten Diskriminierungsverbot aus; der Schutz erstrecke sich nicht nur darauf, eine bestimmte religiöse oder weltanschauliche Überzeugung zu haben oder nicht zu haben, sondern auch darauf, dieser Überzeugung Ausdruck zu verleihen, etwa durch das Tragen bestimmter Kleidung oder von Symbolen. Eine Diskriminierung liege demnach vor, wenn jemand „wegen" der Religion oder Weltanschauung weniger günstig behandelt werde. Eine interne Regelung über das Verbot des Tragens sichtbarer Zeichen weltanschaulicher oder religiöser Überzeugungen am Arbeitsplatz stelle, so wie auch nach bisheriger Auffassung des EuGH, keine unmittelbare Diskriminierung dar, wenn das Gebot, sich neutral zu kleiden, allgemein und undifferenziert gelte. Jedoch liege hier eine mittelbare Diskriminierung vor, weil insbesondere Frauen von einer solchen Regelung betroffen seien, die das Tragen von Kopftüchern aus religiösen Gründen untersage.

Die Entscheidung des EuGH entspricht im Wesentlichen der Auffassung, die auch schon die deutschen Gerichte, allen voran das BAG[64] und das BVerfG[65] vertreten haben. Die deutschen Gerichte waren bislang strenger als der EuGH und haben stets eine „konkrete Störung" als Rechtfertigung für ein Verbot religiöser Symbole gefordert. Nur, wenn es um die Ausübung von Hoheitsgewalt gehe, sei die religiöse Bekundungsfreiheit nach Auffassung des BVerfG gesetzlich einschränkbar (in der Entscheidung ging es um das Kopftuchverbot bei Referendarinnen).[66] Zusammenfassend gilt im privatrechtlichen Arbeitsverhältnis, dass eine konkrete Gefährdung unternehmerischer Interessen vorliegen muss, damit ein Arbeitgeber – im Einklang mit dem Europarecht – ein politisch, philosophisch oder religiös neutrales Erscheinungsbild der Arbeitnehmer fordern kann.

[63] EuGH, Urt. v. 15.07.2021 – C-804/18 u. C-341/19 (WABE und MH Müller Handel).

[64] BAG, Urt. v. 27.08.2020 – 8 AZR 62/19. So auch mit konkretem Bezug auf die EuGH-Entscheidung in der Rs. C-157/15 das LAG Nürnberg, Urt. v. 27.03.2018 – 7 SA 304/17.

[65] BVerfG, Beschl. v. 27.01.2015 – 1 BvR 471/10, 1 BvR 1181/10.

[66] BVerfG, Beschl. v. 14.01.2020 – 2 BvR 1333/17, NJW 2020, 1049.

3. Umsetzung des Konzepts der „angemessenen Vorkehrungen"

Art. 5 RL 2000/78/EG enthält die Maßgabe, dass „angemessene Vorkehrungen" zu treffen sind, um Menschen mit Behinderung den ungehinderten Zugang zur Arbeitswelt zu ermöglichen (so auch Art. 2 der UN-Behindertenrechtskonvention (UN-BKR)).[67] Eine konsequente Umsetzung dieser Vorgaben lässt sich in Deutschland allerdings noch nicht erkennen. So enthält etwa § 12 AGG keine Pflicht der Arbeitgeber, angemessene Vorkehrungen zu treffen, und den betroffenen Personen wird auch kein Rechtsanspruch auf entsprechende Maßnahmen eingeräumt. Es ist daher angebracht, das AGG entsprechend zu erweitern.[68] Eine gesetzliche Verankerung dieses Rechts ist mit Blick auf Art. 5 RL 2000/78/EG und die UN-BKR allerdings geboten.[69] Sinnvoll ist es, den Begriff „angemessene Vorkehrungen" ins AGG aufzunehmen.[70] Dieser Terminus ist als Grundbegriff des Gleichbehandlungsrechts zu verstehen. Er bezeichnet die Handlungspflichten für Institutionen, „um für Menschen, die Opfer einer Diskriminierung werden können, mittels zielgerichteter Maßnahmen deren soziale Beteiligung zu sichern und damit eine ihnen andernfalls drohende Behinderung abzuwenden". Diese Pflicht folgt aus dem Grundanliegen, Menschen vor Diskriminierungen zu schützen.[71] Im Ergebnis bedarf es eines Rechtsanspruchs auf „angemessene Vorkehrungen" für alle nach § 1 AGG geschützten Menschen.[72] Ein sinnvoller Vorschlag ist es daher, dem § 5 AGG die Sätze 2 und 3 hinzuzufügen, die etwa lauten könnten: „Jeder durch § 1 AGG geschützte Mensch hat einen Rechtsanspruch auf angemessene Vorkehrungen. Diese sind notwendige und geeignete Änderungen und Anpassungen, die keine unverhältnismäßige oder unbillige Belastung darstellen und die, wenn sie in einem besonderen Fall erforderlich sind, vorgenommen werden, um zu gewährleisten, dass die nach § 1 AGG geschützten Menschen gleichwertig mit anderen alle Menschenrechte und Grundfreiheiten genießen und ausüben können."[73]

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[67] Nach Art. 2 UN-BKR handelt es sich hierbei um notwendige und geeignete Änderungen und Anpassungen, die keine unverhältnismäßige oder unbillige Belastung darstellen und die, wen sie in einem bestimmten Fall erforderlich sind, vorgenommen werden, um zu gewährleisten, dass Menschen mit Behinderungen gleichberechtigt mit anderen alle Menschenrechte und Grundfreiheiten genießen und ausüben können. Ebenfalls heißt es „[Diskriminierung aufgrund von Behinderung] umfasst alle Formen der Diskriminierung, einschließlich der Versagung angemessener Vorkehrungen".

[68] E. Eichenhofer, Sozialrecht, 12. Aufl. 2021, S. 74.

[69] E. Eichenhofer, Sozialrecht, 12. Aufl. 2021, S. 74.

[70] E. Eichenhofer, Sozialrecht, 12. Aufl. 2021, S. 74.

[71] E. Eichenhofer, Sozialrecht, 12. Aufl. 2021, S. 74.

[72] E. Eichenhofer, Sozialrecht, 12. Aufl. 2021, S. 74.

[73] E. Eichenhofer, Sozialrecht, 12. Aufl. 2021, S. 75.

Maßnahmen zur Gleichstellung von Menschen mit Behinderung hat der Gesetzgeber auch mit dem Teilhabestärkungsgesetz vom 2. Juni 2021 getroffen.[74] Siehe dazu unten.

4. Arbeitszeitrecht

Regelungen und Ansprüche zur Arbeitszeit sind im deutschen Recht im Arbeitszeitgesetz (ArbZG) normiert. Dieses soll ausweislich des § 1 unter anderem „die Sicherheit und den Gesundheitsschutz der Arbeitnehmer" bei der Arbeitszeitgestaltung in der Bundesrepublik gewährleisten. Dieses Ziel realisiert der Gesetzgeber, indem es Höchstgrenzen für die werktägliche Arbeitszeit (§ 3), notwendige Ruhepausen (§ 4) und eine Mindestruhezeit vor dem nächsten Arbeitseinsatz (§ 5) gibt.[75]

Jüngst hat der EuGH eine Entscheidung getroffen, die den Schutz der Beschäftigten im Bereich der Arbeitszeiterfassung ausweitet. Konkret hat der EuGH die EU-Mitgliedstaaten dazu angehalten, ihre Arbeitgeber zu systematischer Arbeitszeiterfassung zu verpflichten.[76] Nur so könne kontrolliert und durchgesetzt werden, dass die Arbeitszeitregeln eingehalten und der gesetzlich vorgesehene Gesundheitsschutz der Arbeitnehmer gewährleistet werde. Hierzulande besteht zwar gemäß § 16 Abs. 2 ArbZG bereits die Pflicht zur Aufzeichnung von täglichen Arbeitszeiten, allerdings erst ab acht Stunden. Die Entscheidung des EuGH ist zu begrüßen, da die Arbeitszeiterfassung notwendige Transparenz schafft. Zudem lässt sich im Wege der Arbeitszeiterfassung feststellen, ob der Arbeitnehmer Pausen und Ruhezeiten tatsächlich wahrgenommen hat. Der EuGH hat betont, dass jeder Mitgliedstaat das Urteil umzusetzen hat, belässt den Mitgliedstaaten allerdings einen gewissen Spielraum, um beispielsweise den Besonderheiten des jeweiligen Tätigkeitsbereichs oder des jeweiligen Unternehmens Rechnung zu tragen. Notwendig ist es, so die Luxemburger Richter, „ein objektives, verlässliches und zugängliches System einzuführen, mit dem die von einem jeden Arbeitnehmer geleistete tägliche Arbeitszeit gemessen werden kann".[77]

Welche Anpassungen des geltenden Rechts zur Umsetzung des EuGH-Urteils nötig sind, ohne dabei auf Flexibilität (insbesondere durch Vertrauensarbeitszeit) verzichten zu müssen, will die Bundesregierung laut Koalitionsvertrag noch prüfen.[78] Entsprechende Gesetzesvorhaben sind bislang jedoch gescheitert.

[74] BGBl. I S. 1387.
[75] BeckOK ArbR/Kock, ArbZG, § 1 Rn. 1-4.3.
[76] EuGH, Urt. v. 14.05.2019 – C-55/18.
[77] EuGH, Urt. v. 14.05.2019 – C-55/18.
[78] Koalitionsvertrag 2021–2025 zwischen SPD, Grünen und FDP, Mehr Fortschritt wagen, S. 54.

Eine deutliche Ansage kam allerdings jüngst vom BAG. Es hat mit Urteil vom 13. September 2022 deutlich gemacht, dass Arbeitgeber schon nach aktueller Rechtslage verpflichtet seien, ein System zur Arbeitszeiterfassung einzuführen.[79] Infolgedessen werden Unternehmen nun zunehmend digitale Lösungen zur Zeiterfassung nutzen müssen. Weiterhin dringend notwendig ist jedoch eine gesetzliche Regelung, um die notwendige Rechtssicherheit zu schaffen.

5. Plattformarbeit

Die Plattformarbeit ist in Deutschland gesetzlich nicht geregelt. Sie wirft Fragen individualarbeitsrechtlicher, betriebsverfassungsrechtlicher und tarifrechtlicher Art auf.[80] Ob es sich bei Plattformarbeitern um Arbeitnehmer handelt, bestimmt sich nach § 611a Abs. 1 BGB. Demnach ist Arbeitnehmer, „wer aufgrund eines privatrechtlichen Vertrags im Dienst eines anderen zur Leistung weisungsgebundener, fremdbestimmter Arbeit in persönlicher Abhängigkeit verpflichtet ist". Hinsichtlich der rechtlichen Einstufung von Plattformarbeitern hat das BAG jüngst entschieden, dass ein Crowdworker Arbeitnehmer i.S.d. § 611a BGB sein kann, wenn er weisungsgebundene, fremdbestimmte Arbeit in persönlicher Abhängigkeit leiste. Zeige die tatsächliche Durchführung eines Vertragsverhältnisses, dass es sich um ein Arbeitsverhältnis handele, sei die Bezeichnung im Vertrag unerheblich. Die Gesamtwürdigung aller Umstände könne demnach, so wie im vorliegenden Fall, ergeben, dass ein Crowdworker als Arbeitnehmer zu behandeln sei. Die Entscheidung des BAG schafft nun Klarheit zur Rechtsstellung von Crowdworkern und stärkt ihre Rechte gegenüber Plattformbetreibern (siehe bereits oben).[81]

Zur Regulierung von Plattformarbeit gibt es auf politischer Ebene seit einiger Zeit zahlreiche Reformbestrebungen.[82] Seit die Kommission einen Richtlinienvorschlag zur Verbesserung der Arbeitsbedingungen in der Plattformarbeit vorgelegt hat,[83] wurden die Debatten erneut befeuert.[84] Insbesondere die Umkehrung der Beweislast zugunsten der Beschäftigten ist ein zentrales Element des Richtlinienvorschlags. Insgesamt zeugen die

[79] BAG, Urt. v. 13.09.2022 – 1 ABR 22/21.

[80] M. Heckelmann, Crowdworking – eine arbeitsrechtliche Bestandsaufnahme, NZA 2022, 73.

[81] BAG, Urt. v. 01.12.2020 – 9 AZR 102/20.

[82] Siehe etwa BMAS, Eckpunktepapier zur Regulierung von digitaler Plattformarbeit, 2020, online unter https://www.denkfabrik-bmas.de/fileadmin/Downloads/eckpunkte-faire-plattformarbeit_1_.pdf.

[83] Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates zur Verbesserung der Arbeitsbedingungen in der Plattformarbeit v. 09.12.2021, COM(2021) 762 final.

[84] Siehe etwa Hans-Böckler-Stiftung, „Plattformen in die Pflicht nehmen", Impuls-Beitrag August 2022, online unter: https://www.boeckler.de/de/boeckler-impuls-plattformen-in-die-pflicht-nehmen-38767.htm; B. Waas, Verbesserung der Arbeitsbedingungen von Plattformbeschäftigten, ZRP 2022, 105.

Entwicklungen in der nationalen Rechtsprechung sowie auf politischer Ebene in Deutschland und der EU von einem Trend zur mehr Fairness und Rechtssicherheit in der Plattformökonomie.

Frage 8:

Dass die Sozialintegration der EU eine zentrale politische Bedeutung hat, ist seit Langem anerkannt:[85] Will man das „Europäische Projekt" nicht sinnentleeren, so bedarf es nach Jürgen Habermas einer „europaweite[n] Bürgersolidarität", die sich nur durch eine Beseitigung sozialer Disparitäten erreichen lässt.[86] Im Zentrum aller sozialrechtlichen Bemühungen steht das Interesse daran, die Lebens- und Arbeitsbedingungen der EU-Bürger zu verbessern und – dort wo möglich und nötig – zu harmonisieren. Wirtschaftliche und gesellschaftliche Entwicklungen fordern stets aufs Neue dazu heraus, sich diesem Anliegen zu widmen: Gegenwärtig ist – bedingt durch Globalisierung und Digitalisierung – eine rasante und tiefgreifende Veränderung des Arbeitsmarktes und der Arbeitsbeziehungen zu beobachten.[87] Mit diesem Tempo halten die nationalen Sozialversicherungssysteme nur bedingt mit. Neue Arbeitsformen brechen mit dem überkommenen Konzept des Normalarbeitsverhältnisses. Problematisch daran ist, dass atypisch Erwerbstätige nicht vollständig in die Sozialversicherungssysteme inkludiert sind; es fehlt ihnen häufig der notwendige soziale Schutz.[88] Die EU kann hier nur bedingt Abhilfe schaffen. Bekanntlich hat sie auf dem Gebiet der Sozialpolitik gemäß Art. 4 Abs. 2 lit. b AEUV[89] nur eine geteilte Zuständigkeit und somit keine umfassende Kompetenz, um soziale Gerechtigkeit und sozialen Ausgleich europaweit herzustellen.[90] Eine entsprechende Änderung der europäischen Verträge wäre in der gegenwärtigen politischen Lage, die durch das Narrativ „Sozialpolitik ist Sache der Nationalstaaten"[91] geprägt ist, wohl auch nicht durchsetzbar.

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[85] H.-J. Blanke/S. Pilz, Europa 2019 bis 2024 – Wohin trägt uns der Stier? – Sieben Thesen zu den Herausforderungen der Europäischen Union –, EuR 2020, 270, 283. Zum Ganzen G. Buchholtz, Streiken im europäischen Grundrechtsgefüge, 2014, S. 113 f.

[86] So auch M. Schlachter, 100 Jahre ILO und die Suche nach sozialer Gerechtigkeit, EuZA 2020, 143.

[87] N. Potocka-Sionek, Facing digital precariousness in the platform economy – On the way towards a more sustainable future of working economy, Economia & Lavoro, LII, pp. 27–42.

[88] Zum Ganzen siehe G. Buchholtz, Die Europäische Säule Sozialer Rechte, in: Soziale Sicherung Selbstständiger, Interdisziplinäre und internationale Betrachtungen (Hrsg. Margarete Schuler-Harms/Ortrud Leßmann/Katharina Goldberg), im Erscheinen 2023.

[89] H-J. Blanke/S. Pilz, Europa 2019 bis 2024 – Wohin trägt uns der Stier? – Sieben Thesen zu den Herausforderungen der Europäischen Union, Zeitschrift Europarecht (EuR) 2020, 270, 283; J. P. Terhechte, in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 73. Ergänzungslieferung, Mai 2021, Art. 3 EUV, Rn. 51.

[90] Außer im Arbeitsrecht, vgl. Art. 153 Abs. 1 lit. c) AEUV.

3 ORF, Sozialgipfel: Österreich und andere für nationale Kompetenz, online unter: https://orf.at/stories/3211990/.

Gleichwohl besteht angesichts der kritischen Lage Handlungsbedarf: 15% der Erwerbstätigen in der EU sind Selbstständige.[92] Die Hälfte von ihnen ist jedoch nicht vollständig von den Systemen der sozialen Sicherung erfasst.[93] Deutlich hat sich dies zuletzt im Rahmen der Covid-19-Pandemie gezeigt; es mussten mangels ausreichender Absicherung europaweit Sonderprogramme für Selbstständige aufgesetzt werden, um drohende Insolvenzen, Arbeitslosigkeit und Verarmung zu verhindern.[94] Die Ursache für diese Entwicklung liegt u.a. darin, dass die Sozialversicherungspflicht – europaweit – vorwiegend an das Beschäftigungsverhältnis gekoppelt ist.[95] Heute allerdings haben sich die Rahmenbedingungen geändert: Durch die Globalisierung und Digitalisierung sind nun neue Arbeits- und Innovationsmöglichkeiten entstanden. Somit ist der Arbeitsmarkt flexibler geworden. Das ist grundsätzlich von Vorteil, weil Flexibilität auch dem Abbau von Arbeitslosigkeit dienen kann. Allerdings treten immer häufiger Abgrenzungsschwierigkeiten zwischen abhängig Beschäftigten und Selbstständigen auf. Um Sozialabgaben einzusparen, vergeben Unternehmen bestimmte Aufträge, etwa im IT-Sektor, immer häufiger extern und verzichten auf die Beschäftigung eigener Arbeitnehmer. Diese Entwicklung birgt soziale Risiken für die wachsende Zahl der Selbstständigen in Europa. Diese Menschen sind nicht obligatorisch abgesichert (in Deutschland sind das rund drei Millionen Selbstständige) und so fehlt es ihnen häufig am notwendigen sozialen Schutz.[96] Deutschland ist im EU-weiten Vergleich bei der sozialen Sicherung Selbstständiger eines der Schlusslichter.[97] Dies zeigt sich deutlich am Beispiel des Schutzes vor dem biometrischen Risiko der Langlebigkeit[98] durch die gesetzliche Rentenversicherung: Versicherungspflichtig kraft Gesetz sind

[92] WKO Statistik, Eurostat, ILO, Selbstständigenquote, Stand 2020, Aktualisierung Mai 2021, online unter: http://wko.at/statistik/eu/europa-selbstaendigenquote.pdf.

[93] M. Matsaganis et al., Non-standard employment and access to social security benefits, 2016.

[94] Eine interessante Analyse zur Existenzsicherung in der Coronakrise u. a. auch für Selbstständige findet sich in U. Becker et al., Protecting Livelihoods in the COVID-19 Crisis: Legal Comparison of Measures to Maintain Employment, the Economy and Social Protection, MPI working papers law, Volume 7, November 2020, online unter: https://www.mpisoc.mpg.de/en/social-law/publications/detail/publication/protecting-livelihoods-in-the-covid-19-crisis-legal-comparison-of-measures-to-maintain-employment-the-economy-and-social-protection-1/.

[95] Vgl. Deutschland: Arbeitslosenversicherung (§ 24 Abs. 1 SGB III), gesetzliche Krankenversicherung (§ 5 Abs. 1 SGB V), gesetzliche Rentenversicherung (§ 1 Nr. 1 SGB VI), gesetzliche Unfallversicherung (§ 2 Abs. 1 Nr. 1 SGB VII), gesetzliche Pflegeversicherung (§ 20 Abs. 1 Nr. 1 SGB XI).

[96] Wissenschaftlicher Dienst, Deutscher Bundestag, Beschäftigung und Selbstständigkeit im Zusammenhang mit den Vorschlägen zur Einbeziehung von Selbstständigen in die gesetzliche Rentenversicherung, Az. WD 6 – 3000 – 09/20, 18.11.2020, S. 7.

[97] U. Becker, Die soziale Sicherung Selbstständiger in Europa, Zeitschrift für europäisches Sozial- und Arbeitsrecht (ZESAR) 2018, 307, 308.

[98] Wissenschaftlicher Dienst, Deutscher Bundestag, Beschäftigung und Selbstständigkeit im Zusammenhang mit den Vorschlägen zur Einbeziehung von Selbstständigen in die gesetzliche Rentenversicherung, Az. WD 6 – 3000 – 09/20, 18.11.2020, S. 1.

gemäß § 2 Satz 1 SGB VI lediglich bestimmte Gruppen von Selbstständigen, die der Gesetzgeber als besonders schutzbedürftig eingestuft hat.[99] Zu denken ist etwa an Hebammen (Nr. 3) oder Personen, die selbst regelmäßig keinen versicherungspflichtigen Arbeitnehmer beschäftigen und auf Dauer und im Wesentlichen nur für einen Auftraggeber tätig sind (Nr. 9). So ist es auch nicht verwunderlich, dass nach Zahlen des Bundesministeriums für Arbeit und Soziales (BMAS) immerhin 3,3 Millionen Selbstständige in Deutschland nicht über eine obligatorische Alterssicherung geschützt sind. Lediglich 300.000 von ihnen sind in der gesetzlichen Rentenversicherung und 600.000 über Versorgungswerke bzw. Alterssicherung der Landwirte abgesichert.[100]

Um diese Sicherungslücken zu schließen, haben sich einige EU-Mitgliedstaaten um eine zeitgemäße Anpassung ihrer Arbeitsmarkteinrichtungen und Sozialschutzsysteme bemüht. Von 2017 bis 2019 haben einige Mitgliedstaaten Reformen beim Zugang zu ihren Sozialschutzsystemen für Selbstständige vorgenommen. So hat etwa Belgien verschiedene Initiativen in die Wege geleitet, um eine „Elternzeit" für Selbstständige einzuführen.[101] Auch in Deutschland hat es immer wieder Vorstöße für Reformen gegeben; besondere Aufmerksamkeit hat in jüngerer Vergangenheit der Vorschlag zur Einbeziehung Solo-Selbstständiger in die gesetzliche Rentenversicherung (mit Befreiungsmöglichkeit) erregt.[102] Weil sich im Zuge der Covid-19-Pandemie gezeigt hat, dass gerade Selbstständige von den Sozialsystemen nicht hinreichend erfasst werden, haben einige Mitgliedstaaten die Arbeitslosen- und Krankenversicherungen vorübergehend auch für Selbstständige geöffnet.[103] Insgesamt zeigt sich aber, dass die Reformansätze noch sehr unterschiedlich und vielfach unzureichend sind.[104] Es besteht Bedarf nach einer vertieften Auseinandersetzung mit den Möglichkeiten und Grenzen

[99] Wissenschaftlicher Dienst, Deutscher Bundestag, Beschäftigung und Selbstständigkeit im Zusammenhang mit den Vorschlägen zur Einbeziehung von Selbstständigen in die gesetzliche Rentenversicherung, Az. WD 6 – 3000 – 09/20, 18.11.2020, S. 3.

[100] BMAS, Gesetzliche Rentenversicherung, Stand 04.08.2021, online abrufbar unter: https://www.bmas.de/DE/Soziales/Rente-und-Altersvorsorge/Fakten-zur-Rente/Gesetzliche-Rentenversicherung/gesetzliche-rentenversicherung.html.

[101] SWD(2021)-46, S. 82.

[102] Übersicht bei Wissenschaftlicher Dienst, Deutscher Bundestag, Beschäftigung und Selbstständigkeit im Zusammenhang mit den Vorschlägen zur Einbeziehung von Selbstständigen in die gesetzliche Rentenversicherung, Az. WD 6 – 3000 – 09/20, 18.11.2020, S. 9. So etwa der Vorschlag bei U. Preis/F. Temming, Für ein modernes Rentenrecht: Die Einbeziehung von Selbständigen in die gesetzliche Rentenversicherung (GRV), Forschungsbericht Nr. 487, Bundesministerium für Arbeit und Soziales, Juli 2017, online unter: https://www.bmas.de/SharedDocs/Downloads/DE/PDFPublikationen/Forschungsberichte/fb-487-fuer-ein-modernes-rentenrecht.pdf?__blob=publicationFile&v=1. Siehe auch bspw. die Forderungen des Bundesverbands für Schauspiel (BFFS), online unter: https://www.bffs.de/download/Rentenversicherungspflicht-fuer-Selbstaendige.pdf.

[103] SWD(2021)-46 S. 83.

[104] So auch der Befund bei U. Becker, Die soziale Sicherung Selbstständiger in Europa, Zeitschrift für europäisches Sozial- und Arbeitsrecht (ZESAR) 2018, 307.

einer EU-weiten Initiative zum Schutz Selbstständiger. Wenngleich die EU-Kompetenzen in diesem Bereich beschränkt sind, so ist doch ein abgestimmtes Vorgehen der Mitgliedstaaten geboten, um die Lebens- und Arbeitsbedingungen ihrer Bürger sozial und nachhaltig zu gestalten.

Vorstöße wie etwa die Initiative der Europäischen Säule Sozialer Rechte (ESSR) sind daher zu begrüßen.[105] Die ESSR wurde am 27. April 2017 auf der Grundlage von Art. 292 AEUV vom Europäischen Parlament, dem Rat und der Europäischen Kommission proklamiert.[106] Gemäß Erwägungsgrund 14 stellt die ESSR-Grundsätze auf, „die im Europa des 21. Jahrhunderts für faire und gut funktionierende Arbeitsmärkte und Sozialsysteme unerlässlich sind". Bemerkenswert ist, dass die ESSR die Rolle der Selbstständigen hervorhebt und damit die zuweilen erschwerte Lebenssituation dieser Menschen adressiert. Diese Initiative ist zu begrüßen; sie setzt dort an, wo der digitalisierungs- und globalisierungsbedingte Wandel der Erwerbsformen seinen sozialen Schatten wirft. Die ESSR enthält zwanzig Vorschriften, verteilt über die Kapitel „Chancengleichheit und gleichberechtigter Zugang zum Arbeitsmarktzugang", „Faire Arbeitsbedingungen" sowie „Sozialschutz und Inklusion". Obwohl die ESSR rechtlich unverbindlich ist und mangels entsprechender unionsrechtlicher Kompetenz auch keine politische Leitlinie für Maßnahmen der EU darstellt, bietet sie einen wichtigen Orientierungsrahmen, um in den Mitgliedstaaten Reformen für die soziale Sicherung Selbstständiger anzustoßen.[107]

Im Rahmen des Nationalen Reformenprogramms 2022[108] geht das Bundesministerium für Wirtschaft und Klimaschutz (BMWK) auf die Umsetzung der ESSR ein und formuliert: „Die Bundesregierung unterstützt das Anliegen, die soziale Dimension der EU durch die Umsetzung aller 20 Grundsätze der Europäischen Säule sozialer Rechte (ESSR) weiterzuentwickeln und zu stärken. Ziel ist es, soziale Ungleichheiten innerhalb der EU zu reduzieren, Verwerfungen an den Arbeitsmärkten auch aufgrund externer Schocks zu mindern und den sozialen Schutz zu verbessern. Die Maßnahmen des 2021 durch die EU-Kommission vorgelegten Aktionsplans zur weiteren Umsetzung der ESSR können einen Beitrag dazu leisten, Armut und sozialer Ausgrenzung auch infolge der Covid-19-Pandemie weiter entgegenzuwirken. Dazu tragen auch die Mittel des Europäischen Sozialfonds Plus und des RRF bei. Auf nationaler Ebene trägt

[105] COM (2017) 250 final: Mitteilung der Kommission an das Europäische Parlament, den Rat, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen v. 26.04.2017.

[106] Empfehlung (EU) 2017/761 der Kommission v. 26.04.2017 zur europäischen Säule sozialer Rechte.

[107] Kritisch B. Hüpers/B. Rees, in: Meyer/Hölscheidt, Charta der Grundrechte der Europäischen Union, 5. Aufl. 2019, Vorbemerkungen Art. 27 GRCh Rn. 22.

[108] BMWK, Nationales Reformenprogramm 2022, online unter: https://www.bmwk.de/Redaktion/DE/Publikationen/Europa/nationales-reformprogramm-2022.pdf?__blob=publicationFile&v=12.

die Bundesregierung mit konkreten Maßnahmen zur Umsetzung der ESSR-Grundsätze bei. Bei gesetzgeberischen und politischen Initiativen werden die Sozialpartner und betroffenen Verbände einbezogen. Anhang III enthält eine Übersicht über die wichtigsten seit 2017 ergriffenen politischen Maßnahmen. Hervorzuheben sind u.a. das ausgeweitete Bundesprogramm „Ausbildungsplätze sichern", der „Digitalpakt Alter" und das Teilhabechancengesetz, das auch der Umsetzung der beschäftigungspolitischen Leitlinien und zur Erreichung der EU 2030-Kernziele im Bereich Armutsbekämpfung dient. Auch der Koalitionsvertrag für die 20. Legislaturperiode enthält eine Reihe von Maßnahmen, die zur Umsetzung der ESSR beitragen. Vorhaben mit besonderer Bedeutung für die Umsetzung der ESSR sind die Erhöhung des Mindestlohns, die Einführung eines Bürgergeldes und die für 2023 anvisierte Einführung einer Bildungs(teil)zeit nach österreichischem Vorbild."[109]

Diese Ausführungen sind nicht nur als Lippenbekenntnis aufzufassen, sondern zeugen davon, dass ein Bewusstsein für die ESSR und das damit verbundene Anliegen geschaffen wurde. Ganz konkret nimmt die deutsche Politik die Plattformökonomie zunehmend in den Blick. So wird politisch seit geraumer Zeit über eine Pflicht zur Rentenversicherung für Selbstständige diskutiert oder einen Anspruch auf Krankengeld, Mutterschutz und Urlaub, ferner über Kündigungsfristen und auch über eine erleichterte Möglichkeit, den eigenen Beschäftigungsstatus zu klären.[110]

Auch auf Ebene der höchstrichterlichen Judikatur zeichnet sich ein neues Bewusstsein ab. Jüngst hat sich das BAG mit der rechtlichen Situation von Crowdworkern befassen müssen und erstmals Klarheit geschaffen.[111] Geklagt hatte ein Mann, der für ein „Crowdsourcing-Unternehmen" tätig war und Aufträge von dessen Kunden annahm. Die Tätigkeit bestand unter anderem darin, Produktregale in Läden und an Tankstellen zu fotografieren (teilweise mit Voranmeldung, teilweise auch als „Mystery Guest") oder Fragen zu einem Werbeplakat an einer Bushaltestelle zu beantworten. Diese Aufträge – auch Microjobs genannt – empfing der Kläger über eine App auf seinem Smartphone, das seinen Standort per GPS übermittelte; bezahlt wurde per Paypal. Die Tätigkeit erfolgte aufgrund einer „Basis-Vereinbarung" zwischen dem Kläger und dem „Crowdsourcing-Unternehmen". Ein konkretes Auftragsvolumen war darin nicht vereinbart; der Kläger durfte überdies selbst entscheiden, welche Aufträge er übernahm. Zwischen

[109] BMWK, Nationales Reformenprogramm 2022, S. 55, online unter: https://www.bmwk.de/Redaktion/DE/Publikationen/Europa/nationales-reformprogramm-2022.pdf?__blob=publicationFile&v=12.

[110] Siehe etwa BMAS, Faire Arbeit in der Plattformökonomie, 2020, online unter: https://www.denkfabrik-bmas.de/fileadmin/Downloads/eckpunkte-faire-plattformarbeit_1_.pdf.

[111] BAG, Urt. v. 01.12.2020 – 9 AZR 102/20.

dem Kläger und den Kunden der Plattform sollte kein Vertrag zustande kommen; auch durfte der Kläger eigene Mitarbeiter engagieren und Unteraufträge vergeben. Für 20 Stunden Tätigkeit pro Woche erhielt er monatlich rund 1.750 €. Nach gut einem Jahr kündigte ihm das Unternehmen. Dagegen wehrt sich der Kläger. Obwohl er eine Gewerbeanmeldung hatte, hielt er sich nicht für selbstständig, sondern für einen Arbeitnehmer mit unbefristetem Arbeitsverhältnis. Das AG und das LAG München teilten diese Einschätzung nicht: Der Kläger sei nicht weisungsabhängig und auch nicht in die betriebliche Organisation der Beklagten eingebunden; dies ist nach § 611a BGB erforderlich, um als Arbeitnehmer zu gelten. Anders wiederum das BAG im Rahmen der Revision: Die Erfurter Richter stellten klar, dass der Kläger zum Zeitpunkt Kündigung Arbeitnehmer des Plattformbetreibers gewesen sei. Für die Arbeitnehmereigenschaft gemäß § 611a BGB komme es darauf an, dass der Beschäftigte weisungsgebundene, fremdbestimmte Arbeit in persönlicher Abhängigkeit leiste. Zeige die tatsächliche Durchführung eines Vertragsverhältnisses, dass es sich um ein Arbeitsverhältnis handele, sei die Bezeichnung im Vertrag unerheblich. Die Gesamtwürdigung aller Umstände könne demnach, so wie im vorliegenden Fall, ergeben, dass Crowdworker als Arbeitnehmer zu behandeln seien. Hier habe der Kläger „in arbeitnehmertypischer Weise weisungsgebundene und fremdbestimmte Arbeit in persönlicher Abhängigkeit" geleistet. Zwar sei er vertraglich nicht dazu verpflichtet gewesen, die Angeboten der Beklagten anzunehmen. Die Organisationsstruktur der Beklagten sei aber darauf ausgerichtet, weisungsgebundene Tätigkeiten zu verrichten. Diese Entscheidung schafft nun Klarheit zur Rechtsstellung von Crowdworkern und stärkt ihre Rechte gegenüber Plattformbetreibern.

Frage 9:

Siehe dazu bereits Frage 8.

Frage 10:

Soziale Rechte enthält die GRCh in Titel IV (Art. 27–38). Titel IV umfasst zunächst Gewährleistungen zur Arbeit (Art. 27–33 GRCh), ferner Garantien zum Schutz der Familie (Art. 33 Abs. 1 GRCh), zur sozialen Sicherheit (Art. 34 GRCh), zum Schutz der Gesundheit (Art. 35 GRCh), zum Zugang zu Dienstleistungen von allgemeinem wirtschaftlichen Interesse (Art. 36 GRCh), zum Schutz der Umwelt (Art. 37 GRCh) und zum Verbraucherschutz (Art. 38 GRCh). Bekanntlich hat die EU auf dem Gebiet der Sozialpolitik gemäß Art. 4 Abs. 2 lit. b AEUV jedoch nur beschränkte Kompetenzen und nach Art. 153 Abs. 5 AEUV ist die Union „nicht für das Arbeitsentgelt, das Koalitionsrecht, das Streikrecht sowie das

Aussperrungsrecht" zuständig. Überdies stehen die Gewährleistungen in Art. 27, 28, 30, 34, 35 und 36 GRCh unter dem Vorbehalt des Unionsrechts und/oder der einzelstaatlichen Rechtsvorschriften und Gepflogenheiten. Ferner stellt Art. 6 Abs. 1 UAbs. 2 EUV klar, dass die GRCh die beschränkten EU-Kompetenzen nicht erweitert. Es fragt sich daher, in welchem Rahmen und mit welchem materiellen Gehalt die Art. 27–38 GRCh eine rechtsverbindliche Wirkung für die Mitgliedstaaten entfalten können.

Einigkeit besteht zunächst darüber, dass die GRCh gemäß Art. 51 Abs. 1 Satz 1 Var. 1 GRCh stets für die Organe der EU gilt.[112] Diese sind sowohl beim Erlass von Rechtsakten als auch bei tatsächlichem Handeln an die GRCh gebunden.[113] Würden nämlich die Handlungen der Unionsorgane nach nationalem Recht beurteilt, wäre die einheitliche Geltung des Unionsrechts nicht gewährleistet. Andererseits entstünden Lücken im supranationalen Grundrechtsschutz,[114] wenn die EU nicht an die mitgliedstaatlichen Grundrechte gebunden wäre.[115] Die Schutzlücken würden zu Legitimationsverlusten des unionsrechtlichen Anwendungsvorrangs führen. Um einem solchen Befund vorzubeugen, muss das Unionsrecht seinerseits einen umfassenden Grundrechtsschutz bieten.[116] Daher ist die GRCh für die Unionsorgane rechtsverbindlich (Art. 6 Abs. 1 EUV). Für die Mitgliedstaaten ist die GRCh dagegen ausschließlich bei der „Durchführung von Unionsrecht" bindend. Dies ergibt sich aus Art. 51 Abs. 1 Satz 1 Var. 2 GRCh.[117] Bei der „Durchführung von Unionsrecht" sind die nationalen Grundrechte wegen des unionsrechtlichen Anwendungsvorrangs nämlich nicht anwendbar. Um mögliche Lücken im Grundrechtsschutz zu schließen, sind die Mitgliedstaaten „als verlängerter Arm der EU"[118] an die europäischen Grundrechte gebunden.[119] Für die Mitgliedstaaten gelten die Vorschriften in

[112] Dass Art. 28 GRCh von den Unionsorganen beim Erlass von Rechtsakten und tatsächlichem Handeln beachtet werden muss, ist selbstredend. Hierauf soll aber nicht näher eingegangen werden. Vielmehr interessiert die Frage, inwiefern und mit welchem Gewährleistungsgehalt Art. 28 GRCh für *mitgliedstaatliches* Handeln gilt. Dieser Frage wird im Folgenden nachgegangen.

[113] H. D. Jarass, Zum Verhältnis von Grundrechtecharta und sonstigem Recht, EuR 2013, 29, 37.

[114] H.-G. Dederer, Die Architektonik des europäischen Grundrechtsraums, ZaöRV 2006, 575, 583 f.; F. J. Lindner, Grundrechtsschutz im europäischen Mehrebenensystem – eine systematische Einführung, Jura 2008, 401, 404; V. Skouris, in: Merten/Papier, Handbuch der Grundrechte, Band VI/1, § 157, Rn. 11.

[115] A. Haratsch, in: Merten/Papier, Handbuch der Grundrechte, Band VI/1, § 165, Rn. 1 f.

[116] T. C. Ludwig, Zum Verhältnis zwischen Grundrechtecharta und allgemeinen Grundsätzen, EuR 2011, 715, 718 f.

[117] H. J. Willemsen/A. Sagan, Die Auswirkungen der europäischen Grundrechtecharta auf das deutsche Arbeitsrecht, NZA 2011, 258.

[118] T. C. Ludwig, Zum Verhältnis zwischen Grundrechtecharta und allgemeinen Grundsätzen, EuR 2011, 715, 719.

[119] C. Wagner, Der Arbeitskampf als Gegenstand des Rechts der Europäischen Union, 2010, S. 58; H. J. Willemsen/A. Sagan, Die Auswirkungen der europäischen Grundrechtecharta auf das deutsche Arbeitsrecht, NZA 2011, 258.

Art. 27 ff. GRCh also dann, wenn der Anwendungsbereich des Unionsrechts eröffnet und das mitgliedstaatliche Handeln nach Unionsrecht zu beurteilen ist.[120] Daher ist von einer „Akzessorietät" der Unionsgrundrechte die Rede. Das bedeutet, dass die Art. 27 ff. GRCh dann anwendbar sind, wenn die Union eine Regelungskompetenz besitzt.[121] Ausdrücklich verbieten jedoch Art. 51 Abs. 2 GRCh und Art. 6 Abs. 1 Satz 2 EUV eine Kompetenzerweiterung der EU. Danach erstreckt die Charta den Geltungsbereich des Unionsrechts nicht über die Zuständigkeiten der EU hinaus und begründet keine neuen Kompetenzen. Aus Art. 27 ff. GRCh können also keine ungeschriebenen Kompetenzen der EU hergeleitet werden. Auch in Bereichen, in denen die EU ausdrücklich nur beschränkte bzw. keine Regelungsbefugnis hat (siehe Art. 4 Abs. 2 lit. b und Art. 153 Abs. 5 AEUV), sind die Mitgliedstaaten nach überzeugender Ansicht aber jedenfalls an unionsrechtliche Mindestvorgaben gebunden, wenn der EU eine „Mit"-Regelungskompetenz zukommt; dies ist einerseits dann anzunehmen, wenn die genannten Regelungsmaterien mittelbar Gegenstand einer Unionskompetenz sind und andererseits bei „Grundfreiheitsrelevanz", d.h., wenn ein Bezug zu den Grundfreiheiten besteht. In diesen Fällen sind auch die Vorgaben der GRCh zu berücksichtigen. Gleichwohl ist der Einflussbereich dieser Vorgaben wegen Art. 4 Abs. 2 lit. b AEUV und Art. 153 Abs. 5 AEUV sehr begrenzt und überdies steht den Mitgliedstaaten ein weiter Ausgestaltungsspielraum zu.[122]

Sehr zurückhaltend geht die Rechtsprechung hierzulande mit den Gewährleistungen in Art. 27 ff GRCh um. Zwar rekurrieren die Gerichte teilweise auf die Art. 27 ff. GRCh, allerdings überwiegend, um bestehende Rechtsauffassungen zu bestätigen. Nähere Ausführungen zur Rechtsverbindlichkeit und zum materiellen Gehalt fehlen in der Regel. So hieß es etwa in einer Entscheidung des BAG aus dem Jahr 2019 zum Streikrecht: „Das in Art. 28 GRCh gewährleistete Recht auf Kollektivverhandlungen muss im Geltungsbereich des Unionsrechts im Einklang mit diesem ausgeübt werden."[123] Ähnlich lauteten auch die Ausführungen des BAG in einem Vorlagebeschluss aus dem Jahr 2020.[124] Mit Blick auf Art. 27 GRCh formulierte das BAG in einer Entscheidung aus demselben Jahr, dass Art. 27 GRCh nur die Verpflichtung zur Unterrichtung und Anhörung konturiere, und zwar offensichtlich nicht in einer über einschlägige Richtlinienbestimmung hinausgehenden Art und Weise.[125] Auch zu Art. 30 GRCh hat sich das BAG mehrfach geäußert. Überwiegend haben die Erfurter Richter einen Einfluss auf

[120] C. Wagner, Der Arbeitskampf als Gegenstand des Rechts der Europäischen Union, 2010, S. 57.
[121] C. Wagner, Der Arbeitskampf als Gegenstand des Rechts der Europäischen Union, 2010, S. 57 f.
[122] Zum Ganzen siehe G. Buchholtz, Streiken im europäischen Grundrechtsgefüge, 2014, S. 355 ff.
[123] BAG, Urt. v. 22.10.2019 – 9 AZR 71/19.
[124] BAG, Beschl. v. 11.11.2020 – 10 AZR 185/20, Rn. 44.
[125] BAG, Beschl. v. 29.09.2020 – 1 ABR 32/19, Rn. 29.

das nationale Recht aber verneint[126] oder haben sich lediglich auf eine Wiedergabe des Wortlauts der Vorschrift beschränkt.[127] Ähnlich sind auch die Instanzgerichte verfahren.[128]

Auch zu Art. 28 GRCh haben sich die nationalen Gerichte, insbesondere die Verwaltungsgerichte des Öfteren geäußert, eine Anwendbarkeit der Vorschrift jedoch stets verneint. So hat etwa das Bundesverwaltungsgericht (BVerwG) in einer Entscheidung aus dem Jahr 2014 ausgeführt, dass die Charta nach Art. 51 Abs. 1 Satz 1 GRCh für die Mitgliedstaaten ausschließlich bei der Durchführung von Unionsrecht gelte. Nach der Kollisionsregel in Art. 51 Abs. 2 GRCh, so das BVerwG weiter, dehne die Charta den Geltungsbereich des Unionsrechts nicht über die Zuständigkeiten der Union aus; sie begründe weder neue Zuständigkeiten noch neue Aufgaben der Union. Daher sei das Recht der Mitgliedstaaten nur dann an den Grundrechten der Charta zu messen, wenn es in den Geltungsbereich des Unionsrechts falle. Daraus folgerte das Gericht, dass bei Regelungen des kollektiven Arbeitsrechts – gleich welchen Inhalts – keine Bindung an Art. 28 GRCh bestehe, weil dieses Rechtsgebiet nicht nach den Vorgaben des Unionsrechts auszurichten sei.[129]

Insgesamt zeigt sich, dass die Gerichte eine nähere Auseinandersetzung mit dem materiellen Gehalt der Gewährleistungen in Titel IV häufig scheuen. Sie ziehen sich darauf zurück, dass nationales Recht mit den Vorgaben der GRCh in Einklang stehe und verweisen im Übrigen darauf, dass eine Anwendbarkeit der GRCh nur im Anwendungsbereich des Unionsrechts möglich sei. Diese Haltung führt dazu, dass eine Auseinandersetzung mit dem materiellen Gehalt der Art. 27 ff. GRCh gar nicht stattfindet, was im Zweifel einer vollen Wirksamkeit der sozialrechtlichen Gewährleistungen abträglich sein kann. Unberücksichtigt bleibt insbesondere auch der Umstand, dass einige Gewährleistungen der GRCh eine Horizontalwirkung, d.h. eine mittelbare Drittwirkung zwischen Privatpersonen nahelegen. Das gilt insbesondere für die Gewährleistungen im Arbeitsrecht. Diese sind naturgemäß auf Privatrechtsverhältnisse zugeschnitten.[130] Auch Art. 28 GRCh würde ohne Horizontalwirkung nahezu leerlaufen.[131]

[126] So etwa BAG, Urt. v. 05.12.2012 – 7 AZR 698/11, Rn. 18; BAG, Beschl. v. 08.12.2011 – 6 AZN 1371/11, Rn. 8.

[127] BAG, Urt. v. 20.06.2018 – 7 AZR 690/16, Rn. 47.

[128] Siehe etwa AG Stuttgart, Urt. v. 21.12.2016 – 26 Ca 735/16.

[129] BVerwG, Urt. v. 27.02.2014 – 2 C 1/13.

[130] J. Heuschmid, Horizontalwirkung von Art. 27 Europäische Grundrechtecharta – Fehlanzeige?, EuZA 2014, 514, 522.

[131] J. Heuschmid, Horizontalwirkung von Art. 27 Europäische Grundrechtecharta – Fehlanzeige?, EuZA 2014, 514, 522.

Frage 11:

Im globalisierten Handel verletzen Unternehmen oftmals grundlegende Menschenrechte. Um diesen Missstand zu beseitigen, müssen Unternehmen, die im Ausland Vorleistungsgüter oder Fertigerzeugnisse erwerben, in die Verantwortung genommen werden.

Die Bundesregierung hat sich in ihrem Koalitionsvertrag von 2018 dazu verpflichtet, unternehmerische Sorgfaltspflichten gesetzlich einzufordern, wenn die deutschen Großunternehmen bis 2020 nicht im Wege einer freiwilligen Selbstverpflichtung für die Einhaltung entsprechender Standards sorgen.[132] Laut Koalitionsvertrag sollte die Einhaltung der menschenrechtlichen Standards überprüft werden. Falls diese Untersuchung, so hieß es im Koalitionsvertrag, „zu dem Ergebnis kommt, dass die freiwillige Selbstverpflichtung der Unternehmen nicht ausreicht, werden wir national gesetzlich tätig und uns für eine EU-weite Regelung einsetzen."[133] Dieses Vorhaben geht auf den Nationalen Aktionsplan Wirtschaft und Menschenrechte der Bundesregierung (NAP) aus dem Jahr 2016 zurück; darin hat die Bundesregierung die Verantwortung deutscher Unternehmen für die Wahrung der Menschenrechte betont.[134] Der Aktionsplan basiert wiederum auf den UN-Leitprinzipien für Wirtschaft und Menschenrechte von 2011; sie sollen die Einhaltung der Menschenrechte in Wirtschaftsbezügen wahren. Die Überprüfung ergab allerdings, dass lediglich 13 bis 17% der Unternehmen die gestellten Anforderungen erfüllten. Weitere 10 bis 12% der Unternehmen, so ergab die Untersuchung, befanden sich „auf einem guten Weg". Damit wurde das von der Bundesregierung im Koalitionsvertrag gesetzte Ziel verfehlt.[135]

In Reaktion auf diesen Missstand und um den Schutz der Umwelt, Menschen- und Kinderrechte entlang globaler Lieferketten zu verbessern, hat die Bundesregierung am 22. Juli 2021 das Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten veröffentlicht. Das sog. Lieferkettengesetz (LkSG) tritt am 1. Januar 2023 in Kraft. Das Gesetz regelt die unternehmerische Verantwortung für die Einhaltung von Menschenrechten in den Lieferketten. Es soll die internationale Menschenrechtslage verbessern, indem es Kriterien für ein verantwortliches

[132] Koalitionsvertrag zwischen CDU, CSU und SPD 2018, Ein neuer Aufbruch für Europa, eine neue Dynamik für Deutschland, ein neuer Zusammenhalt für unser Land, S. 156.

[133] Koalitionsvertrag zwischen CDU, CSU und SPD 2018, Ein neuer Aufbruch für Europa, eine neue Dynamik für Deutschland, ein neuer Zusammenhalt für unser Land, S. 156.

[134] BMAS, Nationaler Aktionsplan Wirtschaft und Menschenrechte, online unter: https://www.csr-in-deutschland.de/DE/Wirtschaft-Menschenrechte/NAP/nap.html.

[135] Auswärtiges Amt, Monitoring zum Nationalen Aktionsplan Wirtschaft und Menschenrechte v. 13.10.2020, online unter: https://www.auswaertiges-amt.de/de/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoring-nap/2124010.

Lieferkettenmanagement für bestimmte Unternehmen definiert. „Unternehmen erhalten einen klaren, verhältnismäßigen und zumutbaren gesetzlichen Rahmen zur Erfüllung der menschenrechtlichen Sorgfaltspflichten.“[136] Das Gesetz enthält zudem behördliche Durchsetzungsmechanismen. Das Gesetz begründet zudem eine Pflicht der Unternehmen, sich um die Wahrung der genannten Anforderungen zu bemühen (Bemühenspflicht), aber weder eine Erfolgspflicht noch eine Garantiehaftung.

Auch das Vergaberecht lässt sich nutzbar machen, um soziale Aspekte bei der öffentlichen Auftragsvergabe zu berücksichtigen.[137] Im Jahr 2016 hat in Deutschland eine umfassende Reform des Vergaberechts stattgefunden, die unionsrechtliche Vorgaben umsetzt. Seitdem ist in § 97 Abs. 3 und § 128 Abs. 1 Satz 4 des Gesetzes gegen Wettbewerbsbeschränkungen (GWB) ausdrücklich normiert, dass soziale Aspekte bei der öffentlichen Auftragsvergabe berücksichtigt werden können.[138] Im Übrigen ist auch die Einhaltung des MiLoG und des AEntG zwingende Voraussetzung der öffentlichen Auftragsvergabe (vgl. § 124 Abs. 2 GWB). Ferner haben bis auf Bayern auch alle Bundesländer eigene Vergabegesetze erlassen, die Vergabemindestlöhne und vergabespezifische Tariftreuepflichten enthalten. Danach dürfen öffentliche Aufträge nur an Unternehmen vergeben werden, die ihren Beschäftigten die geltenden Mindestlöhne nach dem AEntG zahlen. Diese Vorgaben sind mit dem Europarecht vereinbar.[139] Es soll ausgeschlossen werden, dass Bieter über die Lohnkosten in einen Unterbietungswettbewerb treten (vgl. § 4 Abs. 2 AEntG).[140] Auch darüber hinaus „können“ soziale Aspekte bei der Auftragsvergabe berücksichtigt werden (vgl. § 97 Abs. 3 und § 127 Abs. 1 S. 1 GWB).[141] So darf ein öffentlicher Auftraggeber bspw. bei seiner Ausschreibung die Einhaltung von ILO-Kernarbeitsnormen fordern oder ein Produkt aus fairem Handel bei der Vergabeentscheidung bevorzugen, selbst wenn das „faire“ Produkt eigentlich teurer ist.[142]

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136 BMAS, Sorgfaltspflichtengesetz, online unter: https://www.bmas.de/DE/Service/Gesetze-und-Gesetzesvorhaben/gesetz-unternehmerische-sorgfaltspflichten-lieferketten.html#:~:text=Rahmenbedingungen%20f%C3%BCr%20Unternehmen-,Unternehmen%20erhalten%20einen%20klaren%2C%20verh%C3%A4ltnism%C3%A4%C3%9Figen%20und%20zumutbaren%20gesetzlichen%20Rahmen%20zur,benannt%20und%20mit%20Eingriffsbefugnissen%20ausgestattet.

137 Zum Ganzen G. Buchholtz, Schutz von Arbeits- und Sozialstandards im Rahmen der Organisation für wirtschaftliche Zusammenarbeit und Entwicklung (OECD), in: Schlachter/Heuschmid/Ulber (Hrsg.), Arbeitsvölkerrecht, 2019, S. 449, 456 f.

138 Näheres bei H. Pünder/G. Buchholtz, Einführung in das Vergaberecht (Teil 2): Auswahlkriterien, Verfahrensarten und Rechtsschutzmöglichkeiten, JURA 2016, 1358, 1360.

139 EuGH, Urt. v. 03.04.2008 – C-346/06 (Rüffert); nunmehr ausdrücklich bestätigt durch EuGH, Urt. v. 17.11.2015 – C-115/14 (Regio Post).

140 C. Latzel, Soziale Aspekte bei der Vergabe öffentlicher Aufträge nach der Richtlinie 2014/24/EU, NZBau 2014, 673.

141 Siehe dazu auch A. Schultz/C. Scherrer, Mitbestimmung in Zulieferketten, Instrumente der deutschen Außenwirtschaftspolitik, 2016, S. 61.

142 A. Schultz/C. Scherrer, Mitbestimmung in Zulieferketten, Instrumente der deutschen Außenwirtschaftspolitik, 2016, S. 61 m.w.N.

Überdies kann die Nichteinhaltung sozialrechtlicher Standards ein Ausschlussgrund vom Vergabeverfahren sein. Gesetzlicher Anknüpfungspunkt ist § 124 Abs. 1 Nr. 1 GWB. Diese Vorschrift sieht einen fakultativen Ausschluss vom Vergabeverfahren vor, wenn ein Unternehmen bei der Ausführung öffentlicher Aufträge nachweislich gegen geltende umwelt-, sozial- oder arbeitsrechtliche Verpflichtungen verstoßen hat. Um bei menschenrechtswidrigem Verhalten die notwendige Publizität zu schaffen und öffentlichen Auftraggebern die relevanten Informationen zu liefern, wäre außerdem die Einführung eines entsprechenden Registers sinnvoll. Ähnliche Erwägungen liegen dem jüngst verabschiedeten Wettbewerbsregistergesetz (WRegG) zugrunde.[143] Nach § 1 Abs. 1 WRegG wird beim Bundeskartellamt „ein Register zum Schutz des Wettbewerbs um öffentliche Aufträge und Konzessionen (Wettbewerbsregister) eingerichtet und geführt". In das Register werden solche Unternehmen eingetragen, die nachweislich Straftaten oder andere schwerwiegende Rechtsverstöße begangen haben, die nach §§ 123, 124 GWB zum Ausschluss vom Vergabeverfahren führen (vgl. § 1 Abs. 2 WRegG). Welche Rechtsverstöße im Einzelnen einzutragen sind, folgt aus § 2 WRegG. Von Interesse sind im vorliegenden Kontext vor allem die Regelungen in § 2 Abs. 1 Nr. 2 lit. d und e WRegG, wonach Verstöße gegen § 21 Abs. 1 und 2 MiLoG bzw. Verstöße gegen § 23 Abs. 1 und 2 AEntG einzutragen sind. Mit der Einführung des Wettbewerbsregisters auf Bundesebene sollen die bereits bestehenden unterschiedlichen Landesregelungen vereinheitlicht werden, um eine einheitliche Informationsgrundlage bei der Auftragsvergabe zu schaffen.[144] Sinnvoll wäre es, wenn das Register im Hinblick auf die Einhaltung arbeits- und sozialrechtlicher Standards weiter ausgebaut würde. Damit wäre die notwendige Informationsgrundlage geschaffen, damit öffentliche Auftraggeber die Einhaltung menschenrechtlicher Standards bei ihrer Vergabeentscheidung berücksichtigen oder gar einen Ausschluss i.S.d. § 124 Abs. 1 Nr. 1 GWB erwägen könnten.

Neben den bereits erwähnten UN-Leitsätzen spielen auf völkerrechtlicher Ebene auch die Leitsätze der Organisation für wirtschaftliche Zusammenarbeit und Entwicklung (OECD-Leitsätze) eine wichtige Rolle zur Wahrung sozialrechtlicher Standards in den Wertschöpfungs- und Lieferketten.[145] Die OECD-Leitsätze sind Teil der „Erklärung der OECD über internationale Investitionen und multinationale Unternehmen". Die Leitsätze sollen dazu dienen, negative ökonomische, soziale und

[143] Zur Ausschussfassung siehe BT-Drs. 18/12583; zum ursprünglichen Gesetzentwurf siehe BT-Drs. 18/12051.

[144] Näheres zum Gesetzesentwurf bei A. Neun, Neuer Anlauf für ein Wettbewerbsregister auf Bundesebene, NZKart 2017, 181.

[145] G. Buchholtz, Schutz von Arbeits- und Sozialstandards im Rahmen der Organisation für wirtschaftliche Zusammenarbeit und Entwicklung (OECD), in: Schlachter/Heuschmid/Ulber (Hrsg.), Arbeitsvölkerrecht, 2019, S. 449 ff.

ökologische Konsequenzen von internationalen Investitionen zu vermeiden.[146] Sie verfügen über einen eigenständigen Überwachungsmechanismus mit nationalen Kontrollstellen.[147] Hierzu gibt es in jedem Staat sog. Nationale Kontaktstellen (NKS), mit deren Hilfe die Anwendung der Leitsätze vorangetrieben werden soll.[148] Die deutsche NKS ist beim heutigen BMWK angesiedelt. Aufgabe der NKS ist es, Beschwerden von Arbeitnehmerorganisationen, Nichtregierungsorganisationen (NGOs) oder einzelnen Betroffenen wegen Verstößen gegen die OECD-Leitsätze zu bearbeiten. Die NKS sollen den Bekanntheitsgrad der OECD-Leitsätze fördern, mit den Kontaktstellen fremder Staaten zusammenarbeiten, generelle und spezifische Anfragen zu den OECD-Leitsätzen beantworten und bei Beschwerden ein Forum zur Vermittlung zwischen den Parteien bereitstellen.[149] Das Ziel des Verfahrens besteht im Wesentlichen darin, zwischen den „beteiligten Parteien" zu vermitteln. Ferner nutzen verschiedene Akteure (bspw. NGOs und Gewerkschaften) die Beschwerdeverfahren häufig, um „ordentliche" Verfahren vor nationalen Gerichten zu unterstützen oder vorzubereiten.[150] Im Jahr 2015 hat die IG Metall eine solche Beschwerde wegen wiederholter Verletzung der OECD-Leitsätze gegen das Hyundai Entwicklungszentrum in Rüsselsheim eingelegt.[151] Hintergrund war, dass die Geschäftsleitung seit Jahren die Arbeit des Betriebsrats behindert haben soll. Der Betriebsrat habe seine Rechte fast immer einklagen müssen. Dies widerspreche – laut IG Metall – dem Grundsatz der vertrauensvollen Zusammenarbeit zwischen Betriebsrat und Arbeitgeber.[152] Kritisch ist allerdings der Umstand zu bewerten, dass es keine Instanz gibt, um die Einhaltung der von den NKS ausgesprochenen Empfehlungen zu überwachen. Wird eine Empfehlung nicht befolgt, bleibt den Beschwerdeführern lediglich die Möglichkeit, abermals Beschwerde einzulegen. Wenngleich die einzelnen Reformen immer noch auf die Befolgungsbereitschaft der Unternehmen angewiesen sind, stellen die Maßnahmen doch einen wichtigen Schritt zur mehr Rechtsverbindlichkeit dar.

[146] Daneben gibt es auch OECD-Leitsätze zur Corporate Governance, die insbesondere im Stakeholder-Chapter erfreulich klare Aussagen zur Mitbestimmung enthalten und die OECD-Leitsätze sozialrechtlich flankieren.

[147] OECD-Leitsätze, Neufassung 2011, S. 78.

[148] Vgl. OECD-Leitsätze, Neufassung 2011, S. 81.

[149] M. Kasolowsky/T. Voland, Die OECD-Leitsätze für multinationale Unternehmen und ihre Durchsetzung im Wege von Beschwerdeverfahren vor der Nationalen Kontaktstelle, NZG 2014, 1288, 1289; vgl. OECD-Leitsätze, Neufassung 2011, S. 78.

[150] M. Kasolowsky/T. Voland, Die OECD-Leitsätze für multinationale Unternehmen und ihre Durchsetzung im Wege von Beschwerdeverfahren vor der Nationalen Kontaktstelle, NZG 2014, 1288, 1289.

[151] Beschwerde gegen Hyundai online unter: https://www.igmetall.de/autohersteller-hyundai-15886.htm.

[152] Weitere Nachweise, online unter: https://www.igmetall.de/autohersteller-hyundai-15886.htm.

Frage 12:

Grundsätzlich besteht ein gewisses Spannungsfeld zwischen Maßnahmen zur Bekämpfung des Klimawandels und sozialer Gerechtigkeit: Maßnahmen zur Bekämpfung des Klimawandels sind teuer; auch Geringverdiener haben diese Maßnahmen mitzutragen. So dient beispielsweise die EEG-Umlage (Ökostromumlage) aus dem Jahr 2000 der Förderung des Ausbaus von Solar-, Wind-, Biomasse- und Wasserkraftwerken und wurde bei den Endkunden über die Stromrechnung erhoben.[153] Zwar hat sich dieses Problem mittlerweile entschärft, da Maßnahmen zur Senkung des angestiegenen Strompreises für alle ab dem 1. Juli 2022 ergriffen wurden. Seitdem ist die EEG-Umlage auf Null abgesenkt, sodass der Endverbraucher diese nicht mehr zu zahlen hat; ab Januar 2023 wird diese ganz abgeschafft. Allerdings trifft diese Entlastung alle Bürger ungeachtet der Einkommenssituation.

Weitere Beispiele liefert die derzeitige Förderung der E-Mobilität.[154] Die Förderung von E-Mobilität soll dem hohen CO2-Ausstoß entgegenwirken und den Umstieg auf E-Autos für die Bevölkerung erleichtern. Daher sind derzeit weiterhin Zuschüsse für die Anschaffung eines E-Autos vorgesehen.[155] Allerdings zeigt die Liste der förderungsfähigen Autos, dass die Preise für E-Autos sehr hoch sind und sich die sozial schwächeren Schichten diese trotz eines Zuschusses kaum leisten werden können. Die Förderung der E-Mobilität trägt daher kaum zur sozialen Gerechtigkeit bei.

Ebenso verhält es sich im Bereich der Förderung von Solaranlagen/Photovoltaik-Anlagen. Nach §§ 19 ff. EEG besteht ein Anspruch auf Einspeisevergütung. Kritisch ist allerdings auch hier zu beurteilen, dass die Anschaffung einer solchen Anlage mit hohen Kosten verbunden ist, sodass sich sozial schwächere Schichten dies auch mithilfe der Einspeisevergütung kaum leisten können.

Ähnlich verhält es sich bei Förderprogramme zur (energetischen) Sanierung. Im Zuge dessen werden zahlreiche Maßnahmen gefördert, z.B. energieeffizienter Neubau, Sanierung zum Effizienzhaus, Ladestationen für E-Fahrzeuge etc. Jedoch kommen diese Maßnahmen häufig Eigentümern von Immobilien zugute. Viele sozial Schwächere leben aber nur in Mietwohnungen, zudem können Eigentümer

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[153] Bundesregierung v. 28.05.2022, online unter: https://www.bundesregierung.de/breg-de/suche/eeg-umlage-faellt-weg-2011728.

[154] Bundesamt für Wirtschaft und Ausfuhrkontrolle, Elektromobilität, online unter: https://www.bafa.de/DE/Energie/Energieeffizienz/Elektromobilitaet/Neuen_Antrag_stellen/neuen_antrag_stellen.html;jsessionid=0B5F15B702DEE66266AEDBFBB47877F6.1_cid378.

[155] Vgl. zur Liste der förderfähigen Fahrzeuge, Bundesamt für Wirtschaft und Ausfuhrkontrolle, online unter: https://www.bafa.de/SharedDocs/Downloads/DE/Energie/emob_liste_foerderfaehige_fahrzeuge.pdf?__blob=publicationFile&v=187.

die Kosten der Modernisierungsmaßnahmen z.T. auf die Mieter abwälzen (vgl. § 559 BGB).

Eine weitere Maßnahme, die in diesem Zusammenhang erwähnenswert ist, war die Einführung eines 9 €-Tickets für die Nutzung des Öffentlichen Personennahverkehrs (ÖPNV) bzw. des Regionalverkehrs. Diese Maßnahme diente einerseits dem Umweltschutz (mehr Menschen sollen den ÖPNV nutzen und auf das Auto verzichten), zum anderen war die Einführung des 9 €-Tickets eine Reaktion auf die seit dem Russland-Ukraine-Krieg gestiegenen Spritpreise. Allerdings galt das 9 €-Ticket für sämtliche Bevölkerungsschichten unabhängig von ihrem Einkommen und stellte daher keine spezifische Entlastung für sozial Schwächere dar. Überdies war das 9 €-Ticket nur für einen begrenzten Zeitraum vorgesehen. Anschließend erfolgte eine Preiserhöhung der ÖPNV-Tickets, was gerade diejenigen Menschen belastet, die ohnehin schon belastet sind.

Einen ähnlichen Befund liefert die Erhebung der Ökosteuer. Seit 1999 wurde diese von allen Bürgern für besonders umweltschädliches Verhalten erhoben, u.a. als Steuer auf Benzin und Diesel. Mit den dadurch erzielten Einnahmen wurden u.a. die Rentenbeitragssenkungen finanziert, um einer Beitragserhöhung entgegenzuwirken. Dadurch werden zwar einerseits die Rentner als einkommensschwächere und sozial schutzwürdige Gruppe entlastet, gleichwohl hat die Erhebung der Ökosteuer bei Haushalten mit niedrigen Einkommen „zu gewissen Härten“[156] geführt.

Zur Beurteilung der Frage, ob Maßnahmen zur Herstellung sozialer Gerechtigkeit ergriffen werden, ist auch ein Blick in die Förder-/ Fürsorgesysteme des Sozialgesetzbuchs Zweites Buch (SGB II) und des Sozialgesetzbuchs Zwölftes Buch (SGB XII) erforderlich. Hier zeigt sich, dass „energierelevante Impulse bisher fast vollständig fehlen“.[157] Energieeffizienzaspekte spielen bislang weder im Bereich der Grundsicherungsleistungen noch im Wohngeldbereich eine dem Klimaschutz angemessene, eigenständige Rolle.[158] Hier hat der Gesetzgeber unbedingt nachzubessern.

[156] S. Bach/H Buslei/M. Harnisch, N. Isaak, Ökosteuer-Einnahmen sorgen noch heute für niedrigere Rentenbeiträge und höhere Renten, online unter: https://www.diw.de/de/diw_01.c.617687.de/publikationen/wochenberichte/2019_13_2/oekosteuer-einnahmen_sorgen_noch_heute_fuer_niedrigere_rentenbeitraege_und_hoehere_renten.html.

[157] Umwelt Bundesamt, Sozialverträglicher Klimaschutz Abschlussbericht, S. 126, online unter: https://www.umweltbundesamt.de/sites/default/files/medien/479/publikationen/texte_2020_66_sozialvertraeglicher_klimaschutz_final.pdf.

[158] Umwelt Bundesamt, Sozialverträglicher Klimaschutz Abschlussbericht, S. 138, online unter: https://www.umweltbundesamt.de/sites/default/files/medien/479/publikationen/texte_2020_66_sozialvertraeglicher_klimaschutz_final.pdf.

Insgesamt zeigt sich, dass die vom Gesetzgeber vorgesehenen Entlastungsmaßnahmen keine spezifische Entlastungswirkung für die sozial schwächere Bevölkerung haben. Entlastet wird in der Regel die gesamte Bevölkerung ungeachtet ihres Einkommens. Andere Maßnahmen zur Bekämpfung des Klimawandels, wie etwa die Förderung von E-Autos oder von Solaranlagen, richten sich dagegen eher an einkommensstärkere Schichten; sozial Schwächeren können diese Investitionen trotz der staatlichen Förderung kaum tätigen. So heißt es zu Recht: „Viele klimapolitisch motivierte Förderprogramme und Steuererleichterungen, sei es in Deutschland oder anderswo, nützen zudem faktisch nur denjenigen, die bereits über ein gutes Einkommen verfügen, während Abgaben und Umlagen grundsätzlich von allen zu zahlen sind.“[159] Daher besteht noch Potenzial, Maßnahmen speziell zur Entlastung der sozial Schwächeren zu entwickeln und zu etablieren.

Frage 13:

Um jungen Menschen in der Schule Kenntnisse über die Unionsbürgerschaft und die in den Verträgen verankerten Werte zu vermitteln, haben die Bundesländer entsprechende Vorgaben in ihre Lehrpläne aufgenommen. Exemplarisch sollen hier die Lehrpläne in Niedersachsen, Hamburg, Schleswig-Holstein, Bayern und Sachsen dargestellt werden.

In Niedersachsen ist auf Gymnasialebene im Fach Politik und Wirtschaft in der 9. und 10. Klasse das Modul „Europäische Union“ vorgesehen.[160] Dazu heißt es: „Problemstellungen aus dem Gegenstandsbereich ‚Europa‘ sind vorrangig auf das Basiskonzept ‚Ordnungen und Systeme‘ bezogen und werden primär durch die Fachkonzepte ‚Markt‘, ‚Werte‘ und ‚Integration‘ erschlossen.“ Erläuternd wird dazu ausgeführt: „Mit dem integrierenden Fachkonzept ‚Integration‘ erschließen die Schülerinnen und Schüler multiperspektivisch einen aktuellen europäischen Entscheidungsprozess. Dabei stellen sie politische und ökonomische Zusammenhänge, divergierende Interessenslagen und Lösungsmöglichkeiten insbesondere in Bezug auf die politische und ökonomische Ausgestaltung der Europäischen Union heraus. Über das ökonomische Fachkonzept ‚Markt‘ konkretisieren sie die Bedeutung des europäischen Binnenmarktes für die ökonomische Ausgestaltung der europäischen Integration. Mithilfe des politischen Fachkonzepts ‚Werte‘ erschließen die Schülerinnen und Schüler die Bedeutung des europäischen Integrationsprozesses für die Sicherung von Menschenwürde,

[159] Umwelt Bundesamt, Sozialverträglicher Klimaschutz Abschlussbericht, S. 115, online unter: https://www.umweltbundesamt.de/sites/default/files/medien/479/publikationen/texte_2020_66_sozialvertraeglicher_klimaschutz_final.pdf.

[160] Niedersachsen, Politik-Wirtschaft – Kerncurriculum für Gymnasium, Schuljahrgänge 8–10, Stand: 26.05.2021, online unter: https://cuvo.nibis.de/cuvo.php?p=download&upload=310.

Demokratie, Freiheit, Gleichheit, Frieden und Rechtsstaatlichkeit. Am Beispiel einer aktuellen Problemstellung erschließen die Schülerinnen und Schüler die politische und ökonomische Rolle der Europäischen Union im Kontext internationaler Beziehungen.“ Ähnliche Vorgaben finden sich im Lehrplan für die Realschule (Wirtschaft Stufe 10).[161]

In den Lehrplänen für Hamburg sind Vorgaben zur Unionsbürgerschaft und den Werten der Union sowohl in der Sekundarstufe I (Klasse 5 bis 10)[162] als auch in der Sekundarstufe II (Klasse 11 bis 13)[163] und für die Stadtteilschulen getroffen worden.[164] In Schleswig-Holstein heißt es im Lehrplan für die Sekundarstufe I und II: „Der Bürger in der Europäischen Union: Bedeutung der Europäischen Union für die Lebenswelt“.[165]

In Bayern lautet es im Lehrplan für das Gymnasium (Klasse 10–12) zum Fach Wirtschaft und Recht: [166] Behandelt werden die „Europäische Einigung und weltwirtschaftliche Verflechtung; Chancen und Risiken internationaler Arbeitsteilung; Währungen und Europäische Währungsunion; Europäisches Recht als Quelle nationalen Rechts“. Für die Realschule (Klasse 10) ist im Fach Politik und Gesellschaft vorgesehen:[167] „[Die Schülerinnen und Schüler] leiten anhand eines aktuellen Beispiels aus der Europapolitik die Folgen von Regelungen der EU (z. B. rechtliche Verordnungen) für ihr eigenes Leben ab und erkennen dabei die Rolle der EU als supranationaler Gesetzgeber.“ Ferner wird der „Einfluss der von der EU getroffenen Entscheidungen auf das individuelle Leben“ anhand konkreter Beispiele untersucht.

In Sachsen enthält der Lehrplan für Klasse 10 am Gymnasium folgende Vorgaben:[168] Untersucht wird das „Selbstverständnis der Europäischen Union“, namentlich

[161] Niedersächsisches Kultusministerium, Kerncurriculum für die Realschule, Schuljahrgänge 8–10, online unter: https://cuvo.nibis.de/cuvo.php?p=download&upload=122.

[162] Hamburg, Bildungsplan Gymnasium, Sekundarstufe I, Politik/Gesellschaft/Wirtschaft, online unter: https://www.hamburg.de/contentblob/2373332/5a6fdf3718977660bac767cc03688b0b/data/pgw-gym-seki.pdf.

[163] Hamburg, Bildungsplan, gymnasiale Oberstufe, Politik/Gesellschaft/Wirtschaft, online unter: https://www.hamburg.de/contentblob/1475228/61a9944c2c62d55af9a9131dc83c344f/data/p-g-w-gyo.pdf.

[164] Hamburg, Bildungsplan, stadtteilschule, Jahrgangsstufen 7–10, online unter: https://www.hamburg.de/contentblob/4327788/17598c6658e4d96e61981dbd8287f589/data/pgw-sts.pdf.

[165] Schleswig-Holstein, Ministerium für Schule und Berufsbildung, Fachanforderungen Wirtschaft/Politik, Allgemein bildende Schulen, Sekundarstufe I und II, online unter: https://fachportal.lernnetz.de/files/Fachanforderungen%20und%20Leitf%C3%A4den/Sek.%20I_II/Fachanforderungen/Fachanforderungen_Wirtschaft_Politik_Sekundarstufe_I_II.pdf.

[166] Staatsinstitut für Schulqualität und Bildungsforschung, München, Wirtschaft und Recht, Lehrplan, online unter: https://www.gym8-lehrplan.bayern.de/contentserv/3.1.neu/g8.de/index.php?StoryID=26398.

[167] Staatsinstitut für Schulqualität und Bildungsforschung, München, Politik und Gesellschaft, online unter: https://www.lehrplanplus.bayern.de/fachlehrplan/realschule/10/pug.

[168] Sachsen, Lehrplan Gymnasium, Gemeinschaftskunde/Rechtserziehung/Wirtschaft, 2019, online unter: https://www.schulportal.sachsen.de/lplandb/index.php?lplanid=76&lplansc=1IrLTgST5OTPa55GLt6b&token=ce2837afe3489abe09a104d37526dec0.

die „Wertegemeinschaft, Wirtschaftsgemeinschaft, Friedensgemeinschaft, Solidargemeinschaft".

Insgesamt zeigt die Übersicht, dass die EU ein wichtiger Baustein der regulären Bildungssysteme ist; Entsprechende Lerninhalte finden sich allerdings eher für die höheren Klassenstufen. Grundzüge der EU werden zwar bereits in der Sekundarstufe I vermittelt, vertieft wird die Thematik aber in der Sekundarstufe II behandelt. Der Lehrplan für die Grundschulen (Primarbereich) enthält in keinem der Bundesländer Unterrichtsstoff zur EU.

Im Übrigen lässt sich feststellen, dass die meisten der hier näher untersuchten Bundesländer eine wirtschaftliche Perspektive einnehmen. Es werden insbesondere der Binnenmarkt, die Grundfreiheiten und die dazu ergangene Rechtsprechung des EuGH betrachtet. In nur wenigen Bundesländern ist hingegen ausdrücklich festgeschrieben, dass auch die Werte der EU bzw. das Themengebiet „der Bürger in der Union" gelehrt werden soll. Das Wort „Unionsbürgerschaft" taucht in keinem der untersuchten Lehrpläne auf. Dies bestätigt die Einschätzung, dass es im Wesentlichen um eine wirtschaftliche Betrachtung der Thematik geht und weniger um die die Rechte und Pflichten, die mit einer Unionsbürgerschaft einhergehen. Der konkrete Zuschnitt der Thematik und die Art der Vermittlung unterliegen freilich dem jeweiligen Lehrpersonal.

In der Hochschulbildung hängt es vom Studiengang ab, ob die EU ein Lehrthema ist: Beispielsweise wird die Thematik im Studium der Rechtswissenschaft gelehrt und ist etwa in Hamburg Inhalt des Ersten Staatsexamens.[169]

Frage 14:

Im Bereich des Arbeitslebens hat der Gesetzgeber mit dem Gesetz zur Erhöhung des Schutzes durch den gesetzlichen Mindestlohn und zu Änderungen im Bereich der geringfügigen Beschäftigung (Mindestlohnerhöhungsgesetz) den flächendeckenden Mindestlohn angehoben, und zwar zum 1. August 2022 zunächst auf 10,45 € und zum 1. Oktober 2022 auf 12 € brutto pro Stunde.[170] Mit der Erhöhung des Mindestlohns verfolgt der Gesetzgeber das Anliegen, angemessene Mindestarbeitsbedingungen zu sichern und dabei insbesondere Aspekte der gesellschaftlichen Teilhabe stärker zu berücksichtigen.[171]

[169] Hamburg, Verordnung über die Prüfungsgegenstände der staatlichen Pflichtfachprüfung im Rahmen der ersten Prüfung (Prüfungsgegenständeverordnung) vom 23. Dezember 2003, online unter: https://justiz.hamburg.de/contentblob/13550096/d5f5fb57126411296250a6044c52a8bc/data/verordnung-ueber-die-pruefungsgegenstaende-stand-maerz-2012.pdf.

[170] Gesetz zur Erhöhung des Schutzes durch den gesetzlichen Mindestlohn und zu Änderungen im Bereich der geringfügigen Beschäftigung v. 28.06.2022, BGBl. I Nr. 22 S. 969.

[171] BT-Drs. 20/1408, S. 2.

Maßnahmen zur Gleichstellung von Menschen mit Behinderung hat der Gesetzgeber mit dem Teilhabestärkungsgesetz vom 2. Juni 2021 getroffen.[172] Gemäß Art. 7 des Änderungsgesetzes ist eine Ausweitung des Budgets behinderter Menschen für die Ausbildung nach § 61a SGB IX erfolgt. Überdies hat der Gesetzgeber mit der Neuregelung in § 185a SGB IX dafür gesorgt, dass seit dem 1. Januar 2022 eine einheitliche Ansprechstelle existiert, die Arbeitgeber bei der Ausbildung, Einstellung und Beschäftigung von schwerbehinderten Menschen informiert, berät und unterstützt. Eine einheitliche Stelle soll nun dafür sorgen, dass gute Arbeitsbedingungen geschaffen werden, indem der Arbeitgeber zunächst informiert wird und bei der tatsächlichen Umsetzung der notwendigen Maßnahmen Unterstützung erfährt. So werden Hürden abgebaut, die Arbeitgebern die Einstellung behinderter Menschen bislang erschwert haben.

Eine weitere erwähnenswerte Neuerung im gesellschaftlichen Bereich ist das Gesetz gegen Hasskriminalität im Netz bzw. das Gesetz zur Bekämpfung des Rechtsextremismus und der Hasskriminalität vom 30. März 2021.[173] Hierbei handelt es sich um ein Artikelgesetz, mit dem das Strafgesetzbuch, das Bundesmeldegesetz und das Netzwerkdurchsetzungsgesetz (NetzDG) Änderungen erfahren haben. Nach bisheriger Gesetzeslage sollten Netzbetreiber nach dem NetzDG offensichtlich rechtswidrige Inhalte löschen bzw. sperren. Nach neuer Gesetzeslage muss der Netzbetreiber gemäß § 3a Abs. 2 NetzDG dem Bundeskriminalamt (BKA) diese Beiträge melden. Beim BKA ist nun eine Zentralstelle zur Bekämpfung von Hasskriminalität im Internet eingerichtet; zudem hat das neue Gesetz die Kompetenzen anderer Strafverfolgungsbehörden erweitert. Dahinter steht das Ziel, die Rechte der Einzelnen auch im Internet zu stärken und eine Strafverfolgung bzw. Rechtsdurchsetzung in diesem Bereich zu erleichtern.

Eine Maßnahme zur Gleichstellung der Geschlechter ist insbesondere die Gleichstellungsstrategie der Bundesregierung aus dem Juli 2020: [174] Im Rahmen dieser Strategie ist zunächst eine Bestandsaufnahme erfolgt; ermittelt wurde, in welchen Bereichen es an Gleichstellung mangelt, sodann wurden Gleichstellungsziele formuliert. Anschließend hat die Bundesregierung mögliche Maßnahmen[175] zur Erreichung der Ziele vorgestellt. Konkret hat die Bundesregierung etwa eine Verbesserung der Arbeitsbedingungen in der Pflege vorgeschlagen, die insbesondere unter Gleichstellungsgesichtspunkten relevant

[172] BGBl. I S. 1387.

[173] BGBl. I S. 441.

[174] BMFSJ, Gleichstellungsstrategie der Bundesregierung, online unter: https://www.bmfsfj.de/resource/blob/158356/b500f2b30b7bac2fc1446d223d0a3e19/gleichstellungsstrategie-der-bundesregierung-data.pdf.

[175] Vgl. zum Maßnahmenindex S. 118 ff. der Gleichstellungsstrategie.

ist, da in dieser Branche überwiegend Frauen arbeiten.[176] Ab dem 1. September 2022 sind z.B. nur noch Pflegeeinrichtungen zur Versorgung zugelassen, die ihre Pflege- und Betreuungskräfte nach Tarif bezahlen (es geht also insb. um eine bessere Entlohnung der Pflegekräfte). Allerdings ist die Wirksamkeit dieser Maßnahmen insgesamt kritisch zu beurteilen. Anlass zur Kritik bietet etwa eine Untersuchung zur Wirksamkeit der Frauenquote durch die Hans-Böckler-Stiftung: Die Studie hat ergeben, dass Deutschland im Vergleich zu neun anderen Staaten, die ebenfalls eine gesetzlich bindende Quote eingeführt haben, auf dem letzten Platz rangiert.[177] Deutschlands Frauenquote ist demnach im Vergleich zu anderen Ländern am wenigsten wirksam: Zwar wird die Missachtung der Quote nach dem deutschen Recht sanktioniert, dies allerdings nur in einem vergleichsweise milden Rahmen. Im Übrigen hat die Studie gezeigt, dass Deutschland im Bereich der Gleichstellung von Frauen in der Wirtschaft weiterhin kaum Fortschritte gemacht hat. Insbesondere die hohe Lohnungleichheit und der geringe Frauenanteil in Führungspositionen zeigen, dass Maßnahmen zur Gleichstellung, insbesondere im Arbeitsleben, bisher kaum praktische Wirksamkeit gezeigt haben. Demnach ist zu bilanzieren, dass in diesem Bereich ein großes Verbesserungspotential und Aufholbedarf besteht.

Im Bereich der staatlichen Leistungen sind ebenfalls einige Änderungen zu verzeichnen. So hat zum 1. Juli 2022 eine Rentenanpassung (Erhöhung) stattgefunden:[178] Im Westen beträgt die Steigerung 5,35%, in Ostdeutschland 6,12%. Zudem soll ab dem 1. Juli 2024 eine Erhöhung der Erwerbsminderungsrenten erfolgen. Mit diesen Maßnahmen verfolgt der Staat das Ziel, angemessenere Renten zu schaffen und der drohenden Altersarmut entgegenzuwirken; dies ist insbesondere bedeutsam mit Blick auf die angestiegenen Preise bzw. Inflation. Einige Regelungen hat der Gesetzgeber in Reaktion auf die Covid-19-Pandemie im Wege sog. Sozialschutz-Pakete eingeführt. Mit dem Sozialschutz-Paket I vom 27. März 2020 hat der Gesetzgeber zunächst einen erleichterten Zugang zur sozialen Sicherung geschaffen.[179] Das Gesetz enthielt Änderungen zur Gewährung von Sozialleistungen nach dem SGB II, Sonderregelungen zur Kurzarbeit im SGB III und sah zudem eine Erweiterung der Dauer geringfügiger Beschäftigungen, Änderungen der Hinzuverdienstgrenze für vorzeitige Altersrenten sowie Änderungen für den Erhalt von Sozialleistungen nach dem

[176] BMG, Gesundheitsversorgungsweiterentwicklungsgesetz, online unter: https://www.bundesgesundheitsministerium.de/gesundheitsversorgungsweiterentwicklungsgesetz.html.

[177] Hans Böckler Stiftung, Studie Gleichstellung: Gesetzliche Geschlechterquote in Deutschland aktuell nur auf Rang 10 im Europa-Vergleich, online unter: https://www.boeckler.de/de/pressemitteilungen-2675-gleichstellung-gesetzliche-geschlechterquote-in-deutschland-aktuell-23838.htm.

[178] BGBl. I Nr. 22, S. 975.

[179] BGBl. I S. 575.

SGB XII vor. Darüber hinaus änderte das Sozialschutz-Paket I die Anspruchsdauer und Einkommensberücksichtigung für den Erhalt von Kindergeld nach dem BEEG. Das Sozialschutz-Paket II enthielt Änderungen für den Erhalt von Arbeitslosengeld und Kurzarbeitergeld, um flexibel auf die krisenbedingten Herausforderungen reagieren zu können.[180] Mit dem Sozialschutz-Paket III hat der Gesetzgeber die Erleichterungen über den vereinfachten Zugang zu den Grundsicherungssystemen bis zum 31. Dezember 2021 verlängert.

Frage 15:

Die Sozialunion ist ein schillernder Begriff, der im wissenschaftlichen und gesamtgesellschaftlichen Diskurs zuweilen sehr unterschiedlich konnotiert ist.

So hat etwa die ehemalige Bundeskanzlerin Angela Merkel in einem Interview aus dem Jahr 2014 geäußert: „Die EU ist keine Sozialunion."[181] Diese Aussage bezog sich auf die Zuwanderung und den möglichen Missbrauch der Inanspruchnahme von Sozialleistungen durch Zugewanderte. Konkret führte die ehemalige Bundeskanzlerin aus: „Wir wollen Hartz IV nicht für EU-Bürger zahlen, die sich allein zur Arbeitssuche in Deutschland aufhalten. Die EU ist keine Sozialunion." Hierauf hieß es von Seiten der Opposition: „Europa ist nicht nur eine Währungs- und Wirtschaftsunion. Unser Ziel muss ein soziales Europa mit einheitlichen Standards für gute Arbeit sein."[182]

Aus rechtswissenschaftlicher Sicht ist festzuhalten, dass die EU zwar auf dem Gebiet der Sozialgesetzgebung gemäß Art. 4 Abs. 2 lit. b AEUV[183] nur eine geteilte Zuständigkeit und somit keine umfassende Kompetenz hat, um soziale Gerechtigkeit und sozialen Ausgleich europaweit herzustellen. Allerdings wird zu Recht betont, dass die EU ein sozialrechtliches Fundament aufweist: „Europa hat nämlich ein soziales Gesicht, was selten gesehen wird. Das erste Gesetz, was die Europäische Wirtschaftsgemeinschaft erließ, betraf die Koordinierung der Systeme der sozialen Sicherheit, dazu gehört die Regelung über die Kindergeldzahlungen. Das ist eine große soziale Errungenschaft, die man mehr würdigen sollte als es

[180] BGBl. I S. 1055.

[181] Deutschlandfunk v. 22.05.2014, „Die EU ist keine Sozialunion", online unter: https://www.deutschlandfunk.de/zuwanderung-die-eu-ist-keine-sozialunion-100.html.

[182] So der damalige SPD-Vize Ralf Stegner, zitiert im Deutschlandfunk v. 22.05.2014, „Die EU ist keine Sozialunion", online unter: https://www.deutschlandfunk.de/zuwanderung-die-eu-ist-keine-sozialunion-100.html.

[183] H-J. Blanke/S. Pilz, Europa 2019 bis 2024 – Wohin trägt uns der Stier? – Sieben Thesen zu den Herausforderungen der Europäischen Union, Zeitschrift Europarecht (EuR) 2020, 270, 283; J. P. Terhechte, in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 73. Ergänzungslieferung, Mai 2021, Art. 3 EUV, Rn. 51.

zuweilen geschieht."[184] Bereits in den römischen Verträgen von 1957 hieß es in der Präambel, die Unterzeichnenden seien „entschlossen, durch gemeinsames Handeln den wirtschaftlichen und sozialen Fortschritt ihrer Länder zu sichern, indem sie die Europa trennenden Schranken beseitigen" und in Art. 2 „Aufgabe der Gemeinschaft ist es, (...) ein hohes Maß an sozialem Schutz, die Hebung der Lebenshaltung und der Lebensqualität, den wirtschaftlichen und sozialen Zusammenhalt und die Solidarität zwischen den Mitgliedstaaten zu fördern".

Auch Initiativen, wie die bereits dargestellte ESSR zeugen davon, dass es von Seiten der EU immer wieder Bestrebungen gibt, sich europaweit um die Wahrung sozialer Standards zu bemühen. So wird zu Recht betont, dass die Sozialintegration der EU eine zentrale politische Bedeutung hat:[185] Will man das „Europäische Projekt" nicht sinnentleeren, so bedarf es nach Jürgen Habermas zu Recht einer „europaweite[n] Bürgersolidarität", die sich nur durch eine Beseitigung sozialer Disparitäten erreichen lässt.[186] Im Zentrum der sozialrechtlichen Bemühungen steht das Interesse daran, die Lebens- und Arbeitsbedingungen der EU-Bürger zu verbessern und – dort wo möglich und nötig – zu harmonisieren (siehe bereits oben). Auch die unter dem Dach des Europarates entstandenen Vertragswerke, die EMRK und die Europäische Sozialcharta (ESC), sehen sich der sozialrechtlichen Dimension Europas verpflichtet. Dieses Anliegen greift die GRCh auf und führt deutlich vor Augen, dass die europäische Integration auch eine soziale Komponente hat. Mit der GRCh zeigt die EU, dass neben den wirtschaftspolitischen auch die sozialen Zielsetzungen essenziell für das Gelingen des „europäischen Projekts" sind.

So lässt sich resümieren, dass die EU zwar formal betrachtet keine Sozialunion ist. Sie ist aber auch keine reine Währungsunion, sondern weist Elemente einer sozialen Gemeinschaft auf. Dies hat folgende Konsequenzen: Eine vollständige Unitarisierung der Sozialpolitik ist mit Blick auf die unterschiedlichen sozialen und wirtschaftlichen Rahmenbedingungen der Mitgliedstaaten nicht sinnvoll, wohl aber ein abgestimmtes Vorgehen, um die Lebens- und Arbeitsbedingungen der Bürger Europas zu stärken. Insofern kann die EU Impulse setzen, die wiederum Anlass für Reformen in den Mitgliedstaaten geben. Das Beispiel der ESSR verdeutlicht dies. Schließlich verbietet sich eine starre Antwort auf die Frage nach dem rechten Maß an Sozialintegration. Vielmehr ist die Frage danach, wie

[184] E. Eichenhofer, zitiert im Deutschlandfunk v. 22.05.2014, „Die EU ist keine Sozialunion", online unter: https://www.deutschlandfunk.de/zuwanderung-die-eu-ist-keine-sozialunion-100.html.

[185] H.-J. Blanke/S. Pilz, Europa 2019 bis 2024 – Wohin trägt uns der Stier? – Sieben Thesen zu den Herausforderungen der Europäischen Union –, Zeitschrift Europarecht (EuR) 2020, 270, 283. Zum Ganzen G. Buchholtz, Streiken im europäischen Grundrechtsgefüge, 2014, S. 113 f.

[186] So auch M. Schlachter, 100 Jahre ILO und die Suche nach sozialer Gerechtigkeit, EuZA 2020, 143.

viel Vereinheitlichung im Bereich der Sozialpolitik sinnvoll und wünschenswert ist, angesichts sich wandelnder wirtschaftlicher und gesellschaftlicher Rahmenbedingungen immer wieder aufs Neue zu erörtern. Antworten sollten stets am Wohl der Bürger Europas ausgerichtet sein.

GREECE

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Question 1

As one of the fundamental economic freedoms and as a key pillar of the common market, the freedom of movement of workers, established in Article 45 TFEU, and in particular the related prohibition of discrimination on grounds of nationality, is directly and immediately applicable in Greece, and must be regarded as applying to private persons as well. As far as secondary EU law is concerned, the relevant Regulations apply to the Greek legal order and the relevant Directives have been transposed.

Greece joined the EU (then EEC) in 1981 and the freedom of movement of workers applied thereon gradually during a transitional period. Nevertheless, its importance was recognized by the Greek legal theory before that. Meanwhile Greek courts have examined in several cases the conformity of a number of provisions of national law with this fundamental freedom and the prohibition of discrimination on grounds of nationality. The Greek legislator also reformed – sometimes following a negative ruling for Greece by the CJEU – existing discriminatory provisions of the national law.

EU (secondary) Law, as well as the transposing provisions into national law, provides for levels and limitations in the exercise of this freedom. Whether these restrictions comply with the principle of proportionality or affect what is referred to as a 'core area' of the freedom of movement of workers seems not to be an issue among in Greek labor lawyers. Much less is discussed in the light of this freedom a possible unequal treatment between "economically inactive" and "economically active" citizens.

After all, the freedom of movement of workers was not to function as the mainspring of the harmonization of the social law among Member States – on the contrary it was based on the idea of a limited harmonization. Thus, "primary EU law cannot guarantee to a worker that moving to a Member State other than his Member State of origin will be neutral in terms of social security, since, given the disparities between the Member States' social security schemes and legislation, such a move may be more or less advantageous for the person concerned in that

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regard […]. Therefore […] Article 45 TFEU does not grant to that worker the right to rely, in the host Member State, on the conditions of employment which he enjoyed in the Member State of origin under the national legislation of the latter State" (CJEU 18.7.2017, C-566/15, n. 34, 35).

Moreover, "it follows from the case law that a person who has carried out all his occupational activity in the Member State of which he is a national and has exercised the right to reside in another Member State only after his retirement, without any intention of working in that other State, cannot rely on the principle of freedom of movement for workers" (CJEU 14.10.2010, C-345/09, n. 90). And, according to settled case law of the Court of Justice of the European Union, the rules of the Treaty governing the free movement of persons cannot apply in situations which do not show any connecting element with any of the situations which concern the law of the Union. It is also well known that the prohibition of discrimination on grounds of nationality in the exercise of freedom of movement for workers (45 TFEU) excludes in its application Article 18 TFEU; the latter may apply independently only in situations governed by EU law in respect of which the Treaty lays down no specific prohibition of discrimination (such as article 45 par. 2) (CJEU 18.7.2017, C-566/15, n. 25). The prohibition of adverse discrimination based on nationality in the light of Article 45 TFEU is therefore intended to implement the economic freedom enshrined therein and should not be confused with the prohibition of unjustified discrimination established in the context of social policy.

Within this context, Greek courts seem mainly to examine the implementation of the free movement of workers in two of its aspects:
a) The right of workers to leave their country of origin and move to the territory of another Member State in order to exercise economic activity there. Thus, "provisions which prevent or discourage a national of a Member State from leaving their country of origin in order to exercise their right to free movement constitute obstacles to the exercise of this freedom even if they are applied regardless of the nationality of the workers concerned" (CJEC 15.12.1995, C-415/93, n. 97).
b) The right of the itinerant worker to return and reside in the Member State of which they are citizens, after they have exercised a salaried activity in another Member State.

This could be interpreted, among other things, in the light of the fact that Greece, with a chronically high unemployment rate and low wages compared to other Member States, did not star as a market for receiving workers from other Member States, but was rather as a country of origin for workers who sought employment within the common market. So e.g. the Court of Justice of the

European Communities, following a complaint by a private individual, of Greek nationality, who, since April 1986, worked as a musician in the State Orchestra of Thessaloniki, ruled that "by regulation or administrative practice, taking into account of previous employment in the public service of another Member State for the purposes of granting to an employee in Greek public service a seniority increment and of grading him on the salary scale, on the sole ground that the previous employment was not performed in Greek public service, the Hellenic Republic is in breach of its obligations under Community law, in particular under Article 48 of the EC Treaty and Article7(1) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community" (CJEC 12.3.1998, C-187/96). Since then, this matter has come up again several times before the Greek courts.

Other cases concern restrictions that were previously imposed by national provisions, e.g. for professional athletes, for directors and teaching staff of tutoring and private music and dance schools or for workers in mines; they also concern the conditions for granting a maternity allowance by a social security institution, the exclusion from granting a third child allowance to a mother who is citizen of a third country who has children of state nationality member of the EU, issues of social security rights and obligations (level of contributions, establishment of pension rights, etc.), recognition of degrees obtained in a Member State or issues of imposing prohibitions for reasons of public order (awarding criminal justice, etc.).

Question 2

The principle of equality plays a significant role in the domain of social security and especially when it comes to the social security benefits. According to the Art. 4 par. 1 of the Greek Constitution "Greeks are equal before the law". The principle of equality is interpreted in such a way, that similar situations should be treated in the same way. In the field of social security law, equality is interpreted in combination with Art. 22 par. 5 of the Constitution, according to which "The State takes care of the social security of the workers, as prescribed by law". It should be noted, that Art. 22 of the Greek Constitution is entitled "Labor protection", which clearly indicates the close connection of employment (of any kind) and social security. Moreover the Greek Constitution contains provisions regarding social welfare. Art. 21 provides for the protection of family, marriage, motherhood and childhood and the rights of people with disabilities. Social welfare benefits are not linked to employment, hence are financed by taxes and not by contributions.

Since social security is linked to working population, economically inactive EU mobile citizens are not entitled to social security benefits. However they have the right to receive social benefits that are not directly linked to work. In general, economically inactive people have to fulfill the criteria also set to Greek citizens. This means that when they have a legal residency in Greece, they can apply for a number of benefits also granted to the Greek population. In case the benefit is means tested, this also applies to economically inactive people.

Regarding child allowance, it is regulated in Art. 214 of Law 4512/2018. It is considered a welfare allowance (not a social security one). It is granted, among others, to Greek citizens permanently residing in Greece and citizens of Member States of the European Union who reside permanently in Greece. It is required by Law that beneficiaries reside legally and permanently in the Greek territory for the last 5 years before the year of submission of the application for the child allowance.

Question 3

Free movement of employed and self-employed persons allows European citizens to seek better living and working conditions within the European Union. This means practically that EU citizens can work in another EU country without the need of a work permit and enjoy equal treatment with nationals in terms of access to employment, working conditions and social and benefits.

However, as mentioned above, Greece, due to high unemployment rate and low wages compared to other Member States, does not star as a market for receiving workers from other Member States, but is rather as a country of origin for workers who sought employment within the common market.

Nevertheless, a number of EU citizens makes use of their freedom of movement and work in Greece.

According to the Article 8 of Presidential Decree 106/2007 EU citizens who are staying in Greece for a period of more than three months, the police authorities grant a registration certificate. For this purpose, EU citizens have to provide (a) a copy of their identity card or passport and (b) a certificate from the employer or other document proving the existence of an employment.

According to the Hellenic Statistical Authority 145.000 foreigners are working in Greece (Data 4, 2021). However there is no distinction between EU and non EU citizens. In this respect it is difficult to assess whether the idea of “fair movement” gained support in Greece.

Question 4

Greece is one of the EU countries most affected by the brain drain phenomenon. Since the beginning of the economic crisis young educated professional have moved (and still do) to north-western European countries, in order to find a job. It is estimated that in the period 2010-2015, between 280 thousand and 350 thousand Greeks left the country. The majority of those who immigrate have a high level of education. Persons are most likely to move at the beginning of their career (Intra-EU Labour Mobility at a glance, 2019, p. 2). This tendency has been stronger during the economic crisis. There is no doubt that the brain drain is a serious problem, at least in the short term. According to a recent report, it is estimated that in the period 2008-2016 immigrants from Greece produced a product worth €50 billion and paid taxes of €12.9 billion to the countries that host them, while the Greek state had spent the amount of €8 billion on their training [Endeavor (2016) Endeavor Greece Report: Human capital is Greece's #1exported "product" (19 July)].

In order to revoke this phenomenon, a number of regulations have been adopted. The main purpose is to offer incentives especially to young people, to return to Greece. These incentives are mainly fiscal. Incentives are also offered to young academics, in order for them to return to the Greek university.

Question 5

a)

Presidential Decree (PD) 30/2021 (which replaced PD 219/2000) and PD 101/2016, by which Directives 96/71 (as amended by Directive 2018/957) and 2014/67 respectively were transposed into Greek law, constitute the current legislative framework on the posting of workers. PD 30/2021 refers to the substantive conditions that must be met in case of secondment of workers to Greece (observance of the basic provisions of Greek labor legislation, etc.). PD 101/2016 regulates the formalities to be observed by the employer who posts workers to be employed in Greece (declaration to the Labor Inspectorate, etc.). As seconded workers, in the sense of the above provisions, are also understood the workers who are employed in the premises of a company located in Greece, for the execution of a contract concluded between the company-employer and the Greek company, which is the recipient of the agreed services (article 1 par. 4 para. b subpara. ba PD 30/2021). However, the above provisions only apply when the company which sends workers in the territory of Greece is established in an EU Member State or in a state that has signed the agreement on the European Social Area (article 1 par. 4 par. a PD 30/2021).

According to par. 1, 2, 3 and 4 of article 3 PD 30/2021, companies falling under the scope of the above mentioned Decree and posting workers to Greece pursuant to para. b) and c) of par. 4 of article 1, are obliged to guarantee to those workers, under the principle of equal treatment, and regardless of the law governing their employment relationship, the application of the terms of employment determined by the sources of law provided for therein
a) the Greek legislation (laws, decrees, ministerial decisions),
b) the applicable national general collective labor agreements that define the minimum non-salary working conditions, which apply to the workers of the whole country as well as the salary conditions, insofar as these bind the recipient of the provision of services,
c) the applicable collective labor agreements or arbitration decisions that have been declared generally binding, in accordance with the relevant provisions of article 11 of Law 1876/1990 (A' 27) or the sectoral or occupational collective agreements concluded by the most representative organizations as they apply in the relevant geographical area and in the relevant industry or profession, insofar as they bind the recipient of the provision of services and concern, among other things, remuneration within the meaning of paragraph 2 of article 3 Presidential Decree 30/2021. Remuneration means the mixed remuneration determined by statutory Greek provisions (laws, decrees, ministerial decisions), and by the collective labor agreements applicable, in accordance with par. 1 of this article, insofar as they bind the recipient of the provision of services , and which consist of the basic salary and the individual prescribed allowances, including remuneration contributions to the supplementary pension systems and the benefits granted by them are not included in the salary. Also not included in the concept of remuneration are allowances granted to posted workers as a result of the posting, as long as they are paid for the purpose of covering expenses actually incurred as a result of the posting, such as travel, accommodation or food expenses.

In particular, however, temporary work agencies whose employees work for indirect employers established in or carrying out activities in Greece, and falling under the scope of the PD 30/2021, are obliged to guarantee to those employees, in addition to the above, at least the same basic working conditions, including the remuneration applicable in accordance with paragraph 1 of article 117 of Law 4052/2012. According to this provision, the remuneration during the placement of the temporary workers at an indirect employer has to be at least equal to what it would apply if said workers had a direct employment relationship with the indirect employer for the same job. It thus appears that the legislator reserved, for reasons of coordination of national regulations on temporary employment and on the posting of workers, a more favorable treatment for this category of posted workers,

in the sense that the protection of temporary workers posted by temporary work agencies that fall under the scope of application of PD 30/2021 on the territory of Greece "is not limited to specific working conditions, nor it is required that these conditions be established only by legislative and regulatory provisions as provided by the corresponding Union provisions. Thus, the temporary employee is directly entitled to claim equal treatment with regard to all, without exception, salary or non-salary benefits paid voluntarily by the indirect employer, regardless of their source of origin" (*Pertsinidou,* ΔΕΝ 2022, 337).

In conclusion, according to Greek legislation, the protection of temporary workers is not limited to specific working conditions, nor are these conditions required to be established only by legislative and regulatory provisions as provided by the relevant EU provisions. Thus, a temporary employee is directly entitled to claim equal treatment with regard to all, without exception, salary or non-salary benefits paid voluntarily by the indirect employer, regardless of their source of origin.

b)

We are not aware of such case law.

Question 6

a)

We are not aware of a relevant Greek decision with an explicit invocation of Article 16 CFR, let alone in relation to rules of national or EU social law. Case law can be found on specific aspects of the relationship between national social law rules and economic freedoms, mainly in the field of public procurement. Thus, the Supreme Financial Court and Audit Institution held e.g. in its decision n. 409/2012, which concerned a call for tenders for the award of a contract relating to security services, among other things: a) that national regulation stipulating that the staff of the said companies seconded from their Member State of establishment must hold a special license to practice the profession issued by an authority of the host Member State is contrary to the freedom to provide services, as long as they are not obtained in view of the controls to which providers of cross-border services are subject in their home Member State; b) national regulations, which require a contractor of a public procurement to employ personnel who are exclusively nationals of the relevant Member State constitute a violation of article 45 par. 2 TFEU, as long as private security services even if provided to public bodies do not constitute employment in the public administration within the meaning of article 45 par. 4 TFEU, nor exists a reason relating to the preservation of public order, safety and health, according to article 45 par. 3 TFEU, capable of justifying

a restriction of such intensity; c) EU law does not prohibit a Member State from extending its legislation or collective labour agreements concluded by the social partners concerning minimum wages to any person providing paid work, even temporarily, in their territory, regardless of the state of establishment of the employer; d) on the contrary, a mandatory rule of universal application cannot be established regarding the conditions of employment, within the meaning of article 4 par. 2 of PD 219/2000, from a call for tenders whose object is limited to the regulation of the conditions for the performance of services in a given public procurement and therefore, the wage limit set by a call for tenders for the award of a public procurement cannot be considered to constitute a floor limit salary, within the meaning of article 3, paragraph 1, first subparagraph, point c, of Directive 96/71, which the Member States are entitled to impose, by virtue of this Directive, on companies established in other Member States in the context of transnational service provision.

b)

Article 23 par. 2 of the Greek Constitution guarantees to dependant employees the individual – but exercised through lawfully established trade unions – fundamental right to strike as a legal means to protect and promote financial and labour interests of working people. Judges and members of the armed and security forces are exempted. The right to strike may also be subject to limitations in case of public servants, employees of public entities as well as employees of utilities and similar enterprises serving the basic needs of the society. However, such limitations may not affect the core area of the right to strike. Law 1264/1982 provides the basic legal framework for the exercise of the right to strike. This framework has recently been in many aspects amended (Law n. 4808/2021).

Who has the right to call a strike?

The right to strike has to be exercised through lawfully established trade unions. As regards first-level trade unions, any strike action requires the prior decision of their general assembly, unless in the case of a few hours' stoppages where a decision of the executive board of the union would suffice. Same applies to second-level and third-level organisations. According to recently enacted legislation: a) the decision to call a strike in a company requires a quorum of 50% in the general assembly of the union (as opposed to one third before); b) starting 1.1.2022, the use of an electronic voting system that allows remote participation is required; c) second-level or third-level trade unions shall not call for a strike against the same employer and with the same start date if the one called by the first–level union has been deemed illegal by the courts; d) unions as well as members of

their executive board bear civil liability for any illegal acts during strikes or in cases where psychological or physical violence against non-striking employees has been used.

Question 7

In Greece, there is no one single anti-discrimination instrument transposing all relevant EU legislation, as happened in other countries (e.g. German AGG). Law 3896/2010 transposed Directive 2006/54 on equal treatment of men and women. Law 4443/2016 transposed Directives 2000/43/EC and 2000/78/EC, Law 3769/2009 refers to Directive 2004/113/EC on the implementation of the principle of equal treatment of men and women in access to and provision of goods and services, while Law 4097/2012 incorporated Directive 2010/41/EU regarding the same principle where independent professional activities are concerned. Law 4808/2021 introduced explicit prohibition of the termination of the employment contract on grounds of discrimination and victimization, and the explicit provision that such termination cannot be healed unilaterally by the employer in exchange of an enhanced severance.

a)

Have recent developments in CJEU case-law have had a significant impact on religious discrimination at national level?

Not really.

Is the notion of reasonable accommodation properly implemented?

The obligation of employers to exercise their managerial authority in a way that protects reasonable interests of the employee and/or ensures the provision of work under conditions of dignity has always been recognized by Greek courts and is not limited only to issues concerning the prohibition of discrimination due to specific characteristics. It is e.g. generally accepted that "the employer is obliged to avoid transferring employees to a department or work position that does not meet their physical or mental capabilities and must assign (if this is possible) to the employees a different job from the one they were performing, if the physical or their mental powers do not allow the continuation of the initially agreed work, especially when under the previous unfavorable conditions their health had been affected (Supreme Court 1235/2003, 868/2018).

Furthermore, and by invoking the legislation on the prohibition of discrimination based on personal characteristics, the Supreme Court ruled that "in exercising the managerial authority the employer, when it comes specifically to employment contracts of persons with disabilities, must take appropriate measures to

ensure access of such persons in the workplace, in particular, it must anticipate and take effective and practical measures to shape the workplace according to special needs, such as, among other, to determine the provision of work and the distribution of tasks in an appropriate way if these measures do not entail a disproportionate burden on the employer and assign him/her work that he/she is capable of providing" (Supreme Court 1334/2021 EErgD 2022, 563, Supreme Court 876/1989). It is further understood that in case of persons with disabilities the employer is required to make reasonable adjustments to ensure that work can be performed under fair and decent conditions by such employees" (Supreme Court 1334/2021, 750/2016, Zerdelis, EErgD 2022, 489).

b)

Directive 93/104 (prior to Directive 2003/88) regarding certain elements of the organization of working time has been incorporated into Greek law by PD 88/1999. No other new legislation has been enacted to incorporate the newer, with the exception of Law 4498/2017 regarding medical employees at public institutions. According to article 74 of Law 4808/2021, employers are required to use an electronic system for measuring working time in real time. Working time is captured by using a digital work card. This device allows for real time recording of the start and the end of the work, breaks, overtime and any kind of leaves.

In which areas is the acquis most useful to workers? In which areas is the acquis invoked most before national courts (limitation of daily or weekly working time? Annual paid leave? Other matters)?

In the Greek legal practice, EU legislation on working time is invoked before the courts in relation to two main issues: a) the distinction between working time and rest periods (especially with regard to issues of stand-by time – in terms of Greek law, "simple and/or genuine readiness for work"), b) annual leave matters. In a relatively recently judgment, the Plenum of the Greek Supreme Court ruled that (Decision 7/2019) national law on annual leave entitlement, interpreted in the light of article 7 par. 1 and 2 of Directive 2003/88 and Art. 31 par. 2 CFR, has the meaning that such entitlement is not affected by the fact that the employee has been on sick leave that continued until the termination of the employment relationship so that he was prevented to exercise the statutory right to annual paid leave. Regarding exceeding the maximum daily or weekly legal work limits and the legal consequences associated with it, the courts usually invoke national law.

Are there hostile reactions to the case law of the CJEU?

Not really.

c)

Law 4808/2021 regulated platform work. Art. 69 provides that service providers may be employed by a digital platform either under a contract of independent services or a work contract or an employment contract. In order for a service provider not to be considered as an employee, specific typical prerequisites must be met. Non-employee service providers have also the right to establish quasi – unions to promote their professional interests. These quasi – unions of non – employee service providers may also call for a strike. They also have a right to negotiate collectively and enter into collective agreements (Art. 70). Digital platforms shall provide information in written to non – employee service providers about their statutory rights and are held responsible for their health and safety (Art. 71, 71).

d)

Contrasting Union law and international law is not common in Greek jurisprudence. In recent years, however, there has been intense controversy regarding the application of specific provisions of the Revised European Social Charter , which Greece ratified in 2016 (Law n. 4359/2016), and in particular in relation to the application of Article 24 of the Revised European Social Charter in the Greek law of general protection against dismissal. In some court decisions, a rather unsuccessful cumulative invocation of article 24 of the Revised European Social Charter and article 30 of the Charter of Fundamental Rights of the European Union is taking place. In general, however, the Greek courts refer to sources of international labor or social law, such as the Revised European Social Charter or International Labour Contracts although not always consistently in terms of the effect they are considered to have on the national legal order. In recent years there has also been an increased interest in these sources of labor law and theory.

Question 8

Labor law regulates, in principle, the dependent labor relations between the employer and the employee. As a dependent labor contract is considered according to the jurisprudence "[f]rom the provisions of articles 648 et seq., 652 of the Civil Code and 6 Law 765/1943, which was sanctioned by PYS 324/1946 and remained in force even after the introduction of the Civil Code (article 38 EISNAK), it is concluded that a contract of dependent labor exists, when the contracting parties intend to provide the agreed work and the salary, regardless of the method of payment and the employee is subject to legal and personal dependence on the employer, manifested by the right of the latter to gives binding orders and instructions for the employee as to the place, manner and

time of providing the work and to exercise supervision and control to ascertain the employee's compliance with them. Indeed, the obligation of the employee to accept the control of the employer and to comply with his instructions as to the way of providing the work constitutes the main feature of this dependence, which must exist in order to consider the work as dependent" (Supreme Court 13/2022). According to Article 69 of Law 4808/2021, the contract between a digital platform and a service provider is presumed not to be dependent work since the service provider is entitled, based on his contract, to cumulatively enjoy certain freedoms during the provision of his services, which are described in detail in the law. Law 4808/2021 provides for the application of the provisions of the labor legislation on health and safety to service providers who are connected to digital platforms with independent service contracts. Service providers who are natural persons and are connected to digital platforms with contracts for independent services or work, are also entitled to set up organizations, with the aim of promoting their professional interests, while they also have the right to strike which is exercised by the above organizations. Before starting the provision of the services, the digital platforms must deliver to the service providers, linked to them by independent service or work contracts, in digital or written form, as well as via the Internet, a copy of the contract between them, which contains, in particular, a reference to the characteristics of the services to be provided, the rights of collective organization and the obligations of the platform for the health and safety of the providers provided for in the legislation. The contract also includes the measures to protect the personal data of the service providers, which the digital platform takes.

Question 9

On 27 April 2021, Greece submitted its national recovery and resilience plan to the Commission, in accordance with Article 18(1) of Regulation (EU) 2021/241. Pursuant to Article 19 of Regulation the Commission assessed the relevance, effectiveness, efficiency and coherence of the recovery and resilience plan. On 6 July 2021, the Council adopted its Decision on the approval of the assessment of the recovery and resilience plan for Greece. On 30 April 2022, Greece submitted its 2022 National Reform Programme and, on 29 April 2022, its 2022 Stability Programme, in line with Article 4 of Regulation (EC) No 1466/97. To take account of their interlinkages, the two programmes have been assessed together.

The recovery and resilience plan includes an extensive set of mutually reinforcing reforms and investments to be implemented by 2026. In particular, these recommendations address, among others, active labour market policies and policies supporting public investment in education, skills and employability. The

plan also includes a significant number of measures addressing challenges in the areas of social welfare, as well as labour and product markets.

The National Recovery and Resilience Plan (NRRP) "Greece 2.0" aspires to lead the country's economy, institutions and society into a new era. The NRRP is structured on four pillars: (a) Green, (b) Digital, (c) Employment, skills, and social cohesion, (d) Private investment and transformation of the economy. For its implementation, Greece asks for the maximum of funds available under the Recovery and Resilience Facility (RRF), i.e., EUR 17.8 billion in grants and EUR 12.7 billion in loans.

As regards employment, skills, and social cohesion, the Plan's investments and reforms include among others: Labour market reform, enhancing job creation and job resilience in the event of shocks. State-of-the-art active and passive labour market policies, promoting labour market activation, job creation and safety nets against unemployment. reforms and investments strengthening social fairness and safety nets, including programmes enhancing economic and social integration of vulnerable groups, improving overall child protection, promoting equality of opportunities & supporting diversity, promoting integration of the refugee population into the labour market, while securing the social welfare system from misuse and/or fraud. (https://greece20.gov.gr/wp-content/uploads/2021/07/NRRP_Greece_2_0_English.pdf)

Question 10

As it is commonly known, the EU Charter of Fundamental Rights primarily addresses the EU and binds the Member States "only when they are implementing Union law" (Article 51 of the Charter) (also clearly underlined by the national courts, StE 1346/2017, 1722-6/2017, 1180/2016). However, a significant part of national law is directly or indirectly influenced by EU law.

The Greek Constitution does not include a direct reference to the EU Charter. However, pursuant to Article 28 par. 1 of the Constitution, international treaties have an effect superior to ordinary legislation, when ratified.

In Greece, national courts refer often to the Charter in their decisions and rulings. The reference to the Charter extends to a broad filed, such as taxation, the ne bis in idem principle and customs infringement, administrative sanctions, right to education. The rights of the Charter are treated as "equal" in importance to the other fundamental rights, they often are used/examined by the judge in order to support their legal reasoning. However, they are mostly examined together with the reference to secondary EU law (e.g. StE 2367/2021 regarding parental leave).

To our knowledge, the Greek courts have not dealt with the matter of social rights under the Charter in actions between individuals ('horizontal actions').

Question 11

Law 4412-2016 on public procurement, which has transposed into Greek Law Directive 2014/24/EU, contains rules that aim to foster social rights. For instance pursuant to Art. 20 of Law 4412/2016 contracting authorities may exclusively grant the right to participate in public procurement procedures to any economic entity whose main purpose, by virtue of its statute, is the professional and social integration of disabled or disadvantaged persons, as long as more than 30% of the organization's employees are disabled or disadvantaged employees. It is also worth mentioning Art. 86 regarding contract award criteria, according to which the most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including (among others) social aspects. The latest refer particularly to: a) employment of workers who belong to vulnerable groups of the population within the meaning of Law 4430/2016 (A' 205), for a period of at least twelve (12) months prior to the economic operator's participation in a public contract award process; b) facilitating the social and/or work integration of people from vulnerable groups of the population; c) combating discrimination and/or d) promotion of equality between men and women.

HUNGARY

Laura Gyeney[1], *Gábor Kártyás*[2], *Éva Lukács Gellérné*[3]

Question 1

1a.

In Hungary, the requirement of equal treatment in the world of work is regulated by two laws: Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities (ETA Act) and Act I of 2012 on the Labour Code. The ETA Act protects equal treatment in general regarding the employment relationship, while the Labour Code protects the rights of workers in the employment relationship.

By definition discrimination is prohibited if a person or group, because of their perceived or real characteristics, receives less favourable treatment than another person or group in a comparable situation receives, has received or would receive or is put at a significantly greater disadvantage.[4] Protected characteristics in the ETA Act are gender, skin colour, ethnic origin, age, etc. The ETA Act does not contain foreign nationality as an expressis verbis protected characteristic. However, there may be cases in which the employee suffers discrimination based on a status characteristic that also connects him to a vulnerable social group. Foreign citizenship can be an example of this. The Hungarian Equal Treatment Authority[5] accepted the reference to foreign nationality as a protected characteristic in its decision EBH/46/2007. Consequently, it should be considered as a protected characteristic even if it is not included in Article 8 of the ETA Act.

In practice, the very frequently used defence by the employer is that it was not aware of the existence of the protected characteristic of the claimant, however, based on the Hungarian case-law, it should be proved by the employer, and the claimant may not be required to prove the awareness of the employer. Studies show that Hungarian law and case-law implements EU law directives properly and expressly provides for the protection of claimants.[6]

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[3] Ass. Prof, Eötvös Loránd University, Faculty of Law; Author of Questions 1, 2, 7a, 7d, 9, and 14.

[4] Article 8 of the ETA Act.

[5] From 1 January 2021, the former Equal Treatment Authority operates as Directorate-General for Equal Treatment within the Office of the Commissioner for Fundamental Rights.

[6] Szilvia Halmos, 'The Impact of EU Law on Hungarian Anti-Discrimination Law in Employment', *ELTE Law Journal,* 2018/2, pp. 81-99.

Part time workers and workers having a fixed term employment contract enjoy protection under the ETA Act. Pursuant Article 8 paragraph (r) part-time and fixed term employment are protected characteristics. Moreover, the temporary worker status has been by the decisions of the Equal Treatment Authority as a protected characteristic as well.[7]

Article 12(1) of the Labour Code lays down that the requirement of equal treatment must be maintained in relation to the employment relationship, and in particular regarding remuneration. Remedies for violations of this requirement must not violate or impair the rights of other employees. As compared with the ETA Act, the Labour Code focuses rather on labour rights and on determining the equal value of work from the prospective of the principle on equal pay for equal work.

EU citizens have free access to the Hungarian labour market, except in cases of public office and jobs related to objective and proportionate Hungarian linguistic skills, which are proper justifications under EU law.

1b.

Regarding economically inactive citizens, as compared with EU workers, they have some more extensive rights than what would follow from EU law.

Hungarian law transposes the requirement of equal treatment laid down in EU law in the field of education, which serves EU citizens to enter training and receive scholarships. In line with this, Article 39(1) of Act CCIV of 2011 on National Higher Education provides that every Hungarian citizen has the right to study in a higher education institution according to the conditions defined in this law, supported by a Hungarian state scholarship, a Hungarian state partial scholarship, or self-funded. This right also applies to persons with the right to free movement and residence deriving from EU law, and attested by documents issued under Act I of 2007 on Free Movement and Residence. Therefore, although this would be possible, the national higher education act does not restrict access to scholarships for study purposes to EU workers, self-employed persons or their family members, but grants this entitlement in a general manner, in relation to all EU citizens and their family members. In this respect, Hungarian law therefore provides more rights than EU law. However, it should be noted that this affects mostly Hungarian-language courses, so by definition only EU citizens who speak Hungarian well enough to be able to participate in Hungarian-language higher education can become eligible.

[7] EBH 173/2015; EBH 449/2013; and EBH 273/2011.

Entitlement to study loans is limited to EU workers, self-employed persons and their family members in Hungary.[8] This is rooted in EU law, more specifically in Article 24 of Directive 2004/38/EC. In contrast to EU workers, economically inactive EU citizens are not entitled to study loans if they are admitted to high level education except if they are permanent residents.[9] This complies with the Directive and case-law of the ECJ.[10]

Question 2

2a.

In Hungary there is a strong support towards the principle of free movement of persons, which encompasses equal treatment. This extends to social assistance benefits and social security benefits as well, and this principle is not contested neither in literature nor by the press, civil societies, political parties or unions.

The social assistance rights of economically inactive EU citizens, as enshrined in Article 24(2) of Directive 2004/38/EC, are transposed into social law through Act III of 1993 on Social Administration and Social Benefits. Pursuant to Article 3 paragraph (a) the scope of this Act extends to persons exercising their right to free movement and residence in accordance with Act I of 2007, if at the time of requesting the benefit they exercise this right for more than three months and they have a place of residence in Hungary, which is declared and administered in accordance with Act LXVI of 1992 on the Registration of Personal Data and Addresses of Citizens. It means that EU citizens, whether economically active or not active can apply for social assistance benefits after three months, and if they are eligible for it, they are awarded the benefits. As long as the residence is lawful, namely, no expulsion order has been issued, benefits are available. No abuse of benefits has been reported in relation to EU citizens, the reason for which is rather financial: the benefit thresholds are low in Hungary, lower than the expected level of financial resources to obtain a registration certificate in accordance with Directive 2004/38/EC and its implementing law (Act I of 2007).

Regarding social security benefits, equal treatment for EU citizens is provided in Hungary in accordance with Regulation 883/2004/EC on social security coordination. Hungarian laws that implement the Regulation are to be found in the Article 9 notification document.[11] Since the introduction of the EESI

[8] Article 3(b) of Government Decree No. 1/2012. (I.20.) on Students' Credit System.

[9] Éva Gellérné Lukács, 'A diákhitel uniós jogi megítélése és szabályozása Magyarországon', *forthcoming*.

[10] See e.g. Judgment of 2 June 2016, *Commission v the Netherlands*, C-233/14, EU:C:2016:396.

[11] See at <https://ec.europa.eu/social/main.jsp?catId=868&intPageId=2285&langId=en>, visited 30 August 2022.

(electronic data exchange) the administration of claims goes even smoother than before. Referring to the recent case-law of the ECJ,[12] its practical relevance is minimal in Hungary, because persons get the highest amounts of supports in form of tax incentives – not based on pure residence – which is mostly available for economically active people, in whose case residence is not decisive.

2b.

The most heated issue in this realm has been the indexation of child benefits by Austria. An extensive Hungarian article from 2019 has dealt with the legal side of it arguing that the Austrian measures infringed EU law beyond doubt.[13] In fact, the CJEU has confirmed the infringement in Case C-328/20.[14] It took the CJEU almost 2 years to adjudicate in this legal matter. There are thousands of families who have suffered major losses for 3 years because of the Austrian legislative practice. The Family Allowance Satisfaction Fund responsible for family matters, established within the framework of the Prime Minister's Office, would be responsible for administering the indexation reimbursements, the Ministry of Finance announced in a statement to ORF.at.[15]

Hungary fully supports the principle that the country of work shall be responsible for paying social security benefits, not only child benefits but all other kinds of benefits. This issue became quite vivid during the COVID-19 pandemic while people stayed home and worked for their employer seated in another Member State. Pursuant to Regulation 883/2004/EC, the country of work is responsible for the social rights of workers, but due to COVID-19 the Administrative Commission on social security coordination decided to extend a "no-impact" position through 31 December 2022.[16] This means that increased work time spent in the country of residence will not impact the applicable social security legislation for these employees, namely the applicable law will not change from the country of work to the country of residence even if the work is carried out mostly in that country. This is against the main rule of Regulation 883/2004/EC (that of lex loci laboris), and for Hungary it is very important to keep it of a temporary nature.

[12] Starting with the Judgment of 11 November 2014, *Dano,* C-333/13, EU:C:2014:2358.

[13] Éva Gellérné Lukács, 'A családi ellátások indexálása az Európai Unióban', *in* Katalin Raffai & Sarolta Szabó (Eds.), *Honeste benefacere pro scientia: Ünnepi kötet Burián László 65. születésnapja alkalmából*, Budapest, Pázmány Press, 2019, pp. 179-194.

[14] Judgment of 16 June 2022, *Commission v Austria,* C-328/20, EU:C:2022:468.

[15] See at <www.visszateritok.hu/blog/osztrak-csaladi-potlek-indexalas-jogellenes>, visited 30 August 2022.

[16] See at <www.taxathand.com/article/24475/European-Union/2022/Cross-border-workers-COVID-19-no-impact-position-extended-through-31-December-2022>, visited 30 August 2022.

Question 3

3a.

As far as immigration to Hungary is concerned, most immigrants come to Hungary to work. The share of foreigners residing in Hungary for this purpose was steadily increasing between 2014 and 2019, with 62% of foreigners already having obtained residence for this purpose by 2019. While in the first years after accession to the EU, Hungary was the destination of choice for workers from Transylvania (partly due to the fact that Romania only became a Member State of the EU in 2007), nowadays a large number of workers enter the Hungarian labour market from outside the EU, mainly from Ukraine. The ratio of workers of Romanian[17] and Serbian nationality remain significant, the latter being mostly Hungarian-speaking immigrants from across the border.[18] Additionally, the proportion of German immigrants is relatively high; they also arrive to Hungary for employment. The large share of German workers is explained by the fact that several major German car manufacturers invested in production sites in Hungary: Audi in Győr, Mercedes in Kecskemét and BMW in Debrecen. Due to the Russian-Ukrainian war, Hungary has also allowed for the simplified facilitated employment of Ukrainian citizens arriving in Hungary.[19]

3b.

Given Hungary's economic position and income level within the EU, Hungary is basically more interested in "fair movement" than "free movement".

3c.

During the COVID-19 pandemic, Hungary introduced a ban on dismissals in several critical employment sectors (especially in the health sector), rendering worker mobility temporarily impossible.[20] However, these measures were only temporary and were adapted to the period of the health emergency.

In connection with the facilitation of the employment of third-country workers, it is also worth mentioning the enactment of Government Decree No. 320/2022 (VIII. 18.) on Special Rules for the Employment of Third-Country Nationals in Hungary during the Emergency. In view of the situation in Ukraine, this legislation provides for the employment of third-country nationals and stipulates that the

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[17] The number of Romanian citizens entering the country has stagnated at around 2-3 thousand over the last 4-5 years.

[18] See at <www.ksh.hu/mikrocenzus2016/kotet_10_nemzetkozi_vandorlas>, visited 30 August 2022.

[19] Government Decree No. 320/2022. (VIII.18.).

[20] Government Decree No. 41/2020. (III.11.).

latter may participate in the work related to the capacity expansion of the Paks Nuclear Power Plant without obtaining an official permit.

Question 4

4a.

After Hungary's accession to the EU in 2004, the mobility of workers increased dynamically for about a decade, with 31-32 thousand Hungarian citizens taking advantage of the mobility opportunities offered to workers by the EU's single internal market in the mid-2010s. Since 2016 onwards, labour mobility has been declining, plummeting to an annual number of 21,000 workers before the COVID-19 pandemic. In addition, the dynamic of repatriation has accelerated in recent years in the wake of COVID-19 and the Russian-Ukrainian war, with more Hungarian citizens returning to Hungary than the number of Hungarian workers who choose to work abroad in the given year (i.e. the net migration balance per own citizens is positive).[21]

The main destination countries of labour mobility were the UK (pre-Brexit), Austria and Germany, with Austria (due to its geographical proximity) being a significant commuter destination.[22] As regards the sectoral distribution of Hungarian workers working abroad, the 2016 data show that Hungarian citizens abroad are concentrated in trade and services (23%), industry and construction (22%) and in the non-skilled sectors (18%), owing mainly to the relatively higher income levels available in other EU Member States in these sectors. However, in the high-skilled sectors, requiring the independent use of tertiary education, the share of foreign employment is particularly low (7%).[23]

According to the above statistics, the share of Hungarian citizens with a baccalaureate diploma or a vocational diploma working abroad for a short period is particularly high (38.4% and 31.8%, respectively). The share of those with a university degree is 22%, while the share of those with only primary school education is just 8%. In addition, according to the data obtained in 2016, the share of long-term foreign workers with a university degree is particularly high (32%), significantly higher than the share of university graduates as a share of the Hungarian population.

The analysis of the above data suggests that a high proportion of young people with at least upper secondary education take up jobs in other EU Member States,

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[21] See at <www.ksh.hu/stadat_files/nep/hu/nep0030.html>, visited 30 August 2022.

[22] See at <www.ksh.hu/stadat_files/nep/hu/nep0031.html>, visited 30 August 2022.

[23] See at <www.ksh.hu/mikrocenzus2016/kotet_10_nemzetkozi_vandorlas>, visited 30 August 2022.

but it is typically the highly skilled who find long-term employment abroad, while a significant proportion of lower-skilled workers return to Hungary over time.

In terms of gender breakdown, slightly more men leave the country to work abroad than women.[24] Emigration is highest from the Central Hungary region (29.8%), mainly because this region includes the capital Budapest.

According to the 2022 survey published by The Global Economy, Hungary has a relatively low brain drain index of 4 out of 10. Hungary ranks 130th out of 177 countries surveyed by The Global Economy, while in the EU, Hungary is the 9th most affected country by the brain drain phenomenon.[25]

The reason for the high level of brain drain within the EU can be explained by both the high quality of higher education (especially medical education) and the lower level of incomes in Hungary, as compared to Western European wages. In recent years, Hungary has restructured the financing of higher education, transforming a number of universities into public trusts to make their R&D activities more efficient. The declared aim of this model change is to have Hungarian universities placed among leading European universities in various higher education rankings. If successful, the transformation could place Hungary in a unique situation: it could intensify the brain drain of Hungarian students, but it could also bring skilled labour to Hungary, mainly from neighbouring countries outside the EU.

4b.

In order to tackle the brain drain phenomenon as effectively as possible, Hungary is relying on a number of instruments. Since brain drain affects highly qualified workers, the Fundamental Law allows the legislator to make the payment of Hungarian state scholarships for higher education conditional upon a certain period of employment in Hungary.[26] According to Act CCIV of 2011 on National Higher Education, students receiving a Hungarian state scholarship are obliged to successfully complete their studies within a maximum of one and a half times the normal duration of the program and to become active in the Hungarian labour market within 20 years of graduation, for a period at least equal to the duration of their state scholarship studies.[27] Students who do not accept these conditions may also participate in higher education, but they have to cover the costs of their studies.[28]

[24] See at <www.ksh.hu/stadat_files/nep/hu/nep0031.html>, visited 30 August 2022.

[25] See at <www.theglobaleconomy.com/rankings/human_flight_brain_drain_index/>, visited 30 August 2022.

[26] Article XI(3) of the Fundamental Law.

[27] Article 48/A of Act CCIV of 2011.

[28] At the same time, the state provides student loans for fee-paying students. If the student only takes a loan for the amount of the fee to be paid and agrees to the amount being paid directly to the higher education institution, the student loan is completely interest-free.

Hungary is also constantly trying to attract skilled Hungarian workers who are already abroad. In the academic world, the Hungarian Academy of Sciences has been running the "Lendület (Momentum) program" since 2009, which aims to support young researchers boasting outstanding achievements in the national and international academic arena, to reduce the brain drain and to increase the competitiveness of the academic research institute network and universities. Each year, 15-20 winners of the competition receive financial support for 5 years and the opportunity to set up and lead their own research group. However, the 2015-2016 "Come Home, Youth!" program was less successful. With this program, the Government wished to support young Hungarian graduates working in the UK to start a business in their home country. Overall, however, the program failed to provide a competitive offer for Hungarian workers already working abroad, so the Government decided to wind it up in 2016.

Today, the Hungarian government policy is more about preventing labour outflows. In this context, from 2022 onwards, Hungarians under 25 years of age will not have to pay personal income tax. The low corporate tax rate (9%) encourages the establishment of Hungarian businesses, and the Government also provides tax reliefs for companies with significant R&D activities.

Question 5

5a.

Directive 2018/957 (Posting Directive) was fully transposed into Hungarian law, the relevant provisions are in the Labour Code. The new measures came into force on 30 July 2020.[29] The amendment introduced two major changes: a new time limit for postings (12 months which may be extended by further six months)[30] and a broader list of the norms applicable to the posted worker form the host state's law.

The list of the rules applicable to workers posted to Hungary reproduces Article 3(1) of the Posting Directive.[31] The amendment extended this list to include benefits and reimbursement of travel, board and logging.[32] As regards the "equal pay for equal work" principle, the amended text prescribes that the posted worker is subject to Hungarian law with regard to the "amount of remuneration generally applicable at the place of work" as defined by Articles 136-153 of the Labour

[29] Act CXXVI of 2019 on the Amendment of Certain Acts concerning the Action Plan to Protect Families.
[30] Article 295(5)-(7) of the Labour Code.
[31] Article 295(1) of the Labour Code.
[32] Article 295(1)(h) and i) of the Labour Code.

Code.[33] This solution, however, is not perfectly in line with the directive. While, according to the amended directive, any statutory remuneration applies to posted workers, the Labour Code only provides for elements of remuneration regulated by itself. Consequently, if any other law prescribes a wage element that is binding on all employers, it is applicable to employees posted to Hungary under EU law, but not according to the Labour Code.

There are two exceptions to the application of the "equal pay for equal work" principle. Both are based on the relevant provisions of the posting directive.[34] First, it shall not apply to merchant navy enterprises as regards seagoing personnel. Second, in the case of initial assembly and/or first installation of goods where this is an integral part of a contract and carried out by employees posted by the supplier, the provisions on remuneration shall not apply if the period of posting in Hungary does not exceed eight days.[35] As there are no exempted sectors, no information is available on sectors with high exploitation of posted workers.

5b.

Until 1 December 2011, Hungarian labour law required an inland seat to provide temporary work agency services in Hungary.[36] In a preliminary ruling the CJEU declared that this provision was a severe and unlawful restriction on the freedom to provide services.[37] Since then, any company established in an EEA Member State that is authorized under national law to engage in the activities of temporary work agencies may provide services to Hungarian user companies, provided that it also satisfies the requirements prescribed by Hungarian law. Such requirements include registration by the employment authority and a deposit of 15 million HUF (cca. 36,500 euros) to secure employees' claims for damages.[38] In some court cases foreign temporary work agencies challenged the labour authority's sanctions applied against them for not complying with these legal prerequisites.[39] These cases raised no specific questions concerning EU law.

33 Article 295(3) of the Labour Code.

34 Article 1(2) and 3(2) of Directive 96/71/EC.

35 Article 296 of the Labour Code.

36 Article 193/D(1) of the former Labour Code (Act XXII of 1992).

37 Order of 16 June 2010, *Rani*, C-298/09, EU:C:2010:343.

38 Article 215 of the Labour Code; Government Decree No. 118/2001. (VI. 30.) on the Registration and Conditions for the Provision of Temporary Agency Work and Private Employment Agency Activities.

39 See e.g. Mfv.III.10.003/2017/5; and Mfv.I.10.826/2016/8.

Question 6

6a.

There is no relevant case law on this matter.

6b.

The right to strike is enshrined as a constitutional right of employees in Article XVII(2) of the Fundamental Law. The details are set by Act VII of 1989 on the Right to Strike. The hierarchy of the right to strike and the economic freedoms within the EU has not been raised before the Hungarian courts yet.

The strike act prescribes that a strike for a purpose that conflicts with the Fundamental Law is unlawful,[40] and the Fundamental Law declares that the law of the EU is binding.[41] It follows from these provisions that a strike which unlawfully limits the internal market freedoms (as interpreted by the CJEU) would be also unlawful under the Hungarian legal order. Otherwise (outside the scope of EU free movement law) – based on the relevant Hungarian regulations and jurisprudence – it would not be possible to classify a strike as unlawful simply because of its "disproportionate" economic effects.

Question 7

7a.

Anti-discrimination laws of the acquis are – as a main source – implemented by the ETA Act. The case-law related to the ETA Act is widespread, studies analyse it in great detail. The case-law of the Directorate-General for Equal Treatment as part of the Office of the Commissioner for Fundamental Rights is public, in 2022 the majority of cases concerned disability.[42] The number of decisions ranges between 30-50 yearly and to a high extend ends in favour of the claimants.

Access to decent and affordable housing for all is a key component of Social Europe.[43] At the same time, housing is also an economic investment and a highly sensitive market. In Hungary the improvement of housing is promoted by government programs as well that focus on families with children.[44] In 2021 loans

[40] Article 3(1)(b) of Act VII of 1989.

[41] Article E(3) of the Fundamental Law.

[42] See at <https://www.ajbh.hu/ebff-jogesetek>, visited 30 August 2022.

[43] European Parliament Resolution of 21 January 2021 on access to decent and affordable housing for all [2019/2187(INI)].

[44] Márton Czirfusz, *Lakhatási problémák és megoldások. Az önkormányzatok lehetőségei*, Budapest, 2019, p. 4.

related to housing with state subsidy amounted to 29%.[45] The number of housing is constantly rising: there were 4,064,653 flats and houses (housing) in 2001 in Hungary which has increased to 4,519,271 for 2022.[46] On average, the number of apartments increases by 20,000 per year, COVID-19 has not fundamentally influenced the housing market in this respect. Prices, on the other hand, have sharply risen. To provide for social housing fall within the realm of local governments. However,

> the local governments rent out a smaller and smaller part of the existing rental housing stock to those who are in need for social rent. This does not serve social justice, because it displaces those for whom municipal rental apartments are also unaffordable.[47]

7b.

Directive 2003/88/EC was implemented by the Labour Code, on Chapter titled Working Time and Rest Period. There were a remarkable number of cases where the acquis on working time was invoked before Hungarian courts. The most important ones are the following. The notion of working time: following the CJEU's jurisprudence, Hungarian courts classified on-call time as working time, although decided that the remuneration due for the two distinct periods might be different.[48] The time spent in stand-by duty could also be regarded as working time if the preconditions of rest period were not met for the given period of time.[49]

Measure of weekly working time: working time performed over the weekly 48 hours within six months reference periods shall constitute overtime.[50] The conditions for opt-out from the maximum level of weekly working time and the national measures implementing it shall be interpreted strictly.[51]

Daily and weekly rest periods: in a pending preliminary ruling case a Hungarian court asked the CJEU whether the daily rest period forms part of the weekly rest period or these two periods shall not run concurrently.[52]

Working time acquis and the CJEU's relevant case law is often assessed in Hungarian literature with criticism,[53] but without "hostile reactions".

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[45] See at <https://www.ksh.hu/docs/hun/xftp/idoszaki/lakashitel/20214/index.html>, visited 30 August 2022.

[46] See at <https://statinfo.ksh.hu/Statinfo/haViewer.jsp>, visited 30 August 2022.

[47] Czirfusz, 2019, p. 11.

[48] BH2006.374; EBH2008.1800; EBH2008.1809.

[49] Kf.39.750/2020/7; Kf.40.260/2020/7; Kf.40.348/2021/9.

[50] BH2008.309.

[51] EBH2019.M.30.; BH2022.81.

[52] Request for a preliminary ruling, *MÁV-START*, C-477/21, pending.

[53] See e.g. Gábor Fodor T., 'A Munka Törvénykönyve munka- és pihenőidő szabályozásának uniós jogi

7c.

There is no specific regulation for platform work in Hungarian law. The question of (miss-) classification has not been raised in labour litigation and there have been no initiatives for regulation from the social partners or other stakeholders yet.

7d.

In legal terms the application of EU law is clear in Hungary, it prevails over Hungarian national law in accordance with the Fundamental Law (its Article E). In case Kfv.I.35.462/2020/4, the Curia of Hungary adjudicated – in relation to gambling – on the necessity of cross-border element which can be crucial in non-harmonised areas of EU law in the future (as social laws are very similar in nature to gambling in this respect).[54]

The European Social Charter is not often cited in case law. There are two types of cases in which courts have referred to it: in connection with the right to strike[55] and in connection with the unlawful termination of employment.[56] In social matters the Charter was not effectively referred to, the reason of which might also be connected to the fact that Hungary has submitted reservations to the social provisions of the Charter (to Article 12(2)-(4), The right to social security).

Question 8

8a.

When it comes to issues like remuneration, right to associate and right to strike, legal areas that fall within national competence, the Hungarian position is mostly reserved in terms of expanding EU competences in these fields. A good example is the area of posting in which the Hungarian government submitted an action for annulment against Directive 2018/957/EC stating that the legislative bodies – the Council of Ministers and the European Parliament – did not have the competence to regulate on the remuneration of posted workers.[57] The CJEU dismissed this action on 8 December 2020.

megfelelőségéről', *Magyar Munkajog E-journal*, hllj.hu, 2016/2, pp. 21-36.; Lajos Pál, 'Az egyenlőtlen munkaidő-beosztás és a munkabér elszámolása', *Munkajog,* 2020/1, pp. 71-74.; Péter Sipka & Márton Leó Zaccaria, 'A munka és magánélet közötti egyensúly kialakításának alapvető követelményeiről a 2019/1158 irányelvre figyelemmel', *Munkajog*, 2020/4, pp. 24-30.

[54] Kfv.I.35.462/2020/4, para. 36.

[55] Budapest-Capital Regional Court, 20.Mpk.75.155/2020/2.

[56] Mfv.I.10.087/2014/7.

[57] Judgment of 8 December 2020, *Hungary v Parliament and Council*, C-620/18, EU:C:2020:1001; Judgment of 8 December 2020, *Poland v Parliament and Council,* C-626/18, EU:C:2020:1000.

8b.

In Hungary, Act I of 2007 on Free Movement and Residence grants the same treatment to workers and self-employed as persons "who exercises gainful activity". Article 6(1) stipulates that "the EEA citizen is entitled to a stay exceeding ninety days within one hundred and eighty days, a) whose purpose of residence is to continue gainful activity." A person pursuing gainful activity is a worker, a self-employed or who carries out his activities as the owner, manager, or member of the management, representative or supervisory body of a business company, etc. Hence other laws, when defining their personal scope, only refer back to Article 6(1) of Act I of 2007 (e.g. the study loan decree referred to in Question 1 above), it means that workers and self-employed are placed on the same footing and are not treated differently.

In the realm of labour law, there are several differences between workers and self-employed persons. The Labour Code only applies to workers, other laws are applicable to self-employed persons hence they carry out an activity independently and are not subordinated to an employer.

Question 9

9a.

The European Semester and the Country Specific Recommendations are a useful tool to assist Member States to perceive their policies in comparison to common European objectives. Hungary has received recommendations in the last years in several areas, which recommendations are addressed by the national reform programs. The (last) National Reform Program of Hungary 2022[58] (NRP 2022) and its Annex reflects upon employment, family policy, social inequalities, education and health care in detail, including enumerating the concrete interventions in a table format. The NRP 2022 has been assessed by the Council which recommended that Hungary take different actions in 2022.[59]

Supportive family policies became a priority in Hungary in the last decade: an important goal is to achieve a better standard of living for families with children in financial terms than if they had not taken on children. Work-related family benefits have become significantly more valuable. In addition to the classic cash benefits and benefits in kind also encompasses benefits on a wider horizon, it

[58] See at <https://ec.europa.eu/info/sites/default/files/nrp_2022_hu_.pdf>, visited 30 August 2022.

[59] Council Recommendation on the 2022 National Reform Programme of Hungary and delivering a Council opinion on the 2022 Convergence Programme of Hungary.

provides – among other things – considerable housing benefits to buy a home or the car acquisition subsidies for large families.[60]

Finally, the Hungarian recovery and resilience plan (RRP) that was adopted in August 2021 contains relevant sections on social policy. Component H is expressly related to health care referring to the promotion of GP communities and of one-day surgeries in order to make the system more effective. In fact the list of medical interventions that can be provided for as one-day surgery has been expanded as of 1 January 2022.[61]

9b.

EMU is a legally binding instrument with major EU competences. Social policy is mostly dominated by national competence. In order to move social policy into the facet of the EMU a very strong political will – and amendment of the TFEU – is presupposed. Efforts are to be continued in order to find the possible areas of convergence for the future.

Question 10

Parties invoke the Charter's social rights rarely before Hungarian courts and there are only a handful of cases where the court referred to the Charter's provision in its reasoning. Also, in most cases the courts only mentioned the relevant articles of the Charter, but based their reasoning on Hungarian law or on secondary EU legislation.

In a case concerning the dismissal of a temporary agency worker who participated in a strike, Articles 28 and 30 were addressed, but the Curia of Hungary found that neither was applicable to the given case.[62] Article 30 was also invoked but could not be relied upon in a case concerning a civil servant who was dismissed without reasoning.[63] Note that this decision followed the reasoning given by the CJEU in a preliminary ruling.[64]

Some other provisions of the Charter were referred in labour litigation (Article 21 in an age discrimination case[65] and Article 47 in a case concerning a judicial job application process which the employer declared invalid[66]).

[60] Tünde Fűrész & Balázs Molnár, 'The first decade of building a family-friendly Hungary', *Quaderns de Polítiques familiars*, 2021/7, pp. 6-17.

[61] EMMI Regulation No. 39/2021. (IX.6.) amending Annex 9. of NN Regulation No. 9/1993. (IV.2.) on Issues Related to the Social Insurance Financing of Specialised Health Care.

[62] BH2021.111.

[63] Mfv.I.10.078/2014/2.

[64] Order of 16 January 2014, *Weigl*, C-332/13, EU:C:2014:31.

[65] EBH2019.M.8. paras. 42-43.

[66] Mfv.X.10.251/2019/12.

From this limited case-law no conclusions can be drawn to answer the questions specified in points a)-e).

Question 11

11a.

Act CXLIII of 2015 on Public Procurement contains various measures to promote social rights.[67] No economic operator may take part in public procurement processes as candidate, tenderer or subcontractor who has committed the crime of force labour, and the commission of the crime was established in a final court judgment in the last five years, until he/she was exempted from the disadvantages related to his/her criminal record; or has violated the rules on work permits for employment of third country nationals in Hungary in the last who years as established by a final administrative decision.[68]

Contracting authorities may prescribe in the call for competition that no economic operator may take part in public procurement processes as candidate, tenderer or subcontractor who gravely violated in the last three years the obligations in the fields of environmental, social and labour law established by law, collective agreements or by the international provisions listed in Annex 4.[69] The violation shall be proved by the contracting authority.[70]

The contracting authority may also define specific, especially social, environmental and innovation-stimulating conditions for the performance of the contract (e.g. the employment of job seekers, training for unemployed or young persons).[71]

11b.

In order to reduce and prevent public procurement corruption, the Public Procurement Authority developed the Public Procurement Code of Ethics in February 2022. The Code is a recommendation without binding effect. Any private actor may voluntarily submit to its provisions, and can develop their own public procurement code of ethics based on it. Until August 2022, 54 entities signed the Code.[72]

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[67] Following the principles of directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

[68] Article 62(1)(af) and l) of Act CXLIII of 2015.

[69] The list is the same as in Annex X of Directive 2004/18/EC.

[70] Article 63(1)(a) and 73(4) of Act CXLIII of 2015.

[71] Article 132(1) of Act CXLIII of 2015.

[72] See at <www.kozbeszerzes.hu/hatosag/kozbeszerzesi-hatosag/kozbeszerzesi-etikai-kodex/>, visited 30 August 2022.

11c.

No trans-national collective agreements have been concluded by Hungarian firms.

11d.

On condition that they have jurisdiction,[73] Hungarian courts admit civil claims when the violations of social rights have taken place abroad, like in the cases of Hungarian workers posted to other Member States.[74]

Hungarian courts have jurisdiction for certain criminal claims arising from crimes committed abroad (e.g. if an act committed by a Hungarian national abroad is a crime according to Hungarian law).[75]

11e.

Collective actions by civil organisations or interest representative bodies are possible in case of a violation – or a direct threat of violation – of the equal treatment principle, if the violation or its direct threat affects a larger group of persons that cannot be precisely determined.[76]

11f.

There is no legal requirement imposed on firms for social rights due diligence.

Question 12

The Hungarian legal system has traditionally been particularly open towards environmental protection. The Constitutional Court declared the duty to protect the environment, establishing the principle of non-regression in its Decision No. 28/1994 (V. 20.) AB, meaning that the level of environmental protection already achieved cannot be derogated from. Article P of the Fundamental Law defines natural resources as the common heritage of the nation, imposing the duty to protect, maintain and preserve these for future generations on the state and everyone. In its Decision No. 14/2020. (VII. 6.) AB, the Constitutional Court declared that Article P of the Fundamental Law is based on the constitutional formulation of the public trust doctrine, which requires that the state manage natural and cultural resources entrusted to it just like a trustee for future generations. It may be concluded that the protection of intergenerational equity is strongly guaranteed and protected by the Hungarian legal system.

[73] See the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[74] See e.g. Mfv.I.10.047/2015/03; Mfv.II.10.166./2015/3; Mfv.I.10.343./2014/5; Mfv.II.10.388/2014/8; Mfv.I.10.568/2016/10; Mfv.II.10.609/2013/07.

[75] Article 3 of Act C of 2012 on the Penal Code.

[76] Article 20 ETA Act.

Among others, this duty is enforced by the Ombudsman for Future Generations, who is empowered to act in the interests of future generations not only through the media, but also through concrete legal means (e.g. has the right to propose legislation and can also launch proceedings before the Constitutional Court through the Commissioner for Fundamental Rights).[77]

For the effective protection of the values set out in Article P of the Fundamental Law, Hungary promulgated the Paris Climate Agreement in Act L of 2016, and the National Assembly laid down the framework for legal action against climate change in Act LIV of 2020 on Climate Protection.[78]

While intergenerational equity is consistently given effect to in the Hungarian legal system through Article P of the Fundamental Law and the practice of the Constitutional Court, there are many difficulties in ensuring intragenerational equity, notwithstanding the efforts of the government to give effect to it to the fullest possible extent. However, while ensuring intergenerational equity requires primarily a conceptual approach, achieving intragenerational equity also entails concrete budgetary expenditure.

The Hungarian government is taking several measures to reduce the energy costs of the population, notably subsidizing electricity and gas prices up to the average consumption level and capping fuel prices for privately owned cars. While poorer households benefit proportionally more from the subsidies on electricity and gas prices, the capped fuel price is in fact a subsidy for the wealthier. The radically rising gas prices have also led the government in August 2022 to increase the amount of firewood that can be harvested from forests, a measure that may possibly temporarily address the heating problems of those in need, but which seriously jeopardizes the interests of future generations and the common heritage of the nation.[79] While these measures make a significant contribution to ensuring social justice, they do not encourage responsible energy use, which is particularly harmful from a climate change perspective.

In addition to the above, the Hungarian government has a number of other instruments to help combat climate change. These include subsidies for the

[77] The Constitutional Court acted on the motion of the Commissioner for Fundamental Rights in the case concluded by the above-mentioned Decision No. 14/2020. (VII.6.) AB. In this case, the Constitutional Court also annulled several provisions of the Hungarian Forestry Act that had overshadowed the environmental aspects of forest management.

[78] The Hungarian opposite parties asked the Constitutional Court for review the conformity of this Act with the Fundamental Law (Case No. II/3536/2021). The case is similar to the German Federal Constitutional Court's 1 BvR 2656/18 and others' decision (adopted on 24 March 2021). As of 30 August 2022, the case is pending.

[79] The Hungarian opposite parties asked the Constitutional Court for review the conformity of this Government Decree with the Fundamental Law (Case No. II/1907/2022). As of 30 August 2022, the case is pending.

purchase of electric vehicles, subsidies for the installation of solar panels; and subsidies for the energy modernization of buildings. Individually, these measures are all appropriate to tackle climate change, but they are essentially fragmented in nature and do not fit into a coherent, well thought-out climate policy strategy. A further disadvantage of the measures is that, in practice, the self-financing required means that the poorest households are typically unable to take advantage of these options.

Question 13

The Hungarian education system is essentially centralized. The National Core Curriculum, which requires a nationally uniform approach, is not well suited to individualized education, but it also has the undoubted advantage of making the subject knowledge of students completing primary and secondary education comparable, which can be particularly useful for higher education applications.

In the 8th grade of the primary school, "Civic Education" is taught. The subject includes a special focus on the place, role, and importance of nation states; the relationship between Hungary and the EU; and issues of national identity, patriotism and Europeanism. The knowledge acquired in this subject is further expanded in the 4th (12th overall) grade of secondary school, which presents the EU, its values, institutions, and citizenship at a higher level and in a deeper context than before.

Traditionally, legal training in Hungarian universities has placed a strong emphasis on the law of the EU. All Hungarian law faculties teach EU law as a separate, compulsory subject, which is also a part of the final university exams. EU law is also a part of the bar exams organized by the Ministry of Justice.

Hungarian higher education is fully Bologna-compliant, with the exception of a few courses,[80] and students often go on to study abroad for their masters or doctoral degrees after completing their undergraduate studies in Hungary; in addition, a high number of students participate in student mobility schemes.

It should be mentioned, however, that while the overall quality of EU and citizenship education in primary and secondary schools, as well as higher education is satisfactory, the government reformed the Hungarian vocational education and training system starting with the 2020/2021 school year.[81] The renewed system of training now places much more emphasis on teaching practical subjects relevant

[80] Such exceptions are e.g. the training of doctors, veterinary surgeons, lawyers or pharmacists, where the specificities of the training do not allow for a Bologna system.

[81] Act LXXX of 2019 on Vocational Education and Training.

for the labour market, inevitably resulting in the reduction of the quality and depth of knowledge of social sciences (including EU-related knowledge).

Question 14

Hungary has ratified almost all the major international instruments combating discrimination, with the exception of Protocol No. 12 to the ECHR. The Optional Protocol to the ICESCR and the collective complaints protocol of the Revised European Social Charter have also not been ratified by Hungary. The cornerstone of the legislation is the general anti-discrimination clause of the Fundamental Law. This general ban is detailed by the ETA Act. Sectoral laws (e.g. Civil Code, Labour Code) simply refer to the provisions of the ETA Act in discrimination-related instances, which creates consistency within the system. The ETA Act covers all five grounds included in the EU directives (Directives 2000/43 and 200/78) and in some respects (e.g. the number of grounds covered) goes beyond the requirements of the directives.[82]

In 2020, the wage gap calculated on the basis of the gross average monthly earnings of male and female employees amounted to 15.9% among full-time workers, a decrease compared to a year earlier. The difference was 14.9% in the business sector, 16.6% in the budget, and 15.9% in the non-profit sector, which is a lower value than last year in businesses and in the budget.[83] However, it is still higher than the EU average. A positive sign might be that the issue of equal opportunities and diversity management is more and more widespread in Hungary. However, its scope is rather limited to larger and multinational companies. On the political level, the participation of women is extremely low, the proportion of women in the Hungarian parliament is 14% (the EU average is 33%). At present, out of the 14 ministers, Judit Varga (Minister of Justice) is the only woman. Remarkably, the new President of the Republic of Hungary, Katalin Novák, is also a woman.

Question 15

In Hungarian legal and political thinking, the EU is still primarily an economic community, not a social one. This is partly due to the fact that Hungary consistently considers the EU as an organization of independent, sovereign states, and rejects the concept of a federal Europe. Under Article E of the Fundamental Law, Hungary may exercise some of its powers together with the other Member States only to the

[82] András Kádár, *Country report – Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, Hungary*, Brussels, European Commission, 2021, p. 8.

[83] See at <https://www.ksh.hu/sdg/4-17-sdg-8.html>, visited 30 August 2022.

extent necessary for the exercise of the rights and the fulfilment of the obligations arising from the founding treaties.[84]

Accordingly, social rights deriving from EU law are a part of Hungarian public thinking only to the extent that they are directly related to the exercise of an economic right (e.g. support for jobseekers in another Member State; employment abroad; ensuring equal working conditions). To this extent, EU law is given full effect in Hungary, both in legislation and the application of the law, as well as in academic life.

The extent to which certain entitlements under the European Pillar of Social Rights apply in Hungary varies. The Hungarian government has taken significant measures over a longer period of time to increase employment (and achieve the so-called work-based society), but the conditions of benefits for those leaving the labour market (e.g. jobseeker's allowance, disability benefits) are rather strict, without actually serving a real social purpose.[85]

The values of the EU are also reflected in the Hungarian Fundamental Law without exception, and Hungary (despite the highly politicized disputes with some EU institutions) is trying to ensure their full application at the level of individuals. Hungary's approach to the future of the EU, however, makes these rights and values more likely to be seen as national values stemming from the common constitutional traditions of the Member States, instead of the common constitutional basis of a European Social Union.

[84] See the operative part of Decision No. 2/2019. (III.5.) AB: "Under Article R(1) of the Fundamental Law, the applicability of EU law in Hungary is based on Article E of the Fundamental Law."

[85] After the change of regime there were undoubtedly significant abuses, e.g. in the context of benefits for people with disabilities, which by the early 2010s had resulted in such a significant budgetary burden that a review and radical overhaul of the system became inevitable.

IRELAND

Hilary Hogan, Christopher McMahon and Alan Eustace[1]

Question 1

European Communities (Free Movement of Persons) Regulations 2015 (SI no 548/2015), reg 17(1): '…a person who is residing in the State in accordance with these Regulations shall be entitled… (b) to carry on any business, trade or profession and to have access to education and training in the State in the like manner and to the like extent in all respects as Irish citizens'.

a)
As far as we are aware, there is no evidence that Irish courts do not properly apply EU law on equal treatment. We do not have adequate data on the question of specific barriers to equal treatment for the purpose of this report.

b)
The European Communities (Free Movement of Persons) Regulations 2015 (SI no 548/2015) specifies the following difference in treatment:
an economically active EU citizen may remain in the state indefinitely
an economically inactive EU citizen may only remain in the state beyond 3 months if:

- They were previously economically active but have retired or become ill,
- they are not an unreasonable burden on the social assistance system and have sickness insurance,
- they are the primary care-giving parent of a child enrolled in education,
- their marriage or civil partnership to an EU citizen resident in the state has broken down and the resulting court order granted them access to a child resident in the state, or the economically inactive EU citizen was a victim of domestic violence during the marriage or civil partnership, or
- they have been granted permanent residency in the state.

We are not aware of any significant contestation of the difference in treatment in Ireland.

[1] Trinity College Dublin

Question 2

a)

We are not aware of any significant discussion of this in Ireland.

b)

We are not aware of any significant discussion of this in Ireland.

The position is set out in law as follows: Irish law requires a child to be ordinarily resident in the state in order for a parent to receive Child Benefit. However, administrative practice[2] recognises the supremacy of Regulation (EC) No 883/2004 in this respect, and as such, Child Benefit is paid to the EU worker parents resident in Ireland, of children resident in other EU Member States. The amount payable is subject to a deduction to reflect any benefits to which the claimant is entitled in respect of that child in the Member State of the child's residence.

Question 3

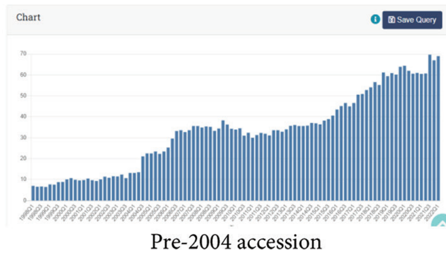
a)

Central Statistics Office data for Q2 2022 data show that approx 252,200 EU citizens are employed (according to ILO economic status) in Ireland. That is 9.9% of the total number in employment. For comparison, approx 361,700 nationals of other EU Member States reside in Ireland (7.1% of the population). This means that 70% of EU citizens resident in Ireland are in employment.

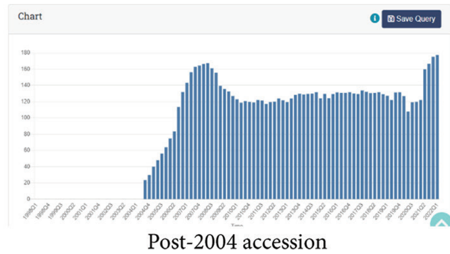
In respect of prominent sectors, these vary according to what Member States the EU citizen workers have come from. Among workers who declared their economic sector, for pre-2004 accession member states, Information and Communication is the most prominent sector (64% of total workers). For post-2004 accession member states, Industry is the most prominent sector (23%), followed by Retail (14%), Administration and Support Services (10%), and Accommodation and Food Service (10%).

The following tables indicate the change over time in the number of workers from pre- and post-2004 accession member states in Ireland:

[2] See gov.ie – Operational Guidelines: Child Benefit (www.gov.ie).



Pre-2004 accession



Post-2004 accession

Data from the European Commission[3] indicate that there are labour shortages in the following industries: science and engineering; information and communication technology; health and social care; and construction. Anecdotal evidence suggests significant shortages in accommodation and food service, and education.

b)

We are not aware of any significant usage of this term, nor the underlying idea, in Ireland. That is not to say there is no discussion around immigration in Ireland, but rather there is no indication it has coalesced behind the idea of 'fair movement' specifically.

c)

We are not aware of any significant discussion of this issue in Ireland.

Question 4

a)

Data for Q2 2022 shows 18,700 people emigrated from Ireland to other Member States, as compared to 28,800 immigrants from other Member States to Ireland in the same period. Only limited data are available on the specific demographics of intra-EU emigration from Ireland: in this group, 51% of emigrants are male. Of emigration from Ireland overall, 77% are aged between 15 and 44; we see no compelling reason to doubt this holds true for intra-EU emigration.

In respect of education levels, again data are only available for overall emigration figures. These show that 57% of emigrants have a third-level qualification. This should be seen in the context that 53% of the Irish population aged 25-64 hold a third level qualification. Therefore, this does not indicate a particularly strong 'brain drain' effect. There are no specific data available on the prior economic sector of emigrants.

[3] See Labour market information: Ireland (europa.eu).

Nonetheless, there is significant concern over 'brain drain' from Ireland in specific sectors, most notably healthcare: for example, 52% of newly-qualified doctors reported an intention to emigrate in 2018 – and the factors contributing to that, like unsustainable workloads, can only have been exacerbated by the Covid-19 pandemic. However, intra-EU migration rarely features in this discussion, as the most prominent destination for emigrating healthcare professionals is a third country, Australia.[4]

b)

We are not aware of any such measures in Ireland.

c)

N/A

Question 5

a)

Yes: European Union (Posting of Workers) (Amendment) Regulations 2020 (SI no 374/2020) and European Union (Posting of Workers) (Amendment) Regulations 2022 (SI no 320/2022)
Equal pay for equal work has been protected in the following ways:

- The Protection of Employees (Part-Time Work) Act 2001, section 20 extends all relevant employment laws to include posted workers within their scope;
- The Workplace Relations Act 2015, section 27 empowers inspectors from the Workplace Relations Commission (WRC, a public regulatory body) to assess the compliance of employers with various measures of national employment law. The European Union (Posting of Workers) Regulations 2016 (SI no 412/2016), reg 10 and schedule 3 gave the inspectors authority to use those same powers in respect of posted workers, to ensure compliance with working time, health and safety, minimum wage, protection of pregnant women and maternity leave, and non-discrimination. Reg 9 allows for workers in the construction industry to take individual complaints to the WRC in respect of minimum wage. In the 2016 Regulations, minimum wage was stated to be equal to the applicable minimum wage for comparable non-posted workers, whether this be the statutory minimum wage, a sectoral collective agreement, or

[4] For discussion, see: Tracking the leavers: towards a better understanding of doctor migration from Ireland to Australia 2008–2018 | SpringerLink).

a sectoral statutory order. The 2020 Regulations amended this method for calculating the applicable minimum wage to more precisely reflect the terms of Directive 2018/957.

The European Union (Posting of Workers) (Amendment) Regulations 2022 exclude drivers engaged in bilateral transport operations from the scope of protection under the regulations transposing Directive 2018/957, in accordance with Regulation (EC) 1071/2009, Regulation (EC) 1072/2009 and Regulation (EC) 1073/2009. We are not aware of any other sectors excluded from the scope of the relevant regulations.

Anecdotally, the WRC and trade unions focus their attention on the construction industry. The implication is that the WRC considers the greatest risk of exploitation here, as this has the highest number of posted workers in Ireland. We are not aware of any further data on this subject.

b)

This has been considered by academic commentary here: Chapter6_Posting of workers before Irish courts.pdf (etui.org), in which the most prominent cases are analysed. Cases about posted workers in Ireland are very rare.

Question 6

a)

There is very little evidence of either freedom of establishment or Article 16 CFR being used to challenge social law in Ireland. Such limited examples as there are include:

- Exclusion from social welfare payments: *Solovastru v Minister for Social Protection* [2011] IEHC 532 (unsuccessful); *Gusa v Minister for Social Protection* [2016] IECA 237 (case referred to CJEU, answers favourable to applicant);
- Levy on private health insurance companies to share burden of risk: *BUPA Ireland Ltd v Health Insurance Authority* [2008] IESC 42 (decided on different grounds);

Of employment law specifically:

- Regulation and licensing of professions and the recognition of qualifications: *Bloomer v Incorporated Law Society of Ireland* [1995] 3 IR 14 (successful in part); *Young v Pharmaceutical Society of Ireland* [1995] 2 IR 91 (unsuccessful); *Scally v Minister for the Environment* [1996] 1 IR 367 (unsuccessful); *McCann v Minister for Education* [1997] 1 ILRM 1

(unsuccessful); *Castletown Fisheries Ltd v Min for Transport* [2009] IEHC 240 (unsuccessful); *Cork Institute of Technology v Minister for Transport, Tourism and Sport* [2017] IEHC 762 (successful); *Md Saydur Rahman v An Garda Síochána* [2022] IEHC 206 (comments on freedom of establishment *obiter*);

- Maritime safety regulations: *Skellig Fish Ltd v Minister for Transport* [2010] IEHC 190 (successful); and
- Sectoral employment regulation system: *NECI v Labour Court* [2021] IESC 36 (unsuccessful).

b)

The right to strike is protected in two ways in Ireland:

- As a personal constitutional right, as the corollary of the right to work encompassed within Article 40.3 of the Constitution: see *Educational Company of Ireland Ltd v Fitzpatrick (no 2)* [1961] IR 345; and
- As a set of statutory immunities from suit in respect of what would otherwise be illegal at common law, including 'combination' and 'watching and besetting': see Industrial Relations Act 1990, part II (as amended).

We are not aware of any cases where a strike has been restrained on the basis of freedom of establishment or freedom to provide services. Nor are we aware of any instances of balancing between the right to strike and internal market freedoms in the case law. However, we cannot say for certain that this does not happen, because not all cases of injunctions against strikes are reported; and there is always the possibility that the threat of an injunction on the basis of internal market freedoms is used to dissuade trade unions from calling strikes in the first place. Adequate data do not exist to report on this.

Question 7

The various directives of the social acquis are implemented by means of national primary legislation, and secondary legislation under the European Communities Act 1972, which gives it the equivalent force of primary legislation.

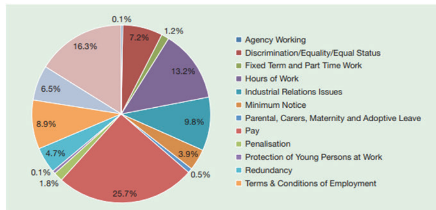
a)

Employment Equality Acts 1998-2015
Equal Status Acts 2000-2018
We are not aware of any significant impact of recent CJEU case law on religious discrimination in Ireland.
As far as we are aware, the notion of reasonable accommodation is properly implemented.

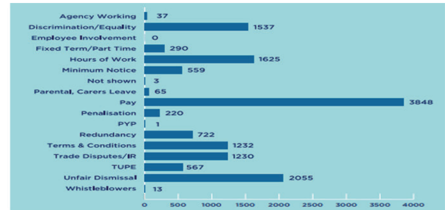
We express no views on developments that may be required in the field of anti-discrimination law at national or EU level.

b)

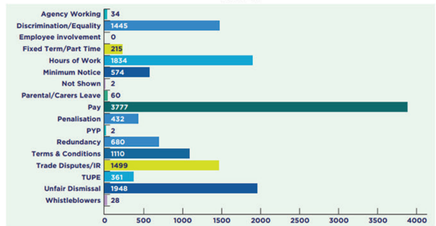
Organisation of Working Time Act 1997 (as amended)
It has not been possible to review all national case law on the social acquis for this report; however, the WRC publishes annual reports breaking down the number of complaints received under each piece of legislation implementing the social acquis. These are the relevant figures from the reports over the period 2015-2021:



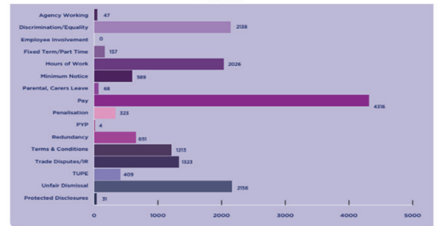
2015



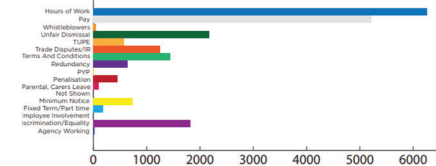
2016

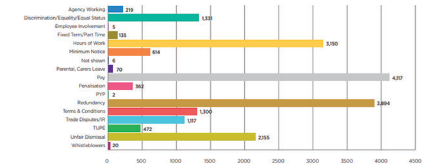


2017



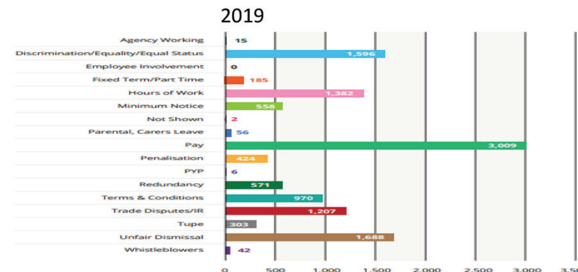
2018





2019

2020



2021

We are not aware of any hostile reaction to the case law of the CJEU.

c)

There is no specific regulation of platform work in Ireland. Irish law adopts a binary approach to workers – employees enjoy the full range of labour law protection, self-employed workers enjoy no such protection.

There is a statutory code of practice for determining employment status, which refers specifically to 'workers in the digital/gig economy':

> New forms of work have emerged in the so-called 'digital/gig/platform/crowd' economies. The emergence of these new forms of work can pose a challenge in determining whether a 'contract of service' or a 'contract for services' exists because traditional lines between employers and workers are becoming blurred. Although the method of engagement of these workers might be different from traditional methods because of the use of modern technology, they will still be categorised as being either an employee or self-employed. Unlike in certain other jurisdictions, this binary approach continues to apply in Ireland. The essential legal tests or factors set out in the preceding sections are still used and are still relevant to deciding whether a 'gig worker' is an employee or is self-employed. Many workers in the digital economy are genuinely operating in an autonomous, independent, self-employed capacity. Others, however, can be deemed to be engaged as employees in a contract of service situation. In determining the employment status of such workers, the same approach is taken as with other workers to decide if they are employed under a contract of service, or a contract for services, and each case must be considered in the round and entirely on its own merits.

One example of a recent case in which the Court of Appeal determined that delivery drivers were not employees is *Karshan (Midlands) Ltd t/a Domino's Pizza v The Revenue Commissioners* [2022] IECA 124. However, this case did not involve a digital platform in particular. There are many instances of Irish workers, including platform workers, being classified as self-employed, but we are not aware of any cases taken in respect of high-profile digital platforms, as have been seen in recent years in some other member states and third countries.

The largest trade union in Ireland, SIPTU, has campaigned for the extension of collective bargaining and other employment rights to platform workers: see SIPTU expresses concerns over platform workers' rights in Ireland | (europa.eu). This has attracted some media coverage, but no changes to the law: As Deliveroo Workers Push for Better Work Conditions, There's Debate About How to Organise | Dublin Inquirer.

Some self-employed workers who are considered 'false self-employed' or 'fully dependent' do have the right to collective representation, in accordance with the Competition (Amendment) Act 2017.

d)

We are not aware of any instances of the relationship between EU and international labour law being clarified. The ESC is rarely cited by national courts, particularly in the labour context. One example, which did not involve EU law, was *NVH v Minister for Justice* [2015] IEHC 246; [2017] IESC 35 in which the courts found a right to work for some asylum seekers.

Question 8

a)

The Directive on adequate minimum wages has been broadly welcomed in Ireland.

There is also support for EU regulation of working time to be updated to include a right to disconnect.

b)

As stated above, Irish law adopts a binary approach to workers – employees enjoy the full range of labour law protection, self-employed workers enjoy no such protection. However, EU internal market freedoms apply to both employees and self-employed workers.

Question 9

a)

We have chosen to focus on the most recent Country Reports and Country-Specific Recommendations, rather than go back to the beginning of the European Semester during the Financial Crisis. Ireland was subject to strict conditionality in respect of the EU-IMF bailout during that period, which obviously had a large impact on economic and social policy. What follows is a synthesis of observations in Country Reports for 2019-2022, and the Recommendations that have derived from these reports:

1. Labour policy:
   i. Although the Irish education generally performs well, there are skill shortages in the labour force, with particular gaps in digital skills and managerial skills (particularly in SMEs). Higher education needs significant additional funding. There are shortages of teachers at primary and secondary levels;
   ii. Active labour market policies are needed to re-integrate both people made recently unemployed by economic and technological realignment, and the long-term unemployed – this includes training and work placement programmes, and apprenticeships;
   iii. Platform working creates instability for workers and reduces the coverage of social assistance programmes. More generally, self-employed people suffer exclusion from social protection;
   iv. Significant numbers of people are underemployed or 'quasi-jobless'. This trend is more pronounced among women and people with disabilities, with high rates of poverty among disabled people;
   v. There is a significant gender pay gap, and regional imbalances in both employment and pay rates;
   vi. Greater social dialogue is needed at policy-making level;

2. Other social policy areas:
   i. Strongly related to the gender employment and pay gap: childcare costs are very high, representing a particular burden on middle-income families, which results in women dropping out of the workforce to care for children;
   ii. Improvement is needed on child poverty;
   iii. The pension system is not sustainable;
   iv. Ireland is a European outlier in lack of access to primary healthcare and waiting times for hospital treatment, despite consistent overspends in healthcare. The health system suffers from inefficiencies of duplication, in the absence of single-tier public healthcare. The health system needs to be rebalanced as between hospital-based treatment on the one hand and primary and community care on the other; and as between curative and preventative care;
   v. The entrenched housing crisis is creating both massive social problems, with homelessness very high, and damaging economic competitiveness, as workers cannot find affordable housing. The

> provision of social housing in particular is far too low, and delivery is inefficient and costly.

The impact of the Semester process on Irish social policy is not obvious. The response of the Irish government to these recommendations in its Recovery and Resilience Plan as part of NextGenerationEU was welcomed by the Commission and the Council, but there are reasons to think many of the proposals from the government would have been made irrespective of these recommendations, as a result of domestic political pressure. Even still, it is far from clear that there has been much impact of government policy (whether inspired by the Semester process or not) on the biggest social challenges facing Ireland.

b)

We express no views on the problems or advantages of such a development.

Question 10

The Charter of Fundamental Rights is directly effective in Irish law.
However, there has been relatively little discussion of the Charter's social rights in Irish case law, and the courts have had relatively few opportunities to outline the meaning and implication of these rights. Thus, it is unclear whether those rights are, for example, considered to be equal to other fundamental rights, to be fully effective, or as principles within the meaning of Art 52(5) of the Charter.
One example is the decision of the Irish High Court in *Hampshire County Council v C.E.* [2019] IEHC 641, where Binchy J cited Art 24 of the Charter of Fundamental Rights, the best interests of the child.

Question 11

a)

Rules on public procurement are used to foster social rights. The Office of Government Procurement issued guidelines in December 2018 for public bodies on how they might incorporate social considerations into decisions on public procurement. In particular, these guidelines highlight that public bodies can reject tenders that do not comply with social or labour law obligations. They recommend rejection of a tender where it is abnormally low because of a failure to comply with these obligations. These guidelines are careful to spell out the limits of public bodies to respond for such considerations, warning that public bodies cannot use public procurement decisions to impose more stringent labour and social standards on companies that are complying with the standards applicable in the jurisdictions in which the relevant operations take place. It also highlights

the possibility of recourse to reserved public procurement procedures within EU rules to allocate contracts to businesses employing minimum proportions of certain categories of disadvantaged workers. They also highlight the flexibility that public bodies have in making decisions on contracts with values below the minimum thresholds for the application of EU law.[5]

b)

Private actors are involved in protecting social rights. The Department of Enterprise, Trade and Employment has implemented two national plans on Corporate Social Responsibility (CSR) since 2014. The most recent achievements of this plan include the organisation of events and informal networks of stakeholders and business leaders to discuss CSR activities and developing a panel of CSR ambassadors within the business community. The Department has developed a website that contains guidelines for businesses and a collection of case studies detailing examples of CSR activities conducted by private businesses.[6] One example of a private initiative in this sphere is the Diversity Charter Ireland, which was launched in 2012 and sees a number of public and private sector bodies committing themselves to effective diversity management, preventing discrimination and promoting equality with respect to all their stakeholders and the environment in which they operate.[7]

c)

The authors are not aware of any major transnational collective agreements concluded by national firms. In general, collective agreements between businesses and workers at a national level have faced significant obstacles from constitutional jurisprudence safeguarding the primacy of the legislature. See for example *John Grace Fried Chicken Ltd and Others v Catering Joint Labour Committee and Others* [2011] IEHC 277, [2011] 3 IR 211; *McGowan v Labour Court* [2013] IESC 21, [2013] 3 IR 718. However, more recently these obstacles appear to have moderated somewhat.[8]

[5] For more detail, see Office of Government Procurement, 'Incorporating Social Considerations into Public Procurement' (2018) <https://www.gov.ie/en/publication/5d4b4-incorporating-social-considerations-into-public-procurement-december-2018/ > accessed 6 September 2022.

[6] See http://csrhub.ie/.

[7] See https://enterprise.gov.ie/en/publications/publication-files/good-for-business-good-for-the-community.pdf; https://enterprise.gov.ie/en/publications/publication-files/csr-check-2020.pdf

[8] See *Náisiúnta Leichtreach Contraitheoir Éireann v Labour Court* [2020] IEHC 303, [2020] IEHC 342; *Náisiúnta Leichtreach Contraitheoir Éireann v Labour Court* [2021] IESC 36; Alan Eustace, 'The Electrical Contractors Case: Irish Supreme Court Illuminates Collective Bargaining and Delegated Legislation' (2022) 85 Modern Law Review 1029.

d)

There is no mechanism for suing businesses in Ireland for breaches of social rights in other jurisdictions. However, an independent report commissioned by the Department of Foreign Affairs has recommended their introduction.[9]

e)

The possibilities for collective or class actions in Ireland are very limited. The existing procedures in Irish law for collective redress are very weak. Order 15, Rule 9 of the Rules of the Superior Courts allows the courts to permit one or more persons to pursue or defend an action on behalf of a broader group, provided that those persons have the same interest in the subject matter of the dispute. The use of this procedure is relatively limited and its boundaries have been interpreted narrowly by the courts. A more informal system of test cases has also been operated by the courts, where one of a number of very similar individual actions is selected as a test case. While subsequent cases will not be formally bound by the court's findings on the test case, a court deciding a very similar case will generally draw similar conclusions following the doctrine of precedent.

A new mechanism is due to be introduced into Irish law imminently which will facilitate greater recourse to collective actions through the Irish courts. The General Scheme of the Representative Actions for the Protection of the Collective Interests of Consumers Bill 2022 has been published by the government and seeks to transpose Parliament and Council Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC. This will allow consumers to pursue collective actions in the Irish courts through qualified entities such as consumer rights organisations that will be designated by the Minister for Enterprise, Trade and Employment. The procedure will require consumers to opt in. Article 24 of the Directive requires these new rules to be transposed into Irish law by 25 December 2022 and to take effect by 25 June 2023.

f)

There does not appear to be any obligation in national law for businesses to undertake social rights due diligence.

[9] See Rachel Widdis, 'Review of Access to Remedy in Ireland' (Department of Foreign Affairs 2020) https://www.dfa.ie/media/dfa/ourrolepolicies/humanrights/FINAL-Access-to-Remedy-in-Ireland-June-2021.pdf;

https://www.dfa.ie/media/dfa/ourrolepolicies/humanrights/Baseline-Study-Business-and-Human-Rights-v2.pdf.

Question 12

A recent study on environmental justice in Ireland has suggested that there are significant shortcomings in Ireland's approach to integrating climate change and social justice. In particular, it suggests that reviews of impacts on the environment prepared by government agencies have failed to appropriately address the social and distributional impacts of harm caused to the environment. It has also suggested that many marginalised groups feel that they can do little to influence planning and environmental decision-making. This report recommends further funding of civil legal aid to allow individuals and community groups to take legal action in defence of the environment. Better data collection on social and distributional impacts of climate change and environmental degradation are also recommended. It also highlights unequal access to environmental amenities and transport.[10]

Question 13

a)

The primary school curriculum is supplemented by the voluntary Blue Star Programme organised by European Movement Ireland through which students can prepare projects on different EU Member States, learn about European history and engage with the works of great European artists.

In secondary schools, all students study Civic, Social and Political Education, which features some explanation of the EU institutions and Ireland's place within it. This used to be assessed by a compulsory written examination and coursework to be completed by the end of the third year of secondary school as part of the Junior Certificate Examination. From 2019, it has been taught as a short course of approximately 100 hours of class time. Students may also take optional subjects in History and Politics in Society as part of the Leaving Certificate course (fifth and sixth year of secondary education) which also engage to some extent with topics related to the EU.

There are a wide range of different courses offered in Irish higher education which will touch on issues of EU integration to varying extents. More than 65,000 students from Irish universities have benefitted from the Erasmus programme of exchanges since it was introduced in 1987. Many Irish universities offer interdisciplinary undergraduate degree courses in European Studies.

[10] See Sadhbh O'Neill et al, 'Environmental Justice in Ireland: Key dimensions of environmental and climate injustice experienced by vulnerable and marginalised communities' (Centre for Climate and Society, Dublin City University 2022) https://communitylawandmediation.ie/wp-content/uploads/2022/03/Environmental-Justice-in-Ireland-230322-1.pdf. accessed 6 September 2022.

b)

There are no particular rules or guidelines available to the authors to report beyond the information on the curriculum reported above.

c)

There are no particular examples of best practice available to the authors to report.

Question 14

One national developments worth mentioning under this heading include the influence of EU law in dismantling discriminatory practices in civil employment. Until 1973, women in public sector employment were required to vacate their posts after getting married, which was inconsistent with the practice in EU Member States. The end of the 'marriage bar' was regarded as a means of ensuring that Ireland complied with future obligations that would arise in the context of its membership of the EU, to which it acceded in 1973. The labour force participation rate of married women almost doubled between 1971 and 1973.[11] Discrimination based on employment and marital status subsequently became illegal throughout the EU in 1977.

Question 15

There is very little engagement with the idea of the EU as a social union in political and judicial discourse in Ireland. Some scholarship from academics based in Ireland has engaged with this issue. This scholarship has argued in favour of the idea of the EU as a social union. Dagmar Schiek, 'The EU Constitution of Social Governance in an Economic Crisis: In Defence of a Transnational Dimension to Social Europe' (2013) 20 Maastricht Journal of European and Comparative Law 185 has argued that EU law must be interpreted to allow the EU to develop its own social policy to fill the gaps created by the economic integration envisaged by the Treaties. Dagmar Schiek, 'Towards More Resilience for a Social EU – The Constitutionally Conditioned Internal Market' (2017) 13 European Constitutional Law Review 611 argues that the Charter of Fundamental Rights of the European Union commits the EU to an internal market that is conditioned on certain social guarantees. Schiek also argues that Article 2 TEU justifies the development of a European Social Union. In a more specific area of EU substantive law, Delia Ferri an Juan Jorge Piernas López, 'The Social Dimension of EU State Aid Law and

[11] See Deirdre Foley, '"Their proper place": women, work and the marriage bar in independent Ireland, c. 1924–1973' (2022) 47 Social History 60.

Policy' (2019) 21 Cambridge Yearbook of European Legal Studies 75 argue that the Commission and the CJEU have recently interpreted the State aid rules in a manner that seeks to protect certain social goals as well as protecting the internal market and competition between undertakings.

ITALY

Vincenzo Di Cerbo[1], Vincenzo Guizzi[2], Filippo Curcuruto[3]

Chapter 1. Free movement of workers.

Despite the fact that free movement of workers is a part of internal market law and therefore outside the scope of social integration, EU legislation as well as CJUE case-law have provided for an important contribution to improve the work conditions and the social status of EU workers.

In particular, thanks to the Maastricht Treaty (signed on 7 February 1992), which gave rise to the European Union, and which established the Union's citizenship, freedom of movement and residence has become 'the first and most important right that the Union confers on to its citizens'.

The most important provisions concerning free movement of workers can be found in the European Chart of Fundamental rights under art. 45 par. 1, according to which „Every citizen of the Union has the right to move and reside freely within the territory of the Member States", and in Art. 15, par. 2, of the same Chart which reads „Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State". It is important to stress that, according to par 3 of the same article, „Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union".

More specific provisions can be found in the Directive n. 2004/38/EC of the EU Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Finally, Regulation n. 492/2011 art. 7 reads (par. 1): „A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment. Furthermore according to par. 2 of the same article „He shall enjoy the same social and tax advantages as national workers". Par. 4 provides for that „Any

[1] Wrote Chapters 1 And 2
[2] Wrote Chapters 3, 6 And 7
[3] Wrote Chapters 4 And 5

clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States".

Question 1

Question 2

(For practical reasons I prefer to give the two questions a common answer)

In principle, the right to equal treatment with regard to EU workers is guaranteed by the principles laid down in the Italian Constitution, which provides, in particular, for the principle of equality and the prohibition of discrimination. These rights are extended to all EU workers not only by means of interpretation from the national courts, but also on the basis of the direct effectiveness, in our legal system, of the above-mentioned European Union regulations. As a matter of fact, the jurisprudence of the Constitutional Court, the Court of Cassation as well as the labour courts guarantee the full enforcement of these principles, in compliance with the principles laid down by the European Court of Justice and the European Court of Human Rights. In particular, the above quoted enforcement refers also to indirect discrimination cases.

The problem of the existence of barriers to equal treatment, which may also concern Italian workers, arises in the context of so-called 'undeclared work' and refers, in particular, to precarious workers and unemployed. This is why the competent authorities, both at central and regional level, are striving to increase controls, but the area of undeclared work is still very large, especially in certain sectors such as agriculture and construction

The principle of equal treatment between migrant workers who are citizens of another member state and nationals (art. 4 of Regulation no. 833 of 2004 on the coordination of social security systems) based on the prohibition of discrimination by nationality is flanked by the provision of mechanisms aimed at granting migrant workers the social security rights acquired during their careers, without them being affected by the exercise of mobility from one member State to another. The most relevant mechanisms being the aggregation of insurance periods referring to different working periods, the pro rata payment of benefits, and the exportability of benefits.

The right to social security is granted not only to EU workers but applies also to non "economically active" citizens (citizens who are not working or actively looking for a job). Indeed art. 34 CFR after par. 1 according to which the "Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment", reads (par. 2) that "Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages".

It should be stressed that this right is recognised not only in accordance with Community law, but also with national laws and practices. This means, according to CJEU case-law, that Member States have the right to refuse to grant social benefits to economically inactive EU mobile citizens.

Regulation No 833 0f 2004, above quoted, confirms that non-economically active citizens are included in the scope of social protection and are therefore beneficiaries of social security and welfare benefits. The only prerequisite for access to these benefits is that the person concerned must be registered in a social security scheme, i.e. an insurance contracted with a national social security scheme that is 'general or special, contributory or non-contributory'.

It follows that under this system, non-economically active citizens are not entitled to all benefits in the area of social assistance.

This directive was implemented in the Italian system by Legislative Decree No. 30 of 2007, which was subsequently updated and supplemented. The decree confirms the principles of the aforementioned Regulation, in particular as regards enrolment (of at least one family member) in an insurance scheme. The consequent limitation in granting social rights finds a justification by the Government in public budget problems.

More in general at present, in the Italian political situation, the problem of controlling the migration mainly from extra-European countries, but sometimes also from European countries is very sensitive among some political parties and a consistent amount of people which would be in favour of a narrower conception of free movement of workers and restrictions concerning solidarity principles. It is therefore difficult to make national programs dealing with immigration politics.

Question 3

Question 4

(For practical reasons I prefer to give the two questions a common answer)

According to ISTAT (Italian Statistical Institute) data, there were approximately 5.2 million foreign citizens residing in Italy on 1 January 2021, making up 8.7% of the resident population. Of these 1.8 million are EU citizens. The number of non-EU citizens legally present in Italy on 1 January 2021 is about 3.3 million. I have not found any data on the distribution of foreign EU citizens among the various economic or industrial sectors.

A growing number of companies report that they have problems in finding workforce.

In Italy, a growing number of workers, many of them with high cultural and professional qualifications, prefer to move to other EU member states as well as to the UK or the USA. This brain drain phenomenon is becoming a social problem. In recent years, our government has tried to launch measures to keep the most qualified young workers in Italy, but at present these measures have not been as successful as hoped.

I am not aware of measures launched by Italian Government which require Italian graduates to work in Italy, which has financed the studies, for a certain period of time, before being able to migrate.

Chapter 2. Conflicts between fundamental freedoms and social rights

The principle of free provision of services has led to an increasing development of posted workers which implies the risk of social dumping and unfair competition. In particular, the fundamental aim to grant posted workers equal pay for equal work has not been reached despite the entry into force of some EU Directives (the last was Directive 2018/957 which amended Directive 96/71 and Directive 2004/67) adopted in order to govern said subject matter.

Question 5

In the practice of Italian economic operators it often happens that instead of posting the Italian worker abroad, it is preferred to adopt an atypical form of suspension of the employment relationship in Italy (so-called unpaid leave) with the simultaneous establishment of a different employment relationship with the

foreign employer and the provision that, on the termination of the latter, the employment relationship subject to suspension will resume. In such a case, the original employer has no responsibility for the employee's remuneration, which only concerns the foreign employer. I am not aware that this practice has been tested for legitimacy against the European rules on posted workers.

The above-mentioned EU Directives have been transposed into the Italian labour law. In particular, Legislative Decree No. 122 of 2020 transposed Directive 2018/957, laying down rules consistent with those of the European Union. The decree provides, inter alia, that in cases where the posting in favour of a company established in Italy is not genuine, the worker is considered to all intents and purposes to be employed by the party that used the service (Art. 3(4)). Article 4 of the same decree also provides that the employment relationship between the posting companies and the workers posted to Italy shall be subject, during the period of posting, if more favourable, to the same terms and conditions of work and employment provided for in Italy by regulations and collective agreements for workers carrying out similar subordinate work in the place where the posting takes place in terms of working hours and leave, remuneration, health and safety in the workplace, and prohibitions of discrimination.

Question 6

The right to strike is provided for and protected by the Constitution. There are no differences in the application of that right linked to the freedom to provide services and the freedom of establishment. Nor do these differences find support in national case law, which is oriented towards ensuring the full exercise of the right to strike consistently with constitutional principles.

Chapter 3. Social acquis and social "non-acquis"

The European integration process has undoubtedly fostered the development of a social dimension in the EU, though achieving it in a contradictory way.

Article 153(1) of the TFEU contains all the fundamentals to attain social *acquis*, which beyond the elimination of all forms of discrimination, however, are already stated in Article 151, such as improvement of living and working conditions; proper social protection; social dialogue; and the development of human resources to stable high employment and combating exclusion. Furthermore, Article 151 lays down an enlightening principle: "*to make possible their harmonisation while the improvement is being maintained*".

Nonetheless, the openness mentioned immediately finds a restraint in Article 153(4): Member States (MSs) retain the right to define the fundamental principles of their social security systems, and the provisions set earlier in the Article shall not affect their financial equilibrium.

Paragraph 5, closing Article 153, also rules out the application of the rules provided earlier in the Article "*to pay, the right of association, the right to strike and lock-outs*".

Accordingly, in times of crisis, the same social acquis has declined for the rise of an intergovernmental drift towards replacing, at least partially, the Community method.

Question 7

The Italian Constitution prohibits all and every discrimination (by sex, race, religion, and more), and it can be said that Italian law complies with EU legislation on anti-discrimination. However, it must be noted that, beyond the rules, discrimination phenomena can occur and, in compliance with European and national legislation, are settled in Courts. Therefore, we can say that in response to points a) and b), the social acquis is respected in Italy. Moreover, the case-law of the European Court of Justice (CJEU) has increasingly favoured such compliance.

A case in point is the protection of the right of every worker, public or private, to paid annual leave, on which the European Court delivered several judgments in 2018 (cases C-619/16; C-684/16; C-569/16; C-570/16 and C-385/17).[4]

It should be emphasised that the "European Pillar of Social Rights" of 17 November 2017 has brought a new impetus and a more substantial systematic framework to the social acquis as a reaction to the return of predominance of market reasons by affirming the centrality of the social dimension of the Union.

By the Pillar, the EU institutions intend to bring together the content of the social acquis in a single document. In this perspective, the "social" Pillar constitutes a starting point for strengthening the European social model.

To a certain extent, the Pillar works as a "compass" to achieve convergence towards better living and working conditions in the EU. The EU's goal of a digital, green, and just transition will also be strengthened by implementing its 20 principles on equal

[4] Judgment of the Court (Grand Chamber) of 6 November 2018, *Kreuziger* C-619/16, EU: C:2018:872; Judgment of the Court (Grand Chamber) of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU: C:2018:874; Judgment of the Court (Grand Chamber) of 6 November 2018, *Bauer*, C-569/16, EU: C:2018:871; C-570/16 Willmeroth (Joined Cases C-569/16, C-570/16); Judgment of the Court (Fourth Chamber) of 13 December 2018, *Hein,* C-385/17, EU: C:2018:1018.

opportunities and access to employment, fair working conditions, protection, and social inclusion, in line with the EU's main 2030 targets concerning employment, skills and poverty reduction.

Applying the Pillar principles should fill the gaps in the current social acquis. It is worth noting that in its Communication of 4 March 2021 on the Social Pillar, the European Commission also set a plan of the main actions to be taken by the Commission from 2020 to 2026 for the implementation of the Pillar.[5]

It must be said that the completion of the Next Generation EU should boost the achievement of the objectives above, being implemented in Italy through the Recovery and Resilience Plan, which contains actions to help women, young people, and other groups socially disadvantaged to find a job. This national RR-Plan also includes a set of reforms necessary for its implementation: functioning of the Public Administration (PA), the civil and criminal judicial system, education, research, and professional skills development.

The Porto Declaration of May 2021 gives hope for a new perspective when it states that "*Europe must be the continent of social cohesion and prosperity*" and reaffirms the commitment to work for a "social Europe".

Legal literature has pointed out the tendency to choose non-binding legal acts (*e.g.*, recommendations) over the typical binding legal acts, such as regulations and directives, and between the latter to opt for directives in some cases. In the free movement of workers, a case in point is Regulation 1612/68 modified by directive 2004/38. In essence, a binding, directly applicable act has been replaced with one which binds the MSs to the results to be achieved, leaving them the choice of form and methods (Article 288 TFEU). As underlined above, this is in line with the intergovernmental drift.

Regarding platform workers (point c), it must be said that a legal framework is being prepared for regulating them in Italy. Article 2(1) of Legislative Decree 2015/81 extends the subordinate work legal framework to collaborative contracts that mainly result in personal continuous professional services, the arrangements determined by the client. Thus, the rule specifies that those provisions apply to services provided through digital platforms.

As for "reasonable accommodation", in two recent judgments, the Court of Cassation has ruled on the dismissal of the disabled worker for unexpected unfitness for the task (Article 3, Law No. 604/1966). The former No. 4896/2021 shows the Court of Cassation (Civil Division) justifying the termination by the

[5] COM (2021) 102 final, The European Pillar of Social Rights Action Plan, Brussels, 4.3.2021

employer because the burden of the measure to be taken would be disproportionate and far from the "reasonable accommodation" wanted in Article 5 of Directive 2000/78/EC. [6] [7] Furthermore, it recalls the provisions of the United Chambers of the Court of Cassation No. 7755/1998, which, however, established that an employee's unexpected unfitness does not in itself constitute a cause for dismissal.[8] Conversely, the latter concerns the Court censuring the employer's conduct, declaring the dismissal unlawful (Cassation Court, Civil Chamber, No. 6497/2021).[9]

The different rulings of the Court show that the path toward equality in employment and occupation for the disabled is still uncertain. However, both refer to the principle that disability can in no way stand as cause for dismissal. On this issue, the European Commission has included "increasing the employment rate of people with disabilities" among the priorities of future policies for tangible recognition of the rights of equality, dignity, and, above all, social and work inclusion, also contributing "significantly to promoting equal rights of persons with disabilities in employment including reasonable accommodation at work. (A Union of Equality: Strategy for the Rights of Persons with Disabilities, 2021-2030, 3 March 2021).[10]

Regarding "living and working conditions", it should be noted that on 22 June 2022, the Italian Government adopted two draft legislative decrees to meet the obligation to transpose into national law the provisions of EU directive 2019/1152 and Directive 2019/1158.[11] Whereas the former lays down criteria for transparent and predictable working conditions in the European Union and the latter aims at facilitating the work-life balance for workers who are parents or carers. Accordingly, the legislative decree implementing Directive 2019/1152 rules the right to information on the essential elements of the employment relationship, working conditions, and related protections. Thus, the employer must communicate a series of information in a transparent, clear, complete way, compliant with accessibility standards also referred to people with disabilities, made available free of charge, to each worker, either in paper format or electronic. In this regard, it should be remembered that in Italy, social partners have played, as always do, an essential role in collective bargaining.

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[6] Court of Cassation, Civil Labour, Judgment of 23 February 2021, No. 4896.

[7] Council Directive 2000/78 EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000, p. 0016 – 0022

[8] Court of Cassation, Civil Joint Chambers; Judgment of 7 August 1998, No. 7755

[9] Court of Cassation, Civil Labour, Judgment of 9 March 2021, No. 6497

[10] COM (2021) 101 final, Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030 of 20 June 2019, Brussels, 3.3.2021

[11] Directive (EU) 2019/1152 of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Official Journal of the European Union L 186/105, 11.7.2019

The legislative decree for the transposition of EU Directive 2019/1158 aims to reconcile family and professional life for parents and carers to share responsibilities between men and women and gender equality in the workplace and family.

On religious discrimination, the CJEU ruling of July 2021[12] tries to define a balance between religious and corporate freedom, outlining a development of European anti-discrimination law based on the principle of equality toward equal protection of fundamental rights and freedoms, including religious ones, throughout the EU. On one side, it restricts both parties' liberty in personal relationships. On the other, it reveals a development that reduces the Member States' authority on matters within their competence (such as religion) and can rewrite the relationship between European law and religion.

The ruling of July 2021 corresponds to the horizontal application of the anti-discrimination law of the Union, based on Article 21 of the Charter of Fundamental Rights, often recalled in religious matters, and prompting the Court, in 2019, to make religious equality concrete.

Referring to point d), it must be said that the Italian legislator and courts respect the International Labour Organization (ILO) conventions, which guide the Union itself. For example, the risks provided for in the social security system of migrant workers are substantially those of the ILO Convention No.102.

Concerning the relationship between the EU and the Italian legal system, it is worthy to say that the Italian legislator respects the principle according to which EU law prevails over national law, which therefore follows the rules provided for at the European level.

Question 8

As concerns point a), the answer appears in the previous paragraphs. It can be confirmed that the new frontier for EU social policy is mainly in applying jointly and close cooperation between the EU and the MSs the principles of the Pillar, which cover a wide range of social acquis.

Regarding point b), an issue that has been the subject of initiatives at the European and national levels is the minimum wage. In this concern, on 7 June 2022, the presidency of the Council and the European Parliament reached a provisional political agreement on the draft directive on adequate minimum wages in the EU, wanting to establish a

[12] Judgment of the Court (Grand Chamber) 15 July 2021 ECLI:EU:C:2021:594, in Joined Cases C-804/18 and C-341/19, IX v WABE eV and MH Müller Handels GmbH v MJ (C-804/18), and MH Müller Handels GmbH v MJ (C-341/19)

European framework to promote proper minimum wages across the EU in compliance with national competence and the autonomy of the social partners. [13]

On self-employed workers (point b), it should be remembered that principles 12 (Social protection) and 15 (Income and Old-age pension) of the Social Pillar explicitly include these workers. Accordingly, the European Commission acknowledges that many MSs have extended social protection to previously uncovered groups during the pandemic.[14] These exceptional measures can pave the way for structural reforms that improve the social protection of the unemployed, atypical, and self-employed workers, ensuring their financing, in line with the EU Council Recommendation of November 2019 on access to social protection for employed and self-employed workers.[15] Moreover, by the SURE Regulation, the Union established a European instrument with a budget of 100€ billion to mitigate the risks of unemployment and loss of income in a state of emergency and address the socio-economic impact of the pandemic.[16] In this sense, SURE has allowed the immediate disbursement of loans to finance short-time work schemes and similar measures, particularly for self-employed workers.

In Italy, SURE resources have been used to finance the *Cassa integrazione* (Italian wages guarantee fund) from March 2020, bonus for self-employed workers, entertainment workers, farmers, non-repayable contributions for self-employed and sole proprietor businesses, parental leave, and babysitter vouchers.

For platform workers, in its Communication 102 final of March 2021, the EU Commission highlighted that the traditional lines between a worker and a self-employed person are wakening, and heterogeneity is growing among the self-employed. A case in point is the emergence of vulnerable self-employed working through platforms and operating under precarious conditions. The pandemic has highlighted this, particularly for delivery workers, about their access to social protection and health and safety risks. Therefore, in line with Article 154 TFEU, in February 2021, the Commission launched a social partners' consultation on the possible direction of EU action.[17]

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[13] COM (2020) 682 final, Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, Brussels, 28.10.2020

[14] (COM (2021) 102 final, The European Pillar of Social Rights Action Plan, Brussels, 4.3.2021

[15] Council Recommendation (2019/C 387/01) of 8 November 2019 on access to social protection for workers and the self-employed, OJ C 387, 15.11.2019, p. 1–8

[16] Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, OJ L 159, 20.5.2020, p. 1–7

[17] C(2021) 1127 final of 24 February 2021, First phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work, Brussels 24.2.2021

Question 9

The European institutions' rigorous interpretation of the EMU has negatively affected the evolution of social policy and the social acquis itself. It is evident in the implementation of the so-called "Stability and Growth Pact", which created great difficulties for the economy of some MSs (Greece and Italy). The EU has carried out a strict and exclusive stability policy, forgetting the other key of the Pact: the "growth", which ironically made some say that it literally "fled" from the Pact.

It would be necessary to review the assumption and implement the principles of solidarity and social market economy enshrined in the Treaty (Articles 2 and 3 of the TEU), which should inspire EMU.

Chapter 4 The Relevance and importance of the Charter of Fundamental Rights

The Charter, although not incorporated into the Treaty, is expressly given the same legal value as the latter. Thus, the Charter assumes the value of a primary norm and should be placed in the same position as norms containing other rights.

On this subject, however, there is a contrast of opinions.

On the one hand, according to some, social rights do not seem to have the capacity to counteract the principle of freedom of economic initiative which is one of the fundamental rights guaranteed by the Treaty.

It is also unclear whether the social rights established by the Charter can be enforced in disputes with employers in the private sector. Although there are signs of change, however, the idea that the strength and impact of social rights are limited seems to prevail in the jurisprudence of the Court of Justice.

Question 10

a, b, and c)

The social rights proclaimed by the Charter have, in theory, the same importance as the other fundamental rights. This does not exclude that they may be subject to balancing with other equally fundamental rights. In these terms, they can be said to be 'fully effective'.

The qualification of the rights under consideration as the manifestation of principles implies the application of the rule that the rules of the Charter containing principles may be implemented by legislative or executive acts of both the Union and the Member States in the exercise of their respective competences.

The safeguard against possible limitations on the exercise of the rights and freedoms recognised by the Charter is that such limitations must be provided for by law and that, in any event, the essential content of giving effect to Union law of those rights and freedoms must be respected, as provided for in Article 52(1) of the Charter.

d)

Is art. 52 (2) of the Charter relied upon by national authorities and Courts in order to limit or hamper the scope of social rights in the Charter ?In particular, do national Courts consider that social rights in the Charter have the same content as under UE secondary legislation and therefore have no " autonomous" content

Social rights which are provided for in the Charter and are also the subject of provisions in the Treaties must be assessed in the light of the provision in Article 52(2). In this respect they may be said to have no autonomous content.

e)

How have Courts dealt with the matter of social rights under the Charter in actions between individual ("horizontal actions") in your country?

In matter of horizontal effect, the principles developed generally on this subject apply

Chapter 5. Trade policy and social rights protection

Question 11

a) and b)

The term 'public procurement' (P.P.) refers to the part of public expenditure that the public administration allocates to the purchase of goods or services.

Public spending can be used to achieve a variety of objectives, including stimulating economic activity, creating jobs, protecting national enterprises by promoting investment and growth.

As far as we are concerned, the economic policy strategy adopted by the EU is characterised by the absence of P.P. protection measures and the adoption of international openings.

It cannot be said that P.P. is used to cure the problems of social rights even if in fact P.P. can have effects in this regard.

Many private entrepreneurs have adopted codes of conduct taking into account moral standards of behaviour. Their scope, however, is not restricted to the protection of employees but extends to various aspects of corporate life. The topics covered are the principles of equality, fairness, confidentiality, protection of the individual and protection of the environment.

These constantly updated codes have a considerable impact on corporate life. In this regard, it should be borne in mind that the courts now consider the violation of codes to be disciplinary conduct, sanctioned in the most serious cases by dismissal.

c)

Since May 1998, an agreement has been adopted between the timber construction workers' union and lIKEA with an attached code of conduct. The agreements aim to establish common rules for the entire group reporting to the multinational. Most of these agreements contain references to standards of respect for human rights. However, these references are very often generic. In some cases, these agreements take non-compliance with them as grounds for breaking off relations with the suppliers. The phenomenon of agreements entered into by companies for reasons of affirmation or protection of corporate image should also be borne in mind.

A significant percentage of transnational agreements concerns European companies. This fact is probably behind the directive 2009/38 and the establishment of an European works council with an advisory role on company matters with the right to be informed and consulted on all company programmes with an effect on employment

d)

In criminal matters it is necessary that there is a criminal offence and that the conditions are in place to allow national courts (in this case the Italian courts) to intervene in offences committed abroad. These are limited hypotheses.

In civil and labour matters the ordinary rules about jurisdiction apply.

e)

The class action was introduced as one of the collective measures to protect consumers but despite the time that has elapsed since its introduction there have been few cases in which a class action has been brought before the courts.

However the entire regulatory apparatus on class actions has so far had consumer protection as its central element. This explains the apparent absence of class actions in labour matters.

In this area, on the other hand, recourse to collective actions is widespread, particularly with regard to the interpretation of collective agreements

f)

Usually among the various types of due diligence, social due diligence is not explicitly mentioned. In fact, however, human resource due diligence also makes it possible to assess the state of relations between the company and its workers.

Chapter 6 Climate change and Social justice

Question 12

The "social clause" derived from Article 9 of the TFEU could apply to EU environmental policy or "environmental compatibility". Article 9 of the TFEU requires that "in defining and implementing its policies and activities, the Union shall take into account the (…) promotion of a high level of employment, (...) adequate social protection, the fight against social exclusion, and (…) protection of human health." Similar considerations can be made about environmental compatibility.

There is strong popular participation in combating climate change in Italy, which also means establishing social justice in defence of the weakest. The EU Commission works in this direction too. It intends to use two specific funds (Just transition Fund and Climate social Fund) to facilitate the "transition" and make it sustainable for families and businesses. Indeed, the war in Ukraine has worsened the situation because of the sharp increase in energy costs, constraining growth. In this regard, the Italian government has issued two decree-laws (DLs) specifically to reduce the energy costs of families and businesses. In the same perspective, a DL was approved on 18 February 2022. In addition to the containment of electricity costs, an expenditure of about 8 billion provides for renewable energy development, particularly photovoltaics.

Chapter 7. Achieving Social Europe: Social rights, democracy and the rule of law

Question 13

In legal terms, the principles set out in the Treaties have given the Union a social dimension and set out the Union as a "rule of law". However, they remain to be implemented in practice. This applies at the EU and national levels.

The Italian Constitution includes the principles on which a "rule of law" is founded, and Article 1 establishes work as the basis of the democratic republic. It sets out the fundamental principles in the first 12 articles: the protection of inviolable human rights and the duties of "political, economic and social" solidarity.

It grants all citizens equal social dignity, without distinction of sex, race, religion, (and on), entrusting the Republic with the task of "removing economic and social obstacles".

In the 74 years of the Republic, substantial progress has been made in the practical implementation of such principles.

Italy has actively participated in the birth and development of the European Union (initially the European Community), sharing the principles that inspired it. On many occasions, the Italian people have expressed their willingness to belong to the Union.

The teaching of civics has been established in Italian schools for many decades. However, a recent law (No. 92 of 2019) has given a new set of rules to teach this subject, including the European institutions, in schools at all levels.[18]

Question 14

As pointed out earlier, the Italian Constitution and national legislation state the principles of equality, solidarity, and elimination of all forms of discrimination.

Question 15

The issue has at length been answered above. It can be added that the EU is generally perceived as a social union. However, there are differences between the political forces: those with a critical attitude towards the EU tend not to recognise this feature. The fact remains that the political forces essentially favour the European

[18] Law No. 92 of 20 August 2019, Introduction of the school teaching of civic education. (GU Serie Generale No. 195 of 21.08.2019)

integration process and identify with the founding values of the EU included in Article 2 of the TEU.

Criticism of some recent European policy developments is due to the predominance Europe has given to financial facets in recent years. However, an issue that has raised some questions in Italy and Europe on the actual social dimension of the Union is that of migration (ruled by the so-called "Dublin III Regulation").[19]

The critical point is the relocation of migrants, which weighed on the initial reception countries (Italy and Greece) for a long time. Some MSs (in particular, but not limited to the so-called "Visegrad group") have caused bewilderment. Now, they welcome Ukrainian refugees fleeing the war, but in the past refused the relocation from the initial reception country (Italy) of migrants fleeing from countries of Asia and Africa (at war or dominated by dictatorships, from terrorism and in any case in situations of grave poverty).

Therefore, it is up to the Union's institutions with the Member States to put the Union back on track, restoring its true soul based on the values of solidarity, humanity, and justice.

[19] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29.6.2013, p. 31–59

LATVIA[1]

Zane Rasnača[2] and Marina Borkoveca[3]

Question 1

The backbone of the principle of equal treatment in Latvia is Article 91 of the Constitution (*Satversme*).[4] In comparison to the constitutional framework at the EU level (Article 2 TEU and Articles 10, 18, 19, 157 TFEU among others), the approach is rather laconic, at least at the level of constitutional law. At the same time, the principle of equality is developed in the statutory law in line with the requirements of EU law. Nevertheless, there is little to be found when it comes to the EU mobile workers specifically.

The underlying idea is that the general legislative framework regulating equal treatment applies and suffices also for the protection of EU mobile workers. In this regard, it is important to point out that both the Constitution and the Labour Law speak about 'everyone', hence also EU mobile workers would be included if working within the Latvian territory (principle of territoriality). There is an underlying assumption that in case any discriminatory practice against mobile workers arises, it will fall under the general non-discrimination provisions and there is no need to introduce special rules. Moreover, due to the direct applicability of many EU level rules special implementing measures might indeed be unnecessary. At the same time, this approach is very much rooted in the idea of formal equality and the question remains whether equality in substantive terms is achieved with regard of these workers?[5]

Latvian Labour Law, just as many other laws after regaining the Latvian independence, was adopted already with the accession to the EU in mind; the provisions there more or less mimic the requirements found in EU Treaties and Equality Directives. The principle of equality is embedded in Article 7. The first part of the Article sets out the equal right to work for everyone and an equal right

[1] Due to some difficulties encountered in the preparation process of this report, it does not include answers to Questions 11, 12, 13 and 14.

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[4] It states: 'All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind'

[5] Zane Rasnača 'Enforcing Migrant and Mobile Workers' Rights' in Effective Enforcement of EU Labour law (Rasnača et al. (eds)), Hart publishing, 2022.

to fair, safe and healthy working conditions as well as the right to fair (equal) remuneration. These rights must be ensured without any direct or indirect discrimination. Prohibited discrimination grounds explicitly mentioned are race, skin colour, gender, age, disability, religious, political or other beliefs, ethnic or social origin, property or marital status as well as sexual orientation. The list of these grounds is somewhat broader than the one found in EU law and the Article also leaves the list open-ended (Article 7(2) Labour Law). At the same time, this list does not explicitly include nationality, though, one can assume it is covered by the open-ended nature of the provision.

Few rules have been designed in order to counter the structural disadvantages migrant workers could typically face.

First of all, one should mention Article 12 of the Labour Law which states that in case an international agreement ratified by the Parliament foresees different rules than Labour Law, the former will apply. Latvia is a monist country and this clearly cements the priority of international law (meant also to include EU law) over the national provisions in case of a dispute. When it comes to determining the applicable law, the priority is given to the principle of territoriality (the law of the country where the worker carries out the work typically applies), followed by the country where the undertaking is based or with which the employment relationship is more closely connected (Article 13(2)-(5)). In any case, the choice of law among the parties of the employment contract cannot restrict the protection the worker would get from the law applicable in line with these rules on the conflict of laws.

Second, Article 29 of the Labour Law states that in case of a dispute, the worker indicated circumstances that might serve as an indication of indirect discrimination based on language, the employer is obliged to prove that the differential treatment was based on objective circumstances and not related to the language proficiency of the employee, and that the proficiency in a specific language was an objective and substantiated precondition for performance of work in the specific position (Article 29(3^1)). Interestingly, the background documents for this provision (introduced in 2018) explain that it was needed to protect workers who do not know Russian language since in many of the biggest cities the knowledge of Russian language had become a *de facto* criterion for hiring even where it was not needed for carrying out the tasks at work.[6] Among the objective of these amendments one also finds the idea that this change might reduce emigration of

[6] Annotation for the Draft amendments to the Labour Law, 2018. Available under: https://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/3EB2D0DDA0F48014C2258243002CB418?OpenDocument (last visited 30 Aug 2022).

Latvian workers, especially, since people from the regions do not typically speak or know Russian (and have better knowledge of other foreign languages), and thus are forced to emigrate from the country to find a job. Finally, the law was also amended to determine that in the public sector only the knowledge of Latvian or other EU languages (thus not Russian) could be asked from job applicants.[7] Finally, it is prohibited to indicate language skills in a specific foreign language in a job advertisement, except where it is reasonably necessary to be able to perform the work duties (Article 31(2^1)). In this case, again, the reversal of the burden of proof is applicable whereas employer has to prove that proficiency in a specific language is an objective and substantiated precondition for performance of the respective work or the respective employment (Article 32(2^2)).

Third, Article 33 Labour Law specifically addresses discrimination based on nationality by stating that a job interview cannot include questions concerning national origin (Article 33(2)(6)). Finally, the employment contract has to be concluded in Latvian, however, if the worker is a foreigner without sufficient knowledge of the language, employer has an obligation to notify workers about the terms and conditions of employment in writing in a language that they understand (Article 40(10)).

Concerning non-economically active EU migrants, the rules on registering their stay (residence) differ from the rules for workers. EU citizens are allowed to reside in Latvia for 3 months if they have a valid travel document and they do not create significant and real risk for country's security, public order or public health.[8] If an EU citizen wants to spend more than 3 months in Latvia, they have to register with the Citizenship and Migration Authority and receive a registration card/authorisation.[9] No registration is needed if the EU citizen resides in Latvia for less than 6 months within a year, or if the goal for residing is to find a job. If after six months the job-seeker has not found a job, they can still reside if there is proof that they continue to seek employment and have a realistic possibility of being hired. Also, no registration is needed if workers work in Latvia but live in another EU country to which they return at least once per week. Finally, students who are EU citizens do not need registration if their planned stay is less than one year.[10]

Non-economically active EU citizens have a right to register and receive authorisation/residence card if they are obtaining education in Latvia and have

[7] Ibid.

[8] Regulations of the Cabinet of Ministers No 675 'Kārtība, kādā Savienības pilsoņi un viņu ģimenes locekļi ieceļo un uzturas Latvijas Republikā', 30 August 2011, para 16.

[9] Ibid, para 25.

[10] MK noteikumi Nr 675, 2011. Gada 30. Augusta, Kārtība, kādā Savienības pilsoņi un viņu ģimenes locekļi ieceļo un uzturas Latvijas Republikā, para 26.

sufficient means without becoming a burden for the Latvian social assistance system, if they have sufficient means not to become a burden for the social system and have the right to access medical assistance in Latvia (holds a document from another Member State that gives them such a right) or have health insurance, or if they are married to a Latvian citizen or permanent resident and also have means and access to healthcare or have health insurance.[11]

The right to reside can be lost in three main situations: 1) creating an excessive burden for the state's social assistance system, 2) circumstances that gave the right to reside have ceased, or 3) there are grounds to believe that the person has concluded a sham marriage or registered a sham partnership in order to obtain a right to reside in Latvia.[12]

Albeit there is hence some differential treatment concerning economically active and non-active EU citizens, this has not so far been much contested neither in case law or administrative practice nor by academics and press. The case law of the Latvian courts often focusses on the question of resident vs non-resident rights. For example, the Administrative Regional court relatively often deals with disputes concerning property rights of non-residents (but EU citizens). In one case the applicant (Belgian resident) contested the differentiated tax system for selling property (20% tax on capital gain applicable for sale to private person, while only 3% tax of the whole value applicable if selling to a legal person) by arguing that this differentiation negatively affects the free movement of capital in the EU. The court rejected the argumentation stating that both Latvian residents and non-residents are treated in the same manner and there is no discrimination.[13]

Another stream of case law concerns the rights of the family members of EU (typically, also Latvian) citizens. While there is not enough space for a comprehensive overview, two separate cases can be mentioned here.

The first one concerned the refusal of residence permit to a same-sex spouse of a Latvian citizen (American citizen and German resident). The refusal was based on the recognition only of a marriage between men and women by the Latvian Constitution (Article 110 of the Constitution). The applicants lost and the residence permit was not given, in contrast to what the CJEU case law in *Coman* case[14] requires. There was no analysis of EU law or the CJEU case law in the judgment and it remains to be seen whether there will be a third instance judgment in this case.[15]

[11] Ibid, para 27.
[12] Ibid, para 56.
[13] Judgment of Administrative Regional court in case No A420276819, 20 April 2021.
[14] CJEU Judgment in Case C-673/16 *Coman and others*
[15] Judgment of the Administrative Regional court in case No A420166420, 28 May 2021.

The second case concerned an Italian citizen who moved to Latvia to join his family here. He was neither employed nor self-employed at the time, but demanded that he should be included in the registered list of persons eligible for free medical care in Latvia (all Latvian citizens residing legally in Latvia typically have access to free healthcare). The applicant argued that he has been discriminated as an EU citizen. The court applied the CJEU findings in case C-535/19 *A (Soins de santé publics)* and ruled in favour of the applicant at the appeal level. However, instead of developing a meaningful right to access medical care, the court reasoned that the circumstances have changed in the meantime and the applicant has lawfully resided in Latvia for more than five years. Hence, he now has access to healthcare and thus the first instance court should re-evaluate whether there is an objective need to litigate in this case or it has been lost.[16]

Overall, there are bits and pieces of case law dealing with EU mobile workers and also non-economically active citizens; however, the national courts only rarely analyse them from the perspective of principle of equality set out in EU and national law. It seems that the more developed EU secondary and also national statutory law implementing EU law is, the more courts are active in their compliance with EU law requirements (see the response to Question 7 for a comparison).

Question 2

The notion of employee for the purpose of social contributions is approximately the same in terms of scope as under the Labour Law and the central idea is that every person who performs work for an agreed remuneration on the basis of an employment contract falls within the scope of Law on Social State Insurance and has to pay social contributions (Article 1(2)(a)). However, also authorised representatives of foreign economic operators, employees of a foreign tax payer, persons leased for work (via foreign temporary work agency) to a domestic taxpayer, and persons conducting seasonal agricultural work are explicitly covered within the notion of 'employee' for the purposes of social state insurance (Article 1(2)(g)(j) and (n)). Hence the notion of 'employee' or 'workers' might be slightly broader for the purpose of social insurance.

Foreign employees for a foreign employer who are not residing in Latvia have the obligation to pay social security contributions here if they stay 183 days or more in a 12-month period (Article 1(5)). All domestic employees including those employed by a foreign employer and also foreign employees employed by foreign employer (but staying more than 183 days within a 12 month period in Latvia)

[16] Judgment of the Senate in case No A420273216, 17 January 2022.

are subject to mandatory social insurance (Article 5(2)). Other foreigners falling out of the scope of these rules can join the social insurance system voluntarily (Article 5(3)).

Foreign employees at a foreign employer have to be subject to pension insurance, disability insurance, health insurance, maternity and sickness insurance, and parents' insurance (Article 6(6)). Domestic employees at a foreign employer are subject to pension insurance, unemployment insurance, disability insurance, health insurance, maternity and sickness insurance, parents' insurance, and occupational accident insurance (Article 6(8)). There are more special rules concerning the coverage of particular risks for domestic employees at a foreign employer who are of age having the right to receive old-age pension, as well as domestic employees of a foreign employer receiving service pension or persons receiving special pensions, like disability pension (Article 6(9)).

One exception of the territoriality of the social security are posted workers sent to Latvia to carry out work for a time period not exceeding 12 months if they submit an attestation (A1 document or another one for the third country nationals) showing that they are covered by the mandatory social security system of another country (Article 6(10)). There are further exceptions for some people like persons at the retirement age earning income from intellectual property (Article 6(13)), a foreigner without applicable intergovernmental agreement on social security employed within the framework of a project funded by the European Commission (Article 6(21)) and some others.

The object of mandatory contributions for all workers is the remuneration received (Article 14(4)). If an employee is ensured for all the risks of social insurance, the mandatory contribution rate is 34,09% of which 23,59% is paid by the employer and 10,50% by the employee (Article 18(1)). It is a fixed rate, which is applicable to everyone included recipients of minimum wage (and even though their income after taxes falls below living wage). Hence, there are hopes that the new Directive on minimum wage will trigger some changes in this regard. One difference between native and foreign workers is that for the purpose of occupational accident insurance and unemployment insurance the social contribution rate is applicable starting only with the 184th day of work since residing in Latvia or with the 367th day is residence if the duration of work exceeds 12 months for person sent to perform work in Latvia (posted worker). This is to (partly) compensate for the lack of right to unemployment benefits and occupational accident benefits if the work period in Latvia has not exceeded one year (12 months).

In general, there is little to no discussion on the reform of social security rules at the EU level in the Latvian context, and there is no indexation when it comes to the child benefits and no discussion on the indexation carried out currently in some EU countries such as Austria. There is also no significant opposition to the CJEU case law, according to which Member States have the right to refuse to grant social benefits to economically inactive EU mobile citizens. The majority of disputes before Latvian courts when it comes the social security rights of EU citizens, concern pension rights and are typically brought by Latvian workers who have worked abroad before retiring.[17]

Question 3

Latvia has faced several emigration waves in the last decades. The first one was after regaining the independence from Soviet Union in 1991.[18] The next emigration wave took place after the accession to the European Union, and the final one during the 2008 financial crisis due to widespread unemployment. Also more recently, there have been warnings of future emigration waves, for example, related to the Covid restrictions and obligations to vaccinate and forced idleness (obligation to stay away from work without pay if worker is not vaccinated, which was for a time introduced by the Government).[19] At the same time the population data shows a much more steady decline in the population over time and the emigration waves have to be understood in the context of the overall aging population and low birth rates that together have contributed to the reduction of population in the country from 2,65 million in 1991 to 1,95 million in 2017. However, in the last years, the emigration has somehow slowed and Latvia gradually moves towards a positive net migration rate.

At the same time, in the EU context, Latvia both 'receives' and 'sends' long-term migrants. As Table No 1 shows, the amount of long-term migrants who leave the country, while still bigger than the number of those who enter, has slightly decreased in the last few years. In contrast, the immigration has been steady and maybe even increased post-Covid.

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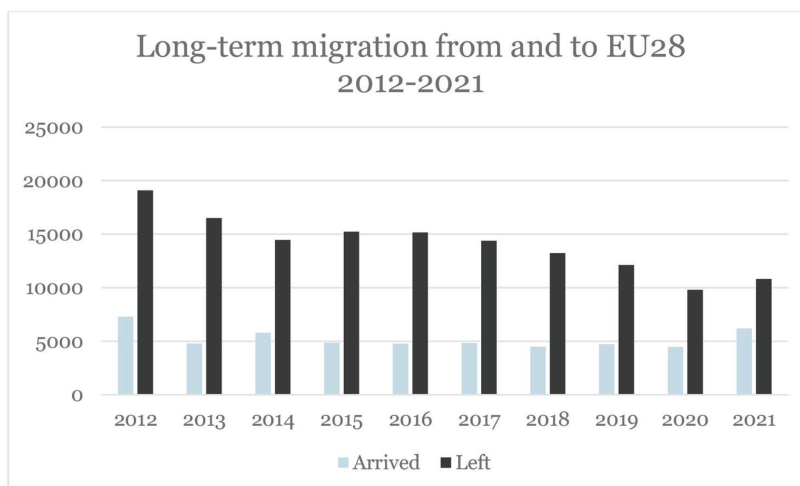
[17] See, for example, the Judgment by the Administrative Department of the Supreme Court in case No A420454011, 20 May 2015.

[18] This wave was consisted mainly of native Russians, especially army personnel more than a million of which was stationed in the Latvian territory, leaving Latvian territory to return to Russia.

[19] LA.LV 'Atkal mums briest kārtējais emigrācijas vilnis', 19 December 2021. Available: https://www.la.lv/atkal-mums-briest-kartejais-emigracijas-vilnis

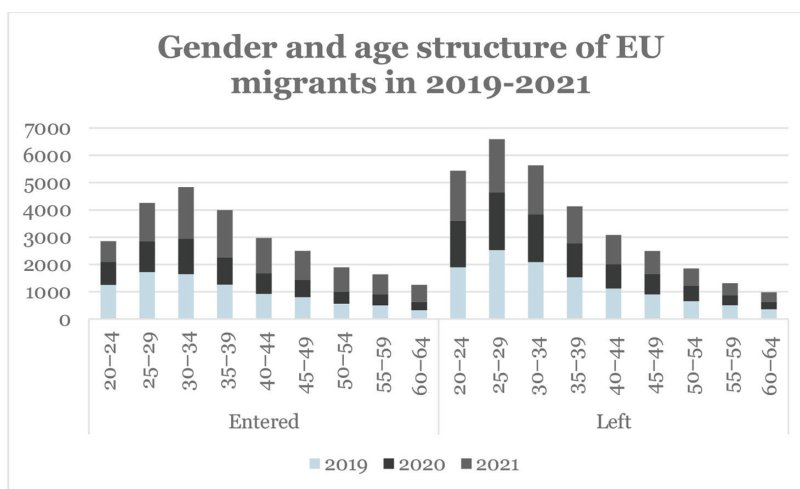
Table No 1



Source: Stat.gov.lv, 2022

When it comes to the structure of the migrants, majority of them are relatively young, especially among leavers, however, also immigrants are relatively young (typically 25 – 44 years old). This indicates that the work-oriented migration likely happens in both directions and while predominantly young people tend to emigrate, likely after finishing education, people in the same age group also enter Latvia (see Table No 2).

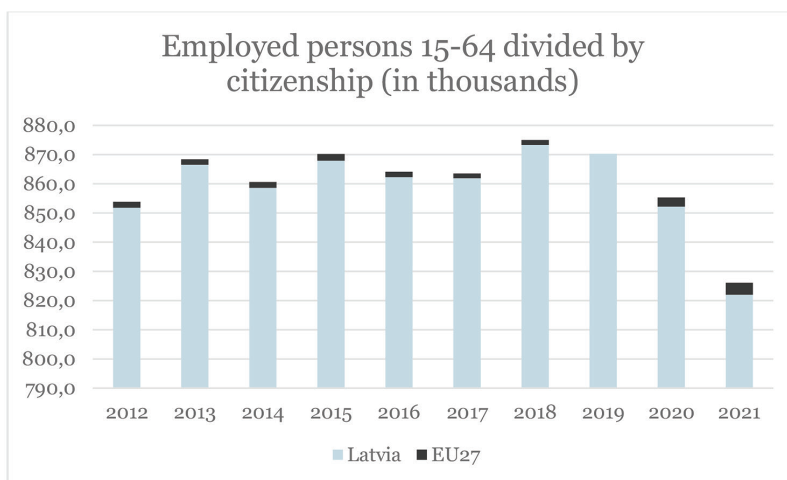
Table No 2



Source: Stat.gov.lv, 2022

When it comes to the employment of workers from other EU countries, there is not much overall data. Table No 3 gives a numerical overview. Overall, a small fraction of the Latvian workforce is constituted by EU citizens from other EU Member States, hence one cannot consider them as a very significant source of workforce. They are also dispersed in many sectors and there is no further detailed data on their employment. Some of them work in construction and transport sectors, others in banking (the role of Scandinavian banks in the Latvian economy is disproportionally big[20]) and IT sectors. However, despite this comparative irrelevance of EU workforce for the Latvian labour market, overall foreign workforce is extremely relevant to Latvia due to persistent workforce shortages in many sectors (especially, healthcare, construction, and agriculture) partly caused by the emigration of workers in these sectors towards EU countries with higher level of pay and social protection (see Question 4 on brain drain).

Table No 3



Source: Eurostat, 2022

More than 27% of employers indicate that they experience workforce shortages that limit their ability to conduct their business.[21] Other data sets indicate that as many as 61,2% of employers already experience workforce shortages. However, it has been argued that the real problem is not so much the shortage of workers than the low salaries in comparison to the other EU countries causing a low motivation for workers and also the issues with inefficient integration of unemployed into

[20] Aldone Jočiene 'Scandinavian bank subsidiaries in the Baltics: Have they all behaved in a similar way?', Intellectual Economics 9(1), 2015, pp. 43-54.

[21] Gundars Dāvidsons, 'Trīs veidu darbaspēka trūkums un viens ne-trūkums', Makroekonomika, 10 October 2019. Available: https://www.makroekonomika.lv/tris-veidu-darbaspeka-trukums-un-viens-ne-trukums

the labour market.[22] The labour costs in Latvia are one of the lowest among EU Member States. In 2019, labour costs per employee in economy as a whole were only 50% of the EU median, and only 37% of EU median in manufacturing.[23]

The shortages of labour are prevalent in the majority of sectors; however, they are especially prevalent in agriculture, healthcare, education, social care, pharmaceutical sector and also IT and construction sectors.[24] The idea that foreign workers (mostly from the third countries) should be brought in to remedy the shortages has been very popular among the employers' representatives.[25] There are also proposals that Ukrainian refugees could fill some gaps in the labour market[26] and it is also argued that foreign students should be allowed to work alongside their studies.[27] There is a rapid increase in the number of work permits issued to third country nationals[28] and the main sectors for those issued in 2019 were in the transport sector, construction, manufacturing and ICT sector.[29] The Government even adopted Regulations meant to foster import of workforce. Regulations of the Cabinet of Minister No 108 from 20 February 2018 set out a list of professions where significant workforce shortages are predicted and where Latvia could invite foreign workers to join the national labour market. These Regulations list scientists (especially, statisticians, physicists, chemists, mathematicians), ICT specialists, manufacturing specialists, specialists in electrical technology and electrical engineering and construction, senior specialists in financial analysis and management, specialists in management of fishing vessels as well as aircraft pilots and maintenance specialists and as many as 237 sub-professions in these categories, as the ones where immigration should be actively facilitated.[30]

Latvia was also among the very first countries to facilitate an introduction of a quick qualification recognition process for healthcare professionals from Ukraine (especially, doctors), thus, enabling them to enter more rapidly into the labour market.[31]

[22] Ibid.

[23] Ministry of Economics, 'Informatīvais ziņojums par darba tirgus vidēja un ilgtermiņa prognozēm', 2020, p. 18.

[24] LETA, 'Jaunzeme prognozē, kura nozare nākamgad saskarsies ar darbinieku trūkumu', 20 Oct 2021.

[25] 'LDDK Sadarbības pārskats 2017', available: https://lddk.lv/wp-content/uploads/2020/06/lddk-parskats-screen.pdf, p.13.

[26] Elīna Aščuka, 'Iekļaujoša darba vide – no Ukrainas atbraukušie kā lakmusa papīrītis', IR, 5 May 2022.

[27] LTRK, 'Uzņēmēju aptauja: jau tagad trūkst darbaspēka, aicina darba tirgū integrēt ārvalstu studentus', available: https://www.ltrk.lv/lv/content/jaunumi/1867

[28] Ministry of Economics, 'Informatīvais ziņojums par darba tirgus vidēja un ilgtermiņa prognozēm', 2020, p. 20.

[29] Ibid.

[30] Cabinet of Ministers Regulations No 108, 20 February 2018. Available: https://likumi.lv/ta/id/297537-specialitates-profesijas-kuras-prognoze-butisku-darbaspeka-trukumu-un-kuras-darba-latvijas-republika-var-uzaicinat-arzemniekus.

[31] 'Īslaicīgā reģistrācija Ukrainas ārstiem', Latvian Medical Association, available: https://www.arstubiedriba.lv/islaiciga-registracija-ukrinas-arstiem/

Against this background, the discussion in Latvia has mainly focussed on the question of how to slow down and discourage the emigration of the Latvian workforce, especially in the so-called 'essential' professions, even though the process of raising wages has been slow and reluctant. The EU free movement rules are therefore mostly discussed as a trigger enabling worker exodus from Latvia and brain drain. While there has not been discussion in the terms of 'fair movement' as laid out in the questionnaire, there has certainly been a discussion about wage dumping by means of importing workers from the third countries (they have to be paid the average pay in the sector in order to receive work permit). There have also been discussions about the unfairness of Latvia paying for educating doctors and other essential professions for years and those afterwards leaving for other EU countries to find better-paid jobs (see Question 4). This is especially relevant because the higher education in Latvia is relatively cheap and often free. Hence, in this context there have been voices demanding that free movement of highly educated people towards EU should be restricted or either they or the receiving countries should repay the state expenses for their education.

There is also something to be said about the necessity to align the wage levels in the EU, at least among workers working for the same international undertaking or group of undertaking operating across borders. Often the same company (e.g. Scandinavian banks) that act as a socially responsible employer within its country of origin (establishment) is paying much lower wages and eliminating any attempts of collective bargaining among workers in their Latvian subsidiaries. They are reporting huge profits that are then transferred abroad. Hence increasing wages in the Latvian labour market in many sectors is in fact often in the hands not only of the Latvian Government but also in the hand of the managers of international undertakings with headquarters in EU Member States having much higher wage levels and higher levels of social protection for their workers there.

Question 4

For general information on the migration of workers from and to Latvia, as well as some of the measures adopted to facilitate remigration and immigration of workers please see Question 3.

The brain drain phenomena is often discussed in press and also has served as a reason for some marginal changes in legislation. It emerged as a clear issue shortly after accession to the EU and then especially after the 2008 financial crisis.[32] There was significant exodus of young, often educated people from the country due to

[32] Damien McGuinness, 'Fears over Latvia brain drain as economy struggles', BBC 20 August 2010.

both loss of jobs and the low level of remuneration and social protection.[33] At the same time, the Ministry of Economics has predicted that the balance between immigration and emigration will even out by 2023.

There are many projects and state-supported initiatives to attract workforce that has already left the country.[34] At the same time, it is far from clear whether such initiatives have been successful. One of them has been the remigration support where a person planning to move back to Latvia can request financial support to start an economic activity in order to transition back to Latvia.[35] The maximum amount to be received is 10 000 EUR.[36] There also have been information campaigns and advertisements asking Latvian workers to return home. However, the question is how efficient can such initiatives be if the wages are competitive only in certain sectors (like IT) and there are concerns among migrants about the level of social protection once they return. As analytical reports show, the main reason for emigration are economic and social – wanting to earn more and to receive better social protection.[37] However, as research carried out by the Diaspora and Migration Center in Latvia also reveals, the reasons for returning to Latvia are mainly emotional rather than economic – homesickness, family, friends, willing to raise children in Latvia and such.[38]

Two sectors where the brain drain phenomena has been discussed in the last few years are education and science[39] and healthcare sectors. The latter is also the only sector where specific measures have been taken in order to discourage emigration of highly educated professionals. Every year about 100 new doctors from Latvia go to work in Germany, Sweden and other EU countries[40] and this poses an incredible challenge to the country's already overburdened health protection system. The Cabinet of Ministers Regulations No 685 'Procedure for admission, distribution and financing of residency' provide that medical residents who do their residency with a stipend financed from the state budget have to work for three years within the next five year period in their speciality in a public hospital or clinic, state institution or have to carry out scientific work or continue in doctorate studies at

[33] Ibid.

[34] See eg the Order of the Cabinet of Ministers No 356 'Par Reemingrācijas atbalsta pasākumu plānu 2013.-2016.gadam', 30 July 2013.

[35] LV portāls, 'Palielina atbalstu "atgriešanās grantiem"', 24 August 2019.

[36] Changes in the Regulations of the Cabinet of Ministers No 496 'Remigrācijas atbalsta pasākuma īstenošanas, novērtēšanas un finansēšanas kārtība', 7 August 2018.

[37] Inese Helmane, 'Ko piedāvāt, lai aizbraukušie talanti atgrieztos', LV portāls (lvportals.lv), 15 October 2020.

[38] Ibid.

[39] Agnese Drunka, Santa Lauga '"Smadzeņu" jeb kvalificētu speciālistu aizplūšana ir izaicinājums Latvijas zinātnei' LR1, Latvijas Radio 1 (lsm.lv), 8 March 2019.

[40] M. Lapsa, D. Ričika, 'Laimīgo zemi meklējot. Mediķu globālā migrācija', Doctus, 13 August 2018.

a university in Latvia (Article 28.1). Alternatively, they can work in their speciality at an institution that has an agreement with state on employing medical residents (28.2). Annotation (preparatory note) for these Regulations is not currently available, hence we are not sure whether the compatibility with EU law was considered in adopting these Regulations.

These rules have been challenged before the Latvian courts.

First, their initial version was challenged by a resident who did his residency through state budget but then decided to move to work in Germany. Latvian Ministry of Health demanded that he repays 30 000 EUR (money state had spent paying for his residency). He refused, because paid residency option (not from the state budget) at the time was cheaper (around 1/3 of the sum) and he believed that he should repay only the amount equivalent to the paid residency cost rather than the factual amount state had paid for state budget students. He also argued that he would have stayed to work in Latvia if for the salary there he would have been able to financially support his family (he has four children) but argued that it was not possible even while working in multiple jobs. He brought his claim to the first instance court and won, also the appeal was won, but the court did not decide on the exact amount he has to pay due to the difficulties in understanding the actual expenses from the University documents.[41] Even though the applicant referred to his rights to free movement and Article 45(3) TFEU, the court did not consider the situation from the perspective of EU law. The Cassation instance (third instance) refused to initiate the case.[42]

In 2020, the Ministry of Welfare informed in 2020 that there are more than 200 court cases against medical residents for refund of the state budget payment, and in the meantime state budget allocation for residents has been aligned with the one demanded from students who pay for the studies. However, the available case law does not seem to reveal any consideration of the EU law in these court cases. According to the available information, many former residents after moving abroad repay the money immediately or ask the hospital they move to repay it.[43] There is also a plan from the Ministry of Welfare to finance all places for residency, which would mean that *de facto* all future medical residents would have an obligation to work in Latvia for three years following their medical training.[44]

[41] Judgment by Administrative Regional court in case No A420273418, 10 December 2020.

[42] Decision by the Senate of the Supreme Court in case No A420273418, 9 March 2021.

[43] Māra Lībeka, 'Aizbrauci strādāt uz Vāciju? Samaksā 30 tūkstošus eiro! Ministrija no jaunā ārsta grib piedzīt naudu par studijām', LA.LV, 24 July 2020.

[44] LETA, 'Slimnīcas vadītājs: Liedzot augstskolām uzņemt rezidentus par maksu, slimnīcās aizvien vairāk trūks speciālistu', LA.LV, 28 January 2022.

Finally, another way how Latvian law allows supporting the worker, from the one hand, and also tying them to the employment contract, is the possibility for employer (also in the public sector) to cover education costs even when education is not necessarily needed for the performance of duties under the employment contract. If such an agreement is concluded between worker and employer, the latter can demand that the worker undertakes to work for employer at least two years after finishing education or has to repay the education costs from personal means.[45]

Question 5

The posting discussion, historically, has been driven by the emphasis on 'competitive advantage' and need to access the market abroad (at the EU level) and the shortage of workforce (at the national level). In the background, however, the posted workers have actively turned to the national courts in order to access their rights and achieve justice.[46]

The amended Posting of Workers Directive (Directive 2018/957) has been implemented in Latvian Law. It has been transposed into Labour Law. The main changes concerned Articles 14, 14.^{1} and 14.^{2} of the Labour Law and dealt with re-posting within the host country and the obligations of the sending undertaking in case it is a temporary work agency, as well as the obligations of temporary work agencies sending workers to Latvia (they have to make sure that the conditions of the worker are equivalent with those of the typical workers who has an employment contract directly with the user undertaking (Article 14(2^{3})). The user undertaking also has a new obligation to inform the temporary work agency about the level of protection and working conditions of its own direct workers, so that the same can be ensured for the posted workers (Article 14(2^{4}). Finally, the user undertaking in Latvia is not allowed to let the posted worker work until it has made sure that the electronic declaration with all the necessary information about the posted worker has been submitted to the Latvian authorities (Article 14.2^{6}).

When it comes to the remuneration, Article 14(2^{5}) states that the notion of remuneration and its mandatory elements have to be determined in line with the host country's law. If worker is posted to Latvia, then independently of applicable law, the posted worker has to be protected in line with the Latvian

[45] Article 96(2) and (3) Labour Law, and also VII Section in the Law on Remuneration of Officials and Employees of State and Local Government Authorities.

[46] For an extensive analysis of the available case law on posting of workers in Latvia please see Zane Rasnača, 'Posting before Latvian courts' in *Posting of workers before courts* (Rasnača and Bernaciak, eds), ETUI, 2020.

law when it comes to remuneration, including allowances that are associated with special risk – overtime work, night work, work during the public holidays and additional work (Article 14.[1](1)(3)) and also any general collective agreements are applicable to determine the correct level of remuneration. It is explicitly stated that remuneration does not include contributions for supplementary pensions paid by the employer. Finally, in line with Article 14.[1](9), any allowances connected to posting are considered part of remuneration except if they are meant for covering worker's expenses. In case the amount of expenses and its elements are not distinguished, entire allowance connected to posting is considered to constitute compensation for expenses. *De facto* it is understood that the worker has to receive at least the Latvian minimum wage (or the minimum wage determined by the general collective agreement in the sector) and all the supplements (like overtime pay etc.) rather than 'equal pay for equal work'.[47]

When it comes to workers posted from Latvia abroad, Article 14.[2](3)(5) of the Labour Law states that employer has to inform in writing the worker *inter alia* about remuneration in line with host country's law as well as about any allowances connected with posting including how and whether accommodation, travel and board will be covered (Article 14.[2](3)(6)).[48] The rules on mission allowances in the host country apply in so far as the Labour Law does not determine differently (Labour Law takes priority over host country's law in this regard) (Article 14.[2](4)). Finally, the mission allowance for workers posted from Latvia is reduced to 30% of that determined by the Regulations of the Cabinet of Ministers (a flat rate sum set for each country of destination).

These latter changes constitute a significant reduction of posted workers' rights in comparison with the situation prior to the implementation of the directive where such reduction was possible only if travel, accommodation and board costs where covered for the worker. Finally the mission allowance does not need to be paid at all (even 30%) if worker received 3 full meals per day for free or the remuneration worker receives is comparable to that received by a local worker in the host country (Article 14.[2](6)(1) and (2)). In general, this again constitutes deregulation of posted workers' rights in disguise of the implementation of the Directive[49] since, as case law indicates, allowances in practice constituted a significant part of the

[47] An anonymous interview with the Representatives from the Latvian Trade Union Confederation on 20 June 2022.

[48] Again it is important to note that it seems that this is not being interpreted as 'equal pay for equal work' but rather as an obligation to pay at least host country's minimum wage + the supplemental pay for additional or dangerous work (like overtime, night time work etc.) (An anonymous interview with the Representatives from the Latvian Trade Union Confederation on 20 June 2022)

[49] See for an earlier situation very similar to this discussed in Rasnaca 'Identifying the (dis)placement of 'new' Member State social interests in the posting of workers: the case of Latvia'

workers' income.[50] Moreover, these changes also indicate that employers are not obliged to cover accommodation, travel and lodging costs of the posted workers. Thus, while posted workers now enjoy formal equality with local workers in terms of remuneration (it remains to be seen how that will be applied in practice and it seems that at least in Latvia it is interpreted to mean the minimum wage in the sector including supplements for atypical work such as overtime, night time work etc.), their actual needs which are often different from those of local workers (e.g. the need for accommodation and food costs to be covered) are not taken into account. Overall, this means moving in the direction of formal equality for posted workers without necessary reaching substantive equality. Employers however remain free to pay mission allowance if they so wish (Article 14.^{2}(7)), however, it is doubtful whether for typically low-paid sectors and less well protected posted workers, this allowance will be ever paid.

It is difficult to determine in which sectors exploitation of posted workers is the most prevalent. Among the workers posted to Latvia, they would likely be construction or agriculture sectors. For workers posted abroad, their treatment depends not only on their direct employer but also on user undertakings although they are formally not liable.

We did not manage to find cases concerning posting of workers by temporary work agencies established in other Member States.

Question 6

To the best of our knowledge, so far the right to conduct a business (Article 16 CFREU) and also the freedom of establishment has not been used by the Latvian courts in order to challenge national or EU social law in national courts.

However, the same cannot be said about the freedom to provide services. As already analysed in more detail elsewhere[51], Latvian courts have used the freedom to provide services in order to limit and challenge national immigration rules. A company had brought workers from Ukraine to work in shipbuilding. As the rules currently stand, the third country nationals immigrating for work purposes have to work in Latvia (at least the majority of they stay), however, in this particular case the company did not have any business in Latvia but offered shipbuilding services in other EEZ countries. Accordingly, the Office of Citizenship and Migration Affairs rejected the requests for work/residence permits on the basis that worker

[50] See posting before Latvian courts in Rasnaca and Bernaciak

[51] Zane Rasnača, 'Posting before Latvian courts' in *Posting of workers before courts* (Rasnača and Bernaciak, eds), ETUI, 2020.

will not be working in Latvia.[52] This decision was challenged. At first court decided that due to worker not working in Latvian territory, the permits had been lawfully rejected.[53] However, at the final instance the Supreme Court overturned the previous judgments and argued that the fact that workers would work for a Latvian shipbuilder but not physically in Latvia is not sufficient to refuse residence permits.[54] Second, at this instance the company also had begun to argue that these refusals limited its freedom to provide services. Rather surprisingly, the Supreme Court agreed and held that such refusals created an unjustified restriction of the company's freedom to provide services and that the residence permits should have been granted.[55] The Supreme Court of Latvia interpreted the judgments in *Vander Elst*, *Commission v Luxembourg*, *Commission v Germany* and *Rush Portuguesa* to reach this decision. This case law has been upheld in further cases.[56] In a way here, EU economic law (freedom to provide services) was used to challenge national immigration rules, and one could even argue in order to support a de facto letterbox company without any economic activity in Latvian territory.

While there are no cases where the right to strike has been evaluated in the light of internal market freedoms, the Latvian courts seem to accept economic reasons for restricting the right of strike[57] and might potentially be susceptible also to limits stemming from internal market law.

Question 7

a.

The principle of equal treatment is established by Article 91 of Latvian Constitution (Latvijas Republikas Satversme) according to which: "[a]ll human beings in Latvia shall be equal before the law and the court. Human rights have to be realised without discrimination of any kind." This is the underlying provision for the non-discrimination framework in Latvian law. More detailed provisions can be found in specific statutes.

As regards, in particular, the prohibition of discrimination in the area of labor law, the Labour Law (Darba likums) specifies the scope of this principle and gives more details regarding its implementation.

[52] Judgment by Administrative district court, Case No A420536110, 2010.

[53] Judgment by Administrative regional court, Case No A420521210, 2012.

[54] Judgment by the Administrative Department of the Supreme Court, Case No A42051110, 2012.

[55] Supreme Court administrative department, 2012, A42051110, SKA-673/201

[56] Ibid.

[57] Please see the controversial judgment by Kurzeme District court in Case C-2651-19/6, 17 June 2019 and for more details: Nataļja Mickeviča, 'The right to strike in the public services. Latvia', EPSU/ETUI, April 2021.

According to Article 7 (2) of that law, an equal right to work, to fair, safe and healthy working conditions, as well as to fair remuneration, shall be ensured without any direct or indirect discrimination, irrespective of a person's race, skin colour, gender, age, disability, religious, political or other conviction, ethnic or social origin, property or marital status, sexual orientation or other circumstances. Paragraph 3 of this Article transposes into Latvian law Article 5 of Directive 2000/78 providing that employers, in order to promote the introduction of the principle of equal treatment, shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. However, Article 7 (3) of Labor Law does not specify what is meant by 'disproportionate' like it is done in the directive itself.[58]

The latter seems to be interpreted by the Supreme Court just once in the judgment of 6 July 2015 where this court explained that the general obligation of the employer to ensure equal treatment as regards persons with a disability does not depend on the status of the disability but on the exact disability of the particular person and on the resources available to the employer.[59] Hence, 'reasonable accommodation' has to be done and evaluated on a case-by-case basis.

Another provision of the Labor Law to mention concerning the implementation of the acquis, in the domain of anti-discrimination law, is Article 29. It prohibits treating workers differently on the ground of their gender, race, skin color, age, disability, religious, political or other conviction, ethnic or social origin, property or marital status, sexual orientation or other circumstances.[60] Just like Directive 2000/78 itself, this article introduces some exceptions to this prohibition, implementing Article 4 of the directive which authorizes a difference of treatment based on a characteristic related to the grounds mentioned in the directive, by reason of the nature of the particular occupational activities concerned or in the context in which they are carried out, if such a characteristic constitutes a genuine and determining occupational requirement (objective has to be legitimate and the requirement proportionate). In particular, Article 29 (2) of Labor Law authorizes such a difference of treatment on the ground of sex, and Article 29 (10), on the ground of religion if it is a genuine and determining occupational requirement taking into account the organization's ethos.

[58] Last phrase of Article 5 of Directive 2000/78 specifies that "[t]his burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

[59] Senāta 2015.gada 6.jūlija lēmuma lietā Nr. 6-70005415, SKA-1002/2015, 5.punkts.

[60] Article 29 (1) and (9) of Labor Law.

In this context, the Supreme Court has ruled that the prohibition of differential treatment enshrined in Article 29(1) and (9) constitutes part of the general principle of equal treatment, but established in conjunction with an objective ground (like, for example, gender or religion) that, with some exceptions, cannot serve as a basis to treat workers differently.[61]

Articles 34 (infringement of prohibition of differential treatment while establishing employment relationships), 48 (infringement of prohibition of differential treatment while ending employment relationships), 60 (equal pay for men and women)[62] and 95 (infringement of prohibition of differential treatment as regards working conditions, professional training or promotion) of Labor Law regulate in more detailed way and flesh out how the principle of equal treatment has to be ensured at every step of employment.[63]

It seems that the question of religious discrimination has not really been discussed yet before Latvian courts, as it is true for other aspects of anti-discrimination law taking into account the lack of case law interpreting Articles 7 and 29 of Labor Law. Probably this fact is linked to the discriminated workers' disbelief in their chance of winning the case, fear of being dismissed if they try to defend their rights or simply their lack of knowledge of their rights and inability to assess whether law was breached. In theory Directive 2000/78 is correctly transposed in Latvian law; however, one could say that the transposition has been rather general and individual workers would need legal assistance in order to understand whether they have been discriminated in specific situations

b.

The acquis in the domain of working time is implemented mainly in the Part D of the Labor Law "Working time and rest time". It is worth mentioning more in detail the provisions of this Part D that have been invoked in cases before the Supreme Court.

Implementing Article 2, points 1 et 2, of Directive 2003/88, Article 130 (1) of Labor Law defines "working time" as a period from the start of work until its end during which a worker is working at the employer's disposal, except rest breaks. Article 141 (1) of that law defines "rest period" as a period during which a worker

[61] Senāta 2019.gada 20.augusta sprieduma lietā Nr. SKC-605/2019, ECLI:LV:AT:2019:0820.C33586617.12.S, 11.3.punkts.

[62] Implementing Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26.7.2006, p. 23–36)

[63] Latvijas Republikas Augstākā tiesas sprieduma 2018.gada 6.jūnijā lietā Nr. C31247015, SKC-79/2018, ECLI:LV:AT:2018:0606.C31247015.1.S, 8.3.punkts.

is not performing their work tasks and which can be used in a discretionary manner. All in all, the Labour law follows very closely the rules in the Working Time Directive. Article 131 (1) of Labor Law sets normal daily working time at 8 hours and normal weekly working time at 40 hours. According to Article 131 (2) of that law, if a worker was working less one day, there is a possibility to make him work longer some other day during the same week, but not more than one hour longer and with the respect of the provisions regarding weekly working time. Overtime cannot exceed 8 hours per week in average within four months period.[64]

Furthermore, a minimum daily rest period of 12 consecutive hours per 24-hour period for adults and of 14 consecutive hours for children[65] is established by Article 142 of the Labor Law. According to Article 143 (1) of this law, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 42 hours. Exception is made for workers having flexible working-time.

Employers have to guarantee breaks for workers whose working time exceeds six hours per day. Those breaks should be granted maximum four hours after a worker began their work and they cannot be shorter than 30 minutes.[66]

The Supreme Court has often interpreted the concepts of "working time" and "rest time".

In a very recent judgment of 22 June 2022, it instructed the appellate instance to verify whether the time spent by a civil servant sent several times to work in different places of Latvia that are located far (almost 200 kilometers away) from his previously fixed work place and his home should be considered as "working time" in the sense of Labor Law and Directive 2003/88. The Supreme Court not only extensively analyzed the case law of the CJEU but even asked for several experts' opinions in this field, stressing the importance of rest and of the possibility for the worker in question to enjoy his private and family life taking into account the excessive number of hours spent on his way to all the working places.[67]

Another example of interpretation of the concept of "working time", where the fact of taking into account case law of the CJEU led to annulment of the judgment of the appellate instance, is the judgment of the Supreme Court of 12 December 2018. The Supreme Court ruled that in order to respect conclusions made by the CJUE in *Federación de Servicios Privados del sindicato Comisiones*

[64] Article 136 (5) of Labor Law.

[65] Article 37 of Labor Law defines working children as persons older than 13 years old and younger than 15 years old (younger than 18 years old if they continue primary education).

[66] Article 145 (1) and (2) of Labor Law.

[67] Senāta 2022.gada 22.jūnija spriedums lietā Nr. A420235317, SKA-34/2022, ECLI:LV:AT:2022:0622.A420235317.16.S.

obreras, time spent by the worker in question, who did not have a fixed place of work, during his journey from his home to or from a customer should be included in his working time.

A good example clarifying the difference between working time and rest period (breaks) is the judgment of the Supreme Court of 18 June 2020 where this jurisdiction interpreted the cited provisions of Latvian law in accordance with the case law of the CJEU. In this case,[68] a police officer asked his employer, a Latvian municipality, for payment compensating several "breaks" of 30 minutes during his 24hours on-call duties. The Supreme Court took into account the case-law of the CJEU, in particular the judgment in *Matzak* case[69], in order to decide whether those breaks should be considered as rest time or working time for which he has to be paid. As the police officer in question could not really devote himself to his personal and social interests during the breaks, those breaks had to be qualified as working time.[70] Even if in theory the employer adopted necessary regulation concerning substitution of a worker during their break, courts have to verify whether rest during break was insured in practice using all available evidence in this regard.[71]

As regards night work, Article 138 (1) of Labor Law defines it as work for more than 2 hours during night time, meaning a period from 10 pm until 6 am (from 8 pm until 6am as regards children). This law defines a night worker as a worker who usually performs night work according to his shift time schedule or at least 50 days during per year.[72] The Supreme Court of Latvia, interpreting those provisions, clarified that just one hour performed by a worker from 10pm until 11pm, even if it is included in the period of night time, is not considered as night work in the sense of Article 138 (1) of Labor Law.[73]

Article 9 of Directive 2003/88 is transposed in particular by Article 138 (4) of Labor Law providing the right of night workers to a free health assessment before their assignment and thereafter at least once in two years (once a year for workers older than 50 years old). According to Article 138 (5) of that law, the employer has to transfer a night worker suffering from health problems recognized as being connected with the fact that he/she performs night work whenever possible to day work to which he/she is suited.

[68] There were several identic cases brought by police officers against their employers.

[69] Judgment of 21 February 2018, Matzak, C-518/15, EU:C:2018:82.

[70] Senāta 2020. gada 18.jūnija spriedums lietā Nr. C73475318, SKC–577/2020, ECLI:LV:AT:2020:0618.C73475318.9.S

[71] Ibid, para 8.3.

[72] Article 138 (2) of Labor Law.

[73] Senāta 2018. gada 20. novembra sprieduma lietā SKC-646/2018, 6.3.punkts.

As regards transposition of the provisions of that directive concerning annual leave, Article 149 (1) of Labor Law establishes the right of every worker for a four weeks long annual leave (a month long annual leave for workers younger than 18 years old), public holidays being excluded for this period. Law allows dividing this period in parts, specifying that at least one of those parts should be at least two weeks long.[74] It allows as well transferring a part of annual leave for next year but only exceptionally and with the written consent of the worker providing that at least half of his/her annual leave is still taken during the year in question.[75] Implementing Article 7 (2) of Directive 2003/88, Article 149 (5) of Labor Law prohibits replacing the minimum period of paid annual leave by an allowance in lieu, except where the employment relationship is terminated. In this case the employer has to pay the compensation for the whole the period during which the worker couldn't take annual leave.

The Supreme Court on several occasions has been asked to interpret that last provision of Labor Law. It is worth mentioning more in detail the judgment of 29 march 2020[76] where the Supreme Court extensively referred to the judgments of the CJEU *Kreuziger*[77] and *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*.[78] The Supreme Court concluded that granting compensation for all the days for which a worker had the right to take annual leave without taking into account reasons, objective or subjective, why this worker did not use their right to the paid annual leave, would lead to the result opposite to the interpretation of Article 7 of Directive 2003/88 provided by the CJEU.[79]

Another example where the Supreme Court put forward EU law and the case law of the CJEU, is the judgment concerning calculation of overtime hours for workers having flexible working-time and being sick during a part of a reference period. The Supreme Court stressed the importance of Article 16 (b) of Directive 2003/88[80] and after referring to the judgment of the CJEU *Syndicat des cadres de la sécurité intérieure*[81] concluded that the period of sick leave cannot be considered

[74] Article 149 (2) of Labor Law.

[75] Article 149 (3) of Labour Law. This exception is not applicable to workers younger than 18 years old and pregnant and breastfeeding women until the child is maximum two years old.

[76] Senāta 2019. gada 29.marta spriedums lietā C30585615, SKC-62/2019, ECLI:LV:AT:2019:0329.C30585615.1.S.

[77] Judgment of 6 November 2018, Kreuziger, C-619/16, EU:C:2018:872.

[78] Judgment of 6 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften, C-684/16, EU:C:2018:874.

[79] Point 7.4 of the judgment SKC-62/2019.

[80] According to that provision for the application of Article 6 (maximum weekly working time), a reference period should not exceed four months. The periods of paid annual leave, granted in accordance with Article 7, and the periods of sick leave shall not be included or shall be neutral in the calculation of the average.

[81] Judgment of 11 April 2019, Syndicat des cadres de la sécurité intérieure, C-254/18, EU:C:2019:318

as rest and during the rest of the predetermined reference period, after sick leave, workers cannot be employed in too intensive manner without insuring them enough rest, proportionally to actual working time.[82]

It follows from the foregoing that the Supreme Court is rather EU law friendly, at least certainly when it comes to the working time rules. Latvian higher court tries to take into account the provisions of the relevant directives and their interpretation given by the CJEU and to interpret Latvian law as much as possible in accordance with EU law, mostly as regards the concepts of “working time” and “rest period”.

c.

There are no specific provisions regulating platform work in Latvian law at the moment. It seems that the Latvian legislator is waiting for the EU legislator to act first in this regard taking into account that the Commission has made a proposal for a new directive in order to improve the working conditions of platform workers.

d.

There is not much case law on this topic. It seems that in general Latvian courts respect Latvian international obligations[83] without discussing though the nature of relationship between EU law and international labor law. It is important to note, however, that Latvia is among very few EU Member States who have not ratified the protocol establishing the collective complaints procedure under the European Social Charter. Hence, the enforcement of the ESC squarely remains in the hands of national courts and no oversight at the international level has been permitted. This potentially also mitigates the need for the Latvian courts to deal with potential disagreements and clashes between EU law and ESC.

A good example concerning European social charter is the case where two Latvian supreme jurisdictions expressed their views on compatibility of the level of Latvian minimal retirement pension with Latvian Constitution and European social charter[84]. The Supreme Court having doubts in this regard submitted the case to the Constitutional Court. In its referral decision, the Supreme Court even included some extracts of Latvian parliamentary debates before their vote to ratify the European social charter, concluding that the decision to ratify this document

[82] Senāta 2019.gada 5.jūlija sprieduma lietā Nr. A420213917, SKA-794/2019, 11.punkts.

[83] As Article 12 of Labor Law provides, in case of a conflict between this law and international agreement ratified by Latvian parliament, the provisions of the latter must be applied.

[84] Otherwise, this document is mentioned sometimes in Latvian case law but without any analysis of its force in Latvian legal system or of its content.

was not just a formality but signified the country's will to comply in reality with obligations deriving from it.[85]

The Constitutional Court pronounced the provisions of Latvian law in question incompatible with Latvian Constitution, as those provisions did not fulfil a socially responsible state's obligation to guarantee a decent retirement pension level. It referred inter alia to Article 12 (1) of European social charter on the right to social security of workers and their dependents including the self-employed.[86]

In another referral to the Constitutional Court decision, the Supreme Court was having doubts about the compatibility of provisions of Latvian law on unemployment benefits for persons returning from parental leave used to take care of children older than 1,5 years old with inter alia Article 27 of European social charter, arguing that use of parental leave should not affect person's right to be socially insured.[87] Those doubts were not confirmed though by the Constitutional Court.

Question 8

EU social policy objectives are not broadly discussed at the national level within the academic community. However, from Latvian perspective, one could identify two main challenges or frontiers in terms of EU social policy one could develop further.

First, one of the main declared national objectives in Latvia is the need to address inequality, especially income inequality. Latvia is among EU countries (just after Bulgaria and Romania) with the highest inequality when it comes to income distribution. There are thus people who earn and live relatively very well, but many more do not. In the light of the already low wages (the minimum wage is 500 EUR and average wage 1011 EUR per month) many people do not have adequate income to lead decent lives. For example, in 2020 23.4% of Latvia's population were at risk of poverty.[88] This especially problematic in the regions. While in the capital region (Rīga) only 16% of the population is at risk of poverty, in Latgale (the region bordering Russia and Belarus) that percentage stands at 36%. Among the requests from the Latvian Trade Union Confederation addressed to the Latvian

[85] Senāta 2019. gada 18.decembra lēmuma lietā Nr. A420271718, SKA-1481/2019, ECLI:LV:AT:2019:1218. A420271718.12.L, 19.-23.punkti.

[86] Latvijas Republikas Satversmes tiesas 2020.gada 10.decembra sprieduma lietā Nr. 2020-07-03, 22.2.punkts. Publicēts: Latvijas Vēstnesis, 240, 11.12.2020.

[87] Senāta 2020. gada 19.jūnija lēmuma lietā Nr. A420150916, SKA-187/2020, ECLI:LV:AT:2020:0619. A420150916.4.L, 26.punkts.

[88] Jānis Kincis, '23.4% of Latvia's population at risk of poverty in 2020', Article (lsm.lv), 14 January 2020.

Parliament in 2021 we find the request to promote increase in wages in Latvia towards the EU average wage, to improve wage transparency and decrease wage inequality. Hence, addressing wage inequality in Europe should be among EU's key objectives. Moreover, since we live in cross-border reality and business are carried out across borders enabled by EU fundamental freedoms, we should also promote equality of workers within firm. Namely, there should be income and rights' equality among workers within any group of undertakings with business in multiple Member States independently in which country they work. Finally, when it comes to the protection of mobile workers, the objective should not be formal equality but rather substantive equality, which takes into account the particular vulnerabilities of migrant workers and remedies those.

Second, one fundamentally new element in Latvia has been to push for more collective bargaining and creation of a legal framework conducive for this. However, this has been introduced against the background of very low rates of union membership and low levels of grassroots activism. In addition, some more protective Labour Laws are being weakened in the name of introducing collective bargaining incentives. According to recent changes, if generally applicable collective agreement foresees a significant increase of minimum wage level or hourly pay in the sector (more than 50%), then the pay for overtime can be reduced (however, there is a limit that it has to be at least 50% of pay).[89] This is of course an incentive to conclude collective agreements, however, there are many sectors where the pay is much higher than the minimum wage already, and in such sectors, we can imagine how these amendments might lead to deregulation. Furthermore, in 2020 new amendments in the Labour Law were introduced allowing to derogate *in peius* from statutory law via collective agreements if the overall level of worker protection is maintained.[90] At the moment, it is unclear what this 'overall level' exactly means and this again seems to be an invitation to deregulate workers' rights via collective bargaining. EU should certainly address the workers' ability to organise and bargain collectively and express their voice, especially across borders in the following years, but EU's role could also be seen in ensuring that the level of the protection in both labour law and social law is not reduced.

In Latvia Labour law applies only to workers (who is a worker has to be determined in line with the definition found in the Labour Law on a case-by-case basis if there is a dispute). Self-employed can be reclassified as workers in case it turns out that it was a case bogus self-employment. However, the regulatory framework for each group is separate and does not overlap.

[89] Grozījumi Darba likumā – Latvijas Vēstnesis (vestnesis.lv)

[90] Grozījumi Darba likumā – Latvijas Vēstnesis (vestnesis.lv)

Question 9

The initial impact of the European Semester was very significant since Latvia was under the balance of payments system and one of the bailout countries before joining the Eurozone, and after introducing euro the monetary supervision from the balance of payments mechanism was accommodated within the European Semester process.

In general, in the social domain, the recommendations have been mainstreamed in the national level policy documents and they have found their way into the Latvian National development plan 2014 – 2020[91] and also the new development plan for 2021 – 2027.[92] At the same time, the exact impact of how the typically rather general recommendations trickle down and affect the legislative framework in Latvia remains unexplored.

There are two key obstacles one could imagine for moving European social policy into the EMU. First, the imbalance between sanction mechanisms (that exist for the economic arm but not for the social field) and the possible prevalence of economic recommendations over the social ones remains a challenge.[93] Second, the lack of transparency and involvement of public in these policy cycles remains an issue. While the involvement of social partners has vastly improved over the last decade or so[94], the question still is whether their opinions are sufficiently taken on board and also the opinions of the larger NGO sector as such.

Question 10

Charter's social rights, that is, those guaranteed by Articles 27 to 38 of the Charter, are not discussed much in Latvian case law. Even when the parties bring the Charter up in their submissions, Latvian courts do not use it often in their argumentation.

In the above mentioned cases (please see Question 7) of the police officers asking for payment for "breaks" during their 24-hour on-call duties, during which they could not devote themselves to their personal and social interests, the Supreme Court just mentioned Article 31 (2) of the Charter to conclude that it, alongside with Article 107 of Latvian Constitution, contains the right for a worker to rest.[95]As

[91] Nacionālā attīstības plāna 2014.-2020.gadam sākotnējā redakcija (pkc.gov.lv)

[92] Par Latvijas Nacionālo attīstības plānu 2021.–2027. gadam (NAP2027) (likumi.lv)

[93] Refer to Melanie and Marco

[94] See the opinion on this by the Latvian Trade Union Confederation: Eiropas semestris – LBAS – Latvijas Brīvo Arodbiedrību Savienība (arodbiedribas.lv)

[95] Senāta 2020. gada 18.jūnija sprieduma lietā Nr. C73475318, SKC–577/2020, ECLI:LV:AT:2020:0618. C73475318.9.S, 7.1.punkts; Senāta 2020. gada 18.jūnija sprieduma lietā Nr. C33617618, SKC–481/2020,

the employers in question were municipalities (public bodies), the Supreme Court did not have to address the question of horizontal effects of this former provision.

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In the above mentioned cases of police officers asking for payment for "breaks" during their 24hours on-call duties, the Supreme Court just mentioned Article 31 (2) of the Charter to conclude that it, alongside with Article 107 of Latvian Constitution, contains the right for a worker to rest.[96]As the employers in question were municipalities (public bodies), the Supreme Court did not have to address the question of horizontal effects of this former provision.

Question 15

No, the European Union is primarily perceived as an economic union, even though the freedom of movement and especially for workers has been an important part of the benefits often used extensively but undervalued by the Latvian population, and in practice, the EU social acquis has had a significant impact on Latvian labour and social law. At the national level, there is an important discussion about Latvia as a socially responsible state, including by academics, practitioners[97] and by the Constitutional Court, as well as about solidarity as one of the fundamental values in the Latvian constitutional system.[98] However, so far these discussions have not been meaningfully connected with EU law and the discussion about European Union as a Social Union.

ECLI:LV:AT:2020:0618.C33617618.10.S, 7.1.punkts; Senāta 2020. gada 18.jūnija sprieduma lietā Nr. C33578718, SKC–698/2020, ECLI:LV:AT:2020:0618.C33578718.9.S, 7.1.punkts.

[96] Senāta 2020. gada 18.jūnija sprieduma lietā Nr. C73475318, SKC–577/2020, ECLI:LV:AT:2020:0618. C73475318.9.S, 7.1.punkts; Senāta 2020. gada 18.jūnija sprieduma lietā Nr. C33617618, SKC–481/2020, ECLI:LV:AT:2020:0618.C33617618.10.S, 7.1.punkts; Senāta 2020. gada 18.jūnija sprieduma lietā Nr. C33578718, SKC–698/2020, ECLI:LV:AT:2020:0618.C33578718.9.S, 7.1.punkts.

[97] Žurnāls: Sociāli atbildīga valsts – Jurista Vārds (juristavards.lv)

[98] Ibid.

LUXEMBOURG

Athanase Popov[1] and Luca Ratti[2]

Question 1

The Grand Duchy of Luxembourg is in a unique situation within the EU. The majority of its workers are foreign nationals, mostly EU citizens. Moreover, 46% of its workforce is made up of frontier workers (commuters, *frontaliers, Grenzgänger*) who reside in the neighbouring countries, but work in the Grand Duchy[3]. Besides, even among the resident population, more than half of the workforce is made up of workers who were not born in the country and often do not intend to settle there[4]. As a result, Luxembourg is the EU Member State with the highest share of mobile workers.

The existing EU framework on equal treatment of EU mobile workers is well implemented in Luxembourg, sometimes better than in neighbouring States. Article 10bis of the Luxemburgish Constitution provides that "Luxembourgers are equal before the law. They are admissible to all public, civil and military employment; the law determines the admissibility of non-Luxembourgers for such employment". Yet, this is not always enough to fully enforce equal treatment due to the local specifics which demand more far-reaching action.

Equal treatment is notably mandated by the law of 28 November 2006 transposing Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[5]. The law of 28 November 2006 has a broader scope than the Directive in that it prohibits direct and indirect discrimination based on religion, personal opinions, disability, age, sexual orientation, race and ethnicity. Nonetheless, consistently with the scope of the Directive, the law of 28 November 2006 does not cover discrimination

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3 "Panorama sur le monde du travail luxembourgeois à l'occasion du 1er mai", Regards, n° 03, 04/2022, available at: https://statistiques.public.lu/dam-assets/catalogue-publications/regards/2022/regards-03-22.pdf (Institut national de la statistique et des études économiques, hereinafter "STATEC", accessed on 8 July 2022).

[4] *Ibid*. According to STATEC, out of 246 000 resident workers in 2021, only 121 000 were Luxembourgish nationals, which of course includes foreign workers having recently acquired dual or multiple citizenship. Thus, the total workforce in the country is mostly foreign.

[5] The law has been codified as Article L.251-1 of the Labour code (*Code du travail*).

based on nationality, which constitutes a major weakness, given the percentage of foreign workers in Luxembourg.

a)

Equal treatment is commonly well respected in Luxembourg, with national authorities and courts fully aware of its meaning and significance.

The Law of 28 November 2006 introduces the possibility for associations to assist a victim of discrimination before national courts and tribunals. Such bodies, however, must have legally existed for five years and be recognised by the Ministry of Justice as being nationally representative in the field of anti-discrimination.[6]

However, when it comes to the practical implementation of the law, language may lead to various situations of indirect discrimination, notably via the inclusion of contractual obligations for the foreign worker to learn Luxembourgish – a language with a very recent grammar and fluctuating pronunciation and vocabulary – within a given deadline. For workers who are not gifted for languages and who have very few occasions to practice Luxembourgish, these contractual obligations may lead to unfair dismissals.

The same applies to the public sector, where language may lead to situations of indirect discrimination on the basis of nationality in the sense that the opening of various positions to EU citizens is partially limited via linguistic requirements, even where there are no communication issues. The country thus insists on the promotion of the national language among foreigners, instead of insisting on a good knowledge of Luxembourgish grammar by all citizens, including natives, who typically practice Luxembourgish as a mostly oral language. Thus, language may constitute a specific barrier to equal treatment.

Another specificity of Luxembourg is the relatively high number of EU institutions based in the country. With regard to barriers to equal treatment, EU officials may face specific issues such as medical overcharging, which constitutes indirect discrimination on the basis of nationality according to the General Court of the EU[7].

Access to vocational training is ensured without any known cases of discrimination.

[6] European network of legal experts in gender equality and non-discrimination, "A comparative analysis of non-discrimination law in Europe", Publications Office of the European Union, Luxembourg, 2019, 86.

[7] Judgment of the General Court (Ninth Chamber) of 30 April 2019, *Francis Wattiau v European Parliament*, T-737/17, ECLI:EU:T:2019:273, on which the only available academic commentary seems to be A. Popov, "Surfacturations hospitalières et qualité de vie des fonctionnaires européens au Grand-Duché de Luxembourg : le Tribunal de l'Union constate que la convention négociée entre l'Union et les hôpitaux luxembourgeois viole le principe de non-discrimination en raison de la nationalité", *Revue des affaires européennes*, 2019/2, 391-399.

b)

In principle, EU citizens who are not economically active are not treated differently compared to EU workers. Compared to other Member states, Luxembourg has a relatively low percentage of economically inactive persons, mostly due to its dynamic labour market.[8] However, the lack of financial resources often leads to very difficult social conditions, i.e. the impossibility to benefit from medical insurance. On the other hand, pensioners are allowed to benefit from medical and social insurance in Luxembourg even if they reside most of the time in another Member State.

Question 2

The Luxembourgish approach towards equal treatment in the area of social security benefits is split into conflicting policy lines. Certain aspects of equal treatment in the area of social security benefits are not particularly contentious, while others are.

a)

Albeit the issue of granting social benefits to economically inactive citizens is less present in Luxembourg as there are fewer economically inactive EU citizens in the country (the unemployment rate being one of the lowest in the EU), the civil society often reports about people who may not claim e.g. medical insurance, as there is no equivalent to the French *couverture maladie universelle* for people without sufficient resources[9].

For economically inactive mobile citizens who are not beneficiaries of international protection, Luxembourg indeed makes access to both social assistance and social security benefits subject to the requirement that such citizens legally reside there. Thus, the citizens who are concerned must have comprehensive sickness insurance and sufficient resources so as not to impose an unreasonable burden on the social security system of the State.

b)

There is a strong opposition to the principle that the country of work of the parent(s) shall be responsible for paying *certain types of* family allowances when the child resides elsewhere. This opposition is not growing, it can rather be described as

[8] See S. Fernandes, "Access to social benefits for EU mobile citizens: "tourism" or myth?", Jacques Delors Institute Policy Paper, 168, 2016, 7.

[9] This has been a recurrent issue in Luxembourgish media for several years, at least as of 2018. See e.g. R. Van Dyck, "Luxembourg : à quand une couverture maladie universelle ?", *Le Quotidien*, 21.05.2018, available at: https://lequotidien.lu/a-la-une/luxembourg-a-quand-une-couverture-maladie-universelle/ (accessed on 25 July 2022).

constant and slightly decreasing for several decades, and it has led to a body of case-law of the Court of Justice, each time obliging Luxembourg to adapt its *legislation*. Thus, the so-called "boni pour enfant" allowance was analysed in *Giersch*[10], where the Court ruled that the previous Luxembourgish legislation, which made the grant of financial aid for higher education studies conditional upon the students' parents or guardians in Luxembourg, gave rise to a difference in treatment amounting to indirect discrimination between persons who reside in the Luxembourg and those who, not being residents of that Member State, are the children of frontier workers carrying out an activity in that Member State. The Court further ruled that while the objective of increasing the proportion of residents with a higher education degree in order to promote the development of the economy of that same Member State was a legitimate objective, which could justify such a difference in treatment, and while a condition of residence, such as that provided for by the Luxembourgish legislation was appropriate for ensuring the attainment of that objective, such a condition went beyond what was necessary in order to attain the objective pursued, to the extent that it precluded the taking into account of other elements potentially representative of the actual degree of integration of the applicant for the financial aid in the local society or labour market.

Such resistance to equal treatment is usually based on the view that scholarships awarded to students as per national law serve the purpose of increasing the percentage of people with higher education in the country, which until 2003 did not have a fully-fledged University. Previously, the government was even explicitly supporting primarily students who were Luxembourgish nationals. Indeed, pursuant to the Law of 22 June 2000, only Luxembourgish nationals and residents of Luxembourg were eligible for the aid[11]. Besides, the 2000 Law required Luxembourg nationals to merely prove their nationality, while non-Luxembourg Union citizens had to be domiciled in Luxembourg and covered by Articles 7 or 12 of the now repealed Regulation No 1612/68. Such discrimination was remedied by a Law of 2005, which required Luxembourgish nationals to reside on the territory

[10] Judgment of the Court (Fifth Chamber), 20 June 2013, *Elodie Giersch and Others v État du Grand-Duché de Luxembourg*, C-20/12, EU:C:2013:411. See generally, about *Giersch* and the subsequent line of case-law, J. Silga, "Luxembourg Financial Aid for Higher Studies and Children of Frontier Workers: Evolution and Challenges in light of the case-law of the Court of Justice", *European Public Law*, Volume 25, Issue 1 (2019) pp. 13-24. Specifically about *Giersch*, Síofra O'Leary writes that the Court of Justice "appears to proceed on the basis of the presumption that a frontier worker is not always as integrated in the Member State of employment as a migrant worker who is employed *and* resident in that State" (in *Common Market Law Review*, 51, 2014, p. 610).

[11] Thus, nationals didn't need to prove residence in Luxembourg, although according to the advisory Opinion of the Council of State on 21 March 2000 on the legislative draft No 4562, leading to the *Loi du 22 juin 2000 concernant l'aide financière de l'État pour études supérieures,* Luxembourg's scheme of financial aid for university studies had set as its primary objective the increase of the proportion of its resident population holding a higher education decree. Apparently not quite so, since nationals residing abroad didn't need to prove residence in order to benefit from the scheme.

of Luxembourg in order to be able to claim the aid at issue. Thus, between 2000 and 2005, frontier workers who, by definition, did not reside in Luxembourg, were excluded from the scope of the Law of 22 June 2000[12].

Luxembourgish society still feels that it is unfair for Luxembourg to pay for students whose parents do not reside in the country, thus overlooking or ignoring traditional arguments in favour of the principle "no taxation without consent", at the basis of modern democracies, whereby taxes should not be spent in accordance with purely national objectives, but in accordance with taxpayers' will.

Although the legislation at issue in *Giersch* was amended so as to – at least prima facie – comply with the Court's ruling, the litigation on similar grounds continued in Luxembourg, both before national courts and before the Court of Justice following preliminary references made by the former. Indeed, Luxembourg had not fully integrated the zero-discrimination rationale implicitly contained in *Giersch.*

The Law of 19 July 2013, which was adopted to give effect to the judgment in *Giersch* and which made amendments to the Law of 22 June 2000 relating solely to the academic year 2013/2014, inserted Article 2 bis into the Law of 22 June 2000, which was worded as follows:

"A student not residing in the Grand Duchy of Luxembourg may also receive financial aid for higher education studies where that student is the child of an employed or self-employed person who is a Luxembourg national or a national of the European Union or of another State party to the Agreement on the European Economic Areac or of the Swiss Confederation, is employed or pursuing an activity in Luxembourg, and has been employed or has pursued an activity in Luxembourg for a continuous period of at least five years at the time the student makes the application for financial aid for higher education studies. Employment in Luxembourg must be for at least half the normal working hours applicable within the undertaking, under statute or by virtue of any collective labour agreement that may be in force. A self-employed worker is required to have been affiliated to the social security system in the Grand Duchy of Luxembourg under Article 1(4) of the Social Security Code for a continuous period of five years prior to the application for financial aid for higher education studies".

The amended Law of 22 June 2000 was repealed by the *loi du 24 juillet 2014 concernant l'aide financière de l'État pour études supérieures* (Law of 24 July 2014 on State financial aid for higher education studies) [13] . Article 3 of the Law of 24 July 2014 provides:

[12] Opinion of Advocate General Mengozzi delivered on 7 February 2013, *Elodie Giersch and Others v État du Grand-Duché de Luxembourg*, C-20/12, EU:C:2013:70, para. 5.

[13] Mémorial A 2014, p. 2188.

> "A student or pupil, as defined in Article 2, hereinafter referred to as a 'student', who fulfils one of the following conditions may benefit from State financial aid for higher education studies:
>
> (…)
>
> (5) a student not resident in the Grand Duchy of Luxembourg who:
>
> (…)
>
> (b) is the child of a worker who is a Luxembourg national or a national of the European Union or of another State party to the Agreement on the European Economic Area or of the Swiss Confederation employed or pursuing an activity in the Grand Duchy of Luxembourg at the time when the student's application for financial aid for higher education studies is made, provided that the worker is continuing to contribute to the maintenance of the student and that the worker has been employed or has pursued an activity in the Grand Duchy of Luxembourg *for at least five years at the time of the student's application for financial aid for higher education studies, within a reference period of seven years counting back from the date of the application for financial aid for higher education studies* or, by way of derogation, the person retaining worker status met the aforementioned criterion of five years out of seven when he or she finished work".

The above legislative amendments were deemed still insufficient – bearing in mind that the law applicable to the facts in the main proceedings was even more discriminatory – and the Court ruled, in *Depesme and Kerrou*[14], that Article 45 TFEU and Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union must be interpreted as meaning that a child of a frontier worker who is able to benefit indirectly from the social advantages referred to in the latter provision, such as study finance granted by a Member State to the children of workers pursuing or who have pursued an activity in that Member State, means *not only a child who has a child-parent relationship with that worker, but also a child of the spouse or registered partner of that worker, where that worker supports that child*.

Regarding the five years' or similar periods applicable to frontier workers, but not to residents, the Court further ruled, in *Bragança Linares Verruga*[15], that Article 7(2) of Regulation (EU) No 492/2011 precluded inter alia Luxembourgish legislation which,

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[14] Judgment of the Court (Second Chamber) of 15 December 2016, *Noémie Depesme and Others v Ministre de l'Enseignement supérieur et de la recherche*, Joined Cases C-401/15 to C-403/15, EU:C:2016:955.

[15] Judgment of the Court (Second Chamber) of 14 December 2016, *Maria do Céu Bragança Linares Verruga and Others v Ministre de l'Enseignement supérieur et de la recherche*, C-238/15, EU:C:2016:949. See, on both cases, C. Jacqueson, "Any news from Luxembourg? On student aid, frontier workers and stepchildren, *Bragança Linares Verruga* and *Depesme*", *Common Market Law Review*, Volume 55, Issue 3 (2018) pp. 901-922.

with the aim of encouraging an increase in the proportion of residents with a higher education degree, makes the grant of financial aid for higher education studies to a non-resident student conditional on at least one of that student's parents having worked in Luxembourg for a minimum and continuous period of five years at the time the application for financial aid is made, but which does not lay down such a condition in respect of a student residing in the territory of that Member State.

That line of authorities was then complemented by the ruling in *Aubriet*, where the Court considered that a rule, which made the grant to non-resident students of financial aid for higher education studies subject to the requirement that a parent who has worked in Luxembourg for a minimum period of five years in the course of a reference period of seven years preceding the application for financial aid, entailed a restriction which went beyond what was necessary to achieve the legitimate objective of increasing the number of residents holding higher education degrees[16].

As a result, Luxembourgish legislation was amended once more in 2016, making it possible to consider frontier workers' stepchildren, as well as children of registered partners, to be eligible for financial support for higher education[17].

The litigation before the Court of Justice did not stop there. In *Caisse pour l'avenir des enfants I*[18], the Court ruled that Article 45 TFEU, read in conjunction with Article 4 of Regulation No 883/2004, must be interpreted as precluding the refusal by the competent authorities of one Member State to pay to a national of a second Member State, who works in the first Member State without living there, family allowances for his child living in a non-member country with her mother when, under identical conditions for the grant of those benefits, those competent authorities recognise the entitlement of their own nationals and residents to family benefits pursuant to a bilateral international convention concluded between the first Member State and that non-member country, unless those authorities can put forward an objective justification for refusing to do so.

In *Caisse pour l'avenir des enfants II*[19], the Court further ruled, firstly, that Article 45 TFEU and Article 7(2) of Regulation (EU) No 492/2011 of the European

[16] Judgment of the Court (First Chamber) of 10 July 2019, *Nicolas Aubriet v Ministre de l'Enseignement supérieur et de la Recherche*, C-410/18, EU:C:2019:582. See, on these recent Luxembourgish cases before the Court of Justice, G. Friden, A. Germeaux, "Cour de justice de l'Union européenne, 2019-2020", *Annales du droit luxembourgeois*, "6.3. Les droits des frontaliers", pp. 579-582.

[17] Article 3 of the *Loi du 23 juillet 2016 portant modification de la loi du 24 juillet 2014 concernant l'aide financière de l'État pour études supérieures*, Mémorial A, No 143 of 29 July 2016, at p. 2430.

[18] Order of the Court (Sixth Chamber) of 5 September 2019, *E.U. v Caisse pour l'avenir des enfants*, C-801/18, EU:C:2019:684.

[19] Judgment of the Court (Sixth Chamber) of 2 April 2020, *Caisse pour l'avenir des enfants*, C-802/18, EU:C:2020:269.

Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union must be interpreted as meaning that a family allowance based on the fact that a frontier worker pursues an activity as an employed person in a Member State constitutes a social advantage within the meaning of those provisions. Secondly, the Court ruled that Article 1(i) and Article 67 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, both read in conjunction with Article 7(2) of Regulation No 492/2011 and with Article 2(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, must be interpreted as precluding the Luxembourgish legislative provisions pursuant to which frontier workers were entitled to receive a family allowance, on the basis of the fact that they pursue an activity as employed persons in that Member State, *solely for their own children, and not for a spouse's children with whom those workers have no child-parent relationship, but whom those workers support, whereas any child residing in that Member State is entitled to receive that allowance*. The said legislative provisions have to be amended accordingly. The latest legislative amendments have not yet reflected the latest rulings of the Court in this never-ending litigation.

Question 3

Workers' mobility in the Grand Duchy is mostly problematic at the moment in so far as teleworking was difficult for frontier workers to make use of tax regimes agreed with neighbouring countries prior to the Covid-19 pandemic. Derogations were granted during the pandemic, and it remains to be seen to which extent upcoming agreements will address the tax distribution so that teleworking – which allows a better work-family balance and is more environmentally friendly – will remain possible without penalising frontier workers.

a)

According to a study conducted by LISER,[20] in 2021 Luxembourg domestic employment was composed of at 27% of Luxembourgish residents, 27% of foreign residents, and 46% of non-resident cross-border (frontier) workers. These latter predominantly work in the services sector. Most of them are nationals of other EU Member States. This trend is compounded over time, as housing prices are constantly rising. Some specific sectors, such as the catering industry and the

[20] LISER (Luxembourg Institute of Socio-Economic Research), "Domestic employment 1994-2021", available at: https://www.liser.lu/ise/display_indic.cfm?id=601 (last accessed on 20 August 2022).

medical sector, but also, lately, the police and other public administrations, are reporting that they face recruitment issues.

b)

The idea of "fair movement" has not yet gained support in Luxembourg. In fact, instead of the possibility for greater control or an "emergency brake" for the host State[21], or for a "selective mobility" [22], Luxembourg has been extending some of the free movement rights, including political rights, to nationals of third countries, who may e.g. vote and even be elected in local elections.

c)

Essential workers in critical occupations (in sectors such as healthcare, farming, transportation etc.) are a priority, and concrete support for their mobility would need to be established, well beyond the temporary measures adopted during the Covid-19 crisis aimed at favouring their entering and exiting the country.[23] Their mobility requires a rethinking of the freedom of movement of workers in so far as neighbouring countries face even more important shortages of medical workers due to the higher attractivity of Luxembourg.

Question 4

There is no brain drain phenomenon in Luxembourg, or it is limited to certain niche activities such as contemporary art, music, etc., for which the country is too small to offer valuable career opportunities.

a)

There is no significant outflow of workers to other Member States. However, there is a minor outflow of people who become frontier workers once they realise that they can no longer afford to reside in the country although they were born or used to live there. There are no official statistics yet as to their exact number.

b)

There are no measures aimed at retaining certain types of workers currently in place.

[21] As per C. Barnard and S. Fraser Butlin, "Free movement vs. fair movement: Brexit and managed migration", *Common Market Law Review,* 55: 203-226, 2018.

[22] As per S. Robin-Olivier, "Free movement of workers in the light of the Covid-19 sanitary crisis: from restrictive selection to selective mobility", *European Papers*, Vol. 5, 2020, n° 1, European Forum, Insight of 16 May 2020, available at: https://www.europeanpapers.eu/en/europeanforum/free-movement-of-workers-covid-19-sanitary-crisis (last accessed on 20 June 2022).

[23] L. Ratti, "Covid-19 and labour law in Luxembourg", *European Labour Law Journal*, 2020, Vol. 11(3) 314–318.

c)

To our best knowledge, there are no case-law or administrative decisions which examine the compatibility with EU law of measures aimed at retaining certain types of workers.

Question 5

The regulation of posting is provided by Title IV of the Labour Code (Articles L-141-1 to L. 145-1) fully implementing the EU directives. The situation of posted workers is regulated by clear and sufficiently detailed statutory provisions.

a)

Directive 2018/957 was transposed into Luxembourgish law by the Law of 15 December 2020[24]. The key innovations include inter alia the rules applicable to long-term posting, posting via temporary employment agencies, and allowances due to the posted worker. Furthermore, an important and innovative aspect is the public policy provisions to be complied with. They are now listed in Article L. 010-1 of the Labour Code and relate to remuneration, working time, paid leave, bank holidays, etc.

Article L. 010-1(2) of the Labour Code, introduced by the Law of 15 December 2020, provides that public policy provisions are now also those relating to equal minimum salary for equal work, as well as the various components of the salary set out in binding legal provisions, namely "all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements" [25]. In that respect, Luxembourg adopts a minimalistic, literal approach towards transposition, given that the revised Article 3 of the Directive sets out very precisely that "for the purposes of this Directive, the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted and means all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements". Thus, since there are no general national provisions on equal pay for equal work, it

[24] Loi du 15 décembre 2020 portant modification : 1° du Code du travail en vue de transposer la directive (UE) 2018/957 du Parlement européen et du Conseil du 28 juin 2018 modifiant la directive 96/71/CE concernant le détachement de travailleurs effectué dans le cadre d'une prestation de services […], publiée au Mémorial A n°1024 du 18 décembre 2020 et entrée en vigueur le 22 décembre 2020.

[25] In the French original, provisions relating to " (…) rémunération correspondant aux taux de salaires minima ainsi qu'à tous les éléments constitutifs du salaire fixés par une disposition légale, réglementaire, administrative, ou par une convention collective déclarée d'obligation générale ou par un accord en matière de dialogue social interprofessionnel déclaré d'obligation générale et à l'adaptation automatique du salaire à l'évolution du coût de la vie ".

may happen that posted workers are paid less for the same work than residents and nationals where the agreed remuneration exceeds the minimum salary and/or where the constituent elements of remuneration are purely contractual and have not been "rendered mandatory by national law, regulation or administrative provision, or by collective agreements". There are no publicly available data on the extent of such a pay gap.

It ought to be observed that this situation is partly due to the case-law of the Court of Justice, which had previously ruled that the Luxembourgish salary indexation scheme, i.e. the automatic adjustment of rates of pay to the cost of living, which does not exist in most other Member States, was inconsistent with the fundamental principle of the freedom to provide services[26]. As a result, in the subsequent legislative amendments, Luxembourg has restricted the application of the equal pay for equal work principle to the situation of workers who earn the minimum salary, which has to be the same for all workers, regardless whether they have been posted or recruited locally.

Regarding sectors of activity where "equal pay for equal work" in the context of posting does not apply, due to the highly mobile nature of the work in international road transport and the need for special rules, the Law of 15 December 2020 provides that workers from the international road transport temporarily posted in Luxembourg remain bound by the previous provisions of the Labour Code, as they were in force prior to the entry into force of the Law of 15 December 2020. Yet this is consistent with Directive (EU) 2020/1057 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector, which provides that "a driver shall not be considered to be posted for the purpose of Directive 96/71/EC when the driver transits through the territory of a Member State without loading or unloading freight and without picking up or setting down passengers" (Article 1(5)). Thus, albeit the legislative draft No 7901 purports to transpose Directive (EU) 2020/1057 while failing to apply the "equal pay for equal work" principle to international road transport, this is consistent with the latter Directive. Article L. 010-1 of the Labour Code does not apply to international road transport where the driver transits through Luxembourg's territory without loading or unloading freight and without picking up or setting down passengers.

It is not known to the national rapporteurs which are the sectors where exploitation of posted workers is most problematic.

[26] Judgment of the Court (First Chamber) of 19 June 2008, *Commission of the European Communities v Grand Duchy of Luxemburg*, C-319/06, EU:C:2008:350, and J.-L. Putz, *Comprendre et appliquer le droit du travail*, 5th edition, Larcier Luxembourg, 2020-2021, p. 40.

b)

To our best knowledge, there are no cases decided on posting of workers via temporary employment agencies.

Question 6

Neither Article 49 TFEU nor Article 16 CFR have been used to challenge employment rights before the Luxembourgish courts.

On the contrary, concerning the right to strike, a ruling in a 1950 case first had considered that trade union freedom (*libertés syndicales*) did not necessarily include the right to strike[27]. Subsequently, the national case-law admitted that the constitutional guarantee of trade union freedom included the right to strike, while considering that this was implicit in article 11 of the Constitution[28]. Legal scholars concurred[29].

The *Laval* and *Viking* case-law may still lead to certain consequences in Luxembourgish Labour law. Indeed, in the Grand-Duchy, it is the National Conciliation Office (ONC) which pronounces upon the legality of a strike, while stating that the conciliation is admissible or otherwise, pursuant to L. 164-2(3) of the Labour Code. The ONC's decision may then be challenged before the administrative courts. Following the *Laval* and *Viking* case-law, the ONC now needs to assess whether workers' or unions' demands do not disproportionally restrict the freedoms under EU law. Prior to that case-law, the demands' being legitimate or otherwise did not affect the legality of the strike[30].

Question 7

a)

To our best knowledge, cases of religious discrimination decided by the CJEU did not have a significant impact on national case-law, mostly due to the lack of domestic litigation on this specific issue.

The notion of "reasonable accommodation" has been implemented both via the Law of 15 July 2011[31], which deals with students having special educational needs,

[27] Tribunal arbitral du canton de Luxembourg, 16 mars 1950, quoted in J.-L. Putz, *Droit du travail collectif – Tome 1*, 2nd edition, Larcier, 2021, p. 554.

[28] CSJ, cassation, 24 July 1952, Pas. 15, 355 ; CSJ, 15 December 1959, Pas. 18, 90.

[29] Putz, 2021, *ibid.*

[30] Putz, 2021, p. 561.

[31] Loi du 15 juillet 2011 visant l'accès aux qualifications scolaires et professionnelles des élèves à besoins éducatifs particuliers.

and via the Law of 28 July 2011, implementing the Convention on the Rights of Persons with Disabilities, as well as the Optional Protocol to the Convention on the Rights of Persons with Disabilities. The Law of 15 July 2011 contains extensive developments on the notion of "reasonable accommodation", but only as regards school education, and thus not about workers. The international Convention on the Rights of Persons with Disabilities and its optional protocol have been ratified in national law by the Law of 28 July 2011, yet, practically speaking, a lot remains to be done. In 2020, the trade union OGBL kept insisting that people with reduced mobility needed more concrete measures[32].

b)

The working time acquis is currently implemented by the Law of 23 December 2016 concerning the regulation of working time.[33]

Under the current legislation, any company has the option of applying a statutory reference period that is longer than 1 month, accompanied by a work organisation plan (WOP) and without recourse to a collective labour agreement. The maximum legal reference period is extended from 1 month to 4 months and the employer can choose between a set of legal reference periods that differ in length, the longest of which is 4 months. The choice of a legal reference period exceeding one month entitles the employees concerned to additional days off.

Maximum working time is reduced. The 2016 law introduces new limits for exceeding the legal working time. Specifically, an employee who normally works 40 hours per week, depending on the length of the reference period, cannot be employed for more than 45 or 44 hours without overtime compensation.

The ministerial authorisation of a reference period of up to 6 months has been abolished.

To our best knowledge, there are no hostile reactions in Luxembourg in that area.

c)

Platform work is not yet regulated in Luxembourg. One of the reasons is that so far Luxembourg has not seen its economy and labour market invaded by online platforms intermediating work, as has happened instead in most Member States. Very few cases have been reported by newspapers about the use of platform work, especially in the food delivery sector, where platforms face difficulties in correctly

[32] "Personnes à mobilité réduite: les obstacles persistent!", available at: http://www.ogbl.lu/personnes-a-mobilite-reduite-les-obstacles-persistent/ (accessed on 19 July 2022).

[33] Loi du 23 décembre 2016 concernant l'organisation du temps de travail et portant modification du Code du travail, Mémorial A271.

characterising the contracts with their collaborators and the labour inspectorate conducted several inspections.[34]

To the best of our knowledge, only one case has been decided by a Labour Tribunal about an allegedly self-employed worker delivering food on behalf of an online platform. Quite specific to the Luxembourgish approach, such platform has been found lacking an *autorisation d'établissement* for the self-employed worker, which is an administrative licence to exercise professional activities in Luxembourg typically applicable to artisans, shops, industries and to some liberal professions (such as accountants, engineers, architects, etc.). Consequently, the platform was condemned to pay an administrative sanction.[35]

So far, social partners and the workers have exposed the loopholes in the Labour Code that does not always allow platform workers to rely on valid contracts of employment[36].

Question 8

There is no particular demand for new developments in EU social policy from Luxembourg. The main stakeholders, including trade unions and employers' associations approve e.g. the Commission proposal on an adequate minimum wage in the EU as well as the Commission proposal on platform work, not least because of the political importance of the current Jobs and Social Rights Commissioner Nicolas Schmit, a popular Luxembourgish politician.

Question 9

The Country Specific Recommendations (CSRs) for Luxembourg in the framework of the European Semester stress that – beyond the economic and social challenges addressed by the recovery and resilience plan – Luxembourg faces a number of additional challenges, notably related to growing inequality in the education system.

In 2011, the first exercise of the CSRs, three main reforms were recommended to Luxembourg in the aftermath of the financial crisis:

[34] https://5minutes.rtl.lu/actu/luxembourg/a/1533476.html (accessed on 20 August 2022).

[35] The case is reported by newspapers, e.g. https://paperjam.lu/article/wedely-condamnee-contrats-ses- (accessed on 20 August 2022).

[36] Jean-Michel Hennebert, "Des services de livraison sous le feu des critiques", French online edition of *Wort*, available at: https://www.wort.lu/fr/luxembourg/des-services-de-livraison-sous-le-feu-des-critiques-6051f650de135b9236c5e474 (accessed on 25 July 2022).

1. Pension reform (increase the participation rate of older workers, in particular by discouraging early retirement and including measures that link the statutory retirement age to life expectancy),

2. Reform of wage setting system to ensure that wage growth better reflects developments in labour productivity and competitiveness and

3. Taking steps to reduce youth unemployment by reinforcing training and education measures aimed at better matching young people's skills to labour demand.

The pension reform was adopted in 2012.[37] The 2012 CSRs explain the main lines of the reform: 'Luxembourg government adopted a draft law to reform the pension system for both the private and the public sector. The reform would build in some corrective mechanisms in case of an adverse evolution of the financial situation of the scheme and contains adaptations to the very generous calculations method of benefits. However, the new calculation method will be phased in over a very long-time horizon of 40 years. Moreover, the possibilities for early retirement remain broadly unchanged and no measures have been proposed to link the statutory retirement age to life expectancy'.

Concerning the reform of wage setting mechanisms, Luxembourg took measures to moderate wage growth by modulating the indexation system between 2012 and 2015. In the 2012 s, it is indicated that: 'the national Parliament adopted a law to limit the application of the automatic indexation of wages between 2012 and 2015 in order to increase the competitiveness of the Luxembourg economy'. 'However, (it continued) besides a possible modification of the reference index, the government has not announced any further plans for a permanent revision of the wage-setting system'.

In the CSRs from 2012 to 2014, the Commission recommended to improve efforts in order to reduce youth unemployment: "Pursue efforts to reduce youth unemployment for low-skilled jobs seekers with a migrant background, through a coherent strategy, including by further improving the design and monitoring of active labour market policies, addressing skills mismatches, and reducing financial disincentives to work. To that effect, accelerate the implementation of the reform of general and vocational education and training to better match young people's skills with labour demand (CSRs 2014)".

In the CSRs 2012 to 2015, one can find the following recommendation on wages: "Reform the wage-setting system, in consultation with the social partners and in

[37] Loi du 21 décembre 2012 portant réforme de l'assurance pension.

accordance with national practices, with a view to ensuring that wages evolve in line with productivity, in particular at sectoral level".

The CSRs from 2012 to 2019 insist on the need to "increase the employment rate of older people by enhancing their employment opportunities and employability while further limiting early retirement, with a view to also improving the long-term sustainability of the pension system".

The most recent CSRs include recommendations to ameliorate the education system. In particular, it is noted that "there is room to improve the education system's governance, further developing evaluation tools and measurable objectives promoting quality and equality of opportunity on both the formal and non-formal sides of the education system". As a result, the Commission recommends inter alia that Luxembourg reduce the impact of inequalities on students' performance and promote equal opportunities in the educational system[38].

Question 10

The case-law of the Court of cassation (*Cour de cassation*) insists on the applicability of the Charter in Luxembourgish law only in so far as the State is implementing EU law. If no provision of EU law applies to a given dispute, the Charter may not be relied as a ground of appeal or cassation[39].

The Charter is mostly relied on by the administrative courts in litigation about asylum and international protection, whenever the applicability of rules of EU law before the national courts may not be challenged.

Question 11

Luxembourg is well on track with the planned transposition of Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers, with the draft legislative act No 7650[40].

[38] Recommendation for a Council Recommendation on the 2022 National Reform Programme of Luxembourg and delivering a Council opinion on the 2022 Stability Programme of Luxembourg, COM(2022) 618 final, available at: https://ec.europa.eu/info/system/files/2022-european-semester-csr-luxembourg-en.pdf (accessed on 27 July 2022).

[39] This consistent case-law is most explicit e.g. in the judgments No 71/2022 (CAS-2021-00060) of 19.05.2022 and, earlier, No 67/14 (3380) of 06.11.2014.

[40] On which, see the conference proceedings of "Les recours collectifs : Perspectives européennes et luxembourgeoises", *Annales du droit luxembourgeois*, Vol. 30, 2020, 1st edition 2021, Bruylant, pp. 173-635.

Question 12

In Luxembourg, the policies to combat climate change, at national level, do try to take social justice into account via direct subsidies. For instance, only households of five people or above may be exempted from the vehicle tax, which is an incentive for private vehicles to be shared by several people[41].

As regards electric vehicles, households of more than 5 people benefit again from better conditions for grant of direct subsidies[42].

Finally, public transport is currently completely free for anybody, which benefits mostly people with low income.

Question 13

The measures that have been taken in Luxembourg in order to provide education on EU citizenship and the values set out in the Treaties in mainstream education are probably more advanced than in other Member States due to the presence of EU institutions in the country and to the unique diversity of the population, yet the inter-governmental vision of the EU prevails most of the time (making "Luxembourg's voice" heard; "Luxembourg speaking with one single voice"). Half of the country's high schools thus have signed a partnership agreement with the European Parliament as "Ambassador Schools" [43]. It is important to stress, though, that not all students are part of the national school system and that there is thus a unique diversity in school models in the country, which in itself is an education on EU citizenship.

Question 14

An important recent development, which can be related to local democracy and the rule of law, is the abolition of the five years' residence requirement before any citizen (including EU and third country citizens) may vote at the local elections[44]. As a result, more citizens will have a say on some of their social rights.

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[41] https://environnement.public.lu/fr/emweltprozeduren/personnes-privees/Energie.html (accessed on 29 July 2022).

[42] https://environnement.public.lu/fr/actualites/2021/021/clever-fueren-2021.html (accessed on 29 July 2022).

[43] See the 2018 European Parliament press release on the Athénée high school's website: http://athenee.lu/images/2018-19/EPAS/Communique_de_presse.pdf (accessed on 29 July 2022).

[44] The consolidated version of the Electoral Law of 18 February 2003 is not yet available, yet the legislative reform has already been officially announced by governmental sources: see the 14 July 2022 press release by the government, available at: https://gouvernement.lu/fr/actualites/toutes_actualites/communiques/2022/07-juillet/14-vote-elections-communales.html (accessed on 29 July 2022).

Question 15

The EU is perceived as a Social Union in Luxembourg in academic and judicial discourse due to the massive presence EU scholars, some of whom serve as EU judges. Common European values, in particular equality and solidarity, laid down in Article 2 TEU, are considered to be the constitutional basis for a European Social Union notably by Koen Lenaerts and Stanislas Adam[45], both of whom reside in Luxembourg.

[45] K. Lenaerts, S. Adam, "La solidarité, valeur commune aux États membres et principe fédératif de l'Union européenne", *Cahiers de droit européen,* No 2, 2021, pp. 307-417.

THE NETHERLANDS

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Question 1

Respect for equal treatment

The Dutch judiciary has accepted the principles of direct effect and supremacy of Union law in direct reference to the CJEU.[2] EU rights and concepts are respected by authorities and enforced by Courts. It is illustrated by a recent district court ruling[3] that a Dutch transport company could not rely on pay arrangements applicable only to foreign employees against a Hungarian worker claiming higher salary. The discriminatory arrangements were null and void under Regulation 492/2011.[4] The court further set aside Dutch time limits for retrospective payment claims under reference to *Emmott*,[5] and referred to *King*[6] to rule on the obligations for the employer. The Hungarian worker in the Dutch case accidentally learned he had right to a higher salary upon consulting legal aid.

Recent research revealed that especially low skilled EU workers lack information about their equal treatment rights, regardless of the type of employment contract they have. Direct employment contracts are often in English or Dutch.[7] EU workers staying longer than four months in the Netherlands are supposed to register in the Personal Records Database (PRD) of the municipality of residence. Many EU workers do not register or register in the database for non-residents, rendering it difficult for municipalities to inform them on housing, health care and municipal welfare provisions. Non-registration may result in denial of social benefits because proof of residence periods is lacking. The COVID-pandemic exposed the vulnerability of low skilled EU workers. Improvement of the registration system and a duty of employers to incite people to register were suggested as

[1] Judge at the Court of Appeal, Amsterdam and Professor of Labour law, Leiden University

[2] ECLI:NL:HR:2004:AR1797, para. 3.6; ECLI:NL:RVS:1995:AN5284.

[3] ECLI:NL:RBOVE:2022:767.

[4] Article 7(4) Regulation 492/2011.

[5] CJEU C-208/90 (*Emmott*).

[6] CJEU C-214/16 (*King*), para. 61.

[7] L. Berntsen a.o., *Working in times of corona in distribution or meat processing. Survey among Polish and Romanian workers in the Netherlands* (Working paper De Burcht) 2022, p. 11-13.

major instruments to end vulnerability of EU workers. The registration system is currently adjusted to include contact details (email and phone number) of those who register as non-resident persons.[8]

Different treatment of economically inactive citizens

Difference in treatment concerns access to social assistance and maintenance aid for studies, in line with Article 24(2) of Directive 2004/38/EC.

Access to social assistance: Foreign nationals residing lawfully under the Aliens Act (AA) are equated to Dutch citizens in access to social assistance. Union citizens reside lawfully when residence is compliant with an arrangement under the TFEU or the EEA Treaty.[9] In line with Article 24(2) of Directive 2004/38/EC, social assistance can be refused to economically inactive citizens residing shorter than three months, or not able to prove residence longer than three months, or residing longer than three months as jobseeker while having a genuine chance to be engaged.[10] Union citizens who work at least 40% of the regular working time and earn at least 50% of the minimum income threshold are presumed to be a worker under EU law, and have access to (complementary) social assistance. Below these thresholds, individual circumstances should be taken into consideration for a decision on their EU worker status.[11]

Dutch municipalities implement and administer social assistance. They enjoy a margin of discretion, but are required to cooperate with the Immigration Services (IND).[12] Municipalities presume lawful residence when citizens reside between three months and five years. They will notify their social assistance to the IND. Social assistance stops the moment the IND terminates the residence. Jobseekers who claim residence under Article 14(4) Directive 2004/38 are also notified to the IND[13]. The IND uses a sliding scale to determine (un)lawful residence.[14] There is little case law on denial of social assistance for economically inactive EU citizens.[15]

[8] Amendment to Article 269 §1 of the PRD Act, 14 July 2021, *Stb.* 2121, 396. These provisions will enter into force once the ICT system is adjusted.

[9] Article 8(e) AA.

[10] Participation Act, Section 11(2); ECLI:NL:CRVB:2016:4132; ECLI:NL:CRVB:2016:4139; ECLI:NL:RBZWB:2020:4650.

[11] Vreemdelingencirculaire B.10/2.2 & 2.3.

[12] ECLI:NL:CRVB:2013:BZ3855; ECLI:NL:CRVB:2013:BZ3857; ECLI:NL:CRVB:2015:57.

[13] The IND decides on continued residence rights for jobseekers; ECLI:NL:CRVB:2018:1704.

[14] Dutch Aliens Act Implementation Guidelines; D. Kramer, *Earning Social Citizenship. Free Movement, National Welfare and the European Court of Justice* (PhD Thesis VU Amsterdam), 2020.

[15] Mantu, Minderhoud and Grütters suggest several explanations: either there are not many applications, or residence rights are not often withdrawn, or citizens do not appeal withdrawal decisions, in 'Legal Approaches to 'Unwanted' EU Citizens in the Netherlands', *CEEMR* 2021, vol. 10(1), p. 40.

Access to student support: EU students with a worker status or who have acquired the right of permanent residence based on Article 16 of Directive 2004/38 are entitled to loans and grants, including costs for study material and public transport cards,[16] in contrast to economically inactive students. Students have a worker status if they work more than 56 hours per month on average.[17] Below 56 hours, individual circumstances are taken into consideration.[18] Media coverage in May 2022 that the 'individual circumstances' rule was not properly communicated, led to adjustment of the information on the website of the relevant Agency (DUO). Provisory student finance is granted for the duration of the submitted employment contract, with retrospective verification and possible recovery per month.[19] Months with zero hours of work cannot be compensated with more hours of work in other months.[20]

Question 2

Equal treatment in the domain of social security benefits

A. In the Dutch public and political discourse, poor EU citizens, criminal EU citizens or EU citizens claiming benefits sometimes are labelled as 'unwanted', even when they legally enjoy a fundamental right to EU mobility and the protection of EU law. In recent years however, there is little discussion on the subject of access to social assistance of non-active EU citizens. There is little Dutch case law on the subject (including expulsion) as well. After the *Dano* judgment, there were some developments of a restrictive nature though. In an unpublished court case, the IND used the *Dano* reasoning regarding an inactive EU citizen who had asked for social assistance benefit but had never searched for work.[21] According to the IND, it was current policy to immediately consider such an EU citizen as an unreasonable burden on Dutch public funds. Another case in which the *Dano* reasoning was used is a judgment by the district court The Hague.[22] In this case, the Court followed the IND and ruled that the Bulgarian applicant never had a right of residence due to being unemployable and not speaking Dutch.

An important change occurred in 2018. In two judgments the Council of State noted that Article 14(3) Directive 2004/38 stating that 'an expulsion measure

[16] Article 2.2.(1) under b Study Finance Act (WSF) 2000; Study Finance Decision (bsf) Article 3a; ECLI:EU:C:2019:3700, point 4.6.

[17] The 56 hours is in line with the implementation guidelines for access to social benefits, see fn. 15.

[18] Beleidsregel controlebeleid migrerend werknemerschap van 13 december 2012.

[19] ECLI:NL:CRVB:2017:2973.

[20] ECLI:NL:RBAMS:2021:6295.

[21] *Rechtbank* Den Haag 1 September 2015, case number AWB 15/4877.

[22] ECLI:NL:RBDHA:2016:3075.

shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State' is implemented in Dutch law with a different wording.[23] Article 8.16(1) of the Dutch Aliens Decree uses the words 'termination of the right of residence' instead of the words 'an expulsion measure'. The Council of State has explicitly emphasized this distinction, marking a radical change in the assessment of this right. Now a balancing of interests and an individual assessment is needed in all cases wherein the immigration authorities decide that the right of residence of an inactive EU citizen has been terminated or had never existed. Questions can still be raised about how this will work in practice.

In academic literature there are some publications critically discussing the CJEU case law in *Brey, Alimanovic, Dano* and *Garcia-Nieto*[24] and some publications, which more or less support this line of case law.[25]

B. Since 2012, the Netherlands has had an indexation system for the export of a number of benefits[26] to non-EU countries with which the Netherlands has signed a social security treaty. The amount of the benefit is linked to the level of the standard of living in the country concerned. As of 2015, child benefits are no longer exported at all to most non-EU countries.

In May 2017, the Minister of Social Affairs indicated that at that time there was insufficient support for the possibility of introducing such an indexation principle within the EU.[27] Indexation within the EU would in fact be contrary to EU law, in particular to Article 67 of the Social Security Coordination Regulation.[28] Starting a discussion within the EU to apply an indexation system would be unwise and could directly worsen the negotiating position of the Netherlands, according to the Minister.

The proposal would also be highly symbolic in nature. The estimated saving for the Netherlands at that time would not exceed € 8 million.

[23] ECLI:NL:RVS:2018:3584 and 3585.

[24] A.o.: P.E. Minderhoud and S.A. Mantu, 'Back to the Roots? No Access to Social Assistance for Union Citizens who are Economically Inactive', in: D. Thym (Ed.), *Questioning EU Citizenship. Judges and the Limits of Free Movement and Solidarity in the EU*, Oxford: Hart Publishing 2017, p. 191-207; D. Kramer, op.cit. fn 19, 2020.

[25] A.o. D. Carter and M. Jesse, *The "Dano Evolution": Assessing Legal Integration and Access to Social Benefits for EU Citizens* (European Papers 3(3)) 2018, p. 1179-1208.

[26] Child benefits AKW, survivor benefits ANW and complementary disability benefit WGA.

[27] *Parliamentary Papers II*, 2016/2017, Appendix 1832.

[28] Regulation 883/2004.

Question 3
Actual situation regarding workers' mobility

Since the EU enlargements of 2004 and 2007, in addition to an increase of 'settlement migration', many other flows of temporary (e.g. posting), frontier and circular labour mobility have emerged within the EU. According to the available data, around 7% (630.000 people) of the total Dutch working-age population (approx. 9 million) does have the nationality from another EU/EEA country than the Netherlands. Around 4% (360.000) has an Eastern-European nationality (more than one-third is of Polish nationality). However, temporary flows of intra-EU labour mobility do not occur fully in the statistics. According to Strockmeijer, around half of the workers from Eastern European countries do not register in the population register, even not when staying in the Netherlands for more than 4 months. Therefore, the actual influx of workers from these Member States is much larger.[29] Moreover, the Netherlands is one of the main 'receiving' Member States of posted workers within the EU. It is estimated that there were between 132.000 and 404.000 incoming posted workers between 2018 and 2020.[30] Eight out of ten notified posted workers are employed in international road freight transport, for whom specific posting rules apply.[31] In general, migrant and posted EU-workers work in larger numbers via temporary work agencies and other intermediaries[32] in industry,[33] agriculture,[34] transportation and warehousing (distribution), construction, wholesale and retail trade. The industries suffering most from labour shortages are construction, healthcare, childcare, military, education, ICT, leisure and hospitality.

In the Netherlands, there is nowadays a broad support for a level playing field (fair intra-EU labour mobility) instead of a free playing field. For instance, when it held presidency of the Council of the EU in the first half of 2016, the Netherlands has strongly pushed for a revision of the posting of workers directive according to the principle of 'equal pay for equal work in the same place'.

[29] Netherlands statistics (2022); A.W. Strockmeijer, P. de Beer, J. Davegos (2020), 'Explaining differences in unemployment benefit takeup between labour migrants and Dutch native workers', *International Social Security Review*, Vol. 73, 2/2020).

[30] Based on examining A-1 certificates, more than one third are third-country nationals employed by companies based in the EU. This concerns mainly Ukrainians and Belarusians posted from Poland or Lithuania.

[31] Arjan Heyma, Henri Bussink, Tobias Vervliet, (2022), *Posted workers to the Netherlands – Facts and figures*, SEO for POSTING.STAT

[32] Bianca Szytniewskia and Marleen van der Haar, 'Mobility power in the migration industry: Polish workers' trajectories in the Netherlands', (2022): Mobility power in the migration industry: Polish workers' trajectories in the Netherlands', *Journal of Ethnic and Migration Studies*.

[33] Including the food processing industry, such as meat-packing.

[34] Much unskilled work in fields, greenhouses, such as collecting strawberries, vegetables, fruits or packing flowers.

The mobility of "essential workers in critical occupations" is an important issue in relation to personnel shortage, especially during and in the aftermath of the pandemic. However, this is not (often) linked to a rethinking of the EU freedom of movement of workers.

Question 4

In the Netherlands, *brain drain* is not considered an issue, as there is no significant outflow of workers to other Member States.

Question 5

National (case) law on posting of workers

a.

The Directive 2018/957 (as well as the other Posting of Workers Directives 96/71 and 2014/67) are transposed into Dutch law in the Terms of Employment Posted Workers in the European Union Act (hereinafter: "*WagwEU*"), effective since 30 July 2020.[35] The purpose of the *WagwEU* is – in short – to avoid social dumping, to deal with sham employment and to implement the Posting of Workers Directives. Concerning the 'hard core' of Dutch labour standards, the *WagwEU* makes a couple of provisions in Book 7 (on employment contracts) of the Civil Code (*BW*) applicable[36] to posted workers in the Netherlands, together with 'public labour law', such as the Minimum Wages Act (*WML*).[37] Next to that, in sectors[38] where a universally binding collective labour agreement (CLA) is applicable, posted workers are also entitled to provisions from such extended CLA's, as far as these are related to the hard core.[39] Regarding the principle of equal pay for equal work as manifested in the revised Article 3 of the Directive, it is codified in the law that the concept of 'remuneration' includes at least the following components:

- the applicable periodic wage for the scale
- the applicable reduction in working hours per week/month/year/period
- bonuses for overtime, shifted and irregular working hours, including public holiday bonus and shift work bonus
- interim wage increases

[35] Government Gazette 2020, 250.

[36] If more favourable for the posted worker concerned (in comparison to his contractual terms and conditions of employment).

[37] The *WML* stipulates a flat minimum wage rate. Lower rates of minimum wage are applicable for young workers (aged 15 to 20 years).

[38] Apart from the merchant shipping sector.

[39] Or the 'extended' hard core, for workers posted longer than 12 or (upon notification) 18 months.

- reimbursement of expenses: allowances for, or reimbursement of costs, necessary for carrying out the job, including travel, meal and accommodation costs for workers who for the purpose of work are away from home and not at their usual place of work in the Netherlands
- increments
- end-of-year bonuses
- additional allowances related to holidays.

Not included in the concept of remuneration are: contributions to supplementary occupational pension schemes, occupational social security benefits, and allowances paid out as reimbursement of costs actually incurred in relation to the posting, such as travel, meal and accommodation costs.

Notably, the (extended) hard core of Dutch CLA provisions does not have to be applied if the period of extension is expired until a renewal of the CLA. In practice, such periods without extension occur regularly. After the renewal of an expired CLA it might take some time before the provisions of the new CLA are extended.

Since the beginning of this century, the increasing presence of Eastern European workers on the Dutch labour market, most notably through reliance on temporary employment agencies and employer-arranged schemes such as posting, led to an increase of exploitative or abusive employment relationships. As numerous research studies have confirmed,[40] this is most problematic in sectors such as road transport, the construction industry, agriculture, horticulture, fish and meat processing industries, hospitality business and the temporary employment agencies sector, due to a high demand for cheap labour. Next to that, unsafe and illegal housing situations, widely exposed in the press, became a growing problem for municipalities with a lot of (posted or migrant) temp agency workers.

b.

Since the first case in 2012 was brought before the court in Groningen against a Polish subcontractor in the building sector, there have been a modest but increasing number of court cases concerning workers posted in the Netherlands.[41] Many cases concerned the road transport sector, including two cases that eventually made it to the CJEU.[42] Some Dutch court cases concern (alleged) posting by temporary

[40] See e.g. K. McGauran e.a. (June 2016), *Profiting from dependency. Working conditions of Polish migrant workers in the Netherlands and the role of recruitment agencies*, commissioned by SOMO/Fair work.

[41] See for an overview: Z. Even (2020), 'Posting of workers before Dutch courts', in: Magdalena Bernaciak, Zane Rasnača, *Posting of workers before national courts*, Brussels: Etui 2020, p. 163-179.

[42] CJEU, 1 December 2020, Case C-815/18 (FNV v VanDenBosch); CJEU 16 July 2020, C-610/18 (AFMB and Others v SVB).

employment agencies, such as the high profile case regarding the notorious Atlanco Rimec Group. In this case, Dutch courts ruled that the workers were not genuinely posted, as under their contracts, their habitual country of work was the Netherlands. Consequently, all Dutch law was deemed applicable pursuant to Art. 8(2) Rome I.[43]

Question 6

Freedom of establishment, the right to conduct a business (Art. 16 CFR) and the right to strike

The right to conduct a business has been invoked to challenge different kinds of national measures, from an obligation to publish the annual accounts in a penal law procedure to a ban to use fireworks during new years' eve in a summary procedure.[44] In the area of labour law, the freedom of establishment and the right to conduct a business have been used by the low cost airline Ryanair to (collectively) dismiss pilots after its decision to close the base in Eindhoven. Ryanair requested the district court in Oost-Brabant to annul the decision of the *UWV*, the competent administrative agency that provides employee insurance schemes.[45] The court left more freedom to the company than the *UWV* to decide to close the base. It refused to ask preliminary questions to the CJEU, demanded by Ryanair, because the court deems the Dutch dismissals rules in the *Ontslagregeling* sufficiently clear and specific to not be against the freedom to conduct a business and the freedom of establishment.

The protection of the right to strike has been guaranteed by the Dutch Supreme Court in 1986 on the basis of Article 6(4) of the European Social Charter (ESC). Recently case law of the Dutch Supreme Court, has strengthened the right to strike. It is not EU law, but the views of the European Committee of Social Rights (ECSR) that have been influential in a recent change of jurisprudence. The ECSR considered the Dutch law concerning the right to strike to be not in conformity with Article 6(4) ESC. The Supreme Court in the cases of *Amsta* and *Enerco* changed its jurisprudence accordingly.[46] There is since this new case law no room anymore for the so-called *ultimum remedium* test in deciding whether a strike is legal or not. The ECSR argued that it should not be up to a judge to decide whether a strike is premature or not.[47] This would affect the very substance of the right to strike. The

[43] ECLI:NL:RBMNE:2015:5393 and ECLI:NL:GHARL:2018:1942.
[44] ECLI:NL:GHARL:2017:11487; ECLI:NL:RBROT:2020:10079.
[45] ECLI:NL:RBOBR:2019:5646.
[46] ECLI:NL:HR:2014:3077 (*Enerco*); ECLI:NL:HR:2015:1687 (*Amsta*).
[47] Annual Conclusions ECSR 2014.

Dutch Supreme Court treated the views of the ECSR as very authoritative. A strike that is within the scope of Article 6(4) ESC is now presumed to be legal. Limitations to this right will have to be dealt with under Article G ESC.

Question 7

Implementation of the social acquis

A. *Anti-discrimination law*

In general, the EU acquis in the domain of anti-discrimination law is implemented correctly in Dutch law, including the notion of reasonable accommodation. Since people with a disability often have difficulty finding a job, the Participation and Quota Act of 2015 encourages employers to hire people with disabilities with subsidies and other support options. According to the quota agreement, employers in the market sector must supply 100,000 jobs for work-disabled people by 2026.[48]

Dutch practice is in conformity with recent EU case-law regarding religious discrimination. The Minister of Justice referred to said case-law in a draft lifestyle-neutrality-code for public servants with special investigation tasks (*buitengewoon opsporingsambtenaren; boa's*) when in contact with the public.[49] A similar guideline for the police was updated in 2021, after the Netherlands Institute for Human Rights (*CRM*) ruled that the National Police cannot simply prohibit employees from wearing a headscarf in combination with their uniform when their official duties require only limited interaction with the public.[50]

Despite the persistent nature of the gender pay gap in the Netherlands, the *CRM* receives relatively few complaints regarding alleged wage discrimination. The Institute has expressed its concerns about failing enforcement of equal pay legislation in practice.[51] Currently, a Bill is pending in Parliament that would make it mandatory for enterprises with 250 or more employees to acquire a certificate of conformity with equal pay for equal work. The Bill is rather similar to the proposal for an EU Directive on pay transparency.[52]

Working Time Directive

B. The Working Time Directive has been implemented in the Dutch Working Time Act (*Arbeidstijdenwet;Artw*). The *Artw* regulates (maximum) working hours

[48] https://business.gov.nl/regulation/participation-act/

[49] *Parliamentary Papers II*, 2021/22, 29628, nr. 1099

[50] https://oordelen.mensenrechten.nl/oordeel/2017-135

[51] The Netherlands is also in breach with Articles 4§3 and 20.c of the ESC. See ECSR, 6 December 2019, UWE v. the Netherlands, Complaint No. 134/2016. (http://hudoc.esc.coe.int/eng?i=cc-134-2016-dmerits-en).

[52] COM/2021/93.

and (minimum) rest periods. The right to paid annual leave is laid down in the Civil Code (*BW*). The *Artw* covers employees and civil servants (Article 2), but not the self-employed. The *Artw* can therefore only apply to platform workers if they are deemed employees.

In general, the Directive has been correctly implemented into Dutch legislation. A problem might be the enforcement of these rules, partly due to limited capacity of the Netherlands Labour Authority (NLA). Moreover, the right to paid leave is not a matter for the NLA, so individual employees or trade unions must enforce this. Also, the obligation for 'multiple jobholders', which often might include platform workers, to report their accrued working times to all their employers, is difficult to enforce.[53]

Another issue might be the scope of the exception to certain provisions of the *Artw* , laid down in Article 2:1:1 section 1a Dutch Working Time Decree (*Arbeidstijdenbesluit*). Article 17 of the Directive allows derogations when the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves. Said provision of the Dutch Working Time Decree defines such employees as employees earning at least three times the statutory minimum wage. It is doubtful whether this quantitative translation of Article 17 in Dutch law is in conformity with the Directive. Recently, the Amsterdam Court of Appeal voiced doubts on this issue.[54] It could be argued that the approach taken in the Dutch Working Time Decree is too simplistic: a high wage does not always imply autonomous determination of working time by employees.

In conformity with the CJEU case law, the *Artw* makes at distinction between working time and rest time. However, in practice, it is rather difficult for employers to distinguish between employees who are 'on call' (but free) and employees who are 'available' on short notice (but strictly speaking do not work). Notably, while the Directive defines working time and rest time as mutually exclusive, the *Artw* contains some limitations for putting employees 'on call', even though that time cannot be considered to be working time in the sense of the Directive.

Another current issue is forfeiture of paid annual leave and the applicability of the (statute of) limitations. The right to paid leave expires if it is not taken within six months after the year in which it was accrued. An exception to this applies if the employee was reasonably unable to take the leave. Moreover, pursuant to Article 7:642 Civil Code (*BW*) this right expires after five years, under the general rules on limitation. The Court of Appeal of The Hague held that an employer must

[53] Article 15(6) Artw.

[54] ECLI:NL:GHAMS:2021:3519.

inform an employee about his right to paid leave and encourage him to take it. In addition, the employer must prove that the employee was able to do so. Only then does the right to vacation expire after six months.[55] Also, the Court infers from the case-law of the CJEU that the five-year limitation period is not applicable, as the limitation period cannot be reconciled with the principle laid down in Article 7 of the Directive (and Article 31(2) CFR), according to which an acquired right to paid annual leave at the end of the reference period and/or from a national the right established transfer period cannot lapse if the employee has not been able to take his leave.[56]

Platform work

C. Platform work is not (yet) regulated in the Netherlands. While initially there was no intention to legislate, with a view to the innovation that these new business models can bring,[57] the current Dutch Government has expressed a desire to clarify and, where necessary, improve the position of platform workers.[58] The Dutch Government supports the ambitions of the proposed EU directive to improve the working conditions in platform work.[59] So far, the social partners do not play a major role in this development, as platforms rather lobby the Government,[60] while trade unions follow a litigation strategy against wrongful classification of platform workers as self-employed. Most cases have been initiated by FNV, the largest trade union in the Netherlands.

Until now, most rulings concern *Deliveroo*. After two contradictory rulings by the lowest court in 2018,[61] the Court of Appeal confirmed in 2021 that Deliveroo's meal delivery riders and drivers work on the basis of an employment contract, rather than being self-employed.[62] That the wages were set unilaterally by Deliveroo and that Deliveroo has far-reaching monitoring possibilities, mainly through continuously tracking the driver's GPS location, was deemed indicative of an employee status. As detailed and individualized instructions are not required for the standardized, low-skilled nature of the work and the riders could not in a truly entrepreneurial way make use of the substitution/subcontracting clause in their contracts, these elements were not deemed counter-indicative of an employee status. Deliveroo appealed and the case is now pending before the Dutch Supreme

[55] ECLI:NL:GHDHA:2021:2386.
[56] CJEU C-214/16 (*King*), para. 56. Cf. CJEU C-684/16 (*Max-Planck*), para. 54.
[57] *Parliamentary Papers II* 2017/18, 29544 en 33009, nr. 837.
[58] *Parliamentary Papers II* 2021/22, 35230, nr. 4; 2021/22 25883, nr. 431; 2020/21, 29544, nr. 1028, p. 15-17.
[59] COM(2021)762; *Parliamentary Papers* II 2021/22, 21501-31, nr. 652.
[60] DutchNews.nl, 'Online platforms want 'social accord' for workers but without the unions', 2021 (online).
[61] ECLI:NL:RBAMS:2018:5183; ECLI:NL:RBAMS:2019:198.
[62] ECLI:NL:GHAMS:2021:392.

Court. According to the Advocate-General, the court of appeal's decision should be upheld. The Supreme Court's decision is expected in late December 2022.[63] Meanwhile, the Court of Appeal has ruled in two judgments that Deliveroo is covered by the collective labour agreement (CLA) for the transport sector and is considered a participant in the professional transport pension fund. Among other things, these rulings mean that Deliveroo must apply the CLA retroactively from 2015 to its delivery riders and pay pension contributions.[64] Deliveroo has announced plans to exit the Dutch market before the end of 2022.[65]

There has been one ruling regarding *Uber* cabdrivers in the Netherlands, classifying these workers as employees and deeming relevant CLAs applicable.[66] However, the Court of Appeal suspended the enforcement of this ruling during the pending appeal.[67] Thus, Uber does not have to comply with the verdict until a final judgment is rendered in the appeal proceedings.

In a judgment concerning *Helpling*, cleaners were deemed temporary agency workers employed by the platform.[68] This judgment was based on a broad interpretation of the term 'user undertaking', as including also private households. In an investigation report on Temper, the Netherlands Labour Authority concluded that the platform is a temporary work agency, instead of a 'freelancers platform'.[69] In Summer 2022, trade unions FNV and CNV were allowed by the court to continue their proceedings against Temper, demanding that the platform (retroactively) applies the CLA for the Temporary Work Agency sector. The FreeFlexers Foundation set up and funded by Temper has been deemed by the court as a non-independent and therefore not-representative (yellow) union.[70]

As observed by Hiessl,[71] there has been a significant degree of cross-fertilisation between courts in EU Member States. Dutch Court rulings have referred to relevant CJEU judgments[72]

[63] ECLI:NL:PHR:2022:578.

[64] ECLI:NL:GHAMS:2021:3978 and ECLI:NL:GHAMS:2021:3979.

[65] NL-TIMES, 'Deliveroo plans to exit the Dutch market by the end of November after 7 years', 2022 (online).

[66] ECLI:NL:RBAMS:2021:5029.

[67] ECLI:NL:GHAMS:2022:2080.

[68] ECLI:NL:GHAMS:2021:2741.

[69] Netherlands Labour Inspectorate report of February 2021 (Temper).

[70] ECLI:NL:RBAMS:2022:4035 and ECLI:NL:RBAMS:2022:4423.

[71] C. Hießl (2022), 'The classification of platform workers in case law: A cross-European comparative analysis', *CLPJ* vol. 42(2), p. 8.

[72] CJEU C-692/19 (*Yodel*); CJEU C-413/13 (*FNV Kunsten*).

The relationship between EU law and international labour law

D. International labour law and the Conventions of the International Labour Organisation (ILO) in general do not have direct effect in the Dutch legal order with exception of a couple of conventions regarding social security law, that contain detailed and unconditional provisions.[73] However, ILO conventions are mentioned regularly in national court judgements. A conflict between EU law and an ILO convention is the issue in a summary judgement of the North-Holland court in a conflict between (again) Ryanair and the trade union of pilots (*VNV*). VNV asked for admission of VNV-members of other airlines to the negotiations on labour standards with Ryanair. Ryanair refused because the company was afraid that confidential information would get in the hands of competing companies. Ryanair used Directive 2016/943/EU (GDPR) and Article 101 TFEU to protest the admission. The district court in North-Holland did not accept the position of Ryanair as fundamental labour rights were at stake.[74]

The ESC is mentioned often in Dutch case law. As explained above, for the right to strike, Article 6(4) ESC has a cardinal importance in Dutch law. This provision is deemed by the Dutch courts to have direct effect. Many other provisions of the ESC do not have direct effect.[75] Sometimes courts do not address the question whether a provision from the ESC has direct effect at all.[76]

Question 8

A new frontier for EU social policy?

A. Apart from views in academia there seems to be, in general, no demand for new regulatory developments in EU social policy. The Dutch Government and the Dutch Parliament tend to be critical in relation to demands for more 'social Europe'. In a government document on the future of the social dimension of the EU from May 2019 the Government set out its views.[77] Although there was support for the EU Pillar of Social Rights, the Dutch Government contended that a future-oriented social policy of the EU should stay within the existing delineation of regulatory competencies between the EU and the member states and of the

[73] E.g. ILO C-103 on mothership benefits, see a court decision in this respect, ECLI:NL:CRVB:1996:AL0666.

[74] ECLI:NL:RBNHO:2018:7350. This court also referred in its summary decision to the *Albany* decision of the CJEU.

[75] For Article 1 ESC, the right to work, see ECLI:NL:RBDHA:2021:7433 concerning persons from the Bahama's who referred to this provision.

[76] For example a case on Articles 13 (the right to social and medical assistance for persons without sufficient means) and 14 ESC (the right to benefit from social welfare services), ECLI:NL:CRVB:2018:512.

[77] *Parliamentary Papers II* 2018/19, 21501-31, nr. 527. The advice of the Dutch Social and Economic Council (SER) titled 'Prioriteiten voor een fair Europa' (Priorities for a fair Europe) is also of importance.

financial frameworks. Hence, the subsidiarity and proportionality principles are paramount for the Dutch Government in the area of EU social policy.

The dominant approach of Dutch governments has been to treat EU social policy (only) as a by-effect of the internal market. The internal market is deemed of key importance for the Netherlands but it is acknowledged that free movement of persons has undoubtedly an influence on the social structure of both home and host member states. The main preference of the Dutch government is for a deeper and fairer internal market. Unfair competition on labour costs and 'social benefit tourism' may endanger the coherence and solidarity within the EU. Therefore, the Dutch government supported both the revision of the Posting of Workers Directive and the launch of the EU Platform on Undeclared Work, as well as more recently, the European Labour Authority (ELA). The ELA could play an important role in the implementation and enforcement of EU rules.

Role of EU law with respect to self-employment

B. EU law is considered to apply only to workers. In particular, the cases *FNV Kunsten,*[78] dealing with the scope of the *Albany*-exception and *Ruhrlandklinik* concerning the scope of the Temporary Agency Directive 2008/104, have impacted Dutch law.[79] In both cases, the formal legal characterisation of the employment relationship under national law was not deemed decisive. This implies that persons who do not have the status of worker under national law on the ground that they did not conclude a contract of employment, but who are substantially not in a different position, can or should in some circumstances be entitled to the same protection as employees.

In reaction to societal worries about a growing group of vulnerable (bogus) self-employed workers the Dutch Competition Authority (*Autoriteit Consument en Markt: ACM*) issued in 2020 practical rules of thumb on how to apply *FNV Kunsten:* if a self-employed worker *de facto* works side-by-side with one or more employees, and is indistinguishable from those employees in day-to-day operations, s/he is not considered to be an undertaking within the meaning of the Dutch Competition Act and can therefore be covered by a collective labour agreement (CLA).[80]

The Dutch Supreme Court has applied the *Ruhrlandklinik* judgment in rulings of 2017 and 2022.[81] A temporary employment agency who deploys a worker to

[78] CJEU C-413/13 (*FNV Kunsten*).
[79] CJEU C-216/15 (*Ruhrlandklinik*).
[80] ACM Guidelines 2020, para 29.
[81] ECLI:NL:HR:2017:689.

a user undertaking is banned by Dutch law from hindering that worker to enter directly into the service of that user undertaking.[82] In such a situation, a non-compete clause in the contract between the agency and the worker can therefore not be enforced. The Supreme Court held that the non-compete clause cannot be enforced either by an agency in a contract with a self-employed, in situations where it is established that this person is not materially different in its relationship with the temporary employment agency from an employee of the agency.

Question 9

EMU impact

The national social law and policy so far is not directly affected by the European Semester and the Country Specific Recommendations. Partly, this is due to the fact that the Netherlands Government has been able to comply with the criteria of the Stability and Growth Pact related to the EMU.

In recent years, the following Country specific recommendations were given in the field of social policy:

2019:

- Reducing the debt bias for households and the distortions in the housing market – limited progress
- Ensure that the second pillar of the pension system is more transparent, inter-generationally fairer and more resilient to shocks – some progress
- Implement policies to increase household disposable incomes – some progress
- Reduce incentives for the solo self-employed, while promoting adequate social protection for solo self-employed – limited progress

2020:

- Take all necessary measures to effectively address the pandemic – not relevant anymore
- Strengthen the resilience of the health system – some progress
- Mitigate the employment and social impact of the crisis – substantial progress
- Promote adequate social protection for the self-employed – limited progress

2021:

- No recommendations in the social field

[82] Article 9a Wet Allocatie Arbeidskrachten door Intermediairs (Waadi).

In 2022 the Country Report mentions as key challenges in the social area:

- Limiting tax incentives that favour debt-financed home ownership
- Addressing shortcomings in the second pillar pension system by implementing the 2019 and 2020 pension agreement
- Reducing labour market segmentation and promoting adequate social protection for the self-employed
- Addressing labour shortages to support the implementation of investments, notably by activating untapped labour and up- and reskilling measures

In the social field, the recommendations did not always have a successful follow-up yet, though on several aspects, reports are produced or legislation is proposed that may lead to measures, such as the Borstlap-report and a report of the Social-Economic Council on the labour market segmentation, flexibility in labour relations and life-long learning, various reports on the position of the self-employed, the proposed bill in order to implement the new second pillar pension system and a recent letter of the Minister of Social Affairs and Employment on labour market shortages.

The recommendations tend to emphasise structural problems in the Netherlands' economy that are also recognised by national economists and are debated in politics. They contribute to the awareness of urgency in these matters. However, the practical influence of the recommendations is rather limited, as the national discussion seems to be most dominant and government as well as Members of Parliament do not often refer to the recommendations.

Question 10

Limited impact of social rights in the EU Charter in Dutch case law and administrative practices.

Only 78 cases referring to articles from Chapter IV of the Charter have been found in Dutch case law.

An analysis of these judgments shows, firstly, that in many cases the courts solely determine that national legislation does not implement Union law and that therefore the Charter is not applicable by virtue of Article 51(1) thereof.[83] Secondly, in none of the examined cases the courts rely on Article 52(2) of the Charter to limit or hamper the scope of social rights under the Charter. However, in some cases the courts seem to easily combine a social right under the Charter

[83] See e.g. ECLI:NL:CRVB:2021:1840, para. 4.3.

and (specific articles of) EU secondary law.[84] In that regard, the Charter article does not appear to have an autonomous content anymore.[85] Thirdly, regarding Article 52(5) of the Charter, there is no indication that social rights are considered (only) as principles. Lastly, it is remarkable that in quite some cases, the courts do not mention the Charter while one or both of the parties explicitly invoke it.

Regarding specific articles of the Charter there are some interesting judgments. By a district court, it was ruled that Article 28 of the Charter does not have direct effect.[86] According to this court judgment, the said article merely entails a normative instruction, to which the Netherlands gave substance by means of legislation. Article 31 of the Charter also produced interesting case law in the Netherlands. In horizontal situations, the courts have considered that employees can rely on Article 31(2) of the Charter and that this provision entails an obligation for the employer.[87] In these cases, the courts refer to the *Max Planck* case.[88]

Two judgements about Article 34 of the Charter are also interesting. In one case, a district court declares that a provision of the regulation on benefits for asylum seekers and other categories of foreigners 2005 – which leaves the claimant out of all of the arrangements – is contrary to Article 34(2) of the Charter.[89] In another case, the highest administrative court in social security law matters rules that the social right in Article 34(2) of the Charter is a part of the general principles in Union law which means that certain regulations are required to be interpreted in conformity with this article.[90]

Furthermore, there are no concrete indications that the Charter's social rights would be considered as less important than other fundamental rights. However, literature examining the Charter in its entirety, shows that the articles in the Solidarity Chapter are not invoked as often as the articles in the Chapters on for example Justice and Freedom.

Finally, outside the scope of the Chapter IV, there are articles closely related to social rights as well. For example, Article 17 of the Charter (the right to property) is often cited in the context of pension law and is considered to offer protection against curtailment of pension entitlements.

[84] For example, this is done in a judgment of the an appeals court where Article 31(2) Charter is cited in conjunction with Article 7 Directive 2003/88.

[85] ECLI:NL:GHDHA:2021:2386, para 5.19.

[86] ECLI:NL:RBAMS:2019:7456, para. 25. This case death with a horizontal relationship.

[87] ECLI:NL:RBGEL:2020:1361; ECLI:NL:RBNHO:2021:4427; ECLI:NL:GHARL: 2021:8899;:NL:RBDHA: 2022:2997.

[88] CJEU C-684/16 (*Max-Planck/Shimizu*).

[89] ECLI:NL:RBDHA:2018:7055, para. 4.11.

[90] ECLI:NL:CRVB:2018:2878, para. 7.1.8.

Question 11

Protection of social rights in the context of international trade and global supply chains

This socially highly relevant topic is being addressed in various ways in the Netherlands. Rules on public procurement are sometimes used to foster social rights, particularly regarding inclusion of persons with a distance to the labour market. Furthermore, agreements promoting international responsible business conduct (so called IMVO covenants) have been concluded for various sectors and many companies have a code of conduct, while multinational companies based in the Netherlands subscribe to the OECD Guidelines. Mandatory due diligence legislation has been adopted, but is not yet enacted, as the Dutch government decided to wait on adoption of a legislation instrument at EU-level.

Question 12

The IMVO covenants bring together various sustainability spearheads, including climate. The Climate Act has as its main goal to achieve 95% greenhouse gas reduction in the Netherlands by 2050 compared to 1990. On June 24, 2015, Urgenda, along with 900 co-plaintiffs, won a Climate Case against the Dutch State. The court ordered the State to reduce greenhouse gas emissions by 25% in 2020 compared to 1990. That verdict was upheld by the highest Dutch court on December 20, 2019.

Question 13

Citizenship/civic education in the Dutch education system

Citizenship/civic education in the Dutch education system primarily focusses on instilling knowledge of political institutions, stimulating social competences and inspiring civic morality, preparing pupils and students for active and adequate participation as citizens and workers within their local and national society. In the past twenty years, Dutch education policy has put increasing efforts in formulating citizenship-oriented *general* tasks and *specific* goals that educational institutions should pursue. Since 2006, the Acts on primary and secondary education contain a general mission statement concerning civic education. In 2021, these Acts have been amended to specify more clearly that schools shall promote active citizenship and social cohesion, focusing on:

Instilling respect for and knowledge of the basic values of the democratic constitutional state as enshrined in the Constitution – democracy, fundamental rights, separation of powers – and acting in accordance with the spirit of these basic values at school;

Developing the social and societal competencies that enable the pupil to be part of and contribute to the pluralistic, democratic Dutch society;

Teaching knowledge of and respect for differences in (e.g.) religion, gender, sexual orientation;

Ensuring a school culture that is in accordance with the spirit of these values.

However, there is not yet a separate subject in the national curriculum specifically devoted to citizenship/civic education. Nevertheless, there are citizenship-related learning goals – defined in subordinate legislation – to be realized in various subjects like history, social studies, philosophy etc., such as learning about the main institutions and the status of citizens within the Dutch and the EU political system; endorsing generally accepted values; understanding the basics of various belief-systems; and developing respect for diversity in society. Likewise, legislation on vocational education does not provide for civic education through a specific subject. This is true as well for higher education. Nevertheless, the constitutional norms and principles regulating the Dutch state and guaranteeing the rights of citizens are essential in legal studies, political science and philosophy. Furthermore, European citizenship also is a basic element in these and other studies. However, European citizenship is not primarily taught as a normative concept, but as a legal-technical, theoretic or political construct.

Hence, there have been various legislative initiatives stressing the relevance of citizenship education. At the same time, there is room for improvements. In part there is not yet an independent separate subject, citizenship education being dependent on being integrated in other subjects. In part the wordings of the learning goals are still rather vague, and to a certain extent lack in focus. The legislator and the education field are in the process of further operationalization of the goals of citizenship education.

Feasibility of implementation of Union values in mainstream education

The introduction to Question 13 contains rather broad reflections concerning the implementation within mainstream education of the Union values in Article 2 TEU. These reflections seem to assume that these values have an independent source in the EU legal order. It should not be overlooked, however, that these EU values also can be found in the constitutional order of the member states, and that these values primarily are derived from and inspired by the national constitutional traditions, not vice versa. Furthermore, numerous member states including the Netherlands are increasing their efforts to educate their pupils and students – through citizenship

education – about their national political system and to stimulate the communication skills and normative attitudes necessary to maintain, develop and strengthen that system. That is already a very complicated and difficult assignment, albeit essential in the light of current trends towards political and social fragmentation. To extend the national mission – possibly to be prescribed into national school systems – to provide for a normative European educational foundation serving the development of supranational cohesion and solidarity might be asking too much, in light of the already great difficulties in realizing cohesion and solidarity at the local and national level. Moreover, it could intrude too much into the heart of state autonomy in this field, contrary to Article 4(2), Articles 165 and 166 TFEU.

Question 14

Developments regarding fundamental social rights related to democracy and the rule of law

Recently, a large scandal occurred in the Netherlands with the recovery of child care allowances, which led to the fall of the government in 2020 and was investigated by the Dutch Parliament and the Venice Commission of the Council of Europe.[91] It revolved around the impact of data driven fraud policies of the Taxation Authorities, which are responsible for paying out the child care allowances.

The system is designed in such a way that the allowance was paid with little *ex ante* verification as an advance payment upon an application by the parents setting out an estimate of the childcare costs for the following year. The relevant legislation was interpreted by the Tax and Customs Administration as the so-called 'all or nothing approach', so that even if a parent had acted in good faith but neither the parent nor the childminder could provide proof of the required administrative details, the parent had to repay the full amount for the whole year. The 'all or nothing approach' contributed to high recoveries of childcare allowances for large number of parents. There was no mitigating policy allowing for any proportionality test or a hardship clause. Algorithms were *de facto* biased against citizens of foreign ethnical origin. The consequences for victimized parents have been terrible. They were hunted down without exception or recourse to critical judicial scrutiny. Many parents appealed to administrative courts and some of them won their cases at first instance. In these cases, Tax and Customs Administration appealed to the highest administrative court, the Administrative Jurisdiction Division of the Council of State, which however confirmed the 'all or nothing approach'.

[91] European Commission for Democracy through Law, 'Netherlands – Opinion on the Legal Protection of Citizens', Opinion No. 1031/2021, 18 October 2021.

The Venice Committee concluded that the shortcomings in individual rights protection uncovered in the Childcare Allowance Case were indeed serious and systemic and involved all branches of government. Yet, the committee also observed that eventually the rule of law mechanisms in the Netherlands did work. Indeed, the reports of the Ombudsman, the Parliamentary inquiry committee into the scandal, and the legislative amendments have shown the reaction of the different mechanisms in the Dutch system.

In the meantime, a lot of soul searching is going on as to how to improve the system of checks and balances. Amongst others, this includes calls for an improved system of judicial protection of fundamental rights as contained in the Dutch constitution, including fundamental social rights.

Question 15

See answer 8a.

POLAND

Joanna Ryszka[1]

1. Free movement of workers

1.1. Free movement of workers and the right to equal treatment of EU mobile workers

1.1.1. The principle of equality follows directly from Article 32 of the Constitution of the Republic of Poland. It defines its scope and formulates the prohibition of discrimination, expressing the right to equal treatment. According to lower-level acts, the Act of 26 June 1974 – Labour Code and the Act of 3 December 2010 on implementation of certain provisions of the European Union on equal treatment (the Equal Treatment Act) are the most important for ensuring compliance with the principle of equal treatment of EU mobile workers.

1.1.2. As far as the Labour Code is concerned, the provisions contained in its Chapter IIa prohibit discrimination with regard to the establishment and termination of the employment relationship, employment conditions, promotion and access to training in order to improve professional qualifications, regardless of an individual's personal characteristics (Article 183a § 1). The national legislator has introduced an open catalogue of prohibited grounds for unequal treatment in employment, thus raising the protective standard in this area. As regards the Equal Treatment Act, it prohibits discrimination based on sex, race, ethnic origin, nationality, religion, belief, worldview, disability, age or sexual orientation, not only in the field of broadly defined professional activity, but also in the field of social security, health care, education and higher education, and access to publicly offered goods and services (Article 1 and 4). Similarly to the Labour Code, the Equal Treatment Act provides for the burden of proof to be shifted to the perpetrator of the alleged breach of the principle of equal treatment once the plaintiff has established the plausibility of the discrimination. Every person with regard to whom the principle of equal treatment has been infringed is entitled to compensation, the amount of which will depend on the findings of evidence. However, the number of proceedings applying norms expressing the principle of equal treatment in Polish law is rarely taken by persons experiencing discrimination.[2]

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[2] Almost a third of these people did nothing about their worse treatment (32%). Any action taken generally took the form of a conversation on the subject with someone close (46%), less frequently – advice from a specialist (19% of respondents), and even less frequently – turning to the media (8%) or NGOs (5%).

1.1.3. An important element in ensuring compliance with the principle of equal treatment is the State's positive obligation to promote it. In this respect, Article 941 of the Labour Code obliges the employer to make the text of provisions on equal treatment in employment available to employees. Another such element is the question of sanctions applicable in the event of a breach of the principle of equality. In both cases – that is the case of the Equal Treatment Act (Article 13(1)) and the Labour Code (Article 183d) – it teaks the form of financial sanctions. They should serve the purpose of compensating both the material damage and the harm suffered, combining the features of compensation and reparation, which in Polish law are separate institutions. Such a mixed character of compensation, despite the lack of its explicit statement by the legislator, has been confirmed by judicature.[3]

1.2. Free movement of workers and social security coordination

1.2.1. In principle, there is no opposition in Poland to the CJEU case law according to which Member States have the right to refuse to grant social benefits to economically inactive EU mobile citizens (especially when it comes to academics). Preventing exclusion from social assistance can lead to a paradox, i.e. the artificial fulfilment of the condition of having sufficient resources by obtaining social assistance in another Member State. Such attempts to abuse the opportunities created by the free movement of persons are undoubtedly not a desirable phenomenon.[4] One can also encounter academic opinions according to which a refusal to grant social benefits to economically inactive EU mobile citizens may be seen as a step backwards in the process of liberating Union citizenship from the market dimension, and the associated principle of non-discrimination could remain the privilege of the wealthy.[5]

'Legal awareness in the context of equal treatment', Kantar 2020. Cf. Also: 'Zasada równego traktowania. Prawo i Praktyka. Ochrona przed dyskryminacją w Polsce. Stan prawny i świadomość społeczna. Wnioski i rekomendacje Rzecznika Praw Obywatelskich', *Biuletyn Rzecznika Praw Obywatelskich* 2020, No. 3; K. Kędziora, A. Mazurczak, K. Śmiszek, *Unijny zakaz dyskryminacji a prawo polskie. Analiza funkcjonowania przepisów antydyskryminacyjnych w praktyce polskich sądów,* Warszawa 2018.

[3] Judgment of the Supreme Court of 7.01.2009, III PK 43/08, LEX no. 577695, judgment of the Warsaw District Court of 18 November 2015, case file V Ca 3611/14, LEX no. 2147965; judgment of the Warsaw District Court of 29 September 2020, case file V Ca 2686/19 (unpublished).

[4] E.g. P. Bogdanowicz, 'Trybunał przeciwko turystyce socjalnej', , <https://www.rp.pl/opinie-prawne/art12153371-trybunal-przeciwko-turystyce-socjalnej>, visited 10 June 2022; A. Cieśliński, 'Orzecznicze poszerzanie granic równouprawnienia – przypadek praw socjalnych migrujących obywateli Unii Europejskiej', *Wrocławskie Studia Erazmiańskie*, <www.repozytorium.uni.wroc.pl/Content/79030/PDF/07_Cieslinski_A_Orzecznicze_poszerzanie_granic_rownouprawnienia.pdf>, visited 10 June 2022; I. Wróbel, 'Wyłączenie nieaktywnych zawodowo obywateli innych państw członkowskich UE z korzystania ze świadczeń socjalnych. Glosa do wyroku TS z dnia 11 listopada 2014 r., C-333/13', *Europejski Przegląd Sądowy* 2015, No. 9, s. 35-43.

[5] E.g. D. E. Harasimiuk, *Wyłącznie dostępu do nieskładkowych świadczeń pieniężnych wobec nieaktywnych zawodowo obywateli UE. Glosa do wyroku TS z dnia 11 listopada 2014 r., C-333/13*, , "Państwo i Prawo" 2016, No.

1.2.2. According to the Act of 20 April 2004 on employment promotion and labour market institutions, unemployed person residing in Poland may claim unemployment benefits. It may therefore also be claimed by citizens of other EU countries if they have fulfilled the same conditions as Polish citizens. Polish legislation introduces a uniform standard in this respect, which does not differentiate between unemployed persons on the basis of their nationality. The requirement to reside on the territory of the Republic of Poland is also applied in respect to family benefits and must be fulfilled for the period for which benefits are to be collected. They are provided by the Act of 28 November 2003 on family benefits and the Act of 11 February 2016 on state aid in upbringing of children. This requirement in granting the right to family benefits and to the upbringing benefit (so-called "500+"). As regards the right to social pension provided by the Act of 27 June 2003 on Social Pension, it is granted, inter alia, to nationals of the Member States of the EU and EFTA who reside on the territory of the Republic of Poland. Due to the fact that, for the first three months of their stay in Poland, EU citizens have a right of residence limited only by the condition of having an identity document or passport, if we consider that such an EU citizen has a place of residence (understood as a centre of vital interests) in Poland, he/she is also immediately entitled to a Polish social pension. There is no automatic exemption in Polish law, which a Member State may introduce pursuant to Article 24(2) of Directive 2004/38.[6]

1.2.3. In Poland, in general, there is no objection to the principle that the payment of child benefits is the responsibility of the country of work of the parent(s), even if the child resides elsewhere. Poland (together with the Czech Republic, Croatia, Romania, Slovenia and Slovakia) supported the European Commission's complaint in case C-328/20, concerning the adjustments of the flat-rate family allowance and the various tax advantages, upwards or downwards, towards employees whose children reside in another Member State, depending on the general price level in the Member States concerned.

1.3. The right to free movement and the actual mobility of EU workers

1.3.1. Pursuant to Article 79(1) of the Act of 14 July 2006 on the entry into, residence in and exit from the territory of the Republic of Poland of nationals of the Member

5, s. 119-127; M. Gniadzik, *Ewolucja statusu obywateli Unii wobec państwa przyjmującego i państwa pochodzenia w świetle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej*, Warszawa 2018.

[6] D. Dzienisiuk, 'Specjalne świadczenia nieskładkowe dla obywateli innych państw członkowskich UE podczas pierwszych trzech miesięcy pobytu w przyjmującym państwie członkowskim: prawo państwa członkowskiego UE do odmowy ich przyznania. Glosa do wyroku TS z dnia 25 lutego 2016 r., C-299/14', LEX/el. 2016.

States and their family members, a register of residence of a Union citizen is kept if the stay exceeds three months. As far as the number of Union citizens who applied for such a registration in 2022 it amounted to 31688 thousand. During the last ten years, the dynamics of this type of stays varied. Thus, in 2012, 2380,000 EU citizens registered their residence in Poland. This number increased year on year to 3737,000 in 2017, before declining to 1059,000 in 2022. The highest number of applications was submitted by Italian citizens (4064 thousand) and the lowest by Luxembourg citizens (13).[7]

1.3.2. Data from the Central Register of the Insured shows that the number of natural persons who were subject to pension and disability insurance and have citizenship other than Polish increased from 184.2 thousand in December 2015 to 875.1 thousand in December 2021. As of 31 December 2021, the number of foreigners from EU countries amounted to 38,600 persons (British citizens are not included in this number), while the number of foreigners from non-EU countries was 836,500, including 627,000 persons with Ukrainian citizenship. During the period under study, the structure of foreigners underwent dynamic changes. The share of foreigners from EU countries has been steadily decreasing (from 16.0% in December 2015 to 4.4% in December 2021), while the share of foreigners from non-EU countries has been steadily increasing (from 84.0% in December 2015 to 95.6% in December 2021). As at 31 December 2021, the dominant sectors/ industries among foreigners from EU countries were: professional, scientific and technical activities; information and communication; as well as wholesale and retail trade and repair of motor vehicles.[8]

1.3.3. According to the 2021 data, the most sought-after group of workers were industrial workers and craftsmen. Within this large group of occupations, more than 43% were job offers for construction and related workers, 29% for metalworkers, machine and equipment mechanics, and almost 15% for workers in food processing, woodworking and textile production. Another large group among the sought-after occupations were specialists, mainly in economics and management (over 32% of job offers), but also health professionals, i.e. health care and social assistance (over 19% of job offers) and specialists in physical, mathematical and technical sciences (over 18% of job offers). The third large group of occupations were operators and assemblers of machinery and equipment, of which over 54% were job offers for drivers and vehicle operators, over 33% for operators of mining and processing machinery and equipment and over 12%

[7] Data made available by the Migration Analysis and Statistics Department of the Office for Foreigners of the Republic of Poland. At the request of the rapporteur (in possession of the author).

[8] <https://www.zus.pl/baza-wiedzy/statystyka/opracowania-tematyczne/cudzoziemcy>, visited 3 August 2022.

for assemblers. The fourth group was service and sales workers (over 12%) and the fifth group was employees performing simple work (over 10%). Other major occupational groups accounted for more than 20% of job offers. Taking into account the type of activity, it can be noted that in the first quarter of 2021, the highest demand for workers concerned entities in the industrial processing and trade and repair of motor vehicles sections, as well as construction.[9]

1.3.4. The new category of "essential workers in critical occupations" has been provided by the European Commission in its Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak.[10] It worked out a list of such workers, which included health professionals, personal care workers in health services, scientists in health care related industries, workers involved in the supply of goods, and transport workers.

1.3.5. The fact that there is a shortage of doctors in Poland has been pointed out for many years. The problem is staff shortages, as well as the so-called generation gap, as many Polish doctors are of retirement age. The Supreme Medical Council estimates that in Poland, with a population of over 37 million, there is a shortage of up to 68,000 medics.[11] In Poland, there was already a profound shortage of medical staff before the pandemic, and the pandemic has further exacerbated staff shortages (sickness absenteeism, deaths, quits). For the first six months of 2022, the district medical chambers issued almost as many certificates for doctors and dentists seeking recognition of qualifications in other EU countries as they did for the whole of 2021.

1.3.6. Staff shortages can also be seen in transport and freight forwarding. Entrepreneurs point to a shortage of at least 150,000 drivers. Road transport is one of the largest sectors of the Polish economy, experiencing a very fast pace of expansion – especially in foreign markets.[12] The logistics sector in Poland as a whole employs almost one million people, with road transport employing around 750,000. Demand for labour is growing faster than the supply of workers. There is a growing proportion of companies for which the lack of access to skilled staff is a barrier to growth. As recently as 2011, there were around 10-15 per cent of

[9] 'Labour market demand for employees by occupation in 2021', Central Statistical Office, <https://stat.gov.pl/obszary-tematyczne/rynek-pracy>, visited 12 June 2022. The labour market demand for employees by occupation will be surveyed periodically every three years.

[10] Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services 2020/C 86 I/01, *OJ C 86I , 16.3.2020, p. 1–4.* Communication from the Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak 2020/C 102 I/03, *OJ C 102I, 30.3.2020, p. 12–14.*

[11] The Central Register of Physicians of the Republic of Poland belonging to the Supreme Medical Council, <https://nil.org.pl/rejestry/centralny-rejestr-lekarzy/informacje-statystyczne>, visited 1 August 2022.

[12] <https://www.pb.pl/w-transporcie-i-spedycji-brakuje-rak-do-pracy-1156930 and https://www.pb.pl/brak-pracownikow-to-tez-szansa-dla-gospodarki-1153079>, visited 1 August 2022.

such companies in the transport and storage sector as a whole, while in 2019 there was approx. 45-50 per cent. Companies need to make up for staff shortages with migrant labour. Between 2015 and 2021, the number of drivers from other countries increased from 13,000 to 131,000.[13]

1.4. The 'supply side' of free movement of workers: the *brain drain* phenomenon and demographic imbalances

1.4.1. For years, Poland has been the biggest "victim" of brain drain in the EU. Unfortunately, no methods have been developed so far to accurately monitor the scale of this phenomenon, identify migrants by their social and demographic characteristics and their motivations. The available data of the Central Statistical Office are burdened with a large error of underestimating the scale of departures from Poland mainly because persons leaving the country often fail to fulfil the obligations connected with registration of this fact. Therefore, the data from the registers do not reflect the real scale of migration. Estimates made by the Central Statistical Office indicate that at the end of 2016, approximately 2 million 515 thousand Polish citizens were temporarily abroad.[14]

1.4.2. Before Polish accession to the EU, men were more likely to migrate. Women have slightly started to dominate in post-accession migrations. Among those whose departure abroad was reported in the population registration units of the municipalities, the most represented group in 2020 was the 30-39 age group. By contrast, 10 years earlier it was those aged 20-29. It can therefore be assumed that a significant proportion of the persons who went abroad in the first years after Poland's accession to the EU have remained abroad until now. Every fifth person (22.8%) graduated from a university, and more than 44% had secondary education (of which: secondary vocational – 21.4%; secondary general – 19%, post-secondary – 3.8%). More than 1 million 200 thousand people with at least secondary education, including more than 400 thousand with higher education, left Poland, which accounted for nearly 7% of the total population with such level of education in Poland. The group of best-educated people leaving the country was dominated by graduates of the humanities, who, especially during the economic slowdown, encountered great difficulties on the labour market. Among physicians, a strong internal migration is observed to the private sector

[13] Conclusions of the report on 'Road transport in Poland 2021+', which was developed by SpotData on behalf of and with the substantive cooperation of the employers' association Transport and Logistics Poland, <https://tlp.org.pl/raport-transport-drogowy-w-polsce-2021/>, visited 1 August 2022.

[14] 'Information on the size and directions of emigration from Poland 2004-2018', Central Statistical Office, <https://stat.gov.pl/obszarytematyczne/ludnosc/migracje-zagraniczne-ludnosci/informacja-o-rozmiarach-i-kierunkach-czasowej-emigracji-z-polski-w-latach-2004- 2018,2,12.html>, visited 11 May 2022.

and other branches of the economy (e.g. pharmaceutical industry). Some over-representation, in comparison to the total population in the country, was observed among IT specialists. Their leaving resulted rather from the pursuit of further development of professional competences than from unemployment. In 2020, the number of Poles temporarily residing in other countries is estimated to have decreased compared to the previous year.[15]

1.4.3. Migration also results in the depopulation of certain regions of the country. It concerns especially rural areas, where mainly elderly people remain. Emigration from Poland remains strongly territorially diversified, although at the same time new emigration regions (e.g. Lower Silesia, Upper Silesia, Zachodniopomorskie or Warmińsko-mazurskie) have joined the traditional ones (e.g. Podlaskie, Podkarpacie, Opolskie). Negative demographic processes have significantly deepened there, which in the long run will not remain indifferent for the local labour markets. Migration has also affected the lives of the younger generation, i.e. the children of those leaving Poland.[16]

1.4.4. As regards national actions undertaken in response to migration processes of Polish citizens, including cessation of the negative effects of *brain drain* by encouraging young, educated people to stay in the country, the document titled 'Migration policy of Poland – diagnosis of the initial state' should be mentioned. It was adopted in December 2020 by the Inter-ministerial Team for Migration and became the basis for works on the draft document defining priorities of the state's migration policy entitled 'Migration policy of Poland – orientations for action 2021-2022'.[17] Another measure of this kind was, for example, the 'Polish Returns' programme, which encouraged the return of Polish scientists to Poland by creating conditions enabling them to take up employment in Polish universities or research institutes in order to strengthen the potential of these institutions and gradually reverse the *brain drain* phenomenon.[18] A similar aim was behind a programme proposed by the Government in 2014, which envisaged paying students' tuition fees at prestigious universities on condition that they take up employment in Poland after graduation. Currently the 'Constitution for Science'

[15] 'Information on the size and directions of temporary emigration from Poland between 2004 and 2020', <https://stat.gov.pl/obszary-tematyczne/ludnosc/migracje-zagraniczne-ludnosci/informacja-o-rozmiarach-i-kierunkach-czasowej-emigracji-z-polski-w-latach-2004-2020,2,14.html> visited 1 August 2022.

[16] Report on 'Brain drain' or migration of intellectual potential, Polish Agency for Enterprise Development, <https://www.parp.gov.pl/component/publications/publication/drenaz-mozgow-czyli-migracje-potencjalu-intelektualnego>, visited 1 August 2022.

[17] <https:///C:/Users/user/Downloads/polityka_migracyjna_Polski_diagnoza_stanu_wyjsciowego.pdf>, visited 4 May 2022. Cf. also <https://www.rp.pl/Gospodarka/170429777-Morawiecki-trzeba-zapobiec-drenazowi-mozgow.html>, visited 4 May 2022.

[18] <https://nawa.gov.pl/nawa/aktualnosci/630-wyniki-naboru-w-programie-polskie-powroty>, visited 4 May 2022.

is in force, which provides for some solutions to reduce the outflow of the best students, PhD students and university staff.[19] The Act assumes gradual changes in the higher education system and the need to create a comprehensive system of support for talented students in order to reduce the phenomenon of highly qualified persons leaving the country. This was also highlighted in Resolution No. 195/2020 of the Council of Ministers of 28 December 2020 on the adoption of the public policy 'Integrated Skills Strategy 2030 (specific part). Policy for the development of skills in line with lifelong learning'.[20]

2. Conflicts between fundamental freedoms and social rights

2.1. Free provision of services and the exploitation of posted workers in the internal market

2.1.1. Directive 2018/957 concerning posted workers was implemented into Polish law by the Act of 10 June 2016 on the posting of workers in the framework of the provision of services by amending the relevant provisions of this Act. The principle of equal pay for equal work provided for by the provisions of Article 3 of Directive 2018/957 has been transposed by giving new wording to Article 4, paragraph 2, point 3 of the aforementioned Act directly indicating the "remuneration for work" to be applied to employees posted on the territory of the Republic of Poland. Paragraphs 3-5 added to this article further specify that in determining the aforementioned remuneration, all mandatory components of remuneration resulting from the provisions of the Labour Code shall be taken into account, including overtime pay. When comparing the remuneration paid to posted worker and the remuneration for work, the total gross amounts of remuneration are compared, not the individual wage components. The part of the posting allowance that does not represent reimbursement of expenses actually incurred in connection with the posting, such as travel, board and lodging expenses, shall also be included in the remuneration for work.

2.1.2. Poland is the undisputed leader in the provision of cross-border services if we take into account the number of posted workers and the number of workers performing work on Poland's territory as posted from other countries. According to the European Commission's data presented in the proposal for the directive 2018/957, there are approximately 1 million posted workers in the European Union, 23% of whom are Poles. The posting of workers is important for the Polish economy and is one of its competitive advantages on the internal market.

[19] <https://konstytucjadlanauki.gov.pl/podsumowanie-zmian>, visited 4 May 2022.

[20] <https://www.gov.pl/web/edukacja-i-nauka/zintegrowana-strategia-umiejetnosci-2030-czesc-szczegolowa--dokument-przyjety-przez-rade-ministrow>, visited 16 May 2022.

2.1.3. In 2018, Social Insurance Institution issued more than 600,000 A1 certificates. The largest share of the total number of A1 certificates are those issued for posted workers and people working in several Member States. A1 certificates are also given to insured persons from outside the EU, EEA or Switzerland who do not have Polish citizenship but perform work in Poland. As many as 97% were Ukrainians (ca. 23 thousand certificates) and Belarusians (ca. 3 thousand certificates).[21] Among posting companies, more than half post workers to Germany. The next most popular countries in this regard are France, Belgium, Sweden and Denmark. The majority of organisations (61% of indications) post workers abroad for up to 12 months, with 39% of companies posting workers for 1 to 3 months. The remaining 4 in 10 companies post workers for a period longer than one year. The vast majority of posted workers (79% of indications) have social insurance in Poland.[22] The predominant industries include construction, industrial services and the provision (rental) of staff.

2.1.4. There were some cases decided at national level, concerning posting of workers by temporary work agencies, but they concerned those that were established in Poland. They were essentially devoted to an assessment what needs to be taken into account in order to establish that a temporary work agency posting workers to other Member States is subject to Polish social security legislation.[23]

2.2. Market freedoms, freedom to conduct a business, and labour law

2.2.1. The freedom of establishment and the right to conduct a business (Article 16 of the CFR) is generally not used to challenge national or EU social law in national courts.

2.2.2. The right to strike is protected under the provisions of the 1997 Constitution of the Republic of Poland. Its Article 59(2) stipulates that it is vested in trade unions within the limits set out by law, which, for reasons of the public good, may

[21] <https://www.zus.pl/-/ponad-pol-miliona-osob-oddelegowanych-do-pracy-za-granica?redirect=%2Fo-zus%2Fdla-mediow%2Fanalizy-i-raporty%3Fp_p_id%3Dcom_liferay_asset_publisher_web_portlet_AssetPublisherPortlet_INSTANCE_DhE0QOAdBB3e%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26_com_liferay_asset_publisher_web_portlet_AssetPublisherPortlet_INSTANCE_DhE0QOAdBB3e_delta%3D10%26p_r_p_resetCur%3Dfalse%26_com_liferay_asset_publisher_web_portlet_AssetPublisherPortlet_INSTANCE_DhE0QOAdBB3e_cur%3D3>, visited 4 August 2022.

[22] The survey was conducted in August/September 2020 using the CAWI online survey method on a sample of 61 companies operating in Poland, 33 of which post employees abroad. Survey report on: 'Employee abroad. How companies in Poland post workers', <https://home.kpmg/pl/pl/home/insights/2020/10/raport-pracownik-za-granica-jak-firmy-w-polsce-deleguja-pracownikow.html>, visited 4 August 2022.

[23] Just as an example: Judgment of the Supreme Court – Labour Chamber of 21.01.2017, II UK 597/15, Legalis 2300086; Judgment of the court of appeal in Wroclaw of 10.01.2017, III AUa 1839/16, Legalis 2352919; Judgment of the Supreme Court – Labour Chamber of 10.05.2018, II UK 112/17, Legalis 1769241.

restrict or prohibit its conduct with respect to certain categories of employees or in certain areas. The detailed conditions for organising a strike are defined in the Act of 23 May 1991 on the resolution of collective disputes. Pursuant to its Article 15 the failure to reach an agreement resolving an industrial dispute through mediation is entitled to take strike action. Indeed, a strike is a measure of last resort and cannot be declared without first exhausting the possibilities of resolving the dispute through bargaining and mediation. They may be disregarded only if the employer's unlawful conduct has made it impossible to conduct them, or if the employer has terminated the employment relationship with the union activist conducting the dispute (Article 17(2)). In deciding whether to call a strike, the entity representing the interests of the employees should take into account the proportionality of the demands to the losses associated with the strike and thus demonstrate their proportionality (Article 17(3)). The Act clearly indicates situations in which the organisation of a strike is not permitted, namely when the cessation of work as a result of strike action would concern workplaces the abandonment of which would endanger human life and health or the security of the state. It is unlawful to organise a strike in the Internal Security Agency, the Intelligence Agency, the Military Counterintelligence Service, the Military Intelligence Service, the Central Anti-Corruption Bureau, the State Protection Service, in units of the Police and the Armed Forces of the Republic of Poland, the Prison Service, the Border Guard, the Marshal Guard, the National Fiscal Administration, in which officers of the Customs and Fiscal Service serve, and organisational units of fire protection. The right to strike also does not apply to employees working in organs of state power, central and local government administration, courts and the prosecutor's office (Article 19).

2.2.3. Most of industrial disputes in Poland concerned wage issues and the conditions for the legality of carrying out a strike. The judgments generally ended in favour of the workers. An example is the allegation of a lack of prior exhaustion of the possibilities for an amicable resolution of an industrial dispute,[24] the impossibility of dismissing a rank-and-file employee for taking part in a strike that turns out to be unlawful (only the organisers of the strike can face consequences in this respect)[,25] or the lack of impact of the potential disproportionality of workers' demands on the illegality of the strike (but the requirement of prudence to ensure that the strike action taken does not lead to insurmountable economic hardship for the employer).[26]

[24] Judgment of the SA in Gdańsk of 16.10.2012, I ACa 540/12, LEX nr 1267199.
[25] Supreme Court judgment of 26.07.2012, I PK 12/12, LEX no. 1228877.
[26] Order of the Supreme Court of 23.08.2018, II PK 218/17, LEX No 2558613.

3. Social acquis and social 'non-acquis'

3.1. The substance of the social acquis

3.1.1. The principle of equality follows directly from Article 32 of the Polish Constitution and the aforementioned Equal Treatment Act. It prohibits discrimination based on grounds of sex, race, ethnic origin, nationality, religion, creed, belief, disability, age or sexual orientation in the sphere of broadly defined professional activity (with respect to employment – to the extent not regulated by the Labour Code) and in the sphere of social security, health care, education and higher education and access to goods and services offered to the public. It also sets out a mechanism to prevent and sanction cases of unequal treatment (e.g. shifting the burden of proof and compensation) and the bodies competent in matters of countering violations of the principle of equal treatment. Those provisions introduced a closed and narrow catalogue of legally protected characteristics (i.e. gender, race or ethnic origin, religion or belief, disability, age and sexual orientation). Limiting the protection against unequal treatment to a few selected grounds results in people experiencing discrimination in spheres other than those covered by it. They are not benefiting from a simplified mechanism for claiming compensation for damage (and harm) caused by a breach of the principle of equal treatment. While they may avail themselves of the legal protection provided by the Act of 23 April 1964. – Civil Code, but this puts them in a less favourable procedural position. This is because they do not have the facility of a reversed burden of proof. It would therefore be justified to introduce an open catalogue of legally protected under the Equal Treatment Act, so that anyone who has experienced discrimination on the basis of an objective personal characteristic is covered by a uniform standard of protection.[27]

3.1.2. When it comes to recent developments in CJEU case-law on religious discrimination in the work place, the issue has been rather commented by academics[28] than national jurisprudence. The reason for this may be the small

[27] 'The principle of equal treatment. Law and Practice. Protection against discrimination in Poland. Legal status and public awareness. Conclusions and recommendations of the Polish Ombudsman', *Biuletyn Rzecznika Praw Obywatelskich* 2020, No. 3.

[28] H. Szewczyk, 'Dyskryminacja ze względu na przekonania religijne. Glosa do wyroku TS z dnia 14 marca 2017 r., C-157/15', *Europejski Przegląd Sądowy* 2017, No. 10, p. 42-49; H. Szewczyk, 'Przekonania religijne pracownika jako istotny i determinujący wymóg zawodowy. Glosa do wyroku TS z dnia 14 marca 2017 r., C-188/15', *Europejski Przegląd Sądowy* 2018, No. 1, p. 29-34; J. Falski, 'Dyskryminacja ze względu na religię w miejscu pracy w kontekście orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej', *Przegląd Sejmowy* 2019, No. 2, p. 53-72; I. Miernicka, '3.4.4. Zastosowanie zasady równego traktowania pracowników oraz zakazu dyskryminacji do wyglądu pracownika w miejscu pracy', [In:] *Wymagania dotyczące wyglądu pracownika jako ingerencja w sferę jego wolności*, Warszawa 2020; R. Bujalski, 'Czy można zakazać noszenia symboli religijnych w pracy? Omówienie wyroku TS z dnia 15 lipca 2021 r., C-804/18 (WABE)', LEX/el. 2021; L. Mitrus, '4.4.4. Religia i przekonania', [4.4.4. Religion and beliefs], [In:] *Różne oblicza dyskryminacji w zatrudnieniu*, [Different

number of religious minorities present in Poland and the historically conditioned cultural dominance of the Catholic Church in Polish society. This may influence the number of potential cases of discrimination, also in the area of employment.[29] However, the existence of various forms of discrimination on the basis of religion in the workplace was noted by the Ombudsman in his 2018 activity report. It noted issues of the permissibility of religious symbolism in an employee's clothing, i.e. a crucifix around the neck or a headscarf on the head of both the majority (Catholics) and minority groups (in the case of Muslims, the problem particularly affects women due to the requirement to cover their hair.[30] As regards legislation, according to Article 113 of the Labour Code, any discrimination (both direct and indirect) on the basis of, inter alia, religion is unacceptable. Equal treatment of employees in this respect should be ensured with regard to the establishment and termination of the employment relationship, terms and conditions of employment, promotion and access to training to improve professional qualifications (Art. 183a § 1).

3.1.3. Reasonable accommodation provided in Article 5 of the Council Directive 2000/78/EC has been transposed into the Polish legal order by Article 23a of the Act of 27 August 1997 on professional and social rehabilitation and employment of disabled persons (Rehabilitation Act). It requires that employee is to report his/her specific needs to the employer, who is obliged to make reasonable accommodation when its own organisational and financial capacities allow it. The employer is therefore covered by this obligation as long as it does not constitute a disproportionate burden (assessed by the court).[31] Failure to make the necessary reasonable accommodation shall be considered a breach of the principle of equal treatment in employment within the meaning of Article 183a § 2-5 of the Labour Code. According to the Polish courts, the obligation to provide reasonable accommodation for a disabled person cannot be equated with the employer's obligation to transfer to another job.[32] This obligation includes taking of measures enabling a disabled employee to continue to occupy a given position, rather than the creation of a new position for him or her. As a result, dismissal on the grounds of disability resulting in the loss of the ability to carry out an occupation (to occupy

faces of discrimination in employment], red. J. R. Carby-Hall, Z. Góral, A. Tyc, Warszawa 2021; K. Jaśkowski, E. Maniewska, *Komentarz aktualizowany do Kodeksu pracy*, LEX/el. 2022, art. 104(1); J. Tlatlik, '1.5. Religia, wyznanie i przekonania polityczne', [In:] *Zakaz dyskryminacji na etapie nawiązywania stosunku pracy*, [Prohibition of discrimination at the stage of establishment of the employment relationship], Warszawa 2022.

[29] M. Kuba, 'Dyskryminacja w zatrudnieniu pracowniczym', LEX 2017 and M. M. Mielczarek, '12.3. Zakaz dyskryminacji w zatrudnieniu ze względu na religię i wyznanie', [In:] *Różne oblicza dyskryminacji w zatrudnieniu*, [Different faces of discrimination in employment], red. J. R. Carby-Hall, Z. Góral, A. Tyc, Warszawa 2021, s. 300.

[30] 'Equal treatment on the grounds of religion in employment. Analysis and recommendations', *Biuletyn Rzecznika Praw Obywatelskich* 2018, No. 6, p. 73-74.

[31] Judgment of the Supreme Court of 12.11.2014, I PK 74/14, OSNP 2016, no. 8, item 101.

[32] Judgment of the Supreme Court of 12.11.2014, I PK 74/14, OSNP 2016, no. 8, item 101.

a particular position) does not constitute an unlawful act of discrimination.[33] Furthermore, reasonable accommodation should be understood to mean not only the adaptation of premises or equipment, but also of working hours and the division of duties.[34] The employer must make the necessary accommodations as soon as she/he becomes aware that the position is not adapted to the needs arising from the person's disability. It can be provided by a statement on the degree of disability or it can be any authoritative and reliable evidence from which it emerges that the performance of work by a disabled person encounters difficulties (it is not restricted to a certificate from an occupational physician).[35]

3.1.4. The acquis in the domain of working time has been implemented by the Labour Code and the Act on special solutions related to the protection of jobs. Working time in Poland may not exceed 8 hours in a 24-hour period and an average of 40 hours in an average five-day working week in an applicable reference period not exceeding 4 months. There is a possibility to extend the reference period up to 12 months, if it is justifiable by objective, technical or organisational reasons (Article 129 of the Labour Code). There are also working time arrangements other than the basic one that contain some element of flexibility involving extension of working time duration beyond 8 hours in a 24-hour period (Articles 135–138 and 143-144 Labour Code). Shortening of working time under special circumstances is also possible for employers who have experienced a decrease in economic activity. The conditions and procedure in such situations shall be determined by the entrepreneur in a collective agreement or in consultation with the company trade unions – or with the employees' representative if there is no union in the workplace (Article 3 and 4 of the Act on special solutions related to the protection of jobs).

3.1.5. The working time is the time during which the work is effectively performed, covering the time during which the employee is on standby to perform work of this kind.[36] This is particularly important for professional drivers. 'Working time' means periods during which the driver is not free to dispose of his or her time and is obliged to remain at his or her workstation, ready to undertake normal work, together with certain tasks related to on-call duty, in particular during periods waiting for loading or unloading. In particular, the time spent waiting for the completion of a loading task is the driver's working time, as she/he is then at the

[33] Judgment of the Supreme Court of 7.12.2017, I PK 334/16, OSNP 2018, no. 9, item 119.

[34] Judgment of the Supreme Court of 12.11.2014, I PK 74/14, OSNP 2016, no. 8, item 101. The theses previously put forward by the CJEU in its judgments C-13/05 Navas and C-335/11 have been confirmed.

[35] Judgment of the WSA in Gorzów Wielkopolski of 9.11.2017, II SA/Go 536/17, LEX No 2399983.

[36] Judgment of the Supreme Court of 11.04.2018, II UK 20/17, LEX No 2509633; Judgment of the SA in Białystok of 8.02.2018, III AUa 740/17, LEX No 2481754; Judgment of the SA in Białystok of 2.11.2016, III AUa 454/16, LEX No 2171124.

disposal of the carrier. Also breaks between journeys are an integral part of the driver's work and, as such, are to be counted as part of his employment duties. The same applies to time spent travelling to or returning from the place where the vehicle is stationary, if the vehicle is neither at the driver's home nor at the employer's base where the driver normally works.[37] The acquis in the domain of working time is also useful to workers in the medical area (health professionals). It is permissible to complement a doctor's working time with medical on-call duty to the average weekly working time standard applicable to her/him.[38]

3.1.6. Platform work in Poland is generally regulated as part of the provision of services (Article 750 of the Civil Code), while the peculiarity of the manner in which this contract is performed makes it possible to assign it to the category of contracts for the provision of electronic services. To date, there are no regulations governing platform working except for those in the road transport sector, which have sanctioned the operation of companies such as Uber, Bolt and FreeNow. In Poland, this market has already been regulated – from both the point of view of the licensing of entrepreneurs carrying out passenger transport by taxi (driver) and the licensing of passenger transport intermediaries (platform). In the case of passenger transport by taxi, drivers are fully free to use several platforms at the same time and to decide on their own working hours. They can accept or reject orders simultaneously on multiple platforms, including working with both taxi apps, classic radio-taxi corporations and operating courses from a standstill. According to current regulations in Poland, all drivers who wish to provide passenger transport by taxi must meet the same criteria, regardless of whether they work for a traditional corporation or cooperate with a platform (taxi app). People employed by digital platforms in Poland as couriers or meal delivery drivers work on a contract basis for mostly three hours a week. The vast majority of their earnings, however, are made up of renting their own bicycle or car with which they provide these services.[39] As regards the role of social partners in the regulation of platform work, it should be mentioned that the July 2018 amendment to the Trade Union Act broadened the scope of freedom of association. Indeed, the right to form and join trade unions is granted to persons performing paid work, i.e. employees or persons performing paid work on a basis other than an

[37] Judgment of the WSA in Warsaw of 22.06.2016, VIII SA/Wa 1087/15, LEX no. 2090370; Judgment of the NSA of 11.12.2018, II GSK 4368/16, LEX no. 2629616; Judgment of the Supreme Court of 6.05.2014, II PK 219/13, OSNP 2015, no. 10, item 132.

[38] Order of the Supreme Court of 20.01.2015, I PZP 4/14, LEX No 1648697; Judgment of the SA in Katowice of 24.03.2016, III AUa 976/15, LEX No 2044312.

[39] Letter from the RPO to the Deputy Prime Minister and Minister for Development, Labour and Technology, available at: https://bip.brpo.gov.pl/sites/default/files/WG_RPO_JGowin_17032021.pdf (accessed: 4.8.22).

employment relationship, if they do not employ other persons for such work, regardless of the basis of employment, and they have such rights and interests related to the performance of work that can be represented and defended by a trade union.

3.1.7. The European Social Charter (ESC) is rather rarely cited in Polish case law. In statistical terms it concerns about 305 cases, provided by district courts (15), the Supreme Administrative Court (20), courts of appeal (26), the Constitutional Court (44), the Supreme Court (48), Provincial administrative courts (152).[40] They referred in their judgments generally to the specific provisions of the ESC relevant to the case at hand.[41] Even rarer is the reference to the Charter by legislator, which then usually takes a general form, i.e. to refer to the provisions of the Charter as such.[42]

3.2. Missing parts of EU social law

3.2.1. According to the governing authorities in Poland, the EU should pay particular attention to the effects of the implementation of the European Pillar of Social Rights on Member States, providing appropriate support for the implementation of individual initiatives. At the same time, it was stressed that social and employment policies are implemented primarily by the Member States, which have the responsibility to identify needs and match them to their internal capacities. Initiatives taken at EU level should therefore be carried out while respecting the division of competences in the Treaty and the principles of social dialogue.[43] As far as minimum wage issues in the EU are concerned, they do need to be regulated, but only to the extent that this is the competence of the EU. Member States should not be bailed out in setting this wage, as this is the exclusive competence of each EU country.[44]

3.2.2. Self-employed persons are obliged in Poland to pay health, disability, pension and accident insurance. Sickness insurance is voluntary (it guarantees,

[40] Figures for August 2022.

[41] E.g.: Judgment of the WSA in Poznań of 28.12.2017, II SA/Po 948/17, LEX no. 2434050; Judgment of the WSA in Poznań of 18.10.2017, II SA/Po 540/17, LEX no. 2390360; Judgment of the Supreme Administrative Court of 1.10.2009, I OSK 423/09, LEX No. 571028.

[42] E.g. Resolution No. XI/90/19 of the council of the municipal committee of Nowy Dwór on adoption of the 'Gminal programme of family support for the years 2019-2021' of 30 December 2019.) and the Act of 12 December 2013 on foreigners.

[43] Position paper presented by Prime Minister Mateusz Morawiecki at the Social Summit in Porto, 7 May 2021 <https://www.gov.pl/web/premier/premier-morawiecki-podczas-szczytu-w-porto-opowiadam-sie-za-tym-zeby-doszlo-do-uwspolnotowienia-patentow-na-szczepionki-przeciw-covid-19>, visited 3 August 2022.

[44] Comment by MEP Elżbieta Rafalska on the compromise on the European minimum wage, <https://www.pap.pl/aktualnosci/news%2C1135274%2Ceuroposlanka-rafalska-do-kompromisu-ws-europejskiej-placy-minimalnej>, visited 5 August 1022.

inter alia, the right to benefits during illness or maternity care) and requires an application. A self-employed person who is on sick leave is then entitled to sickness benefit paid by the Social Insurance Institution. For the period of illness, the entrepreneur does not have to pay contributions. She/he acquires the right to sickness benefit only after 90 days.[45] With regard to the self-employed person, the labour law does not guarantee a minimum wage level. Payment methods and deadlines for remuneration are set individually, depending on the order received or the contract concluded in connection with the business activity. Unlike a full-time employee, a self-employed person is required to do his or her own bookkeeping and pay insurance contributions and taxes. Unlike full-time employees, the self-employed are not covered by the existing protection periods against termination of employment and are not entitled to rights such as annual leave, although changes are being discussed in this area. A rational solution that could help to realise this right is to create a tool that would reduce the costs of economic activity during the time when the entrepreneur is not carrying it out due to the fact that she/he is resting. The idea is to grant a self-employed person, who performs his/her economic activity continuously for a period exceeding 6 months, the possibility to benefit, in a given calendar year, in one month chosen by him/her, from a 50% reduction of contributions to compulsory social insurance for exercising the right to rest. It is assumed that such a reduction will allow to rest for approximately 2 weeks. The draft act amending the Entrepreneurs' Law concerns micro-entrepreneurs who do not employ employees, and therefore will not cover micro-entrepreneurs employing employees and small and medium-sized entrepreneurs.[46]

3.3. Impact of Economic and Monetary Union on the social acquis and the role of European Pillar of Social Rights

3.3.1. In general terms, the impact of the European Semester together with the Country Specific Recommendations on Polish social law and policy is positive.[47] As an example, one can take the need to improve the accessibility, resilience and efficiency of the health system by providing sufficient resources and accelerating the implementation of e-health services. The e-Health (P1) project, as one of the flagship projects of the Ministry of Health has been implemented since February 2017. It aims to build an electronic platform of public health services allowing

[45] Article 4 and 6 of the Act of 25 June 1999 on cash benefits from social insurance in the event of sickness and maternity. OJ 2021, item 1133, as amended.

[46] Explanatory memorandum to the draft law on amendments to the Law – Entrepreneurs' Law of 2 February 2021, print no. 377, <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=377>, visited 12 August 2022.

[47] 2020 European Semester. Country Specific Recommendation – Poland (COM)2020 521 final and 2022 European Semester. Country Specific Recommendation – Poland (COM)2022 622 final.

for the streamlining of processes related to the planning and implementation of health services, monitoring and reporting on their implementation, access to information on the services provided and publication of information in the area of health care. It covers the introduction of e-prescription, e-referral, an Internet Patient Account and the exchange of electronic medical records, respectively.[48] Another recommendation is to ensure the adequacy of future pension benefits and the sustainability of the pension system, inter alia, by introducing measures to increase the effective retirement age and by reforming preferential pension schemes. Currently, previous reforms that increased the statutory retirement age have been withdrawn, but another remedy has been proposed instead. As a result of the tax reform introduced in 2022, a person who remains in the labour market after reaching retirement age will be exempted from taxes (up to PLN 86,000 per year). This change may contribute to an increase in the level of pension benefits in the long term by extending the effective retirement age. Another recommendation is to increase the rate of coverage of children up to the age of three in formal care, as limited access to childcare makes it difficult for women to enter the labour market. Supporting parents in combining family life and work is the aim of the subsidy for a child's stay in a crèche, children's club or day-care centre, which entered into force on 1 April 2022. It provides a maximum of PLN 400 for parents of those children who do not receive the family care capital. It is the second instrument, which has been in operation since the beginning of the year 2022. It provides PLN 500 per month for two years or PLN 1,000 per month for one year for parents for the second and each subsequent child in a family from the age of 12 to 35 months. Another instrument of such a kind is the government programme for the development of childcare institutions for children up to the age of three, called 'Maluch+'. It has been in operation since 2011, continuing every year and increasing the availability of care places in crèches, children's clubs and day care centres for children.

3.3.2. On the other hand, some recommendations have not been taken into account. It concerns, for example, a better targeting of social benefits and ensuring access to these benefits for those in need. This recommendation is not implemented either in the case of the 500+ Programme (500 PLN for each child) or the so-called thirteenth pension (additional pension in a year), where funds are allocated without regard to income criteria. A similar impression can be given to the recommendation related to the targeting of investments for ecological transformation, in particular for clean and efficient energy production and use. There are regulatory, procedural and administrative barriers that limit

[48] <https://www.gov.pl/web/zdrowie/krajowe-dzialania-na-rzecz-e-zdrowia>, and <https://ezdrowie.gov.pl/portal/artykul/e-zdrowie-bedzie-sie-rozwijalo>, both visited 2 Jun 2022.

the development of renewable energy generation capacity. These barriers include restrictive regulations for energy cooperatives, restrictive regulations and lengthy permitting procedures for onshore wind farms, complexity and instability of tax regulations or lengthy grid connection procedures. Another recommendation calls for ensuring effective public consultation and involvement of social partners in the policy-making process. This process still seems to be weakened considering, for example, the use of the so-called parliamentary path (not requiring public consultation), or the power of the Prime Minister to dismiss, during a state of epidemiological emergency and a state of epidemics – at the request of an organisation or without its request – members of the Social Dialogue Council. It was provided in the Act of 31 March 2020 amending the Act on special solutions related to the prevention, prevention and combating of COVID-19, other infectious diseases and crisis situations caused by them and some other acts. This may risk further reducing the effectiveness of social dialogue in Poland.

4. The Relevance and the Importance of the Charter of Fundamental Rights

4.1. As far as the jurisprudence of the Polish courts is concerned, the Charter of Fundamental Rights (CFR) was not often referred to. In statistical terms, it concerns about 5355 cases, provided by Court of Competition and Consumer Protection (39), the Constitutional Court (75), courts of appeal (187), district courts (590), the Supreme Administrative Court (984), the Supreme Court (381), Provincial administrative courts (3099).[49] It may be concluded that the social rights of the CFR are generally mentioned among other legal acts, like the relevant EU directives, the ESC or the relevant conventions of the International Labour Organisation.[50] Very often the specific provisions of the Charter are referred to by the parties to the dispute, while on the side of the courts we observe passivity and a lack of in-depth analysis or argumentation.[51] There are also cases in which the courts mention the social rights provided for by the Charter among the violated Polish substantive or procedural laws, as a kind of additional argument.[52]

[49] Figures for August 2022,

[50] E.g. Article 1 CFR – Judgment of the Regional Court in Łódź of 11.04.2022, VIII U 2957/21, Legalis no. 2690954; Article 30 CFR – Judgment of the Supreme Court of 5.10.2012, I PK 79/12, Legalis no. 550793; Article 34(1) CFR – Judgment of the Supreme Court 10.07.2019, III UK 191/18, Legalis no. 1971892; Article 15(2) CFR; – Judgment of the Supreme Court of 11.01.2018, II UK 650/16, Legalis no. 1826996; Article 33(2) CFR – Judgment of the Supreme Court of 18.11.2020, III PK 53/19, Legalis no. 2496933; Article 21 CFR – Judgment of the Supreme Court of 13.02.2018, II PK 345/16, Legalis no. 1769293; Articles 14 and 31(2) – Judgment of the Supreme Court of 23.03.2017, I PK 130/16, Legalis no. 1612228; Article 31(1) CFR Judgment of the Supreme Court of 13.0.2016, III PK 146/15, Legalis no. 1507266..

[51] E.g. Judgment of the Supreme Court – Labour Chamber of 2.10.2002, I PKN 374/01, Legalis no. 55941; Article 34(3) – Judgment of the NSA of 12.10.2021, I OSK 484/21, Legalis No 2618316

[52] E.g. Article 15 CFR – Judgment of the Supreme Court – Labour Chamber of 13.09.2018, II PK 141/17, Legalis no. 1838310.

4.2. With regard to all of the examples mentioned above, one can get the impression that the Charter's social rights cited in this jurisprudence are 'equal' in terms of importance with other fundamental rights. At the same time, it is not possible to clearly indicate whether they are treated as 'principles' within the meaning of Article 52(5) of the Charter. As regards the effectiveness of the Charter's social rights as applied by the Polish courts, one gets the impression that such a situation will generally be possible when the Charter's provisions are clear and precise. From the analysis of the reviewed case law of the Polish courts, one cannot draw the conclusion that Article 52(2) of the Charter is invoked in order to limit or impede the scope of social rights under it. Quite a number of cases in which national courts refer both to the applicable social rights of the Charter and a provision of secondary law may lead to the conclusion that these courts consider that the former has the same content as the later. Cases decided by the Polish courts in this area were generally not of the nature of 'horizontal actions'.

4.3. The role of the Charter appears to be even weaker in Polish administrative practice. Only a few cases can be mentioned here, in which it is rather the parties who invoke the relevant Charter provisions to support their arguments. It was the judgment of the National Board of Appeal concerning public procurement procedure, possible threats to state security and freedom to conduct business provided by the Article 16 of the CFR.[53] In a similar way, the General Inspector for Data Protection referred to Articles 8 and 10 of the CFR cited by the complainant in the case before him[54]. The activity of the President of the Office for Personal Data Protection is different in this context. In the justifications of his decisions, he explicitly referred to the content of Article 8 of the CFR, providing in-depth analysis and argumentation.[55]

5. EU Trade policy and social rights' protection

5.1. It should be pointed out that the Act of 11 September 2019 – Public Procurement Law refers directly to social issues, indicating that the purchasing policy of states must take into account issues of corporate social responsibility and the application of social and health aspects (Article 21). However, the audit activities carried out by the Supreme Audit Office revealed irregularities in the application of social clauses by both the government administration and local governments. These irregularities basically concerned the lack of proper supervision over the implementation of contracts in the part concerning social

[53] KIO 2897/21, 8.11.2021, Legalis 415513.

[54] DOLiS/DEC-883/12/56858, 19.9.2012, Legalis 815965; DOLiS/DEC-171/14/14199, 21.2.2014, Legalis 1348741.

[55] DKN.5131.11.2020, 30.6.2021, Legalis 2601283.

clauses and the failure to carry out analyses of the rationality of the application of these clauses or assessments of the social effects, costs and benefits of their application. It was also pointed out that it was necessary to indicate in public procurement notices the social clause applied as a necessary condition for the principle of transparency and equal treatment of contractors. Tenderers must be aware of all the obligations they should take into account in their bids in a public procurement procedure.[56]

5.2. Published annually by the Responsible Business Forum, the report 'Responsible Business in Poland. Good practices' is the largest overview of CSR and sustainable development initiatives in Poland. The 20th edition presents 1,677 activities undertaken by 283 companies, demonstrating a 25% increase compared to the previous edition of the report.[57] A Ranking of Responsible Companies is also provided, that is drawn up on the basis of a questionnaire that companies complete in accordance with due diligence, corporate social responsibility, and professional ethics.[58] Its 2022 edition shows that many companies operating in Poland, including the largest concerns, take this issue seriously into account. Appropriate actions (including, inter alia, codes of conduct or ethics) are taken by companies in various industries, i.e. banking, financial and insurance sectors (11 companies), fuels, energy, mining (11 companies), industrial and chemical production (9 companies), commerce (8 companies), consumer goods (5 companies), telecommunications, technology, media and entertainment (4 companies), transport, logistics, services (3 companies), pharmacy and medicine (2 companies).

5.3. At present (that is 2022), 174 trans-national collective agreements are registered in the register kept by the Minister of Family, Labour and Social Policy, with 76 agreements in force and 98 agreements terminated or dissolved.[59] Agreements concluded by local government bodies predominate, followed by agreements concluded by government authorities. The importance of agreements concluded by employers' organisations is declining, e.g. for entities operating in a specific sector (i.e. metallurgy, road and rail transport, energy industry, lignite mining, defence and aviation). It is estimated that the post-employment agreements in place apply to around 200 000 employees. Poland is therefore one of the countries where cross-company bargaining does not currently play a major role.[60]

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[56] <https://www.nik.gov.pl/plik/id,13176,vp,15591.pdf>, visited 6 May 2022.

[57] <https://odpowiedzialnybiznes.pl/aktualno%C5%9Bci/raport-odpowiedzialnego-biznesu-2021-z-rekordowa-liczba-firm/>, visited 5 August 2022.

[58] As of 2018, the organiser of the ranking is the Kozminski Business Hub, while the Responsible Business Forum is the content partner.

[59] <https://www.gov.pl/web/dialog/uklady-zbiorowe-pracy>, visited 6 May 2022.

[60] Ł. Pisarczyk, J. Rumian, 'Ponadzakładowe układy zbiorowe. Zmierzch instytucji?', *Labour and Social Security Journal* 2019, No. 11.

5.4. Cases heard in a trial fall under domestic jurisdiction if the defendant has his or her domicile or habitual residence or seat in the Republic of Poland. In addition, domestic jurisdiction belongs to the Polish courts, inter alia, in labour law cases in which the employee is the plaintiff when the work is usually, was or was to be performed in the Republic of Poland (art. 11034 of the Act – Code of Civil Procedure). The some applies to insurance relationship cases against the insurer when the plaintiff is domiciled in the Republic of Poland or when there is another element indicating its territorial jurisdiction (Article 11035 of the Act – Code of Civil Procedure). As regards criminal claims, the Polish Criminal Act applies to a Polish citizen who has committed an offence abroad (Article 109 of the Act – Criminal Code), as well as to a foreigner who has committed an offence abroad against the interests of the Republic of Poland, a Polish citizen, a Polish legal person or a Polish organisational unit without legal personality (Article 110 of the Act – Criminal Code). It is possible to bring class actions if it is in accordance with the provisions of the Act of 17 December 2009 on the vindication of claims in group proceedings. It regulates civil court proceedings in cases in which claims of one type are asserted by at least 10 persons, based on the same basis. The Act applies in cases involving claims for liability for damage caused by a dangerous product, for tort, for liability for non-performance or improper performance of a contractual obligation or for unjust enrichment, and, with regard to consumer protection claims (Article 1(1) and (2)).

5.5. By the end of 2016, in the Polish market more than 300 non-financial reports had been issued, despite the lack of obligation. They present the environmental, social and economic perspective of the company's activities (reports are available at www.rejestrraportow.pl). The scope of non-financial information has been expanded to include a description of the entity's policies with respect to social, labour and environmental issues, respect for human rights and anti-corruption, and a description of the results of applying those policies, including a description of due diligence procedures if the entity applies them as part of its policies with respect to the aforementioned issues. It is worth to notice, that there is no obligation for the auditor to review the above-mentioned statement or a separate report.[61] As far as the supply chain is concerned, in current national law it is referred to by the term 'relations with the external environment, including counterparties' and includes the presentation of at least basic information about the design and structure of the supply chain and the importance of non-financial information concerning it.[62]

[61] Article 49b of the Act of 15.12.2016 amending the Accounting Act, Journal of Laws 2017, item 61.

[62] <https://mf-arch2.mf.gov.pl/c/document_library/get_file?uuid=041fa0d5-333b-4074-b583-6465cda2f687&groupId=764034>, visited 4 July 2022.

6. Climate change and social justice

6.1. 'T*he National Energy and Climate Plan 2021-2030' (the National Plan) was adopted on 18 December 2019.*[63] It presents the assumptions and objectives as well as the policies and actions to be taken for an energy union. Social justice can be understand as equal and fair access to rights and resources by increasing people's capacity to adapt to the consequences of climate change. It therefore entails the distribution of environmental goods or of the social and economic capital needed to adapt to a changing environment together with the process of decision-making about distribution and the inclusion or exclusion. The National Plan can therefore be analysed in the light of these observations.

6.2. Taking into account the objective concerning decarbonisation process and the fair transition policy, it should be pointed out that the National Plan does not provide a detailed assessment of the social and employment impact of the transition on coal regions. It only indicates that, in the area of employment policy, it will be crucial to take measures to create quality jobs and to adapt professional qualifications in connection with the process of transforming the economy towards a less carbon-intensive one. The National Plan indicates that the relevant analysis concerning the social dimension will be carried out within the framework of the restructuring plan for coal and mining regions. The relevant social agreement was adopted on 28 May 2021, and the systemic solution proposals adopted therein protect mine workers, ensure the maximum level of Poland's energy security and enable the transformation of mining regions.[64] The National Plan also addresses the issue of fuel poverty and includes information on ongoing plans on various initiatives to address this challenge. However, this analysis is not in-depth, as work on these issues is still ongoing. The result of the proposed comprehensive public policy is expected to be a reduction in energy poverty and increased protection for vulnerable consumers (e.g. in the form of an energy allowance).

6.3. The National Plan also envisages various types of projects to provide financial support to the public in response to the climate transition measures taken. In 2018, the nationally funded investment support programme 'Clean Air' was launched, under which it is possible to provide support for the thermal modernisation of single-family houses and the replacement of old heating sources. In order to accelerate the development of prosumer energy, additional development programmes have been implemented, such as the 'My Current' programme. It aims to increase energy production from photovoltaic sources. The programme will subsidise new photovoltaic micro-installations of 2-10 kW. It is envisaged that

[63] <https://www.gov.pl/web/klimat/krajowy-plan-na-rzecz-energii-i-klimatu>, visited 20 Jun 2022.
[64] <https://www.gov.pl/web/>, visited 16 July 2022.

200,000 beneficiaries will benefit from the subsidies. A Termomodernisation and Renovation Fund has also been established to support investments in improving the energy efficiency of existing residential buildings. Amendments to the Act on Support for Thermal Upgrading and Renovation are envisaged, which will enable municipal governments to be involved in the implementation of low-carbon projects.

6.4. The link between climate change and social justice was addressed by Prime Minister Mateusz Morawiecki at the COP26 climate summit held in Glasgow in November 2021. He stressed that 'if domestic and global policies are to achieve common goals to tackle climate change, countries must create not only a resilient economy, but also a resilient society that leaves no one behind". According to the Prime Minister, Poland is to pursue this goal in three stages: 1) Good jobs – through the use of renewable energy sources, three hundred thousand new jobs are expected to be created in Poland; 2) Cheap energy – the evolution of the renewable energy market creates opportunities for the production of cheap and clean energy (mainly in photovoltaics); 3) Clean environment – by intensifying efforts to reduce smog in cities – in the coming years, it is planned to eliminate three million coal-burning cookers, switch public transport to zero-emission technologies, and support electromobility in the passenger car segment. However, despite the above-mentioned intention to base RES in Poland primarily on photovoltaics, some obstacles to its development should be pointed out. In April 2022, changes to the billing rules for electricity produced by prosumers entered into force (amendments to the Renewable Energy Sources Act), which led to a photovoltaic crisis and a drop in new connections by more than 90%. Consumers have thus been discouraged from investing in this area.

7. Achieving Social Europe: Social rights, democracy and the rule of law

7.1. EU citizenship in mainstream education

7.1.1. To ensure education on EU citizenship and the values set out in the Treaties, these issues are included in the curricula at both primary, secondary and tertiary levels. However, there are no specific regulations or guidelines in this respect.

7.1.2. As far as the primary level of teaching is concerned, the subject called Knowledge of Society, taught in the last year of primary school, should be mentioned first and foremost. It is an interdisciplinary subject drawing on the social sciences and elements of the humanities. Once this subject has been passed, pupils are able to explain the principle of the rule of law, including the principle of independence of the courts and the independence of judges, and in relation to

an international organisations such as the EU (together with the concept of the EU citizenship).[65]

7.1.3. Teaching at secondary level also provides the subject Knowledge of Society (converted from 1 September 2022 to History and the Present). It is an interdisciplinary subject, which in the case of the basic programme at lower secondary and upper secondary school draws on the achievements of the social sciences and in the case of the extended programme – on the achievements of the social sciences and the humanities. Once this subject has been passed, pupils are able to list the existing primary legislation of the EU, locate its member states, present the basic areas and principles of the EU, together with its institutions, present the rights of a citizen of the EU and considers the benefits and costs of the Republic of Poland's membership of the EU.[66]

7.1.4. The teaching of Union citizenship at tertiary level depends on the field of study. Those of a scientific nature generally do not provide room in their study programme for in-depth knowledge of the subject. The situation is different in studies of a humanistic nature, especially those with a legal profile. Here, courses on EU issues should be mentioned first and foremost. Its curricular content provides for separate attention to the citizenship of the Union together with its objectives and values. A good practice here is the activity of student's research clubs, in particular those whose primary activity is focused on widely understood issues related to the EU. On the initiative of the students, thematic meetings are organised for those interested, but also lessons conducted by members of these clubs in primary and secondary schools on the subject of EU citizenship.

7.2. National developments in the area of fundamental social rights in relation to democracy and the rule of law

7.2.1. Ensuring real equality between women and men in terms of labour market opportunities by making it easier for parents or carers to reconcile work and family life is provided for in the proposed amendments to the Labour Code enabling the implementation into Polish law of Directive 2019/1158. These changes include, among others, extended parental leave periods from 32 to 41 weeks in the case of the birth of one child and from 34 to 43 weeks in the case of multiple pregnancies. The individual right to parental leave is to be granted to both the mother and the father – to the extent of 9 weeks, which is not transferable. If it is not taken by either parent, it will be forfeited. Parental leave will be granted at the employee's request either one or in no more than five parts and no later than the child's sixth

[65] <https://podstawaprogramowa.pl/szkołapodstawowa>, visited 6 August 2022.

[66] <https://podstawaprogramowa.pl/Liceum-technikum/>, visited 6 August 2022.

birthday. The proposed amendments to the Labour Code also concern paternity leave, which, at the rate of 2 weeks until the child is 12 months old, will be available for use by the employee-father. A new type of leave is also to be provided, that is care leave. It will be an unpaid leave granted at the employee's request of 5 days per calendar year. It will be requested in order to provide personal care or support to a person who is a family member or who lives in the same household and who requires significant care for medical reasons.

7.2.2. It is worth noting that on 8th November 2021, the National Action Programme for Equal Treatment 2022-2030 was adopted, outlining the implementation of the principle of non-discrimination under seven priorities, i.e. anti-discrimination policy, work and social security, education, health, access to goods and services, awareness-building, data collection and research, and coordination. Attention was also given to financial issues and monitoring of the Programme's implementation.[67] The Polish Ombudsman made very relevant comments on this document.[68] He pointed out, first of all, the need to open up the catalogue of legally protected characteristics and spheres covered by the prohibition of discrimination under the Equal Treatment Act. Limiting the protection against unequal treatment to a few selected grounds results in people experiencing discrimination in spheres other than those covered by it not benefiting from a simplified mechanism for claiming compensation for damage (and harm) caused by a breach of the principle of equal treatment (a reversed burden of proof). The demand to broaden the catalogue of legally protected characteristics in access to goods and services becomes even more urgent after the Constitutional Tribunal's judgment concerning the refusal to provide a service on the grounds of the service provider's freedom of conscience and religion.[69] It decided on the partial unconstitutionality of Article 138 of the Misdemeanours Code which in its original wording stated that: 'Whoever, while professionally engaged in the provision of services, (...) intentionally refuses, without a legitimate reason, to provide a service to which he is obliged, shall be subject to a fine'. As such, it was used to protect the rights of persons against unequal treatment in this sphere, complementing the protection against discrimination under the Equal Treatment Act, which was limited to four grounds. Following the judgment of the Constitutional Court, this option to protect persons suffering discrimination also on the basis of characteristics other than gender, racial or ethnic origin and nationality in access to goods and services

[67] <https://www.gov.pl/web/rodzina/projekt-uchwaly-rady-ministrow-w-sprawie-ustanowienia-programu-wieloletniego-krajowy-program-dzialan-na-rzecz-rownego-traktowania-na-lata-2022-2030>, visited 1 July 2022.

[68] <https://bip.brpo.gov.pl/sites/default/files/2022-01/Rowne_traktowanie_program_10.1.2022.pdf>, visited 1 July 2022.

[69] Judgment of the Constitutional Court of 26.06.2019, K 16/17, OTK-A 2019, No. 49.

was excluded. The burden of initiating compensation proceedings for a breach of the principle of equal treatment lies solely with the injured party and the remedies under the Equal Treatment Act are limited.[70]

7.2.3. The Polish Ombudsman, in cooperation with the Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe, conducted an interesting study on legal awareness of equal treatment and the nature and scale of unreported hate crimes against members of selected communities in Poland. The most common perceived reason for discrimination turned out to be ethnicity and nationality – as many as 49% of respondents indicated this premise in 2018.[71]

7.2.4. As far as hate speech is concerned, it should be pointed out that crimes committed on the basis of prohibited grounds of discrimination, such as sexual orientation, gender identity, sex, disability and age do not constitute specific crimes (so-called hate crimes) under the current criminal law. According to the Polish Ombudsman, the Criminal Code should be amended so that crimes motivated by prejudice also on grounds other than race, national or ethnic origin and religion are prosecuted ex officio and punished as a qualified form of criminal behaviour, as well as to create a statutory definition of hate speech.[72] The Government Plenipotentiary for Equal Treatment does not agree with these demands, stressing that there is no reason to increase the criminal law protection of victims of such crimes. This position was also expressed by the Minister of Justice, pointing out that Polish criminal law already has adequate instruments for a criminal law response to criminal behaviour motivated by discriminatory grounds and does not foresee any changes in this area.[73]

7.2.5. Issues of equal treatment for people belonging to the LGBT community have been decided by Polish national courts. The Supreme Court ruled in a case in which an employee of a printing company refused to produce a banner for the LGBT Business Forum Foundation. He cited his reluctance to contribute to the promotion of the LGBT movement. During the trial, he pointed to the teachings of the Catholic Church, the Bible and morality as standing in the way of his fulfilling the Foundation's order.[74] The Regional Court in Łódź sentenced

[70] <https://bip.brpo.gov.pl/pl/content/rpo-rowne-traktowanie-rzad>, visited 3 Jun 2022.

[71] **The survey report available at: <https://bip.brpo.gov.pl/>, visited 5 Jun 2022.**

[72] <https://bip.brpo.gov.pl/pl/content/rpo-rowne-traktowanie-rzad>, visited 5 Jun 2022).

[73] <https://www.prawo.pl/prawo/mowa-nienawisci-rzad-nie-planuje-zmian-w-przepisach,508272.html>, visited 5 Jun 2022.

[74] In another case, a self-defence martial arts instructor refused to conduct a workshop organised by an entity dedicated to the LGBTQ+ community. He justified his decision on the grounds that he "does not want to be identified with 'something' he does not subscribe to" and that he "does not support male-male relationships, much less raising children". He also demanded that the administrator of the organisation's profile account remove

him validly on the basis of the aforementioned Article 138 of the Misdemeanours Code (be subject to a fine), but waived the penalty. The cassation against this sentence was dismissed by the Supreme Court.[75] According to its judgment, the prohibition of discrimination included in Article 32(2) of the Polish Constitution constitutes one of the main basic principles of a democratic state of law, ordering the system of human rights and freedoms. This prohibition thus gains absolute precedence over the principle of freedom of contract. Indeed, the unbridgeable limit of this freedom is the commission of an act of discrimination to which an individual is not entitled, irrespective of his or her religious convictions or the worldview presented. Freedom of conscience and religion that manifests itself in discrimination against other people does not enjoy constitutional protection. The issue of the treatment of persons belonging to the LGBT community has also been the subject of judgments of the Supreme Administrative Court dismissing cassation complaints against the invalidation by the Provincial Administrative Courts of resolutions of municipal councils (in Serniki, Istebna, Osiek and Klwów) on the subject of the declaration adopted by them called "Gmina (...) free of LGBT ideology". It was emphasised that such resolutions interfere with the dignity and private life of this group of residents who identify as LGBT. The social effect of these resolutions is to violate the dignity, honour, good name and the private life of a specific group of residents.[76]

7.2.6. When it comes to equal access to social services, social benefits and housing, Article 6 of the Equal Treatment Act provides a ban to treat individuals unequally on the grounds of sex, race, ethnic origin or nationality with regard to access to and the conditions of use of social security, services, including housing services, goods and the acquisition of rights or energy, when offered to the public. The legislator has overlooked certain social groups and has not extended protection against unequal treatment in this area. Thus, persons with disabilities, elderly persons, persons discriminated against on the basis of their sexual orientation or their religion or beliefs remain outside the protection against discrimination in access to goods and services. These persons can enforce their rights using other provisions in Polish law, although they are not as effective as those contained in the above-mentioned act.

7.2.7. The issue of facilitating access to social services in Poland is, inter alia, the

the link containing his name as the person who would conduct the workshop. He was therefore found guilty of an offence under Article 138 of the Misdemeanours Code, but the punishment was dropped. This decision of the lower court was upheld by the Court of Appeal. Judgment of the Regional Court in Poznań of 3.10.2018, XVII Ka 772/18, KZS 2019, no. 6, item 113.

[75] Order of the Supreme Court of 14.06.2018, II KK 333/17, OSNKW 2018, no. 9, item 61.

[76] Judgment of the Supreme Administrative Court of 28.06.2022, III OSK 4028/21, LEX no. 3361700; Judgment of the Supreme Administrative Court of 28.06.2022, III OSK 3746/21, LEX no. 3361734.

subject of the Act of 19 July 2019 on the implementation of social services by a social services centre. Its provisions introduce a new concept of social services into Polish law[77], as well as an optional local social service programme, a new optional organisational unit called the Centre for Social Services (CUS) and new professional roles for people employed in the centre, primarily the social service organiser and the coordinator of individual social service plans. At the moment, it is not possible to answer the question to what extent the solutions provided by this law respond to the challenges of modern social services due to the fact that the CUS pilots started in 2020 and are currently in the stage of implementation.[78] The basic aim of the Act is to develop and integrate the system of social services at the local level, as well as to integrate and coordinate various types of services and to actually increase the availability of social services at the local level. It is also worth mentioning that the government's Strategy for the Development of Social Services, Public Policy to 2030 (with an Outlook to 2035) was adopted on 7 June 2022[79]. It was developed in the context of the idea of deinstitutionalisation, i.e. the transition from institutional care to care provided in the family and community environment. Social services are to focus on family and children, seniors, people with disabilities and people with mental disorders and in crisis of homelessness.

7.3. Perception of the EU as a Social Union by its Member States

7.3.1. The position on the Social Union has been presented by the employers' organisation – Lewiatan Confederation. It wants a Social Europe that supports Member States in improving social and economic conditions, but not a Social Union with harmonised social policies. It argues that it would jeopardise well-functioning systems in the Member States. The Union should strive for a social Europe in which Member States receive adequate support to ensure decent social standards and economic growth. However, it is important to strike the right balance between national and EU competences. They advocate the path of the European Pillar of Social Rights, which is not legally binding, and of the Union playing a supporting role, enabling all Member States to improve their long-term growth potential, job creation, labour market participation and social conditions.[80]

[77] These are activities in the following areas: family policy, family support, foster care system, social assistance, health promotion and protection, support for the disabled, public education, counteracting unemployment, culture, physical culture and tourism, stimulating civic activity, housing, environmental protection, professional and social reintegration.

[78] R. Szarfenberg, 'Centra usług społecznych – czy poprawią dostęp do usług społecznych i ich jakość?', <https://www.batory.org.pl/>, visited 5 July 2022.

[79]<https://www.gov.pl/web/rodzina/projekt-uchwaly-rady-ministrow-w-sprawie-ustanowienia-polityki-publicznej-pt-strategia-rozwoju-uslug-spolecznych-polityka-publiczna-na-lata-20212035>, visited 4 July 2022.

[80] <https://lewiatan.org//>, visited 4 July 2022.

7.3.2. As far as the position of the ruling party is concerned, the Law and Justice (PiS) Political Committee stressed in its resolution that, although it linked Poland's future to its membership of the EU, it did not agree with the 'extra-treaty process of limiting the sovereignty of member states'. It stated that this implied an attempt to take away the powers of the sovereign in favour of the strongest, with all the disastrous consequences of this, both in the economic and social fields, as well as with regard to cultural identity, national tradition, the cohesion of society and its demographic development. Instead of the slogan 'more Union', the direction of a 'Europe of different nations' and a 'Europe of solidarity states' was proposed. It is the duty of the EU to be the regulator of the common market, the guardian of the freedom of movement of persons and the free movement of capital. The EU's competence should cover everything that is needed for the common market to exist. The European Pillar of Social Rights was a measure to strengthen the social dimension of the EU that should be treated as a roadmap with its non-legislative form. It is the Member States that are responsible for building social rules and rights and the European Union can only help in this matter.[81]

7.3.3. As to Polish academics, EU social law should become part of a balanced, standardised practice in the Member States, with the involvement of their administrative authorities and national courts, as is the case in the context of the internal market. The tasks and role of the national authorities in the Member States in developing consistent practice and coherent jurisprudence regarding the recognition of social protection benefits provided by national legislation are apparent here. This is a step-by-step approach aimed at gradually building a balanced relationship between EU social law and national law in the Member States.[82] The new quality of the social dimension of EU integration is undoubtedly the adoption of the CHR, which has made social rights 'more visible' and their protection more robust. Indeed, they are now an essential part of EU law of the highest order and with a wide material scope.[83]

7.3.4. Solidarity, laid down in Article 2 TEU, seems not to be considered as the constitutional basis for a European Social Union in academic discourse. Solidarity is rather seen as a fundamental and important value in the context

[81] <https://pis.org.pl/ >, visited 15 Jun 2022.

[82] E.g. D. Kornobis-Romanowska, 'Obywatelstwo i prawa społeczne Unii Europejskiej w dobie kryzysu gospodarczo-politycznego', Acta *Universitatis Wratislaviens. Przegląd Prawa i Administracji* 2020, issue 120, p. 277-287.

[83] E.g. L. Mitrus, 'Prawa społeczne w Karcie Praw Podstawowych Unii Europejskiej', *Państwo i Prawo* 2013, issue 7, p. 16-30.

of the European integration process, appearing in its ideological dimension as a certain intrinsic value in the doctrine of conduct of EU Member States (Article 2 TEU). It also has a practical dimension in the form of a kind of mechanism for action, or a kind of guideline for initiatives taken jointly by Member States (art. 222 TFUE).[84]

[84] E.g. K. Tomaszewski, 'Solidarność i subsydiarność – wartości ustrojowe Unii. W poszukiwaniu remedium na współczesny kryzys procesu integracji europejskiej', *Przegląd Sejmowy* 2020, No. 1(156), p. 171-184.

PORTUGAL

Maria do Rosário Palma Ramalho[1]

Foreword

Before answering the questionnaire, the author would like to point out the legal perspective of this Report. In this sense, statistical and economic information on the several topics will not be provided, on the one hand, because there is no available data on specific points, and, on the other hand, because the treatment of such information requires an economic insight that goes beyond our line of expertise.

Also, it is important to say that the opinions expressed in this Report reflect the author's point of view as an expert in labour law and equality law and are not to be considered as official opinions.

To make this Report easy to read, the author chose to keep the context remarks and the questions in the text (in a different lettering) adding the answers right below.

Question 1

a.

I. In Portugal, the right to equal opportunities and to equal treatment is recognized in the Portuguese Constitution (Article 13) as a universal right of all persons, irrespective, among other factors, of their nationality, origin or place of birth. Under this general principle, no one can be denied of any right or granted a more favourable treatment based on those grounds.

The general principle of equality and non-discrimination is further developed in the Constitution in more concrete provisions in the field of work and employment relations. These provisions reinforce the right to equal opportunities in access to employment and in working conditions, professional training and pay (Articles 48, 58 and 59 (1) (a) of the Constitution). These provisions apply both in the private sector and in the public sector and some of them apply also to independent workers while others apply only to employees.

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On the other hand, the Portuguese Constitution has a wide set of workers' rights, some of which also apply to independent workers. These rights are qualified as fundamental rights and accordingly, they rank at the highest level in the Portuguese legal system, thus determining the evolution of the legal system as a whole, since other legal provisions must respect this rights and pursuit them.

Among the set of workers' rights described in the Constitution, a main division can be established between "individual" rights and "collective" rights of workers.

"Individual rights" of workers include the right to equal opportunities in access to work or to a job and the right to equal treatment in employment relations, including equal pay for equal work or work of the same value, the right to minimum wages, the right to a balanced reconciliation of professional and family life, the right to healthy, safe and adequate working conditions, including the right to daily and weekly resting periods and to annual paid vacations, the right to be protected in the event of an accident or professional disease, the right to be protected against unfair dismissal, and the right to social security protection, including unemployment allowance in case of involuntary termination of employment contract, old-age and invalidity pension and allowances related to the exercise of parenting rights (Articles 53, 58 and 59 of the Constitution).

"Collective" rights of workers include the right to instate trade unions at all levels, the right to elect workers' councils at company level, the right to collective bargaining and the right to strike (Articles 54 to 57 of the Constitution).

Since the Portuguese Constitution is a relatively modern Constitution (it dates from 1976), the main principles and the set of fundamental rights of workers inscribed in the Constitution are very complete and have largely benefited from the modern Welfare State cultural and legal acquis and also from the European Union social acquis. In fact, in some areas (including employment and industrial relations) the Portuguese Constitution goes beyond the level of protection granted by EU law. And in practice, the protection granted by the constitutional provisions is quite effective because these principles and rights rank among the more important legal provisions of the Constitution, so they influence the whole legal system and they must be respected by other legislation.

II. In the field of employment, equality and non-discrimination principles and workers' rights are further developed by the Portuguese Labour Code (LC), approved by Law No. 7/2009, of 12 February 2009, and outside the field of private employment relations, in several Acts.

In the Labour Code, the notions of discrimination (both direct and indirect discrimination) are inscribed and developed according to the EU-Law and to the European Court of Justice acquis. The sources of discrimination indicated in the Code include, among others, sex, sex orientation and sex identity, nationality, race and place of origin (Articles 24 and 25 of the LC). In this respect, the Directives related to gender equality and to non-discrimination have been transposed into national legislation and the more recent ones (Directive 2006/54/EC, of 5 July 2006, on gender equality in employment relations, Directive 2000/43/EC, of 29 June, on non-discrimination on the grounds of origin or ethnicity, and Directive 2000/78/EC, of 27 November 2000, regarding non-discrimination in general in employment relations) were transposed by the Labour Code.

Under the Labour Code, all candidates to a job and all employees must be treated equality. This principle applies irrespective of the nature if the employment relation (permanent or fixed-term contracts and posted workers, including workers of temporary agencies), or of the nationality or place of origin of the worker (Articles 4 to 8 and Articles 24 and ff. of the LC). The Labour Code has also transposed Directive 1999/70/EC, of 28 June, regarding the protection of fixed-term workers, and Directive 96/71/EC, of 16 December, regarding the posting of workers from other Member States in the context of a service contract.

In the author's view, Portuguese courts are aware of the EU concepts of equality and non-discrimination (including indirect discrimination) and of the EU Law developments regarding workers' rights, since those concepts have been introduced in national legislation and, as regards workers' rights, the national legal system is even more protective than the EU legal system.

III. However, in practice, precarious workers and workers from countries outside Europe are not as protected as common employees: precarious workers are less protected than common workers especially as regards dismissal, due to the precarious nature of their employment contract; workers' from third countries (e.g. non-EU countries) are less protected than common workers because their employment relation depends upon a residence visa, that is granted by Portuguese authorities under specific conditions. Anyway, these limitations do not apply to citizens from EU-countries that choose to work and reside in Portugal.

b.

I. The answer to these questions depend upon the concept of "non economically active citizens", that may include very different situations: working persons that have lost their jobs; older persons or persons with a disability that have already

stopped working and other non-active and dependant persons; and persons that simply do not work and have no family income or only have a very low income.

These situations are treated differently under Portuguese legislation.

Working persons that have lost their jobs (except upon their own will or when the termination of the contract was agreed with the employer), have the right to apply for unemployment allowance ("subsídio de desemprego") that is granted by the public social security system. This public allowance is granted under certain conditions and for a certain period of time, and is ruled by Decree-Law No. 220/2006, of 3 November 2006.

Older or disabled persons that have already stopped working have the right to apply for old age or for invalidity pension. These pensions are granted by the public social security system under certain conditions, linked to a minimum number of years of work with paid social security contributions. But, if these conditions are not met, the person is still protected by the social security system under another scheme. Old age and invalidity pensions are ruled by Decree-Law No. 187/2007, of 10 May 2007.

Other dependent persons, which include children but also disabled persons or other dependants, who do not work are also protected by the public social security system, on the basis of several schemes, including parenting allowances in the case of children.

Persons that do not work and have no means of subsistence may apply to a specific public allowance called "rendimento social de inserção" ("minimum public allowance for social integration"[2]), that is a public flat-rate allowance intended to compensate the absence of means of subsistence. The rules applicable to this allowance are established in Law No. 13/2003, of 21 May 2003.

This system has been established in Portugal for many years. The last measure indicated ("minimum public allowance for social integration") is regularly challenged by some political sectors that argue that this allowance perpetuates public dependency of a wide range of persons that do not seek regular employment or keep working only in parallel and informal economy while benefiting of this protection.

More recently, there are also some critics regarding unemployment allowance that do not deny the right to such allowance but some aspects of its legal ruling. Some sectors consider that these rules are over-protective in the sense that it is relatively easy for the beneficiary of unemployment allowance to refuse engaging in a new

[2] This is a rough and non-official translation of the author.

job (on the grounds that it is not a similar to his previous one, or arguing that the tasks involved are beneath his professional qualifications or even that his financial situation would not improve with the new job). So, it is possible for unemployed persons to keep benefiting from the allowance for a long period of time, during which they don't actively seek for a new job or only work in informal Economy.

Question 2

In Portugal, the principle of equal treatment applies to social security issues and does not discriminate between national citizens and other EU citizens working and/or residing in Portugal. This applies to all social security benefits including those related to child benefits: provided the legal conditions established in national legislation to have access to the benefit are met (and, as already mentioned, these conditions relate to residence in Portugal and in some cases, to a determinate period of social security contributions, but not to nationality or to the place of birth of the worker or of the child entitled to the benefit), the person can apply for the social security benefit in the exact same conditions that a Portuguese citizen can.

To the author's knowledge, there is no debate regarding the issues indicated in the questions.

Question 3

I. Regarding the first question, it is common knowledge that a number of workers from other Member States work and reside in Portugal, especially in recent years. Also, it is reported that some of those persons work remotely, with the support of digital technologies so they can live wherever they wish. For this purpose, Portugal is considered an attractive destination for a number a reasons that include the nice climate, good food, good healthcare service and general safety, but this means of course that some foreigners actually residing in Portugal are working for companies that are located elsewhere.

Aside these situations that seem to have grown in the last few years, there are also persons from other Member States that reside in Portugal and work for Portuguese companies or have developed their own business here, mostly in areas like agriculture or tourism.

On the other hand, traditionally, many Portuguese workers live and work abroad in other Member States.

Aside this general information, the author had no access to statistical data or more detailed information on this topic.

II. As to questions (b) and (c), the author is not aware of any debate at academic or political level regarding the notion of "fair movement", as an alternate concept to "free movement" of persons and workers inside Europe or about the importance of the issue of movement of "essential workers in critical occupations" in relation to free movement of workers.

In this context, it is important to point out that Portugal is, by tradition, a very open country in the sense that, in different periods of its history (including recent history) and for very different reasons, the country has received huge groups of persons and many of them ended up living and working here – Jewish families in the Second World War, Portuguese coming back from ancient colonies and African people also from ancient colonies, in the mid 70's of the XX Century and in more recent decades, waves of emigrants coming from Eastern Europe or from Brazil.

Maybe this tradition explains why the discussions about the above-indicated topic are not yet an issue in Portugal.

Question 4

I. Portugal is a good example of a strong migration movement of young educated professionals from a southern Europe country to north-western countries in Europe, especially in the last two decades. To a certain extent, this movement has replaced the traditional waves of low qualified Portuguese immigrants that left the country to central Europe countries in search for better jobs and better living conditions in the 50's, 60's and 70's decades of the XX century.

The author had no access to statistical data or more detailed information on this topic, but it is commonly recognized that this new migration tendency affects mostly young people, highly educated and qualified – almost all of them have a university degree, that includes graduation but in many cases a master or even a doctorate degree. Despite their high qualifications and skills, these persons do not find adequate and well-paid jobs in their field of expertise in Portugal and move to central-western or north-western European countries. And since, this generation is, in fact, the more educated and qualified of the country this is indeed a "brain drain" phenomena.

Several reasons are indicated for this phenomena: the low-level of remuneration in Portugal, including for highly skilled positions and especially when compared with remuneration level for equivalent positions in other European countries; the high price of housing in the major cities and surroundings, where highly skilled positions are to be found; and also the high level of professional expectations of the new generation in accordance with their level of education and qualification.

II. This movement has very negative consequences both from an economic perspective and from a social perspective.

From an economic perspective, this new migration movement entails an immediate loss for the State since the public investment that was made in the education of people of this generation will have no social return inside the country. But the more negative economic impact will of course be the massive loss of qualified professionals in all areas, that reflects on the society and on the Economy as a whole.

From a demographic perspective, the immigration of these young people has also a strong impact, since most of them will start their families abroad and this reflects in the lowering of fertility rate. Portugal is already a very bad example in this area, having one of the lowest fertility rates of European countries – according to published data[3], the fertility rate in Portugal in 2021 was 1,34 children per woman in fertile age, against a rate of 3,20 in 1960 – and if this tendency persists the situation may get worse.

As known, a low fertility rate has also severe economic impacts in the long run, as it will mean an ageing population, less workforce and, as consequence, a less sustainable social security system.

III. Despite the gravity of the above-described situation, the author is not aware of any debate or of any legal or political measures intended to address the problem seriously.

Specifically as regards questions (b) and (c), there are no measures aimed at retaining certain types of workers, e.g. the young and highly qualified generation, that is leaving the country. Certainly, there are no measures requiring graduates to work in Portugal, which has financed their studies, for a certain period of time, before being able to migrate, as such measures would certainly be judged unconstitutional, and the author is not aware of other measures pursuing the same objective.

To the contrary, the low level of medium wages, the difficulties in housing in the cities and the low level of support given to young families, as regards the reconciliation of family and working life and as regards child-benefits (many measures in this field are established in the law but in most cases they are unpaid or paid only at a flat rate) contribute to increase the young generation migration movement above indicated.

[3] https://www.pordata.pt/Portugal/Indicadores+de+fecundidade+%C3%8Dndice+sint%C3%A9tico+de+fecundidade+e+taxa+bruta+de+reprodu%C3%A7%C3%A3o-416

Question 5

I. Portuguese law already establishes the principle of equal pay for equal work or work of the same value, as a general principle, inscribed in the Portuguese Constitution (Article 59 (1) (a)) and developed by the Labour Code (Article 24 (2) (c) and Article 25). The Labour Code develops the notions of direct and indirect discrimination, equal work and work of the same value (Article 23 (1)) in accordance with EU Law.

The general rule of equal pay for equal work or work of the same value applies to all workers irrespective of the nature of their employment relation, so there are no doubts that this rule applies to posted workers.

In any case, the Labour Code has transposed Directive 96/71/EC, on the posting of workers from another Member State in the context of a provision of service. This issue is ruled by Articles 6 to 8 of the LC, and Article 7 (1) (e) and (l) explicitly establishes the right of these workers to equal treatment and non-discrimination, that includes the right to equal pay.

The provisions of the Labour Code in this respect are complemented by Law No. 29/2017, of 30 Mai, that transposed Directive 2014/67/EU, of 15 Mai 2014, on the same topic. And more recently, this piece of legislation has been changed by Decree-Law No. 101-E/2020, of 7 December 2020, that has transposed Directive 2018/957, of 28 June 2018.

The subject of equal pay is ruled more extensively in Articles 3-A and 3-B of Law No. 29/2017, of 30 Mai, as amended by Decree-Law No. 101-E/2020, of 7 December 2020, and are in line with Directive 2018/957, of 28 June 2018.

Finally in the specific regulation of temporary agencies employment contracts, that is also inscribed in the Labour Code, Article 185 (5) of the Code explicitly addresses this issue: according to this provision, posted workers have either the right to the remuneration established for their professional category in the collective agreement that is in force in the company where the worker is posted, or the right to be paid according to the level of remuneration applicable to common workers of that company performing the same work or work of the same value, and equal value, according to the more favourable solution.

II. Theoretically, equal pay principles and rules apply to all workers, and in all economic sectors. However, the author had no information or way ok knowing how are things in practise and is unaware of case law regarding this issue at national level.

Question 6

I. To the authors' knowledge, in Portugal the freedom of establishment and the right to conduct a business (Article 16 of the CFR) has not been used to challenge national or EU social law in national courts.

As to possible conflicts between freedom of establishment and the right to conduct a business and other EU social (and national) legislation regarding workers' rights and the non- discrimination principle (on several grounds, including, as indicated in the question above, a possible conflict between the right not to be discriminated against on the basis of religion and the right of the employer to conduct his business in a neutral way) under the Portuguese legislation such conflict would have to be considered in several perspectives and might fall under three types of provisions.

First, the non-discrimination principle in employment relations would apply, as religious belief is a relevant source of discrimination in employment relations and Article 25 (1) of the Labour Code prohibits discriminatory practises of the employer on such ground. Secondly, a personality right of the worker could be in stake, and such right must be respected by the employer under Articles 14 *et seq.* of the Labour Code. But, on the other hand, restrictions to non-discrimination principle, that are admitted by Article 25 (2) of the Labour Code (in line with EC Law) could also apply, and the right of the employer to conduct his business (that is also a constitutional right – Article 61 of the Portuguese Constitution) in a religious neutral way could be accepted as an objective justification that would allow for a proportional restriction of non-discrimination principle in such a case.

Despite no case law was discussed at national level on this type of conflict, in the author's opinion, these are very complex situations to deal with according to the opposite interests in presence, that are all relevant.

II. As to the right of strike, it is a fundamental right of workers inscribed in the Portuguese Constitution (Article 57). This right is extensively ruled in Articles 530 and ff. of the Labour Code.

As a fundamental right that belongs to the core of the workers' "collective" rights indicated above in this Report, the right to strike prevails over freedom of business or market freedom. Additionally, it is important to say that the right to strike is not subjected to proportionality requirements in Portugal, unlike in other countries.

Question 7

a.

I. Anti-discrimination EU law and acquis are well implemented in Portugal, from a legal perspective. The Portuguese legislation has evolved from addressing sex discrimination issues to the coverage of all other sources of discrimination.

As regards sex equality, national legislation is very protective and complete and aims towards the active promotion of equality between women and men at all levels: employment and self-employment (including equal opportunities in access to employment, and equality in working conditions, including pay and career, prohibition of harassment practises, and possibility of positive action), professional training, social security, violence against women, women in decision making positions, including quotas, and the reconciliation of work and family life, including women's protection during pregnancy and in maternity, adoption and parenting protection measures.

Most of these topics were addressed even before the Portuguese accession to the European Union (that occurred in 1985), but the legal rules were of course developed and updated according to the evolution of EU legislation and to EU case law over the years.

II. Similar legal developments occurred as regards the implementation of non-discrimination principle related to other grounds of discrimination, such as nationality, place of origin or ethnicity, sexual orientation and sex identity, age and disability, religious and political beliefs, economic and family situation. All these grounds of discrimination are covered by the Labour Code (Article 25 (1)) but the measures in place cover also other areas aside employment, with some exceptions where only equality between men and women is covered – for instance violence against women, women in decision making positions, including quotas, and of course women's protection during pregnancy. As regards these other sources of discrimination, the evolution of national legislation occurred later than in the area of gender discrimination, and much under the influence of the EU directives in this field, published in 2000.

Specifically as regards religious discrimination, the recent developments in CJEU case law did not have a significant impact on religious discrimination at national level, since the law was not subjected to change and also because there is yet no case-law on this issue. But as already explained just above, should the situation arise, it would be a problematic issue, since the opposite interests in stake are all relevant and they both fall under different constitutional provisions.

As to reasonable accommodation, Article 84 (1) of the Labour Code imposes upon the employer the duty to adapt the working conditions and working facilities in order to accommodate disabled workers as well as other workers suffering from a condition that impacts on their working capacities. But the exact notion of "reasonable accommodation" is not defined by national law, so the content of this concept must be found directly by reference to EU law.

II. This short résumé of the Portuguese legislation in the field of gender equality and non-discrimination gives ground for the conclusion that the problem does not rely in the legal system that is very complete and quite protective.

To the contrary, the practical implementation of the legal provisions already in force remains problematic in many areas. In the author's opinion, the difficult implementation of the legal provisions is due to a number of reasons, including social and cultural reasons, deficient monitoring of the implementation of legal provisions and also financial reasons.

On the one hand, Portugal is a traditional society where men are still seen as the major providers within the family, where the tasks related to the care of children and other family dependants still rely predominantly on women, where employers tend to prefer extensive hours of work and where predominantly feminine professions are less valued than predominantly masculine professions. Also, despite being considered an open country where important communities from other ethnicity, other religious beliefs or other races are welcomed to live and work, the fact remains that people from those groups are more vulnerable to discrimination.

An example of these practical difficulties is the gender pay gap, as shown in available data: the more recent survey published by the CITE – '*Comissão para a Igualdade no Trabalho e no Emprego* ('Gender Equality Agency in the Field of Employment') and relating to 2020[4] indicates that the gender pay gap is still high (14.0 % when considering basic salary, and 17,1 % when considering the earning capacity), and that the pay gap is more severe in higher positions (25,5 % in favour of men, when considering only the basic salary, and 26,5, when considering the total earning capacity) [5] despite the fact that women have better qualifications than men.[6] Another example is the issue of access to decision making positions,

[4] The more recent general report of the CITE ('Relatório sobre o Progresso da Igualdade entre Homens e Mulheres 2020' – 'Report on the Progress of Equality between Men and Women 2020') relates to 2020 and is available at: https://cite.gov.pt/documents/14333/137018/Relat_Lei10_2020.pdf/cbd12a55-f152-43bb-abf5-03f2ee7f0c28. This Report will be mentioned hereafter as *CITE 2020 Report.*

[5] *CITE 2020 Report*, pp. 49-50.

[6] *CITE 2020 Report*, p. 24. In Portugal the number of women with a graduation degree is consistently higher in recent years than the number of men.

where the legislation on binding quota in favor of the under-representative sex, which is women (quota for the elections for the National Parliament and regional and elected boards[7], quota for the boards of public companies and of private listed companies[8] and for highly qualified public officials[9]) was absolutely essential to increase the number of women in those forums.

Another problem of the Portuguese legal system is that the protective measures and benefits inscribed in the law are not always financially supported by the State, so these measures are not taken in practice. One simple example of this situation concerns the payment of paternity leave: when this leave was not paid, it was not taken by the fathers, despite being a mandatory leave; now that it gives right to a social security allowance that corresponds to the medium salary of the worker, 72,1% of the fathers enjoy the leave (this percentage relates to 2020)[10], thus demonstrating that the loss of the salary was damaging the practical implementation of a measure intended to promote gender equality, throughout a more balanced reconciliation of family and professional life.

Finally, the deficient monitoring of the practical implementation of the measures in the area of non-discrimination, by the authorities, is also worth mentioning.

As a conclusion to this point, we would say that there is of course still room for further developments in the field of anti-discrimination law, to be initiated at EU level or at national level, but it would more important to focus on the practical implementation of the measures that are already in force.

a.

As regards employment relations in the private sector, the issue of working time is dealt with at national level by Articles 197 *et seq.* of the Labour Code. As regards employment relations in the public sector, working time provisions are inscribed in Articles 101 *et seq.* of Law No. 34/2014, of 25 June ("Lei Geral do Trabalho em Funções Públicas" – "General Law for Public Servants"[11]), and in more specific legislation, applicable to specific categories of public servants. Aside some minor differences (the more significant one being the maximum number of working hours per week, which is more favourable for public servants than for private employees – 35 versus 40 hours per week), the rules applicable in both sectors are quite similar.

[7] Lei Orgânica No. 3/2006, of 21 August 2006 (known as 'Parity Law'), with the changes introduced by Lei Orgânica No. 1/2017, of 29 March 2017, and by Lei Orgânica No. 1/2019, of 2 May 2019.

[8] Law No. 62/2017, of 1 August 2017.

[9] Law No. 26/2019, of 28 March 2019.

[10] *CITE Report 2020*, pp. 88-89.

[11] This a rough and non-official translation of the author.

Since the Portuguese legislation in relation to working time arrangements and working time patterns complies with EU Law and is in fact much more developed and, in several aspects, more protective than EU law in this respect, national case law relies mostly in domestic legal provisions rather than in EU legal provisions or case law, and the EU acquis in this area is not usually invoked before national courts.

Nevertheless, EU law (especially Directive 2003/88), has had an impact on the Portuguese legal system in this area, especially for the purpose of clarifying some concepts attached to working time.

b.

I. Platform work is regulated in Portugal only as regards one specific situation: platform drivers carrying persons (e.g., not platform drivers in general nor for the purpose of delivery of goods and other services). This piece of legislation is Law No. 45/2018, of 10 August, that is prior to the EU Directive Proposal on this subject.

Under this piece of legislation, only legal entities are able to register at the digital platform as "platform operators" ("operador de TVDE"), thus establishing a service contract with the digital platform (Uber or similar platform). Platform workers as such (e.g. natural persons driving the cars) will then carry their activity under a service contract or under an employment contract with the legal entity that is registered at the platform (e.g. the "platform operator") and not directly with the platform. In this sense, employment or service relations related to these digital platforms involve not three entities (the owner of the platform, the driver and the costumer) but four entities (the owner of the platform, the platform operator, the driver and the costumer).

This legal system is very criticized by some sectors, not only because of its unjustified complexity, but also because it has led thousands of platform drivers that were already performing their activity as natural persons directly registered at the platforms to create a legal entity for that purpose, that, in most cases, has only one worker, e.g. the same driver . On the other hand, in this system, the digital platforms can never be recognized as employers with the inherent responsibilities because they contract with a legal entity, and, under the Labour Code, only natural persons can be qualified as employees.

In short, this system favours the entity that owns the platform and does not protect platform drivers as such.

II. Social partners did not play a significant role as regards the establishment of platform drivers regulation. Only the taxi associations manifested rather firmly against the admission of Uber drivers in Portugal but did not succeed in their intent.

Presently a new bill is being discussed at the National Parliament that will introduce some changes in the Labour Code and apparently a new regulation about platform workers (not specifically on drivers but in general) may be included in this new legislation.

a.

In the area of employment, Portugal has dealt with conflicts between EU law and international law since the accession to the European Union, in 1985, and especial with conflicts between EU law and ILO Conventions, since Portugal is a founding member of the ILO and has ratified most of its Conventions.

When such conflict arises, the Convention in stake cease to be applied at national level and are formally denounced by the Portuguese State.

A classic example of such a conflict is ILO Convention nº 89, on the prohibition of nightwork for women in industry that Portugal had ratified long before acceding to the EU and that was considered contrary to EU Law gender equality principle. In time, that Convention, which had been ratified before the Constitution of 1976, also became contrary to our Constitution, so it was not applied in Portugal since 1976, but, to make things clear in EU context the Portuguese State formally denounced the Convention.

II. The European Social Charter is invoked from time to time by the legislator, in the preamble or at the formal justification of the bills, and also in case law.

Question 8

I. To the author's knowledge, the question of enlarging the range of action of the EU to social policy issues that are not yet covered, due to the Treaties restriction rules, has not been discussed in Portugal. However, it is important to say that in Portugal the issue of remuneration is extensively ruled by the law, and the freedom of association (both for workers and for employers) is established as a fundamental right in the Portuguese Constitution and also addressed extensively by the Labour Code, as well as the right to strike.

In the author's view, the enlargement of social policies of the EU in some of these areas might be delicate for a country like Portugal, for fear that the national acquis

in these areas, which is very protective, would be challenged, at least in some points – a good example is lock-out, which is admitted in some countries, at least implicitly allowed for by EU-law and strictly prohibited in Portugal, being qualified as a criminal offence (Article 57 (3) of the Constitution and Articles 544 (2) and 545 of the Labour Code).

II. In Portugal, EU social Law is viewed as being applicable mostly in employment relations, but also in self-employment, in areas like equality and non-discrimination (where the directives related to self-employment and to the access to and providing for goods and services have been transposed into domestic legislation).

In any case, if EU Law develops further as regards self-employment, including by extending some provisions related to employment relations to self-employed persons, especially when they depend economically on the creditor of the provided services, this would not be a problem for Portugal, because national legislation already establishes specific rules for these persons and extends some provisions of the Labour Code to those situations.

Question 9

The author has no information on this topic.

Question 10

As indicated above in this Report, Portugal has a relatively modern Constitution (dating from 1976) that integrates a very complete set of fundamental rights of different nature: personal rights and liberties of all individuals, citizens' rights, specific rights of workers (related to employment, working conditions, dismissal, protection in involuntary dismissal, protection in professional hazards, reconciliation of family and working life, but also liberty to instate trade unions and workers councils at the companies, right to collective bargaining and right to strike – e.g. "individual" and "collective" rights of workers, as already indicated) and social and economic rights, concerning private propriety and private businesses, family, education, health or social security, among others.

All the provisions of the Constitution instating these fundamental rights are binding and rank at the highest position in the Portuguese legal system, therefore influencing the whole legal system, as already indicated. But some of them are self-executing and have an horizontal effect (in the sense that they can be directly invoked not only against the State but also against the other party in a private relationship), while others are addressed to the State and not self-executing.

All the rights inscribed in the ECFR (mainly in the "Solidarity" section) are also inscribed in the Portuguese Constitution in one of the above mentioned categories of fundamental rights. This means that in practise there is no need to call upon the Charter and the problems listed in the questions above do not raise in Portugal in the context of the Charter but raise and are discussed directly in the context of the fundamental rights and principles inscribed in the Portuguese Constitution.

In any case, should there be an issue when the ECFR is directly called-upon, its provisions would rank at the same level or immediately below the Portuguese Constitution (there is a discussion among academics on this specific point), but certainly above ordinary law, according to the rule established in Article 8 of the Portuguese Constitution. And the nature of the principle in stake and to what extent it could be applied, would certainly be discussed as principles and fundamental rights of the Portuguese Constitution are.

Question 11

Public procurement rules are in fact used to foster social rights here and there, especially throughout the imposing of sanctions to those who do not comply with specific rights. For instance, if a company does not comply with this or that rule, it may be left out from a public contract or contest, or may lose a public benefit or be considered unable to apply for such benefit, or may be subjected to a certain penalty.

In general, these sort of provisions are directly imposed by the law. But some companies (especially bigger companies) adopt internal codes of conduct for several purposes or adopt internal plans to achieve determinate social goals. In other cases, the adoption of such codes of conduct or internal plans by the companies is imposed by the law: for instance, all companies with seven or more workers must adopt a code of conduct regarding harassment practices (Article 127 (1) (k) of the Labour Code); and the companies where a salary gap between man and women is detected by the Labour Inspection Services, must establish an equality plan that is implemented under close public monitoring (Article 5 *et seq.* of Law No. 60/2018, of 21 August, on equal pay).

a.

The author has no knowledge of transnational collective agreements concluded by national firms.

The main obstacles that a transnational agreement would face *vis a vis* the national legal system regard the legitimacy of the parties and the legal conditions for its application.

On the one hand, under the Labour Code, a collective agreement must be concluded by a regular trade union, that can be of any level (union, union federation, or union confederation) and that can also be a member of an international trade union. But the union must have its by-laws registered in Portugal to be recognized as an adequate partner of the collective agreement (Article 2 and Article 447 of the Labour Code). And the same rule applies to the other party of the collective agreement that is an employers' association, except in the case of collective agreements concluded at company level, that can be signed directly by the employer. So, in the event of transnational collective agreements some legitimacy problems can arise.

On the other hand, to be qualified as a source of law and to enter into force, collective agreements must follow a procedure of formal deposit at the Labour Ministry and have to be published in a Portuguese official journal ("Boletim do Trabalho e Emprego") (Article 494 and Article 519 pf the Labour Code). Again, these formal procedures may be very difficult to apply to transnational collective agreements.

In short, the legal provisions in the area of collective bargaining are conceived for collective agreements concluded at national level and between national trade unions and national employers or national employers' associations.

b., c. and d.

As regards these last questions, civil or criminal claims for violations of social rights that have taken place abroad would be difficult to admit, but class actions are allowed for the defence of collective interests and rights.

Finally, national law does not require specific due diligence in relation to social rights inside the companies, aside from the compulsory codes of conduct and plans intended to pursuit determinate social goals that were already mentioned above, and that also involve prior due diligence to a certain extent.

Question 12

The author has no information on this topic.

Question 13

The author has no information on this topic.

Question 14

Most national developments in the area of fundamental social rights are closely linked to the values of democracy and the rule of law, especially because Portugal lived under a dictatorship from 1927 until 1974, and the great development of fundamental social rights happened after the end of that period and under the umbrella of the first democratic Constitution (the Constitution of 1976), that is still in force.

But, since the Portuguese Constitution treats those issues in a very extensive way, as already indicated, it is fair to say that in Portugal the major legal reference for fundamental rights is the Constitution and not necessarily the European Union.

Question 15

Yes.

ROMANIA

Gabriel Liviu Ispas[1]

Question 1

a) Equal treatment is respected at national legislative level, with no qualitative or quantitative limitations between different European workers. In practice, this is however difficult to achieve, as long as Romania has the largest community of active citizens carrying out gainful activities in other states of the Union, with over 3 million people working abroad. Both the legislative system and the judicial system are really concerned about equal treatment and the rights of workers regardless of their nationality. At the political and media level, there is more concern about how these norms are respected in other states than about the situation in Romania. Including during the pandemic, when the free movement of people was put under restrictive measures, several contingents of Romanian workers were placed in other countries, especially in Germany, for gainful activities in Germany[2]. Both the public opinion and the authorities in the two states were warned and took measures regarding the observance of the medical rights of those at work, but also regarding the legality and effectiveness of employment, as well as aspects regarding social insurance and how migrant workers benefit from them.

b) There are no differences in treatment between European citizens, regardless of whether they are working or economically inactive.

Question 2

a) There is no opposition, neither at the administrative level nor at the social or political level regarding the positioning of the Court of Justice towards the state's right to refuse social grants to economically inactive European citizens who are not looking for a job, except in extreme emergency situations. We could say that Romania is one of the states of origin for many people who move within the Union, without having the intention

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[2] Ispas Gabriel Liviu, *The free movement of workers during a state of emergency*, Proceedings of the International Conference of Law, European Studies and International Relations, Romanian Law, 30 years after the collapse of communism, 8th Edition, May 15, 2020, Bucharest, ISSN 2668-0203, pp. 39-47.

of carrying out gainful activities. At the national level, in collaboration with the authorities of other states, mechanisms are identified to offer unemployed nationals the possibility of vocational training or access to the educational system (especially since those who do not have an occupation are people who left school early).

b) In Romania there is no such opposition; at the administrative, political, but also social level there being a majority opinion in the sense that the state in which the parent works is responsible for paying allowances for minor children, even if they do not live in that state. The Court's decision of June 16, 2022, pronounced in case C-328/20, shows, in recital 113, that "In the light of all the foregoing, it must be held that:
   - by establishing the adjustment mechanism applicable to family allowances and the child tax credit for workers whose children reside permanently in another Member State, the Republic of Austria has failed to fulfil its obligations under Articles 4 and 67 of Regulation No 883/2004 and under Article 7(2) of Regulation No 492/2011; and
   - by establishing an adjustment mechanism applicable to the Family Bonus Plus, the sole earner's allowance, the single parent's allowance and the tax credit for maintenance payments, for migrant workers whose children reside permanently in another Member State, the Republic of Austria has failed to fulfil its obligations under Article 7(2) of Regulation No 492/2011."[3]

Question 3

a) The labour market in Romania was affected by the legal migration of citizens to other states of the European Union. Therefore, employers turned to workers from other Member States, but also to workers from non-member States. If in 2019 there were approximately 50,000 foreign workers employed in Romania, in June 2022 over 84,000 foreign citizens were employed. As the salary level is low, at the bottom of the European statistics, the labour market in Romania has become less and less attractive for European citizens. If in 2019 the top 10 countries of origin of workers were Italy, France, Hungary, Greece, with a total of over 8,000 citizens, in 2022, only Italy remains in the top 10 countries of origin, with approximately 3,500 citizens. Romania has become attractive for non-EU

[3] Judgment of June 16, 2022, Case C-328/20, ECLI:EU:C:2022:468, https: //curia.europa.eu/juris/document/document.jsf?docid=260986&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=RO&cid=11193820 viewed on 24.08.2022, 2.30 p.m

countries, especially Turkey, Nepal, Sri Lanka, the Republic of Moldova and Ukraine, over 80% of the number of foreign employees coming from outside the European Union. Most workers are active in construction, manufacturing and service industries, but the labour market has become attractive for European citizens especially in highly skilled fields (IT&C, scientific activities, but also administrative support activities).[4] There is a genuine competition for the identification of labour force, especially in the context of the completion of the Brexit process[5], at the level of 2021 there is a decision to approve a quota of workers from outside the Union space of 50,000 people, and for the year 2022 the Government has approved contingents of workers of up to 100,000 citizens. These quotas are approved by the Government's decision, after the procedures for hiring citizens of the Union and the European Economic Area have been completed.

b) In Romania, there is a debate, often devoid of scientific substance, regarding employment from the perspective of identifying some solutions to make it attractive for Romanian citizens who work in the Union space to return to the country as employees. The debate often has political-nationalist accents suggesting that migration is not beneficial for citizens or the national economy, and the concept of "fair movement" is not developed in public debates, being only marginally presented in scientific debates.

c) Employment in critical occupations (in healthcare, IT&C, top engineering) is under constant government and university scrutiny, and the concern for filling positions with skilled employees is real. There have been a series of discussions in the public space, usually initiated by government representatives, regarding how the university education system should be rethought, in order to ensure quality human resources for employability in Romania. A special discussion has been held in recent years regarding the migration of young medical school graduates, especially in relation to the conditioning of the financing of university spots by the state on an obligation to remain employed in Romania for a certain period of time. The talks have not reached a conclusion, mainly because there has been a warning from experts about the risk of infringing the free movement of workers as part of the European Union's internal market. There is a preoccupation to rethink the freedom of movement at European level, but there is no outline of a direction of action and no principles in mind

[4] https://cursdeguvernare.ro/analiza-angajatii-straini-din-romania-o-evolutie-pe-ultimii-ani-cati-de-unde-in-ce-domenii.html , viewed on 26.08.2022, 10.30 a.m

[5] Ispas Gabriel Liviu, The Brexit consequences on the European single market, Juridical Tribune, Volume no. 10, Issue 1, March, 2020, http://tribunajuridica.eu/arhiva/anul10v1.html

are exposed. The debate is rather emotional, being influenced by the electoral cycles and the issues on the public agenda. The most important sectors in which the rethinking of free movement is needed are medicine (doctors, nurses with higher education), industry (especially the nuclear electric component, car construction, energy, electrotechnics).

Question 4

a) Immediately after the integration into the European Union, Romania faced a strong migration of the workforce to the Member countries. At the level of 2022, Romania has the largest community working outside the state of origin, of all the States of the Union, with over 3 million citizens. All sectors of activity were affected by migration, especially construction, healthcare, agriculture and industry.

b) At the national level, there are no legal mechanisms introduced to stop the free movement of workers. However, there is a debate about how education should be financed in order to achieve a true coordination with the needs of the labour market. In Romania, compulsory education is free, being fully financed by the state in public institutions, respectively co-financed for private education. Every year, the Romanian state finances over 60,000 places in higher education, undergraduate studies, over 30,000 places in master's programs, respectively over 2,000 places in doctoral studies. The debate tends to condition access to state-funded places either by taking up employment for a certain period of time at national level, or by reimbursing the costs paid by the state for university education tuition. The national debates are part of the European theme, to protect the labour market, not to affect family life, to control unemployment without placing restrictive conditions on emigration or employment of citizens from other member states.

c) At the national level, there are no cases in which the compatibility of a rule restricting the right to movement with Union law can be questioned. The administrative authorities have not limited the right to seek a job outside the state by legislative measures.

Question 5

a) Law no. 16/2017 regarding the posting of employees in the framework of the provision of transnational services, published in the Official Gazette of Romania, Part I, no. 196 of March 21, 2017 was amended and completed for

the transposition of the directive, by Law 172/2020. Thus, in article 1, it is specified:

"(2) The provisions of this law aim at guaranteeing an adequate level of protection of seconded employees in the provision of transnational services, in particular ensuring compliance with the application of employment clauses and conditions and the protection of employees' health and safety at work, provided for by national legislation."
Next, the legislator establishes: "(2^1) The provisions of this law facilitate the exercise of the freedom to provide services for service providers, to promote a climate of fair competition between them and to support the functioning of the internal market." And the notion of posted employee is defined as follows: "c) employee posted from the territory of Romania - the employee of an employer established on the territory of Romania, who, for a limited period of time, but not more than 24 months, according to art. 12 of Regulation (EC) no. 883/2004 of April 29, 2004 on the coordination of social security systems, work on the territory of a member state, other than the one where the employer is based provided for in Article 3 b), or on the territory of the Swiss Confederation, during the execution of the contract concluded with the employer from the other member state, as provided for in Article 5 (2), in the framework of the provision of transnational services;
The law does not provide for exemptions from the application of the principle of equal pay for equal work, and the sectors of activity do not benefit from legal exemptions or dispensations.

b) **Case C-301/21** is pending before the CJEU[6]**,** in which **the Alba Iulia Court of Appeal requested the interpretation of the provisions of Directive 2000/78/EC** creating a general framework in favor of equal treatment in terms of placement in work and employment, especially of Article 9 (1), Article 2 (1) and (2) and Article 3 (1) (c) the final sentence thereof, as well as the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union. In this case, written observations were made, awaiting the conclusions of the Advocate General and the Court's decision.

Even if there is no incidence by reference to the mentioned directive, which Romania has transposed, and no actions are registered on the part of the CJEU with this object, there is a concern in the field of transport regarding the mobility package, established by Directive 2020/1057.[7] Romania is an

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[6] https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:62021CN0301&from=EN viewed on 30.08.2022, at 16:20

[7] https://www.etf-europe.org/etf-launches-mobility-package-enforcement-campaign/ , viewed on 22.08.2022, 1.30 p.m

intervener in several cases pending before the CJEU regarding the annulment of the directive.[8]

We show that Romanian citizens are, as a rule, in the situation of working in other states, or of being posted in other states, so far there are not many incident situations in which citizens employed in other states are posted in Romania.

Question 6

a) At the Romanian level, there is no case-law opposing the freedom of establishment or the right to run a business to national or European social law.

b) The right to strike is established in the labour legislation, without attempting to position it in relation to the freedoms of the internal market. The Romanian state, as a social state, recognizes and respects the right to strike, and the limitations of the right to strike are related to the provision of critical services for the state (especially in medical services, transport, ensuring the functioning of national security domains)

Question 7

a) In Romania, there is primary legislation on anti-discrimination rules, regardless of their form and nature. In order to establish an independent body, the National Council for Combating Discrimination was established, a state authority in the field of discrimination, autonomous, with legal personality, under parliamentary control and guarantor of the respect and application of the principle of non-discrimination.[9] Romania has no cases before the CJEU related to discrimination on religious grounds, but it intervened in support of the Commission, in Case C-328/2020, in which the judgment was pronounced on June 16, 2022.[10] There is no impact of the CJEU rulings on religious discrimination at the national level, the legal regulations being comprehensive in the matter of ensuring equal treatment, regardless of the religious leaning. In addition, being an offering labour market especially for non-member states, the religious diversity of those who carry out a gainful activity being very high, in a country where the majority of the population is of the Christian Orthodox religion. At this time, we have not identified a need to further develop the legal regulations regarding anti-discrimination policies.

[8] http://www.mae.ro/node/58443 , viewed on 22.08.2022, 2.30 p.m

[9] https://www.cncd.ro/ , viewed on 22.08.2022, 4.30 p.m

[10] https://curia.europa.eu/juris/document/document.jsf?text=&docid=260986&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=9187640 , viewed on 22.08.2022, 1.00 p.m

b) The labour legislation establishes the rules regarding the duration of work, the specific elements of Union law being adequately implemented. The regulation of working time is important, in particular, for those who work in construction, for those who work in restaurant-bar services, in IT, but also people who carry out their activity online, as a result of the evolution of the labour market after the COVID-19 pandemic period. Various cases were brought before the courts, starting from the actual payment for the working time performed, the limitation of the working time to no more than 48 hours/week, elements aimed at work standardization and possible increases for difficult working conditions. There are no reported hostile reactions to CJEU jurisprudence in this field of activity.

c) Working in the platform is possible, to be implemented by each individual employer. Especially in multinational companies such a system is implemented, in the public sector there are intentions to develop a work program. Those operating in such platforms are employees, not self-employed. At the institutional level, either unions or employee representatives are consulted on the implementation of these platforms.

d) At the legislative level, there is no positioning in the relationship between international and European regulations regarding labour law. There are no such conflicts, and the European Social Charter is invoked both by the litigants and by the court, in the judgments rendered.

Question 8

a) Romania has a well-defined social policy, and the needs for adaptation and modernization have been included in the National Recovery and Resilience Plan. However, in relation to workers' rights, the principle of equal pay for equal work should be discussed not only in employment relationships with the same employer, regardless of the employee's nationality, but also with the same employer, regardless of the state in which it operates. At the European level, a debate is needed on how the standard of living, respectively the salary level, can be standardized at the level of the Member States, in the policies regarding the internal market. Related to the powers assigned to the Union[11], we believe that it is worth considering the harmonization of the right to strike in order to prevent brutal interventions by the public apparatus against employees.

[11] Gabriel Liviu ISPAS, Daniela PANC, *Drept instituțional al Uniunii Europene (Institutional law of the European Union)*, Hamangiu Publishing House, 2021, second edition, revised and supplemented, ISBN 978-606-27-1730-8- , p. 88-102

b) Union legislation is applied in accordance with the principle of attribution of powers, for each category of beneficiaries, separately. Regulations targeting workers are applicable to employment relationships in all their complexity, and rules relating to the service market or self-employment apply accordingly.

Question 9

a) Romania, like all Member States, participates in the development of the economic union, as an extension of the internal market, but is not yet part of the single monetary system. According to the analyses of the European Central Bank, the possibility of Romania joining the euro currency can materialize in 2025 at the earliest. The Government in general and the ministry of labour in particular, outline their policies in accordance with the country recommendations and the specific elements of the European Semester. The impact is in the sense of strengthening the regulatory component, including through legislative harmonization. However, in Romania there is an important category of people who are socially assisted, which causes a constant concern for national policies in social matters.

b) We believe that, before the European social policy is part of the EMU, it is necessary to complete the process of switching to the euro currency for all Member States. It is illusory, in our opinion, to develop EMU with a highly complicated, problematic area, with a limited competence granted to the Union, before completing the process of adopting the single monetary system, which began more than 30 years ago. This proposal could be beneficial in relation to legislative harmonization, but it will not produce positive consequences for citizens if it is not correlated with rules that bring the minimum wage closer to the economy throughout the Union. The economic disparities between the regions of the Union cannot be ignored, and policies for balanced development and accelerated support for poor regions or those with a poor economy should precede this objective.

Question 10

a) There are no differences in approach between social rights and other fundamental rights in cases tried in national courts;

b) These are fully effective, in the sense of the terminology of the relevant jurisprudence of the Court of Justice of the European Union. We show that the courts, in justifying their decisions, are based on the effective norms of

the charter[12]. For example, in a case pending before it, the Court of Appeal of Iași issued Decision 906/2021 in a dispute concerning monetary rights, and also considered the following elements: "*The provisions of Article 7 of Directive 2003/88/EC establish the obligation of the Member States to take the necessary measures for any worker to benefit from a paid annual leave of at least four weeks in accordance with the conditions for obtaining and granting leave provided by legislation and national practices; the minimum period of paid annual leave cannot be replaced by a financial allowance, unless the employment relationship ends. In its jurisprudence, the Court of Justice showed that "the right of every worker to paid annual leave must be considered a principle of social community law of particular importance that cannot be derogated from and whose implementation by the competent national authorities can only be carried out within the limits expressly provided for in Council Directive 93/104/EC of November 23, 1993 on certain aspects of the organization of working time" (Related cases C-350/2006 and C-520/06, JUDGMENT OF THE COURT of 20.01.2009 Gerhard Schultz Hoff (C 350/06) v. Deutsche Rentenversicherung Bund and Stringer and others (C 520/06) v. Her Majesty's Revenue and Customs, paragraph 21). „The right to annual leave, enshrined in Article 31 paragraph (2) of the Charter of Fundamental Rights of the European Union and in Article 7 of Directive 2003/88, has a double purpose, namely to allow the worker, on the one hand, to rest following the performance of the tasks assigned to him under his employment contract and, on the other hand, to have a period of relaxation and recreation" (Case C 277/08, JUDGMENT OF THE COURT of September 10, 2009, in the proceedings Francisco Vicente Pereda v. Madrid Movilidad SA).*"[13]

c) All the social rights provided for in the Charter are considered by the courts to be principles that must be taken into account in the settlement of disputes (see letter b). In a dispute pending before the Court of Appeal of Iași, the court had, in its reasoning, the following elements: "According to Article 31 (2) of the Charter of Fundamental Rights of the European Union „*Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave." Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of November 4, 2003 regarding certain aspects of the organization of working time establishes the obligation of*

[12] For details see Gabriel Liviu ISPAS, Daniela PANC, *Organizarea justiției în Uniunea Europeană (The Organization of justice in the European Union)*, Hamangiu Publishing House, 2021, ISBN 978-606-27-1796-4,

[13] Decision 906 of November 16, 2021 issued by the Iași Court of Appeal, unpublished, but which can be found at https://sintact.ro/#/jurisprudence/535844555/1/decizie-nr-906-2021-din-16-nov-2021-curtea-de-apel-iasi-drepturi-banesti-litigii-de-munca?keyword=carta%20drepturilor%20sociale%20art.%2052 , viewed on 27.08.2022, at 15.30

member states to take the necessary measures for every worker to benefit from a paid annual leave of at least four weeks in accordance with the conditions for obtaining and granting leave provided by national laws and practices; the minimum period of paid annual leave cannot be replaced by a financial allowance, unless the employment relationship ends. In the interpretation of these provisions, according to a constant jurisprudence of the Court of Justice of the European Union, the right of each worker to paid annual leave must be considered a principle of the social law of the Union of particular importance, which cannot be derogated from and whose implementation by the competent national authorities can only be carried out within the limits expressly provided by Directive 2003/88 (see in this regard the Judgment of 12 June 2014, Bollacke, C-118/13, EU:C:2014:1755, point 15 and the cited jurisprudence). Also, out of concern to guarantee compliance with this fundamental right enshrined in Union law, Article 7 of Directive 2003/88 cannot be subject to a restrictive interpretation, to the detriment of the rights enjoyed by the worker under it (see in this regard the Judgment of 12 June 2014, Bollacke, C-118/13, EU:C:2014:1755, point 22 and the cited jurisprudence). (...) Providing that a minimum period of paid annual leave cannot be replaced by a financial allowance, except on termination of employment, article 7 paragraph (2) of Directive 2003/88 aims in particular to ensure the possibility of the worker to benefit from an effective rest, out of a concern for the effective protection of his safety and health (see in this regard the Judgment of 16 March 2006, Robinson-Steele and others, C-131/04 and C-257/04, EU:C:2006:177, point 60 and the cited jurisprudence).(...) If the employment relationship ends, it is no longer possible to actually take the paid annual leave to which the worker was entitled. In order to avoid the situation where, due to this impossibility, the worker cannot benefit from this right, even in pecuniary form, Article 7(2) of Directive 2003/88 provides that the worker is entitled to a financial allowance for unused annual leave days (see in this regard Judgment of 20 January 2009, Schultz-Hoff and others, C-350/06 and C-520/06, EU:C:2009:18, paragraph 56, Judgment of 12 June 2014, Bollacke, C -118/13, EU:C:2014:1755, point 17, as well as the Judgment of 20 July 2016, Maschek, C-341/15, EU:C:2016:576, point 27). This provision does not impose any condition for the birth of the right to a financial allowance, apart from the one related, on the one hand, to the termination of the employment relationship and, on the other hand, to the fact that the worker did not take the entire paid annual leave to which he was entitled on the date of termination of this relationship (see in this regard the Judgment of 12 June 2014, Bollacke, C-118/13, EU:C:2014:1755, point 23)" -(Related cases C-569/16 and C-570/16, Stadt Wuppertal v. M____ E_____ Bauer (C-569/16) , Volker Willmeroth v.

M______ Broßonn (C-570/16), The Court's decision of November 6, 2018 (Grand Chamber), excerpted paragraphs 38-45). Consequently, according to the mandatory interpretation made by the Court of Justice of the European Union, it must be concluded that the right to financial compensation for unused leave has an autonomous character and its own individuality, arising only at the termination of the employment relationship."[14]

d) The application of the provisions of the Charter is carried out in the sense of the interpretations given by the Court of Justice of the Union; at the national level there are no legislative actions or court decisions that limit or remove its legal force.

e) No such actions, in horizontal disputes between individual litigants, have been identified.

Question 11

a) Public procurement rules are used exclusively for contracts for the procurement of goods and services according to the legislation. Regarding services, public procurement rules are used when independent services are selected, namely accounting/management services/legal representation services.

b) There are approved codes of conduct in both the public and private sectors. In the public sector, both regarding public office and contractual positions, there are norms of conduct. In the private sector, there are rules of conduct adopted at the level of each corporation. To the extent that there is concern at the management level, these rules of conduct have a positive effect, both regarding the employees' activities and regarding their rights related to the employer, or in the functional relations between them. The elements regarding the European Works Council are also applicable in Romania.

c) There are concerns about this and the European Federation of Public Service Union has decided that companies operating in the European gas and electricity industry should adhere to the IMO's core international labour conventions.[15] The collective agreements transposed into the

[14] Decision 14 of January 19, 2021 issued by the Iași Court of Appeal, unpublished, but which can be found at https://sintact.ro/#/jurisprudence/534902295/1/decizie-nr-14-2021-din-19-ian-2021-curtea-de-apel-iasi-drepturi-banesti-litigii-de-munca?keyword=carta%20drepturilor%20sociale%20art.%2052 , viewed on 28.08.2022, 9.00 AM

[15] https://www.epsu.org/sites/default/files/article/files/transnational_solidarity_adopted_RO.pdf, viewed on 28.08.2022, 5.30 p.m

directives are applied in Romania: parental leave[16], 1 part-time work[17], 2 fixed-term work.[18]

d) National courts admit civil or criminal cases, observing general, territorial and special jurisdiction. National courts specialized in labour law operate on the basis of legal regulations, including regarding the posting of workers, respectively regarding the rights of norms that have foreign element.

e) Collective actions are possible as there are many cases, in which, as a rule, unions have initiated collective litigation for the violation of employees' rights.

f) Both the labour legislation and the administrative code provide for the diligence of the authorities in order to protect social rights. The obligations refer, without limitation, to the facilitation of work for people with disabilities, the integration of employees, the granting of rights to pregnant people, the reintegration of people returning after maternal/paternal leave or after extended medical leave, the professional training of employees, the personalization of the activity schedule.

Question 12

Combating climate change is not a priority topic in the public debate in Romania. In the context of the Commission's priorities for the period 2019-2024, Romania adapted its development intentions by developing the digital, circular economy, and by developing green policies. The National Recovery and Resilience Plan includes these concerns and assumed benchmarks. However, the decision of the authorities to close certain coal mines was not viewed positively by the population of the region, especially in the context where the economic offer is precarious and the area is poorly developed. Negative reactions also appeared after the increase in energy and oil prices, with public opinion believing that green policy is wrong as long as it affects citizens' jobs. Without being a widely debated topic, we believe that initiatives to combat climate change must be concurrent with the identification of new jobs and adequate professional training for those who need to re-profile themselves occupationally.

[16] Council Directive 96/34/EC of June 3, 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and CES, Council Directive 2010/18/EU of March 8, 2010

[17] Council Directive 97/81/EC of 15 December 1997 on the framework agreement on part-time work

[18] Council Directive 1999/70/EC of 28 June 1999 on the framework agreement on fixed-term work

Question 13

In the education system, there is a developed curriculum that promotes European values and citizenship. Elements of familiarization are present since kindergarten, especially in the presentation of important days for the European Union. The values of Article 2 TEU are developed in civic education courses, and the basic elements of European law are considered in the legal education courses. In Romania, the level of trust in the European Union is very high, and the voices that challenge European values are isolated.

Question 14

All elements concerning fundamental rights, regardless of whether they are general or social, are perceived as specific elements of the rule of law, and the rules of law are applied without discrimination. Equality between women and men, although well regulated legally, is still far from being effective, especially in poor communities in underdeveloped regions. Exploitation of children through work by parents, including the determination of school dropout, remain issues on which Romania still has to act in order to reach an acceptable level at the European level. In this sense, the aspects of education, but also of continuous training and rethinking of the social aid system must remain a priority for the public authorities.

Question 15

In public discourse, especially in academic and political discourse, the Union is perceived as a social union. Even if the social policy is a recent one for the Union, the Treaty of Nice being the one that lays the foundations of the Charter of Fundamental Social Rights, the Treaty of Lisbon gives the Charter the same legal status as the Treaties of the Union. The implementation of social policies, based on the Europe 2020 Strategy and the European Pillar of Social Rights-2025, will be based on the three general objectives: the balance between family life and professional life, effective social protection and uniform working conditions. In the context where, at the level of public perception, along with war and medical pandemics, the challenges that the Union and the States will face are related to the migration of workers, to social inequalities in various regions of the Union, respectively to professional life and reconversion, but also to the increase in unemployment, it is clear that solutions must be identified for legislative harmonization, but also for balancing the standard of living.

Starting from the provisions of Article 2 TEU, it is necessary for the Union and the States to identify solutions that are closer to the citizens' interest. Conferring a constitutional-type regime for a European social union is a desired goal that will be reached over time. At this moment, at least in Romania, there is no tendency to propose an expansion of the Union's powers and, even if this were to happen, observing the slippages from the rules of the rule of law in some European states, combined with a nationalist discourse, in which the States should regain the authority and powers ceded to the Union, it is unlikely that the approach will have the desired finality.

As stated in the national doctrine, "to be credible and perceived by Europeans as a reality, the European social model must have concrete results, it must be consistent. Although social Europe already exists, although the ESM is a factor of integration and cohesion, Europeans having the feeling of integration in the single market, its achievements in this area are not very obvious. The focus could be on...initiating a concrete project-framework to remove the fear of job loss; the regulation of a European minimum income indexed annually to avoid social dumping;...ESM must take globalization into account in order to capitalize more effectively on Europe's strengths."[19]

[19] Claudia Ana Moarcăș, Dreptul social european în practică (European social law in practice), Hamangiu Publishing House, 2019, p. 417-418.

SLOVENIA

Verena Rošic Feguš, Katarina Vatovec[1]

1. Equal treatment of EU mobile workers in the Slovenian legislation and case law

Equal treatment of EU mobile workers in the Republic of Slovenia (hereinafter Slovenia) is guaranteed by (i) Article 14 of the Constitution of the Republic of Slovenia (titled Equality before the law);[2] (ii) provisions of the Employment Relationships Act[3] and (iii) provisions of the Protection Against Discrimination Act.[4]

In Slovenia, everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political, or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance (Article 14 of the Constitution).[5] Discrimination and unequal treatment on the basis of any personal circumstances is prohibited also by the Employment Relationships Act. Namely, Article 6(2) demands employer's equal treatment in all aspects of employment relationship: equal treatment of job seekers in gaining employment; equal treatment of workers during employment relationship (by employment, promotion, training, education, remuneration and other income, absences from work, working conditions, working hours); and equal treatment by termination of an employment contract. The Employment Relationships Act prohibits direct and indirect discrimination.[6]

These general provisions are supplemented by sector specific measures demanding equal treatment in concrete sectors, e.g. the Public Employees Act prohibits discrimination and demands equal treatment in public sector.[7]

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[2] Constitution of the Republic of Slovenia (Official Gazette RS, No. 33/91-I et seq).

[3] Zakon o delovnih razmerjih (Official Gazette RS, No. 21/13 et seq).

4 Zakon o varstvu pred diskriminacijo (Official Gazette RS, No. 33/15). This Act derogated the Implementation of the Principle of Equal Treatment Act (Zakon o uresničevanju načela enakega obravnavanja) previously in force.

[5] For an analysis of this provision and the relevant case law of the Constitutional Court of the RS, see e.g. M. Avbelj, K. Vatovec, 'Article 14', *in* M. Avbelj (ed.), *Komentar Ustave Republike Slovenije, Del 1: Človekove pravice in temeljne svoboščine*, Nova Gorica, Nova univerza, Evropska pravna fakulteta, 2019, pp. 110–123.

[6] Article 6(3) of the Employment Relationships Act.

[7] Zakon o javnih uslužbencih (Official Gazette RS, No. 63/07 et seq). E.g. in Article 7 this Act embodies the principle of equal accessibility of workplace under equal conditions, whereas Article 27 demands equal treatment in employment tenders.

In accordance with Article 2(1) of the Protection Against Discrimination Act, also state and local authorities, bodies exercising public powers and legal or natural persons are bound to ensure protection against discrimination and equal treatment of all persons, especially in regard to:

- access to employment, self-employment and profession, including criteria and conditions for employment regardless of the type of activity and at all levels of employment, including career advancement;
- access to all types and levels of career orientation and consultation, professional and vocational training, additional vocational training and re-training, including work practice;
- employment conditions and working conditions, including termination of an employment contract and wages;
- membership and inclusion in collective organisations, including benefits provided by membership of such organisation;
- social protection, including social security and healthcare;
- social benefits;
- education;
- access to services publicly available, including apartments and supply thereof.

It derives from case law (search through case law database[8] in regard to prohibition of discrimination under Article 6 of the Employment Relationships Act) that courts are fully aware of the concept of equal treatment and EU workers' rights: any direct or indirect unequal treatment based on personal circumstances which is not objectively justified is sanctioned by employer's obligation to pay adequate compensation in accordance with Article 8 of the Employment Relationships Act.[9] Additionally, in the case of discriminatory actions or measures of the employer extraordinary dismissal by worker is possible (Article 111 of the Employment Relationships Act). Judicial protection due to discrimination is possible also in civil, criminal and administrative procedure, before offense authority or Constitutional Court. No case law however directly refers to the question of discrimination of EU mobile workers. Nevertheless, considering the standing point of Slovenian courts described above, general rules on prohibition of discrimination would apply.

[8] Search engine accessible at <www.sodnapraksa.si/ >, visited 10 August 2022.

[9] The same obligation is stressed in case law of Slovenian courts, e.g., VSRS, 6 July 2021, VIII Ips 14/2021, ECLI:SI:VSRS:2021:VIII.IPS.14.2021.

Personal scope of the prohibition of unequal treatment concerning employment and work is extended to certain categories of people performing work or services outside the scope of employment relationship. These are:

a) economically dependent workers (Articles 213 and 214 of the Employment Relationships Act), which can demand labour law protection in regard to equal treatment (Article 214(2) of the Employment Relationships Act; persons that are formally self-employed with concluded business contract with a single company (employer) from which they are economically dependent (at least 80% of their income comes from this source));

b) pensioners performing temporary work in accordance with Article 27a of the Labour Market Regulation Act[10] (the work is performed on the basis of contract of temporary work, provisions of labour law on prohibition of discrimination apply).

Principe of equal treatment applies also to vocational training (the Employment Relationships Act and the Protection Against Discrimination Act prohibit discrimination in all aspects of employment relationship, including vocational training and career advancement).

By its wording and scope legislative provisions do not discriminate non 'economically active' citizens, however their exercise of rights is in some cases more difficult (see Chapter 2).

2. Equal treatment in the domain of social security benefits

Social rights in Slovenia are granted on the basis of permanent residence and mostly dependent on employment status; most of the rights derive from mandatory payment of contributions in social security schemes (healthcare insurance, pension insurance, disability insurance coverage, unemployment insurance, occupational injuries insurance and parental protection insurance). When employed and insured in Slovenia, also EU migrant workers are included in social security schemes. EU migrant workers are thus generally assimilated with Slovenian nationals. Instead of permanent residence required to exercise social rights, an EU citizen aiming to reside in Slovenia shall obtain registration certificate of residence. Conditions for latter are: a) valid personal identity card or passport; b) adequate healthcare insurance; c) means of subsistence; d) certificate of employer regarding future employment, certificate of employment or performance of work, when employment already takes place, evidence of self-employment or performance of service if the purpose of residence is employment/

[10] Zakon o urejanju trga dela (Official Gazette RS, No. 80/10 et seq).

work/self-employment/performance of services; or certificate of registration of EU citizen as a job-seeker at the Unemployment Office if the purpose of registration is to find employment in Slovenia; or evidence of admission to certain education/training when purpose of registration is vocational training/education and the like; or evidence of family relationship if the purpose of registration is family reunification with a family member who is an EU citizen. If an EU citizen is employed/self-employed or performs services in Slovenia, evidence of healthcare insurance and means of subsistence is not necessary. The same applies for family member of Slovenian nationals (Articles 119-123 of the Foreigners Act).[11]

Although non-Slovenian nationals pay contributions into social security schemes in accordance with law, they are not always capable of exercising social rights deriving from such social security schemes. An example of such situation may be found in Article 72 of the Parental Protection and Family Benefits Act.[12] This provision determines that the right to child allowance is the right guaranteed to one of the parent or other person for a child under age of 18 with permanent or temporary residence in Slovenia who actually lives in Slovenia. Hence, only if actual residence of a child is in Slovenia, a parent (or another person) shall be entitled to social benefits – payment of child allowance in Slovenia. Such legislation is contrary to CJEU's case law[13] and provision of Article 67 of the Regulation 883/2004[14] determining that a person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his family members residing in another Member State, as if they were residing in the former Member State. The legislation therefore seems to imply that a Member State responsible for payment of child allowance is the Member State of actual residence of a child.[15] The mentioned legislation has not (yet) been challenged before Slovenian courts or the CJEU.

The search through databases of Slovenian scholarly articles or media publications found no results in regard to the question of the right of a Member State to refuse to grant social benefits to economically inactive EU mobile citizens. The same applies in regard to opposition for responsibility for paying child allowances.

[11] Zakon o tujcih (Official Gazette RS, No. 91/21 et seq).

[12] Zakon o starševskem varstvu in družinskih prejemkih (Official Gazette RS, No. 26/14 et seq).

[13] See CJEU Judgment of 16 June 2022, *Commission v Austria*, C-328/20, ECLI:EU:C:2022:468.

[14] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30. 4. 2004, et seq).

15 V. Leskošek. 'Migracije in dostop do socialnih pravic v EU in Sloveniji', *Dve domovini/Two Homelands*, No. 43, 2016, pp. 91-102.

3. Workers' mobility in Slovenia – characteristics and trends

3.1. Statistical data regarding workers from other Member States in Slovenia

Statistical data regarding number of mobile workers, their nationality, gender, age and type of activities are provided by the Statistical Office of the Republic of Slovenia.[16] At the time of writing Slovenia had 21,192 inhabitants from the EU Member States, which represented 12.3% of all inhabitants in Slovenia.[17]

In general, those coming to Slovenia for work may be divided into two large groups: 1) citizens of EU, Norway, Iceland and Liechtenstein; and 2) third-country nationals (non-EU nationals). Since 2002, the flow of active foreign citizens in Slovenia has been increasing. The most visible increase was between year 2006 and 2008, when 41,819 of active foreigners increased to 56,030 in year 2007 and to 68,269 in year 2008. Between 2008 and 2013, the flow changed slightly downwards, going into positive direction from 2013 on: from 4,537 in year 2012 to 10,382 active foreigners in year 2013. In year 2018, Slovenia had 89,704 active foreign workers, from which there was 74,237 of third-country nationals and 15,431 from EU Member States. The situation was similar in 2019-2022. At the time of writing, the newest data relate to May 2022, when the number of EU mobile workers in Slovenia was 16,750. In January 2022, the number of EU mobile workers was 16,202, gradually increasing to reach 16,709 EU mobile workers in April 2022. In year 2021, the number varied between 14,905 (January 2021) and 16,488 (December 2021).[18]

Statistical data for 2002-2018 show that third-country nationals represent far more numerous group of workers when compared with mobile workers from EU Member States: in the past EU mobile workers represented up to maximum 21.2% of all foreign workers in Slovenia. This share varied from 3.3% in 2004 (when Slovenia became a member of the EU), 4.5% in year 2005, 4.9% in year 2006, 6.5% in year 2007, 5.6% in year 2008, 5.9% in year 2009, 7.5% in year 2010, 8.4% in year 2011, 9.0% in year 2012, 20.7% in year 2013, 21.2% in year 2014, 21% in year 2015, 20.4% in year 2016, 19.1% in year 2017, and 17.2% in year 2018.[19]

Work active nationals from EU Member States are most often employed in manufacturing industry, construction, traffic and storage, trade, maintenance and repair of motor vehicles, professional, academic and technical activities, restaurants

[16] The Statistical Office of the Republic of Slovenia, <www.stat.si/StatWeb/en>, visited 2 August 2022.

[17] The number was similar in year 2021 (21,120). For details see, SiStat, <pxweb.stat.si/SiStatData/pxweb/sl/Data/Data/05E1014S.px/table/tableViewLayout2/>, visited 2 August 2022.

[18] See SiStat, <pxweb.stat.si/SiStatData/pxweb/sl/Data/Data/0700925S.px/table/tableViewLayout2/>, visited 2 August 2022.

[19] M. Sedmak et al., *Raziskava o potrebah na področju integracije delavcev iz drugih članic EU v Sloveniji: Končno poročilo*, Koper, Inštitut za družboslovne študije, 2019, p. 21.

and hotel activities and other services. Statistical data for year 2022 (January to May 2022) show that most EU mobile workers are employed in manufacturing industry (5,174 in January 2022, 5,237 in February 2022, 5,327 in March 2022, 5,389 in April, and 5,397 in May 2022), followed by construction activity (1,887 in January 2022, 1,907 in February 2022, 1,921 in March 2022, 1,922 in April 2022, and 1,901 in May 2022), and trade, maintenance and service of motor vehicles (between 1,630 and 1,639 between January 2022 and May 2022). In household activities and in public administration and defence, EU mobile workers are represented in a very small number (up to 20 workers in January to May 2022).[20]

Regarding the nationality of EU mobile workers, the structure and the number in the past varied in accordance with the enlargement of the EU. When the Republic of Croatia entered in the EU, workers working in Slovenia became EU mobile workers. Other mobile workers come from Bulgaria, Italy, Hungary, Romania, Slovakia and the UK (before Brexit). Other nationalities were represented in less than 200 workers in May 2019.[21]

3.2. Statistical data regarding lack of workforce in certain national industries

Each year Slovenian Employment Service performs a research *Occupational Barometer* (in Slovene *Poklicni barometer*). On the basis of annual data Slovenian Employment Service predict future state of labour market for the following year (the research predicts which occupations will have problems finding workforce, in which occupations there will be balance between offer and demand and which occupations will face lack of workforce). For year 2022, the researchers assessed that the lack of workforce will appear in 108 occupations (14 more than in 2021), in 51 occupations there will be balance between offer and demand, whereas 18 occupations will have less work than workers at disposal. Occupational Barometer for 2021 determines that the lack of workforce is and will be in 2022 in health care (on all levels), IT, education (schools), construction (all activities), traffic, storage and hotels and restaurants. In comparison to previous year, noticeable changes relate to education: for year 2022, the research predicts the lack of teachers in primary and high schools, advisory workers and childcare workers. Another curious change is the change in the category of legal experts: for year 2022, it is assumed that there will be the lack of legal experts (in the past there was less work than actual workers in this expertise).[22]

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[20] See SiStat, <pxweb.stat.si/SiStatData/pxweb/sl/Data/Data/0700925S.px/table/tableViewLayout2/>, visited 2 August 2022.

[21] M. Sedmak et al., 2019, pp. 24-25.

[22] Katerih kadrov bo primanjkovalo prihodnje leto (Zavod RS za zaposlovanje, 2021), <www.ess.gov.si/obvestila/obvestilo/katerih-kadrov-bo-primanjkovalo-prihodnje-leto>, visited 2 August 2022.

3.3. The question of 'fair movement' instead of 'free movement' in Slovenia

The issue of 'fair movement' instead of 'free movement' has not yet been addressed by academics, civil society or economic and politic leaders in Slovenia. At the time of writing, no discussions with regard to 'essential workers in critical occupations' and their freedom of movement were detected. The employment of EU citizens is assimilated with the employment of Slovenian nationals.

4. *Brain drain* phenomenon in Slovenia

4.1. Outflow of workers – statistical data

Annual statistical data of the Statistical Office of the Republic of Slovenia show that in year 2021 21,114 inhabitants have moved abroad, from which there was 6,443 women and 14,701 men. This is more than two years before when 17,745 (in 2020) and 15,106 (in 2019) people moved. Also in year 2019 and 2020, more men than women moved (in year 2019, 9,904 men and 5,202 women; in year 2020, 12,225 men and 5,520 women).[23] From people that have moved from Slovenia to another EU Member State (thus exercising their freedom of movement) 1,774 in year 2019 and 1,527 in year 2020 were active inhabitants, from which there was 1,485 in year 2019 and 1,299 in year 2020 employed inhabitants, whereas 289 in year 2019 and 228 in year 2020 were unemployed nationals moving to another EU Member State. In both cases, there were more men than women (see Table 1, Annex 1).

In accordance with the Employment Relationships Act, minimum employment age is 15 years (Article 21(1)). Research of age groups between 15 and 69 (general retirement age) show that in the last three years (2019-2021) migration from Slovenia is most often in age groups of 25-29 years, 30-34 years and 35-39 years (see Table 2, Annex 1).[24]

Considering people that have moved in year 2019 and year 2020 (data for year 2021 are not (yet) available), most of them had high school education (7,794 in year 2019 and 9,560 in year 2020), followed by primary or lower level of education (3,137 in year 2019 and 3,925 in year 2020).[25] People with higher levels of education moved the least (2,589 in year 2019 and 2,637 in year 2020). Statistical data for year 2019 and year 2020 show that most affected sectors are manufacturing industry,

[23] See SiStat, <pxweb.stat.si/SiStatData/pxweb/sl/Data/-/05N1002S.px/table/tableViewLayout2/>, visited 4 August 2022.

[24] There is no statistical data regarding age groups and country of migration (if immigrants moved to EU Member States or to third countries).

25 See SiStat, <pxweb.stat.si/SiStatData/pxweb/sl/Data/-/H146S.px/table/tableViewLayout2/>, visited 4 August 2022.

construction, health care, trade and maintenance and service of motor vehicles, education, professional, academic and technical activities and other professional activities.[26] There are no statistical data in relation to the type of education. Most people move from central Slovenia, followed by Drava region (*Podravska regija*; southwest region of Slovenia). The trend has been the same in the last three years.[27] Although certain regions are more affected than others are, this has not yet caused demographic problems.

4.2. National measures aimed at retaining certain types of workers

Beside activities in the scope of EU Youth Guarantee (in regard to which Slovenia adopted Youth Guarantee Implementation Plan for 2016-2020), certain national measures aim to retain certain types of workers after conclusion of their education, internship or specialisation.

Namely, the State Legal Exam Act prescribes compulsory internship as a prerequisite for state legal exam.[28] If an intern has performed internship as a person in an employment relationship at court or in the scope of education provided by the employer, such intern shall, after successfully passing bar exam, conclude an employment contract for appropriate position at the Court, State Prosecutors Office or Ministry of Justice. The duration of the employment contract shall be equal to the duration of an internship or shorter if so determined by the employer. The notice on obligation of conclusion of employment contract shall be served in 30 days after successful completion of bar exam, otherwise the intern is free from such obligation (Article 11a of the State Legal Exam Act). If the intern does not act in accordance with notice on conclusion of employment contract, he or she is obligated to return the costs of his education in the sum of gross income obtained in time of internship.

Another example is the Medical Services Act in the case of specialised doctors.[29] Specialisation in the scope of public healthcare network is financed by the budget. After conclusion of specialisation, specialised doctor shall conclude employment contract with provider of public healthcare network, otherwise he/she is obliged to return costs of his specialisation, except wages and other payments from the employment relationship. If such person is employed by a provider of public healthcare network for time shorter to duration of his specialisation, the obligation

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[26] See SiStat, <pxweb.stat.si/SiStatData/pxweb/sl/Data/-/05N3220S.px/table/tableViewLayout2/>, visited 4 August 2022.

[27] See SiStat, <pxweb.stat.si/SiStatData/pxweb/sl/Data/-/05N1042S.px/table/tableViewLayout2/>, visited 4 August 2022.

[28] Zakon o pravniškem državnem izpitu (Official Gazette RS, No. 83/03 et seq).

[29] Zakon o zdravniški službi (Official Gazette RS, No. 72/06 et seq).

to return costs is proportionate (Article 25 of the Medical Services Act).

Also in the case of certain grants or scholarships, compulsory conclusion of employment contract is prescribed (Article 81 of the Scholarship Act).[30]

Measures concerning the obligatory conclusion of employment contract of a judicial intern were challenged before the Constitutional Court in Case No. U-I-174/10, Up-944/10.[31] The Constitutional Court decided that such measures are compatible with the right to freely choose one's employment determined by Article 49(2) of the Constitution arguing that the challenged legislation 'is not unreasonable, because it enables an even distribution of burden between parties'.[32] Beside national law, the Constitutional Court mentioned the ILO Convention No. 95, however no reference was made to the EU law of free movement.

5. Posted workers and their status in Slovenian legislation

5.1. Transposition of the Directive 2018/957 into national law

Directive 2018/957 was transposed into Slovenian law by means of Act Amending the Transnational Provision of Services Act in 2021.[33] The amendment entered into force on 4 August 2021. Beside Directive 2018/957, the Act also implemented Directive 96/71 and Directive 2014/67 into national legal order.

The (future) purpose of Slovenian legislator is to adopt special Act regulating the status of workers posted to Slovenia. At the time of writing, such Act has not yet been proposed or adopted. By current state of affair, the principle of equal pay for equal work as manifested in the revised Article 3 of the Directive 2018/957 is implemented in Article 6 of the Act Amending the Transnational Provision of Services Act.

This Article amended Article 210 of the Employment Relationship Act.[34] The Article now reads as follows:

'(1) A worker, who has been posted to work temporarily in the Republic of Slovenia by a foreign employer on the basis of an employment contract in accordance with the foreign law, shall carry out work for a limited period in the Republic of

[30] Zakon o štipendiranju (Official Gazette RS, No. 56/13 et seq).

[31] USRS, 1 March 2012, U-I-174/10, Up-944/10, ECLI:SI:USRS:2012:U.I.174.10.

[32] Ibid., para. 16.

[33] Zakon o spremembah in dopolnitvah Zakona o čezmejnem izvajanju storitev (Official Gazette RS, No. 119/21).

[34] The Employment Relationships Act defines remuneration in Article 126 as remuneration for work carried out on the basis of an employment contract and composed of wage, which shall be paid in cash, and eventual other types of remuneration, if determined in a collective agreement.

Slovenia under the conditions laid down in regulations governing the work and employment of foreign citizens and transnational provision of services.

(2) An employer must ensure the worker referred to in the previous paragraph the rights according to the regulations of the Republic of Slovenia and according to the provisions of the branch collective agreement regulating working time, breaks and rests, night work, minimum annual leave, remuneration, employment contract between worker and employer – work agency, safety and health at work, special protection of workers and equal treatment, if these are more favourable to the worker.

(3) In case of temporary initial works, which are an integral part of the contract for the supply of goods and do not exceed eight working days and are carried out by skilled workers of the supplier, the provision of the previous paragraph shall not apply in the part referring to the minimum annual leave and remuneration.

(4) The provision of paragraph 2 of this Article shall not apply in a part referring to the remuneration provided that the period of posting does not exceed one month in a calendar year.

(5) The provision of paragraphs 3 and 4 of this Article shall not apply to activities registered within the framework of construction.

(6) Where the effective duration of a posting exceeds 12 months or 18 months in the case of prolongation in accordance with provisions of transnational provision of services, irrespective to paragraph 2 of this Article, the employer shall ensure to the worker rights in accordance with regulation of the Republic of Slovenia regulating employment relationships and in accordance with provisions of branch collective agreement, if this is more favourable to the worker.

(7) The provision of paragraph 6 does not apply in regard to provisions relating to conclusion and termination of the employment contract, competition clause and in regard to additional occupational pension schemes.'

It derives from the Proposal of the Act Amending the Transnational Provision of Services Act that the objective of Article 6 is to temporarily regulate the position of workers posted to Slovenia.[35] In legislator's opinion, such regulation fully corresponds to provisions of Directive 97/71 and Directive 2018/957.[36] The amendment supplemented the existing labour law regulation determining an institute of remuneration for posted workers (instead of a concept of minimal hourly rates). Additionally, the amendment broadens the scope of application of

[35] The Proposal of the Act Amending the Transnational Provision of Services Act, <https://imss.dz-rs.si/IMiS/ImisAdmin.nsf/ImisnetAgent?OpenAgent&2&DZ-MSS-01/a1ae1a0d29d6f5aed09d4885efb0834e2d96ad9273108a8bae8a09653c0c50b1>, visited 2 August 2022.

[36] Ibid.

Slovenian employment legislation to workers posted to Slovenia by work agencies. In accordance with the Directive, the Article regulates also long-term posting, i.e. when period of posting exceeds 12 or 18 months in accordance with provisions of the Transnational Provision of Services Act. In this case, the employer shall ensure to posted worker rights in accordance with Slovenian employment regulations and in accordance with provisions of branch collective agreements, if this is more favourable for the worker, unless exceptions apply.

The rule of equal remuneration is excluded in the case of temporary initial works, which are an integral part of the contract for the supply of goods and which do not exceed eight working days and are carried out by skilled workers of the supplier, or when the period of posting does not exceed one month in a calendar year (Articles 6(3) and 6(4) of the Act Amending the Transnational Provision of Services Act). Construction activities are however excluded from this rule: the rule of equal pay for equal work applies also if posting is shorter than one month in a calendar year or in the case of temporary initial works.

There are no official data on sectors where exploitation of workers is most often or most problematic. Journalists in media however seem to suggest that exploitation of workers and absence of appropriate remuneration often arise in the sector of construction activities.

5.2. Absence of case law concerning posting of workers by temporary work agencies established in other Member States

The search through case law database did not result in any published cases decided by Higher Courts or the Supreme Court of the Republic of Slovenia concerning posting of workers by temporary work agencies established in other Member States. There are some cases concerning the conclusion of employment contract for indefinite period or responsibility of an employer for work accident in the time of posting abroad (in another Member State, for example Austria or Germany), however there are no cases in relation to foreign workers being posted to Slovenia.

6. Freedom of establishment and the right to conduct a business in the Slovenian legislation and case law

There is no case law relating to employment relationships where freedom of establishment and the right to conduct a business was used to challenge national or EU social law. There was an administrative dispute where parties referred to the freedom of establishment and the right to conduct a business, however this dispute concerned the question of tax liability.[37]

[37] See VSRS, 6 April 2016, X Ips 314/2013, ECLI:SI:VSRS:2016:X.IPS.314.2013.

Regarding the right to strike it needs to be stressed that this is a constitutionally guaranteed right (Article 77 of the Constitution). In more details the right to strike is regulate by the Strike Act.[38] The strike will be lawful (and will thus not result in a breach of employment contract) if it is organised in accordance with provisions of the Act. For latter formal and substantive criteria are prescribed. The substantive criteria is connected with the demands of workers and it shall refer to economic and social rights and interests from work.[39] Formal criteria, stemming from the Strike Act, are the following: adoption of a decision to call a strike (trade union/ majority of workers); the appropriate content of the decision (workers' demands, time and place of the strike, authority leading strike and representing workers in strike (strike committee)); the strike committee must give prior notice of any strike action of at least 5 days; the decision must be notified to the employer in writing; during strike: a strike must be organised and carried out in a manner which safeguards people's health and safety and ensure the protection of property, as well as to enable the continuation of work after the strike has ended; the strike committee and the representatives of the bodies to which notice of the strike was given must make every effort to settle the dispute by agreement.

The Strike Act does not demand balance between the right to strike and the freedom to provide services and freedom of establishment. The case law however does recognize that the right to strike and the right of free economic initiative shall be balanced. In this regard, the Constitutional Court stressed that the strike has to be necessary, appropriate and proportionate.[40] The Supreme Court of the Republic of Slovenia is of similar opinion.[41]

7. Implementation of the *social acquis* in Slovenia

7.1. *Acquis* in the domain of anti-discrimination law in the Slovenian legislation

As has been already mentioned, the general provision on prohibition of discrimination and equality before the law is embodied in Article 14 of the Constitution. Directive 2000/43 and Directive 2000/78 have been transposed into national legislation by means of various acts. Directive 2000/43 has been transposed by inter alia the Protection Against Discrimination Act; the Employment Relationships Act; Public Employees Act etc. Directive 2000/78 has been transposed by inter alia the Employment Relationships Act; the Public

[38] Zakon o stavki (Official Gazette RS, No. 23/91).

[39] Article 1(1) of the Strike Act.

[40] USRS, 28 October 1998, U-I-230/96, ECLI:SI:USRS:1989:U.I.290.96; USRS, 27 May 2004, U-I-321/02, ECLI:SI:USRS:2004:U.I.321.02.

[41] E.g. VSRS, 31 January 2006, VIII Ips 222/2005, ECLI:SI:VSRS:2006:VIII.IPS.222.2005; VSRS, 20 June 2003, VIII Ips 48/2003, ECLI:SI:VSRS:2003:VIII.IPS.48.2003.

Employees Act; the Vocational Rehabilitation and Employment of Persons with Disabilities Act;[42] the Protection Against Discrimination Act etc.

Discrimination and/or unequal treatment on the basis of personal circumstances is prohibited in all aspects of employment relationship as determined in Article 6 of the Employment Relationships Act, Article 2 of the Protection Against Discrimination Act and *lex specialis* in certain sectors (as explained in more details in Chapter 1).

The notion of reasonable accommodation concerning persons with disability is implemented in the Vocational Rehabilitation and Employment of Persons with Disabilities Act providing special measures for rehabilitation, employment and protection against dismissal of disabled persons. It is our opinion that the protection in this regard suffices. There is also no debate in civil society, political

Recent development in the CJEU case law has not yet have significant impact on religious discrimination at national level. The case dealing with issue of balance between free economic initiative and freedom of religion or faith is the case of the Administrative Court of the Republic of Slovenia No. I U 1228/2019-42.[43] Although in its reasoning the Administrative Court mentions several directives (among them also Directives 2000/78 and 2000/43) and the judgment of the CJEU in Case C-157/15 (*Achbita*), the decision of the Administrative Court is mostly grounded on the case law of the ECtHR and national legislation.

7.2. Provisions on working time in the Slovenian legislation

The Directive 2003/88 has been transposed into national legislation with the following acts and rules currently in force: the Employment Relationships Act; the Health Services Act;[44] the Medical Services Act;[45] and the Rules on preventive medical examinations of workers.[46]

Considering the existing case law of Slovenian Labour Courts, it seems that acquis is most often applied by determination of working time and its limitation, overtime work (and demand for its payment), additional work and its admissibility, (minimal) annual paid leave and parental leave. Many case law relate to workers employed in military, police or healthcare (when overtime work or work on an international mission is considered). Before national courts, the acquis is invoked mostly in the areas of limitation of daily or weekly working time, demand for

[42] Zakon o zaposlitveni rehabilitaciji in zaposlovanju invalidov (Official Gazette RS, No. 100/05).
[43] UPRS, 10 November 2021, I U 1228/2019-42, ECLI:SI:UPRS:2021:I.U.1228.2019.42.
[44] Zakon o zdravstveni dejavnosti (Official Gazette RS, No. 9/92 et seq).
[45] Zakon o zdravniški službi (Official Gazette RS, No. 98/99 et seq).
[46] Pravilnik o preventivnih zdravstvenih pregledih delavcev (Official Gazette RS, No. 87/02 et seq).

payment of overtime work and demand for payment of unused annual leave in the case of termination of the employment relationship. There are no hostile reactions to the case law of the CJEU. The Slovenian courts take the CJEU's case law duly into regard.

7.3. Absence of legislation of platform work in Slovenia

In Slovenia, platform work is not expressly regulated. If such workers conduct an employment contract, provisions of the Employment Relationships Act apply. When platform worker is organised as a sole entrepreneur having a business cooperation contract with the company, general obligation rules embodied in the Obligations Code apply.[47] The research project of platform work in Slovenia conducted in 2020 shows that generally platform workers do not conduct employment contracts, although elements of employment relationships are given.[48] Rather they work on the basis of a business cooperation contract or via student work. Platform work appears in various activities such as cleaning, marketing, design, translation, delivery etc. Different platforms have different business models and therefore risks for precarisation are different. Interviewed workers included in the mentioned research mostly worked as sole entrepreneur or as sole proprietorship. Some have student status or status of unemployed person. The research shows that the decision for such work is mostly voluntary decision of a worker, especially due to work's flexibility, independence, creativity and financial benefits. They would not conclude an employment contract even if employer's need for work would be permanent. The safety of employment is correlated with sufficient number of customers. Interviewed persons see the downside of such work in instability of projects and payments, a lot of unpaid work and in exposure (bloggers). Regarding labour rights, they mention the absence of paid sick leave and possibly lower pensions in the future. The responsibility for working conditions and working time is in their own domain. Their estimation is that they receive an average wage or little more, however other costs of work are not covered. They receive no payments for travel expenses, lunch, annual leave payment or Christmas bonus. They do however receive awards for work well performed. The payment is in money or in kind (products or services). Interviewed persons do not mention breach of their rights; it is often that platform work is their additional source of income.

Concerning platform work and its characteristics scholars have already emphasized that it is necessary to determine on case-by-case basis if elements of employment

[47] Obligacijski zakonik (Official Gazette RS, No. 97/07 et seq).

[48] Platformno delo v Sloveniji: na primerih dostavljalcev hrane, Poročilo 1. Faza, Sindikat Mladi plus, Ljubljana, 2021, <www.mladiplus.si/platformno-delo-v-sloveniji/>, visited 6 August 2022.

relationship exist; if they do, employment is necessary.[49] Current situation enables precarisation of work and economically dependent persons, that is why scholars have already stressed the need to regulate platform work either in the scope of the Employment Relationships Act or in a lex specialis dedicated solely to platform workers.

In times of writing, no case on platform work has been published (in Slovenia, decisions and judgments of first instance courts are not published). However, the case law referring to elements of employment relationships and work on the basis of civil law contract enables a conclusion, that a platform worker would be granted legal protection (demanding for the Court to determine that an employment relationship between him and the company exists, if elements of the employment relationships are given).[50]

Trade union Mladi Up (Youth Plus) is a trade union, which represents students, pupils, and unemployed youth (up to 35 years old). Their aim is to protect rights and interests by aiming to ensure decent work, improve working conditions for precarious workers, and spread awareness on the importance of trade-unionism and the labour movement among youth. Trade union is affiliated with Association of Free Trade Unions of Slovenia, the biggest trade union association in the country. In the scope of their activities and research, they demand proper regulation of platform work in order to prevent precarious work and exploitation of workers.[51]

National legislator and the national courts have not taken a position on the relationship between EU law and international labour law. When the legislator or courts refer to international law or EU law they cite the relevant ILO Conventions and/or EU legislation and decision of the CJEU, not dealing with the relationship between them.

The European Social Charter was noted as means of reference in 29 cases (the search was conducted through the database, keyword EU Social Charter in Slovene).

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[49] K. Kresal Šoltes, G. Strban, P. Domadenik (Eds.), *Prekarno delo: multidisciplinarna analiza*, Ljubljana, Pravna fakulteta, Ekonomska fakulteta, 2020.

[50] These elements are: voluntariness, integration into organised working process (a worker works in defined and organised working process; such process enables work being bound to certain working hours, place of work, means of performance of work and contract); work is carried out for remuneration (a worker works for agreed payment; remuneration is fundamental obligation of an employer); work is carried out in person (personal relationship between an employer and certain worker, which presupposes a level of trust between parties); work in carried out continuously (continuous, long-term working activity); a worker works according to the instructions and under supervision of an employer (a worker is in an inferior position in relation to an employer.

[51] See Platformno delo v Sloveniji: na primerih dostavljalcev hrane, 2021.

8. New frontier for EU social policy

Recently, the question of EU social policy has not received attention by scholars in Slovenia. Two contributions on social dimension and the future of the EU were made by the author Rošic Feguš in the scope of the research project Integral Theory of Future of the European Union (leader Matej Avbelj) (both pending publications). Both contributions consider the need for the development of EU social union and suggest that it is time that social dimension catches-up with the economic dimension of the EU. Although some scholars have addressed the question of EU social union, they have done that briefly, without thorough debate on the need for development of the EU social policy.[52]

Referring to the question on self-employed persons, it is worth stressing that the Transnational Provision of Services Act regulates transnational provision of services for both, employers and self-employed persons. Under conditions determined in the Act, Slovenian self-employed person may perform services in another EU Member States (Article 5 of the Transnational Provision of Services Act). Self-employed person from another EU Member States may perform services in Slovenia under conditions determined in Article 13 of the Act.

In more details, Article 5(1) of the Act determines that Slovenian self-employed person may perform transnational provision of services under the following conditions: if service is performed in the scope of registered activities of self-employed person in Slovenia on the basis of concluded contract and if self-employed person ordinarily performs services in Slovenia. As Article 5(2) stipulates, it is considered that a self-employed person ordinarily performs service in Slovenia when (i) he is registered in a commercial register of Slovenia for at least two months, (ii) when self-employed person is included in social security schemes on the basis of self-employment for at least two months; (iii) when self-employed person has no cancelled unpaid tax obligations; and (iv) when self-employed person states under criminal and material liability that he ordinarily performs activity in Slovenia.

According to Article 13 of the Act, self-employed person from another EU Member State may perform services in Slovenia if he obtains valid certificate A1, and the service is performed in the scope of registered activities of self-employed person and on the basis of a concluded contract.

[52] E.g. J. Hojnik, 'Na poti v socialno unijo EU ali korak nazaj', *Pravna praksa*, Vol. 34, No. 2, 2015, p. 33.

9. The impact of the Economic and Monetary Union on national social law and policy

We consider the introduction of the European Semester in 2011 as an important mechanism to enhance policy coordination, conduct a regular discussion and monitoring of Member States' economic, social and budgetary plans. The Country Reports and Recommendations need to be taken into careful consideration by each Member State. The Slovenian Government annually prepares the National Reform Programme.[53]

A way to detect and measure the impact of the European Semester and the Country Specific Recommendations on Slovenia is through the adopted legislation or other regulation following the given recommendations. In recent years, there were legislative amendments adopted in order to increase the activation of the unemployed, namely amendments to the Labour Market Regulation Act on unemployment benefits changed the eligibility conditions and duration.[54] The age of unemployed persons eligible for the unemployment benefits for a period of 19 months has been increased from 50 to 53 years, and for those entitled to the unemployment benefit for 25 months, the age condition has been increased from 55 to 58 and the insurance period has been increased from 25 to 28 years.[55] The Council, e.g. stressed that 'it is essential that Slovenia continues to provide an adequate package of social benefits' in order to mitigate the social impact of the health and economic crisis caused by COVID-19.[56] In 2022, Slovenia noted in its National Reform Programme: 'Measures taken included: welfare-related measures and social transfers (raising the minimum wage; increasing some transfers or subsidies), solidarity-related transfers (raising the amount of the partial payment for loss of income; raising the amount of the partial payment for loss of income for the family assistant), measures increasing pensions and the well-being of pensioners (the guaranteed pension for full insurance period has been increased …'.[57] In 2021, the National Assembly passed the Act on Additional Measures to Stop Spreading and Mitigate, Control, Recover and Eliminate the Consequences of COVID-19, which contains several one-off solidarity benefits and the prolongation of financially enhanced benefits in different fields of social

[53] See, e.g., National Reform Programme 2022, Republic of Slovenia, <ec.europa.eu/info/sites/default/files/nrp_2022_slovenia_en.pdf>, 31 August 2022.

[54] Zakon o urejanju trga dela (Offical Gazette RS, No. 80/10 et seq).

[55] Article 60 of the Labour Market Regulation Act.

[56] Recommendation for a Council Recommendation on the 2020 National Reform Programme of Slovenia and delivering a Council opinion on the 2020 Stability Programme of Slovenia, COM/2020/524 final, Brussels, 20. 5. 2020, p. 6.

[57] National Reform Programme 2022, Republic of Slovenia, p. 15.

security.[58] Another example is offered by the adoption of the Act Determining Emergency Measures to Mitigate the Consequences of the Impact of High Energy Commodity Prices in view of the high energy price rises, which introduce a one-off solidarity allowance for the most vulnerable, a temporary exemption of all economic operators from electricity network charges and lower excise duties, and equalisation of the rights of all natural gas consumers.[59] It remains to be seen whether the adopted measures form an adequate response to recommendations and crisis.

Moving the European social policy into the EMU have its advantages and drawbacks, which are well discussed in literature, e.g. the EMU integration has an effect upon national welfare states, increased marketization of public services (e.g. social care); growing pressure for positive integration such as harmonization of social standards imposed on employers; notwithstanding different goals of the EMU and the European social policy, the sustainability of the EMU is only possible through diminishing social divergences and imbalances and harmonising national welfare states.[60]

10. The role and legal force of the Charter's social rights in national case law

Article 3a(3) of the Constitution is relevant for the position of the EU Charter of Fundamental Rights in the Slovenian legal system: legal acts and decisions adopted in the framework of the EU apply in Slovenia in conformity with the legal regulation of the EU. The provision establishes an internal constitutional foundation on the basis of which all authorities of the state (including courts and administrative bodies) shall, when exercising their competences, take account of EU law, including its case law, and as of the entry into force of the Treaty of Lisbon also the Charter as a legally binding instrument.[61] In Decision No. U-I-295/13, the Constitutional Court stressed: 'On the basis of the first paragraph of Article 51 of the Charter, also the provisions of the Charter are binding thereon when implementing EU law.'[62]

The review of the case law of Slovenian courts reveals that courts are referring to Charter's particular provisions in their decisions; above all, it seems, in cases

[58] Zakon o dodatnih ukrepih za preprečevanje širjenja, omilitev, obvladovanje, okrevanje in odpravo posledic COVID-19 (Official Gazette RS, No. 206/21).

[59] Zakon o nujnih ukrepih za omilitev posledic zaradi vpliva visokih cen energentov (Official Gazette RS, No. 29/22).

[60] Arguing for a European Social Union see, e.g., F. Vandenbroucke, 'Why we need a European Social Union', *Reflets et perspectives de la vie économique*, Vol. 52, No. 2/3, 2013, pp. 97-112.

[61] See, e.g., USRS, 14 November 2013, U-I-146/12, ECLI:SI:USRS:2013:U.I.146.12, para. 32.

[62] USRS, 19 October 2016, U-I-295/13, ECLI:SI:USRS:2016:U.I.295.13, para. 67.

of international protection.[63] The Constitutional Court has not yet dealt with a case in which it would have had to apply the Charter as a direct criterion for its assessment. The Charter serves predominantly as an additional argument for the interpretation of constitutional provisions or it is referred to from a comparative law perspective. In a few cases, the Constitutional Court defined the content of constitutional provisions by referring to the content of the Charter. We point to some written contributions that highlight the relevant case law.[64]

11. The protection of social rights in the context of international trade and global supply chains in Slovenia

In November 2018, the Slovenian Government adopted the National Action Plan on Business and Human Rights.[65] Its aim is to strengthen activities designed to ensure that the UN Guiding Principles on Business and Human Rights are implemented and that human rights are respected in business activities throughout the value chain. The National Action Plan thus outlines Slovenia's priorities and expectations towards business enterprises and provides guidelines on corporate human rights due diligence.[66]

The Slovenian Government considers socially responsible public procurement to be one of the key guidelines for the development of the public procurement system.[67] The public procurement in Slovenia is regulated by the Public Procurement Act, which stipulates in Article 3(2): when performing public procurement, economic entities must fulfil applicable obligations in the field of environmental, social and labour law, which are set out in EU law, regulations in force in Slovenia, collective agreements or regulations of international environmental, social and labour law.[68] Article 71(1) of the Act, e.g., stipulates that – if necessary – the Slovenian Government prescribes for individual items of public procurement that contracting authorities in public procurement procedures take into account social and ethical or environmental aspects and the way of including these aspects in the subject of the procurement, technical specifications, conditions for cooperation,

[63] See, e.g., USRS 18 September 2019, U-I-59/17, ECLI:SI:USRS:2019:U.I.59.17.

[64] See, e.g., K. Vatovec, 'Evropeizacija ustavnosodne presoje prek Listine Evropske unije o temeljnih pravicah', *Dignitas*, No. 83–84, 2019, pp. 27–52; M. Accetto, 'Trials, Tributes and Tribulations: The EU Charter before the Slovenian Courts', in M. Bobek, J. Adams-Prassl (Eds.), *The EU Charter of Fundamental Rights in the Member States*, Hart Publishing, 2020, pp. 305-318.

[65] Nacionalni akcijski načrt Republike Slovenije za spoštovanje človekovih pravic v gospodarstvu, November 2018, <www.gov.si/en/topics/business-and-human-rights/>, 31 August 2022.

[66] For further research in this area see, e.g., J. Letnar Černič, A. Strojin Štampar, T. Rozman, *Gospodarstvo in varstvo človekovih pravic*, Nova Gorica, Nova univerza, 2021; J. Letnar Černič (Ed.), Človekove pravice in gospodarstvo, Nova Gorica, Nova univerza, (forthcoming).

[67] Ibid.

[68] Zakon o javnem naročanju (Official Gazette RS, No. 91/15 et seq).

criteria for the award of a public contract and special conditions on the execution of a public contract.

12. Climate Change and Social Justice

The connection between combatting climate change at national level (but also broader) and social rights is imminent. In 2021, the National Assembly adopted the Resolution on the Slovenian climate long-term strategy 2050, which sets a clear goal, namely to achieve net zero emissions or climate neutrality by 2050.[69] The resolution is a strategic document and it does not contain concrete measures. However, it is expected that concrete measures and policies will be adopted following the resolution bearing in mind the social justice dimension.

It is noteworthy that the Resolution mentions the European Green Deal and its statement: 'The transition will only be successful if it is carried out in a fair and inclusive manner.' By adopting the Resolution, Slovenia commits itself that the costs and benefits of the transition will be distributed fairly; that no one will be left behind in the transition to a low-carbon society; that even the most vulnerable groups will be able to implement measures to mitigate climate change and adapt to it; and entities that will be most affected by the transition will receive timely assistance for the necessary action.[70]

13. Education on EU citizenship and the European values in the Slovenian education system

The education system in Slovenia is divided into three sections: primary, secondary and tertiary.[71] Whereas primary education is provided by public and private nurseries, schools, schools with an adapted education programme, music schools and educational institutions for children with special educational needs, the secondary education is provided by upper secondary schools and secondary schools. The tertiary education in Slovenia consists of short-cycle higher vocational education and higher education.

Briefly, the inclusion of EU topics (EU citizenship, EU values etc.) already in the primary education and in elementary school lessons is extremely important for the formation of the EU identity; private and public institutions and teaching staff need to actively include EU contents in teaching. The EU dimension in education

[69] Resolucija o Dolgoročni podnebni strategiji Slovenije do leta 2050 (Official Gazette RS, No. 119/21).

[70] Ibid., chapter 8.2.4.3.

[71] For more see, e.g., T. Taštanoska (Ed.), The Education System in the Republic of Slovenia 2018/2019, Ljubljana, Ministry of Education, Science and Sport of the Republic of Slovenia, 2019.

system in Slovenia is found, e.g. in the curriculum of primary education in classes of History,[72] and Civic and Citizenship Education.[73]

14. National developments in the area of fundamental social rights

According to the Slovenian Institute of Macroeconomic Analysis and Development, Slovenia has one of the lowest levels of inequality and people at-risk-of-poverty and social exclusion in the EU and the lowest level of children at-risk-of poverty and social exclusion among all Member States.[74] Nevertheless, certain challenges arise in the area of social protection and inclusion, e.g.: providing accessible and sufficient social transfers to protect all low-income and other socioeconomically vulnerable groups from poverty; improving access to unemployment benefits for youth; reducing health-care waiting times; increasing the number of doctors and graduate nurses; ensuring adequate pension levels for all retirees to live with dignity.[75]

15 The perception of the EU as a Social Union in Slovenia

Drawing from current state of affairs in Slovenia, case law of Slovenian courts which dully demand respect of EU law, absence of opposition against social union and some academia calling for closing the gap between economic and social dimension of the EU, it is our opinion that perception of the EU as a Social Union, in which Member States would remain responsible for social policy on the one hand, and with EU as supranational actor determining minimal social standards on the other, would be accepted by Slovenian citizens as appropriate and adequate.

Annex 1

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[72] See Učni načrt, Program osnovna šola, Zgodovina, Ljubljana, Ministrstvo za šolstvo in šport, Zavod za šolstvo, 2011, <www.gov.si/assets/ministrstva/MIZS/Dokumenti/Osnovna-sola/Ucni-nacrti/obvezni/UN_zgodovina.pdf>, 31 August 2022.

[73] Učni načrt, Program osnovna šola, Državljanska in domovinska vzgoja ter etika, Ljubljana, Ministrstvo za šolstvo in šport, Zavod za šolstvo, 2011, <https://www.gov.si/assets/ministrstva/MIZS/Dokumenti/Osnovna-sola/Ucni-nacrti/obvezni/UN_DDE_OS.pdf>, 31 August 2022.

[74] European Pillar of Social Rights, Slovenia 2000–2020, Institute of Macroeconomic Analysis and Development, <www.umar.gov.si/fileadmin/user_upload/publikacije/ESSP/2021/angleski/ESSP_2021_Summary.pdf>, 31 August 2022.

[75] Ibid., pp. 7-8.

Table 1: Inhabitants older than 15 years that have moved to EU Member States in 2019 and 2020; by status, country of immigration, sex, nationality (annual data for Slovenia)

		2019			2020		
		Slovenian Citizens			Slovenian Citizens		
		Active inhabitants - together	Employed	Unemployed	Active inhabitants - together	Employed	Unemployed
Gender: together	EU Member States: together	1,774	1,485	289	1,527	1,299	228
Men	EU Member States: together	1,012	875	137	841	720	121
Women	EU Member States: together	762	610	152	686	579	107

Table 2: International Migration by year, nationality and sex

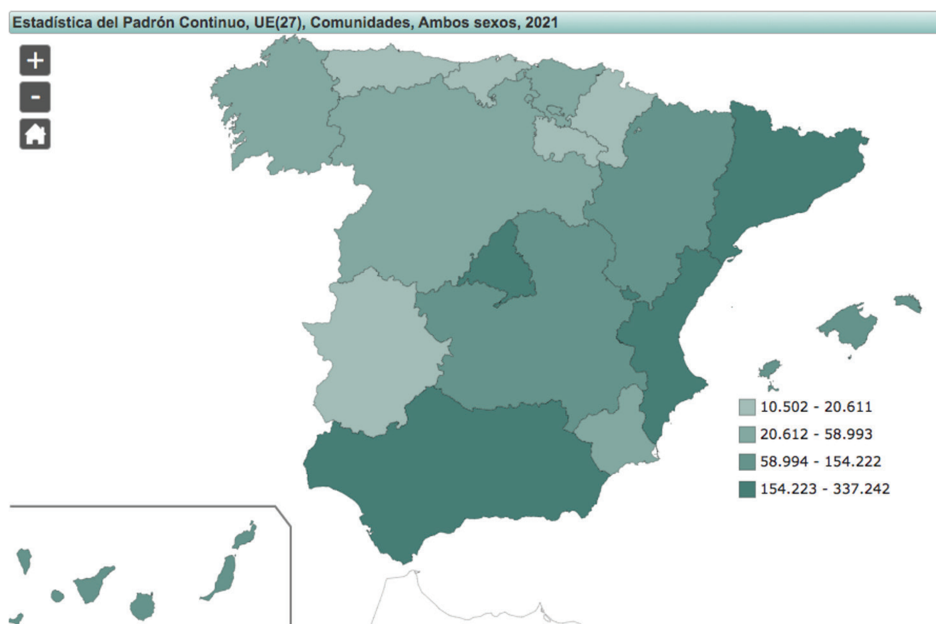
		2019			2020			2021		
		Slovenian Citizens			Slovenian Citizens			Slovenian Citizens		
		Gender-together	Men	Women	Gender-together	Men	Women	Gender-together	Men	Women
Migration abroad	15-19 years	284	155	129	226	106	120	227	126	101
	20-24 years	628	300	328	535	242	293	522	264	258
	25-29 years	998	470	528	772	347	425	741	358	383
	30-34 years	824	438	386	687	346	341	640	329	311
	35-39 years	681	383	298	589	316	273	547	317	230
	40-44 years	587	331	256	482	263	219	505	273	232
	45-49 years	422	262	160	369	209	160	387	227	160
	50-54 years	321	199	122	288	174	114	304	172	132
	55-59 years	243	141	102	238	140	98	234	138	96
	60-64 years	170	107	63	176	101	75	189	113	76
	65-69 years	170	100	70	180	88	92	233	104	129

SPAIN

José María Miranda Boto[1]

Question 1

According to official statistics[2], the number of EU citizens in Spain on 1 January 2022 was 1,605,384, 3.4% of the total population. They tend to concentrate in the largest cities and, those who are economically inactive after their retirement, on the Mediterranean coast and the islands (Balearic and Canary).



Source: Instituto Nacional de Estadística (www.ine.es)

The main legislation concerning them is the *Real Decreto 240/2007*[3], which has not been modified since 2015. The state of the legislation is, thus, very stable. In the internal dimension, most judicial decisions are related to administrative requirements for residence. Cases concerning discrimination mainly deal with medical assistance and not labour law.

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[2] https://www.ine.es/prensa/pad_2022_p.pdf

[3] https://www.boe.es/buscar/pdf/2007/BOE-A-2007-4184-consolidado.pdf

The number of preliminary rulings that have originated in Spanish courts dealing with free movement (not social security) is very low, amounting to just one case over the last years (*Gerencia Regional de Salud de la Junta de Castilla y León*, C-86/21, seniority in the public administration). The *milestone case* concerning discrimination is *Colegio de Oficiales de la Marina Mercante Española* (C-405/01) that dealt with such a reduced scope as the nationality of ship captains and first officers. No other important affairs in this field have originated in Spain.

A)

As a rule, equal treatment is respected, and no general discrimination can be perceived when examining court activity. The majority of case law dealing with EU Law in this field is related to social security regulations, not free movement, and mainly concerns Spanish migrant workers returning to Spain and having problems with the Spanish administration regarding their old-age pensions. These issues were, in fact, the first preliminary rulings that originated in Spain in the early 90s.

The *Real Decreto 7/2015*[4] on public employment services establishes as its goal to "identify and manage job vacancies, including from the rest of the European Economic Area and other countries". No complaints have been filed about its (deficient) working related to discrimination on grounds of nationality[5].

The main official barrier concerning free movement is the *Real Decreto 543/2001*[6]. It establishes a nationality limit in several positions in public administrations, but it can be considered as clearly respecting EU Law. According to the official database of case law[7], it has never been challenged in court and no case related to it has been reported.

B)

I am not aware of this situation. It is not a legal or administrative problem in Spain. Statistics, on the other hand, show that the unemployment rate for EU nationals is higher (14.49%) than the Spanish nationals' rate (11.47%). In any case, it is lower than third-country nationals (20.69%)[8]. No formal barriers exist, nonetheless.

[4] https://www.boe.es/buscar/doc.php?id=BOE-A-2015-1056

[5] C. Aguilar Gonzálvez, "Despliegue de derechos en el ejercicio de la libre circulación de trabajadores en la Unión Europea", *Revista de derecho migratorio y extranjería*, 59, 2022, pp. 117-152.

[6] https://www.boe.es/buscar/act.php?id=BOE-A-2001-10249

[7] https://www.poderjudicial.es/search/indexAN.jsp

[8] Instituto Nacional de Estadística, 2nd term of 2022. https://www.ine.es/jaxiT3/Datos.htm?t=4249

Question 2

A)

The main political issues related to social security benefits in Spain do not deal with EU citizens, but with migrants from third countries, especially coming from Africa and South America. These critical opinions are mainly linked to right-wing parties and are the usual fodder for fake news and Twitter hoaxes.

From a legal point of view, the Spanish social security system is based on the idea of "universality" and the most recent measure on economically inactive citizens, the *Ingreso Mínimo Vital* ("minimal living income"), establishes equal requisites for Spaniards and foreigners. The totality of academia supports this approach[9]. In fact, one of the main researchers of EU social security in Spain has vigorously attacked the CJEU's case law on inactive EU citizens, naming it "aporophobia"[10] (hatred of poor people).

B)

Spain is a country where child benefits (the lowest in Europe, according to the European Commission[11]) are normally imported, not exported, so the current system is viewed positively. The issue has never been part of the political debate.

Question 3

Since 1986, Spain has had a positive attitude to the reception of EU workers. In recent times, the attitude is changing into a policy, concerning the most skilled workers. I find very remarkable that in the "Law on the promotion of the start-up ecosystem"[12], there is a whole chapter concerning the tax benefits that "international teleworkers" will receive in Spain, not as workers, but as residents.

A)

According to official data[13], the number of EU citizens working in Spain in 2021 was close to 750,000 (Romania, Italy, Portugal and Bulgaria being the four main countries of origin). This was their distribution (in thousands): Agriculture,

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[9] C. Sánchez-Rodas Navarro, "El ingreso mínimo vital a la luz del derecho de la Unión Europea y de los convenios internacionales de Seguridad Social vigentes en España", *Cuadernos de derecho transnacional*, 13, No. 1, 2021, pp. 629-656.

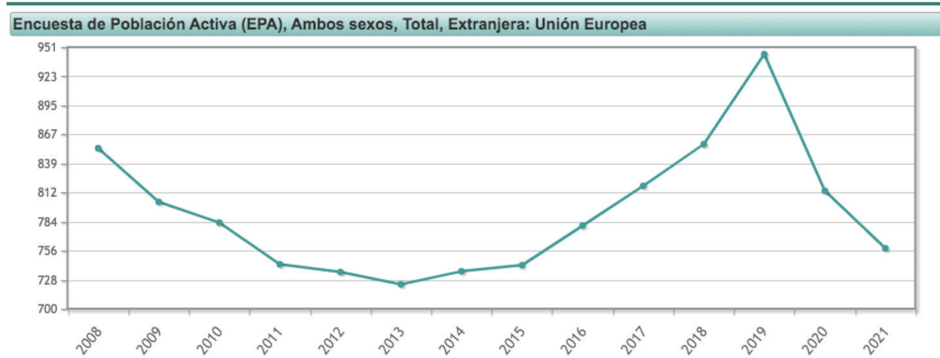
[10] M. D. Carrascosa Bermejo, "Libre circulación de ciudadanos comunitarios inactivos y protección social: ¿sufre la UE de aporofobia?", in J.M. Miranda Boto (ed.), *El Derecho del Trabajo español ante el Tribunal de Justicia: problemas y soluciones*, Madrid, Ediciones Cinca, 2018, pp. 505-533,

[11] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020SC0508

[12] https://www.boe.es/buscar/act.php?id=BOE-A-2022-21739

[13] https://www.ine.es/jaxiT3/Datos.htm?t=4882

43,2; Industry, 92,9; Construction, 83,8; Services, 538,0. In the following graph, the effects of the economic crisis (2008-2013) can be easily perceived, and how the pandemic put an end to a clear trend of growth since the beginning of the recovery.



Source: Instituto Nacional de Estadística (www.ine.es)

One must not forget, in any case, the importance of the employment in Spain of nationals from other countries that is double the figures of EU citizens.

In spite of high unemployment rates, there is remarkable concern nowadays about the absence of workers in the hospitality sector. The usually draconian working conditions in this sector, key to the Spanish economy (and way of life), have been rejected after the pandemic. Shorter shifts, higher wages, more efficient opening hours are being asked for and sometimes obtained, but a change of mindset is still needed. This issue has crossed the borders of labour law and it is the subject of public debate concerning both Spanish and foreign workers.

B)

To my knowledge, the idea of fair movement has not truly been discussed by labour lawyers, as academics are not particularly interested in the issue. Only the author of this report has written about it, very briefly[14], and spoken about the subject in some seminars, rejecting the idea.

C)

Once again, there is a lack of academic interest. The main defender of the idea is the author of this report, who lives in a region with very strong cross-border

[14] J. M. Miranda Boto, "La libre circulación tras (¿?) la Covid-19. Retos en materia de restricciones, nuevos modelos familiares y digitalización", *Labos: Revista de Derecho del Trabajo y Protección Social*, 3, No. 1, 2022, pp. 47-69.

economic relationships. I have tried to give some hints of proposals for the implementation of cross-border movement of these workers, exposing them in some seminars, but without any reaction.

Question 4

A)

Brain drain has been a matter of discussion in the public opinion in Spain for the last few decades and its very existence is widely debated. In contrast with the low-skilled emigration of the 20th century, statistics show that thousands of graduates have moved to other EU countries. Between 2007 and 2017, 87,000 graduates left Spain[15]. However, another source indicates that the issue warrants more nuances[16] and that the case is not as important as in other countries. The perception, whatever the numbers, is that brain drain exists.

The economic crisis was the trigger for a higher talent migration. The main sector concerned is the medical one, including doctors, nurses, and other specialists, mainly young and of both sexes (nurses, however, are mainly women, in proportion to the workforce). Training provided by Spanish Universities in this field is very high. The United Kingdom and Germany were the main destinations over the last few these years, but Brexit has altered this trend.

In any case, external migration has not had a real impact on the demographic aspect. The current imbalances in Spain, called "*la España vaciada*" (emptied Spain), come from internal migrations from small towns and poorer regions to the largest cities and motors of economic activity in the country. This is, currently, a great issue of debate but, once again, does not concern EU Law.

B)

There are no compulsory measures aimed at retaining workers as the ones described. On the other hand, political concern is growing, as brain drain is considered a severe obstacle for scientific competition in Spain. The most recent measure in this field is the "National Plan for the attraction and retention of scientific and innovative talent in Spain"[17]. It is endowed with €3bn (June 2022 – December 2023) and its main goal is to avoid human capital flight. It contains no compulsory measure, in any case. A previous plan from 2019 was not very successful, in part due to Covid-19.

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[15] https://www.observatoriuniversitari.org/blog/2020/09/26/espana-e-italia-encabezan-la-fuga-de-cerebros-dentro-de-la-ue-unos-87-000-trabajadores-muy-cualificados-dejaron-nuestro-pais-en-la-ultima-decada/

[16] https://www.usc.es/export9/sites/webinstitucional/gl/investigacion/grupos/icede/descargas/Paper-ICEDE.Jose.Blanco.pdf

[17] https://www.ciencia.gob.es/InfoGeneralPortal/documento/f5ca8c39-53be-40b2-a658-431c6350a93b

C)

There have been no case law or administrative decisions on these issues, as far as I know.

Question 5

From a sending perspective[18], Spain is one of the Member States with the highest number of posted workers. In 2019, Spain was only surpassed by Germany and Poland. In 2020, however, there was a decrease (-31%) in the number of postings because of the COVID-19 pandemic.

Directive 96/71/EC was transposed by the *Ley 45/1999*. In the last 20 years, there have been less than 25 judicial decisions in the official database concerning it, and none of them comes from the Supreme Court.

A)

Yes, through *Real Decreto-ley 7/2021*. Authors consider that the transposition is correct, as a rule.

From its initial transposition in 1999, the Spanish posting law already referred to salary (not the legal or conventional minimum wage) as a form of remuneration for posted workers. The same law specifies that the salary to be considered for the comparison is the one corresponding to the professional group or category attributable to the posted worker in accordance with the service to be performed. In addition, all salary concepts must be included (basic salary, allowances, extraordinary bonuses, overtime, complementary hours, and night work) with the express exclusion of complementary social security schemes relating to retirement. Moreover, the transposition makes it clear that allowances for posting that are considered salary must be included. They would therefore not be considered if they were reimbursement of expenses.

From the initial transposition of the Directive in 1999, a special rule was set for Temporary Employment Agencies that post workers to Spain, obliging them to compare the worker's salary (in accordance with their contract or agreement/ foreign law) with the total remuneration established for the job to be performed according to the Spanish collective agreement applicable to the user company, calculated per unit of time. This remuneration must include, where applicable, the proportional share of weekly rest, special payments, public holidays, and

[18] This whole question is based on M. D. Carrascosa Bermejo, O Contreras Hernández (2022). Posted workers from and to Spain. Facts and figures, Leuven: POSTING.STAT project VS/2020/0499. https://doi.org/10.5281/zenodo.6543137

holidays. The user company is responsible for the quantification of the worker's final earnings. The user company operating in Spain must include this salary in the contract for the provision of services.

Two situations support the idea of the low importance of exploitation and irregular posting in Spain: on the one hand, the low activity of the Labour Inspectorate in this area, the low participation in the Spanish IMI system and the low level of litigation between 2008 and 2021: in this period, there are about 20 judgments on posting from and to Spain, moreover, there is no Supreme Court case law, and no preliminary rulings have been referred to the CJEU. In these judgments, Portugal is the main country of origin of posting to Spain, while the main destination states are France and, secondly, Portugal. Construction is the main sector targeted by the vast majority of judgments. In some cases, the claims are related to occupational accidents suffered by posted workers, while in most cases the Spanish Labour Inspectorate has played a relevant role in identifying non-compliance or fraud.

However, a significant number of non-compliances escape the control of the Inspectorate services in Spain. Indeed, the figures provided here could be just the tip of the iceberg. Between 2018 and 2020, 1,543 inspections were carried out to control compliance with labour and social security obligations of workers posted to Spain. These actions resulted in the imposition of 315 sanctions. The infringement rate was over 20%; 30% of the sanctions were imposed on companies established in Portugal and 20% on companies established in Spain. By number of workers affected, however, 40% of all sanctions were imposed on companies established in Romania. By sector of activity and number of infringements, the secondary sector (with construction and related activities as the most important sub-sector) accounted for 53% of the sanctions, the agricultural sector for 25% and the services sector for the remaining 22%.

B)

Not a single one. More restrictive or protective conditions apply to posted workers. For example, the exception to consider salary and holiday conditions in Spain, even if they last less than eight days, does not apply. Spanish legislation has always envisaged - regarding TEAs that post temporary workers to Spain - that, in addition to guaranteeing basic conditions as well those associated with long-term postings, they must also comply with the conditions established in the general law applicable on TEA in Spain.

Question 6

A)

Never.

B)

The right to strike is included in the Constitution as a fundamental right, thus having the highest rank in Spanish Law. To my knowledge, there is not a single decision by a Spanish court where the (Spanish) right to strike and the (EU) fundamental freedoms have clashed.

In the academic dimension, the totality of authors in the labour law field defends the right to strike over economic freedoms. Its constitutional model of recognition is an autonomous means of collective action that is conceived as an instrument for the realisation of the interests of workers as such, and in this sense is detached from the contractual framework referred to in the Charter[19].

Question 7

The EU social acquis has been a major driving force in the evolution of Spanish labour and social security Law since 1986. The transposition is not made always in time (as it is the case with two relevant directives from 2019 in the moment of closing this report), but all the due reforms are implemented[20].

I must underline the importance, in the last years, of preliminary rulings concerning the social acquis originated in Spain[21]. The Spanish courts have been, in the last years, extremely active in the social field, and a remarkable number of decisions concerning Directives 1999/70/EC and 2003/88/EC have had this origin. Directive 79/7/EEC is being explored currently very intensively, bringing new issues that had never been contemplated.

[19] A. P. Baylos Grau, "Derecho de huelga y medidas de conflicto", in M.E. Casas Baamonde et al (Eds.), *Derecho Social de la Unión Europea: Aplicación por el Tribunal de Justicia*, 2nd edition, Madrid, Francis Lefebvre, 2019 , p.1176.

[20] The full range of the proceedings under art.258 TFEU in J. M. Miranda Boto, "El control de la recepción del Derecho de la Unión Europea en la legislación laboral española a través del Recurso por incumplimiento", *Documentación Laboral*, 113, 2018, pp. 119-132.

[21] A complete catalogue until 2020 in J. Gárate Castro and Y. Maneiro Vázquez (Eds.), *Las respuestas del Tribunal de Justicia a las cuestiones prejudiciales sobre política social planteadas por órganos jurisdiccionales españoles: Estudios ofrecidos a María Emilia Casas Baamonde con motivo de su investidura como doctora honoris causa por la Universidad de Santiago de Compostela,* Santiago de Compostela, Servicio de Publicaciones de la USC, 2020.

A)

EU Law has been a strong actor in the development of anti-discrimination law in Spain. The most recent text, the *Ley 15/2022*[22] ("comprehensive Law on for equal treatment and non-discrimination") explicitly mentions EU Law (the Charter, Directives 2000/43/EC and 2000/78/EC, among others). On the other hand, the main legislation on equality on grounds of sex, the *Ley Orgánica 3/2007*[23] for the effective equality of women and men, is formally the transposition of Directives 2002/73/EC and 2004/113/EC, even if it includes *original* content.

Religious discrimination, on the other hand, is not a very frequent subject in the courts. The main issue is the employment of people in Catholic schools. During the last few years, the only decisions concerning the Islamic headcovering in the Labour Law field, for example, were related to health and safety considerations in mushroom production. On the other hand, the only mention of *G4S Secure Solutions* in the official case law database is in the criminal field and not truly relevant. *WABE* is not even mentioned in this database.

The obligation to make reasonable accommodation is adapted to EU law. The transposition of art. 5 of Directive 2000/78/EC into art. 40.2 of *Real Decreto Legislativo 1/2013*[24] (the general law on disability) has been made by copying the content of the directive verbatim. Therefore, there is no point of conflict between Spanish and EU law.

However, it is interesting to note that the Spanish legal system has gone beyond the provisions of the Directive. Art. 63.1 of said *Real Decreto Legislativo 1/2013*, which states that the infringement of reasonable accommodation constitutes a violation of the right to equal opportunities. This precept has been interpreted by the Constitutional Court (STC 51/2021), understanding that the breach of this obligation constitutes an infringement of anti-discrimination protection, and, therefore, implies the nullity of the conduct and the possibility of requesting compensation for damages[25].

Currently, I think that Spanish anti-discrimination Law, as a whole, is more advanced than EU Law is. Article 2 of said *Ley 15/2022* establishes that "the right of all persons to equal treatment and non-discrimination is recognised regardless

[22] https://www.boe.es/buscar/act.php?id=BOE-A-2022-11589

[23] https://www.boe.es/buscar/act.php?id=BOE-A-2007-6115

[24] https://www.boe.es/buscar/act.php?id=BOE-A-2013-12632

[25] D. Gutiérrez Colominas, "Can Reasonable accommodation Safeguard the Employment of People with Disabilities?" in P. Czech et al (Eds.), *European Yearbook on Human Rights 2019*, Intersentia, Cambridge, 2018, pp. 63-90; D. Gutiérrez Colominas, *La obligación de realizar ajustes razonables en el puesto de trabajo para personas con discapacidad: una perspectiva desde el Derecho comparado y el Derecho español*, Albacete, Bomarzo, 2019.

of their nationality, whether they are minors or adults, or whether they are legally resident. No one may be discriminated against on the grounds of birth, racial or ethnic origin, sex, religion, conviction or opinion, age, disability, sexual orientation or identity, gender expression, illness or health condition, serological status and/ or genetic predisposition to suffer pathologies and disorders, language, socio-economic situation, or any other personal or social condition or circumstance". This list is much wider than the elements contemplated in EU Law that will keep, in any case, its worth in the interpretations provided by the Court of Justice.

B)

Most of the content in Directive 93/104/EC was already present, formally, in the Spanish legislation. However, the case law of the Court of Justice brought very significant improvements, among others the *SIMAP* case (C-303/98) for the limitation of working time in the medical sector; the *Merino Gómez* case (C-342/01) that established the right to enjoy annual paid leave if it coincided with maternity leave (prior to that it was lost); the *Vicente Pereda* (C-277/08) and *ANGED* (C-78/11) cases: that established the right to enjoy annual paid leave if it coincided with sick leave (prior to that it was lost); and, more recently, the *CCOO v. Deutsche Bank* (C-55/18) case that brought a compulsory system enabling the daily working time to be recorded. All these decisions implied legal reforms, nearly immediate, in contrast with the absolute inactivity of the legislator in the domain of collective redundancies[26].

It is difficult to talk about "hostility". The Supreme Court, however, has been reluctant to admit these changes sometimes, as they were contrary to its own doctrine. There is a remarkable trend in Spain, it must be said, to challenge the Supreme Court's doctrine through preliminary rulings by inferior courts. And, as it has been successful several times, it will not stop.

C)

Spain is a leading country in the field of platform work. The so-called "*Ley rider*" (*Real Decreto-ley 9/2021*[27]) established the presumption of the condition of employees (*trabajadores asalariados*) in the following terms: "The activity of persons providing paid services consisting of the delivery or distribution of any consumer product or commodity, by employers who exercise the entrepreneurial powers of organisation, direction and control directly, indirectly or implicitly, by

[26] Y. Maneiro Vázquez, "El régimen del despido colectivo en el ordenamiento europeo: contrastes y fricciones con el ordenamiento español", *Revista del Ministerio de Empleo y Seguridad Social*, 127, 2017, pp. 121-144.

[27] https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-7840

means of algorithmic management of the service or working conditions, through a digital platform."

Before this legislation, the Labour Inspectorate and the courts had played a decisive role in the fight for labour rights for platform workers. The direct role of social partners has been limited to the compulsory inclusion of deliverers in the scope of the statewide collective agreement for hotels, restaurants and catering[28]. They performed a remarkable role in the diffusion of information among these workers.

D)

The position of Spain on international labour law, mainly the ILO conventions, has greatly changed in the last 50 years. During Franco's dictatorial regime, Spain was an avid complier with the conventions (except, of course, those dealing with collective rights). But as the EU social acquis was developed, the degree of ratifications diminished. Since 2010, only conventions on maritime labour (MLC and Seafarers' Identity Documents Convention No. 185, and their amendments), the Violence and Harassment Convention, 2019 (No. 190) and, very recently, the Domestic Workers Convention, 2011 (No. 189) have been ratified.

The presence of ILO conventions in the courts is absolutely anecdotal. In the last 40 years, only Holidays with Pay Convention (Revised), 1970 (No. 132) and Termination of Employment Convention, 1982 (No. 158), have been employed successfully by the Supreme Court[29] with a little more presence.

The Spanish legislator, whatever the political party, has normally shown "indifference"[30] to the European Social Charter. Recently, several discordances between Spanish labour legislation and the ESC have been pointed out academically, and they include, among others, that the right to reasonable hours of work does not exist with a working week of more than 60 hours, entitlement to paid annual leave is not always guaranteed, that do not always guarantee a decent standard of living, and the absence of a reasonable period of notice in case of termination of the employment contract[31]. In the same line, it was ignored

[28] D. Pérez del Prado, "The Personal Dimension of Collective Bargaining in the Gig Economy. The Spanish Perspective", in J.M. Miranda Boto and E. Brameshuber (eds.), Collective Bargaining and the Gig Economy: A Traditional Tool for New Business Models, London, Hart Publishing, 2022, pp.179-196.

[29] J.M. Miranda Boto, "La OIT en la jurisprudencia del Tribunal Supremo: un panorama reciente", Revista del Ministerio de Trabajo y Economía Social, 147, 2020, pp. 509-537.

[30] C. Salcedo Beltrán, "Conclusiones 2021 del Comité Europeo de Derechos Sociales: más utopía que realidad en los derechos relativos a la salud, la seguridad social y la protección social", *Revista General de Derecho Europeo,* 57, 2022, p.463.

[31] X. M. Carril Vázquez, "La doctrina del Comité Europeo de Derechos Sociales acerca del incumplimiento por España de derechos laborales elementales regulados en la Carta Social Europea", *Revista de Trabajo y Seguridad Social. CEF*, 460, 2021, pp. 147-174.

for years by the Spanish courts, but in recent times is gaining support. Mainly, it has been used to challenge the previous right-wing Government's measures. In any case, it is not yet an established tool within the Spanish legal system, even if support is growing in the academic community, as the ESC (revised) is in force since 1st July 2021.

Question 8

A)

As a rule, EU social policy has been usually considered acceptable by the main political parties, in line with the attitude towards the EU by parties that have held government roles. In recent times, however, the changes in Spanish politics have prompted a demand for a more intense social policy (Podemos, member of the coalition government), but also a lack of trust in the EU (Vox – a far-right party - in the opposition) and all its policies. The majority, in any case, remain in the traditional line.

In academia, the panorama has always been supportive of EU social policy but requesting further developments. The more liberal approaches to EU social law have been regarded with mistrust. For example, no author commented positively on the *Viking* and *Rüffert* decisions, and the earlier position of the Court of Justice about posting of workers was severely criticised. The desire for a stronger EU social policy is deeply rooted, I think, in Spanish academia, but also in Spanish society, as I will show in Question 15.

The limits of article 153.5 TFEU have not been widely explored by Spanish academics. Usually, they have been admitted, as the issues included are, politically, very sensitive. The Spanish legislation on the right to strike, for example, dates from 1977 and no internal political consensus has ever been reached to prepare a new regulation. Thus, the influence of EU Law is not considered relevant.

The main dissenting voice on the reach of the article is the author of this report, who since his thesis has defended that the prohibition of art.153.5 TFEU is not absolute and leaves a wide space for an EU legislation that deals with transnational aspects of the right to associate and the right to strike, on the basis of arts. 115 TFEU or 352 TFEU[32]. The main problem I have pointed out is the danger of the utilisation of this possibility to restrict these rights, in the line of the Monti II proposal.

[32] J. M. Miranda Boto, "The competence of the EU concerning the right to strike", *Hungarian Labour Law E-Journal*, 2, 2016 - https://hllj.hu/letolt/2016_2_a/A_01_Boto_hllj_2016_2.pdf

On the other hand, the new directive on minimum wages has been very positively received. As it is in line with the current Government's will to increase minimum wages, there is strong political support. Dissent may have been expressed from some employers' organisations, but there has been no serious challenge.

B)

The only field that is applied to self-employed persons is the legislation on health and safety, according to article 3 of *Ley 31/1995* (the main transposition of Directive 89/391/EEC).

Of course, the specific rules on social security and recognition of professional qualifications are applied to them.

Question 9

A)

Research analysis, focused on the period before the COVID pandemic, has shown clear evidence that the austerity policies "were one of the factors that explained the relapse into the crisis in Europe in 2010 and its prolongation over time"[33]. Concretely, country specific recommendations, especially in the period 2010-2013, meant drastic cuts for the most important social programmes (pensions, unemployment, and health system) in order to guarantee their financial sustainability, but preventing social security and social policies from acting as social cushioning mechanisms. Additionally, they suggested "structural reforms" that targeted the labour market. These legal changes, that were highly followed by labour market reforms 2010, 2011 and 2012, focused on ensuring that salary increases reflected the evolution of productivity, decentralizing collective bargaining at company level and providing companies with sufficient flexibility to internally adapt working conditions to changes in the economic environment. The reforms suggested by the EU produced a clear salary devaluation by impoverishing working conditions with ambiguous effects on the general trend of the whole economy. Considered as excessive, they have been partially compensated by the labour market reform in 2021[34].

But beyond this, it also examines the justifications given to promote these measures to conclude that "the model of social law that the European institutions propose to the Member States is clearly orthodox", "evades the traditional role of social law",

[33] D. Pérez del Prado, *El Impacto Social de la Gobernanza Económica Europea,* Valencia, Tirant lo Blanch, 2021.

[34] J. M. Goerlich Peset et al, *La reforma laboral de 2021. Un estudio del Real Decreto-Ley 32/2021,* Valencia, Tirant lo Blanch, 2022.

and "is incompatible with any alternative proposal that is not formulated within its parameters." In this sense, it is highlighted that the enormous weight of technical analysis in the European Semester obeys the theoretical basis of *ordoliberalism*, or Hayekian-style liberalism, in which "the experts of the European institutions are the only ones capable of knowing what is best for the citizens and they are, therefore, the ones called to formulate the lines of action to follow" [35]. Hence, the measures that were promoted, many of them very painful, lacked the necessary contrast with other approaches or perspectives or included an analysis of costs and benefits.

B)

On the one hand, there is a serious risk of subjecting social policy to the interests of economic and monetary policy. On the other hand, it would raise the importance of employment, and working conditions related to it, as one of the goals of the EMU.

Question 10

The Charter does not have a powerful role in Spanish case law related to social rights. It is usually employed as a mainly rhetoric, "ornamental"[36] reinforcement of existing rights. The Constitutional Court, for example, in the social field, only mentioned it once, and without any relevance.

Concerning the practice of the Supreme Court, for example, the Charter was mentioned in ten decisions in the first six months of 2022, according to the official database. Not even one of these mentions was other than literary. In my opinion, the Charter is not being used as a tool to provide solutions in the social field.

Question 11

A)

The main legislation on public procurement is the *Ley 9/2017* (on Public Sector Contracts, transposing into Spanish law the Directives 2014/23/EU and 2014/24/EU). It contains many possibilities for the use of social clauses and many guidelines have been prepared to foster its presence in regular public procurement.

It makes compulsory the "Indication of the supply chain management systems, including those ensuring compliance with the core conventions of the International Labour Organisation, and monitoring systems that the employer may apply in the

[35] Pérez del Prado, 2021.

[36] S. Ripol Carulla, La Carta de derechos fundamentales de la Unión europea en la jurisprudencia del Tribunal Constitucional Español en procesos de amparo, *Freedom, Security § Justice: European Legal Studies*, 2021, 1, pp.219-237.

performance of the contract". On the other hand, its art.202, dealing with special conditions for the performance of the contract of a social, ethical, environmental or other nature lists as one of these conditions "ensuring respect for basic labour rights along the production chain by requiring compliance with the core conventions of the International Labour Organisation, including considerations that seek to favour small producers in developing countries, with which favourable trade relations are maintained, such as the payment of a minimum price and a premium to producers or greater transparency and traceability of the entire trade chain".

However, its implementation is far from perfect, and not only concerning supply chains. According to a report from 2020[37], contracting authorities have not incorporated this type of criteria in 33.89% of the procedures. In the case of the Autonomous Regions and other contracting authorities that do incorporate them, only 11.96% are exclusively social criteria, and 16.28% are a combination of social and environmental criteria. Some regions do not include social criteria at all in any of their procedures, and the percentages used by some sectors such as the state administration, local authorities, universities and most regions is negligible.

In any case, public procurement tends to protect mainly internal situations.

B)

On the non-binding level, some fifteen years ago, codes of conduct were a subject of prime actuality in Spain. They included aspects dealing with internationalisation, but their effective lack of legal force made them, initially, an issue more suited to the "public opinion courts" [38] than real ones. New, harder forms of implication completed the framework.

C)

The global dimension of INDITEX led to the signature of one of the first global agreements (2007), between the ITGLWF and the Spanish firm. It was developed through several protocols and renewed in 2014 and in 2019[39]. During the entire procedure, there was a very strong involvement of the main Spanish trade unions, CCOO and UGT.

There is, from the point of view of CCOO, a detailed report on the implementation of the first versions[40]. The main problems pointed out were the difficulties local

[37] https://www.hacienda.gob.es/RSC/OIReScon/informe-anual-supervision-2020/ias-2020.pdf

[38] W. Sanguineti Raymond, "La construcción de un nuevo derecho transnacional del trabajo para las cadenas globales de valor", *Revista General de Derecho del Trabajo y de la Seguridad Social*, 61, 2022.

[39] https://www.industriall-union.org/sites/default/files/uploads/documents/2019/SWITZERLAND/INDITEX/industriall_inditex_gfa_english.pdf

[40] I. Boix Lluch and V. Garrido Sotomayor, "Balance sindical de los 10 años del Acuerdo Marco Global con INDITEX", Trabajo y Derecho, 10, 2017.

trade unions had to participate (especially in China and Morocco) and the lack of information about the whole supply chain (that led, in Brazil, to the discovery of "slave work"). A very positive aspect was the number of wages that had grown remarkably in all the countries covered by the agreement. On the whole, the agreement was considered very useful in this analysis, even with the due scepticism before a giant corporation.

D)

The "universal jurisdiction" only exists in Spanish Law, after the *Ley Orgánica 1/2014* for crimes of genocide, torture, enforced disappearances, piracy, etc. Violations of social rights are not yet included in this possibility. Changing this situation is one of the goals of the pre-draft of a law on the protection of human rights, sustainability, and due diligence in transnational business activities.

E)

Not yet.

F)

Currently, there is no standing legislation on "social" due diligence in Spain. The Ministry of Social Affairs has opened a public consultation on the pre-draft of a law on the protection of human rights, sustainability, and due diligence in transnational business activities[41]. The text proposed launching a process that sets broad objectives that go beyond the strict concept of human rights and due diligence and places the Spanish normative debate at the forefront of the comparative framework[42]. At the time of closing this report, however, the legislative procedure has not yet started.

Question 12

In Spain, the *Ley 7/2021* on climate change and energy transition seeks, on the one hand, to advance in the fight against the climate crisis and, on the other, to anticipate and "offer solidarity-based and inclusive responses to the groups most affected by climate change and the transformation of the economy". Its purpose is articulated in four pillars: to ensure compliance with the objectives of the Paris Agreement, to facilitate the decarbonisation of the Spanish economy, to promote adaptation to the impacts of climate change,

[41] https://www.mdsocialesa2030.gob.es/agenda2030/documentos/220208-consulta-publica-definitiva.pdf

[42] A. Guamán Hernández, Diligencia debida en derechos humanos: análisis crítico de los principales marcos normativos estatales, *Trabajo y Derecho*, 87, 2022.

and to implement a sustainable development model that generates decent employment. One of its guiding principles is that sustainable development, together with (as far as it matters here) social and territorial cohesion, furthers the protection of vulnerable groups and equality between women and men.

The social perspective is developed in the Just Transition Strategy, which constitutes the "state-level instrument aimed at optimising opportunities in activity and employment in the transition to a low greenhouse gas emission economy and at identifying and adopting measures that guarantee equitable and supportive treatment for workers and territories in this transition." It includes the following contents, approved on a five-yearly basis: identification of groups, sectors, companies and territories potentially vulnerable to the process of transition to a low-carbon economy; analysis of the opportunities for the creation of economic activity and employment linked to the energy transition; industrial, agricultural and forestry policies, research and development, innovation, promotion of economic activity and employment and occupational training for a just transition; instruments for monitoring the labour market in the framework of the energy transition through the participation of the social agents, as well as in the social dialogue roundtables, and the framework for drawing up Just Transition agreements.

These agreements will be signed with the aim of promoting economic activity and its modernisation, as well as the employability of vulnerable workers and groups at risk of exclusion in the transition to a low-carbon economy, particularly in cases of closure or reconversion of facilities. They will be signed between the central Government and other Public Administrations, in particular municipal councils in geographical areas vulnerable to the transition to a low-carbon economy. The participation of companies, employers' organisations, trade unions, universities, educational centres, non-governmental environmental associations, and organisations and other interested or affected entities is also envisaged. They are therefore a clear example of social dialogue in the search for a just transition.

The main objective of these agreements lies in the maintenance and creation of activity and employment in the area through the support of sectors and at-risk groups, maintaining the population in rural areas and the promotion of diversification and specialisation in line with the socio-economic context. The aim is to take advantage of the endogenous resources of the territory, whether economic, social, or environmental, and to attract exogenous investment, giving

priority to those sectors that also show the best results in terms of environmental, economic and social sustainability[43].

No judicial procedure has taken place yet concerning this issue.

Question 13

European "civic education" is strongly rooted in the Spanish education system.

According to the *Real Decreto 157/2022*[44] (establishing the organisation and minimum teachings of Primary Education – 6-12 years), the minimum requirements concerning the EU are "to know the principles and values of the European Union; explain the general functioning of the governing bodies of the (...) European Union, assessing their functions and the management of public services for citizens; the main institutions of Spain and the European Union, their values and functions. The areas of action of the European institutions and their impact on the environment".

According to the *Real Decreto 217/2022*[45] (which establishes the organisation and minimum teaching of Compulsory Secondary Education – 12 to 16 years), these are the minimum requirements concerning the EU: to understand the origins and evolution of European integration processes and their relevance for the present and future of Spanish society; the role that Spain has played in European exchange networks and the implications for the present and the future of Spanish society of being part of the Union; identify and assess the main European institutions, analysing their guiding principles, rules of operation and functions, judging their role in international conflicts and recognising their contribution to peace and international cooperation, sustainable development; the fight against climate change and global citizenship; the process of European integration: economic, monetary and civic integration; European institutions; European and global citizenship: ideas and attitudes for the formation of a common identity.

According to the *Real Decreto 243/2022*[46] (establishing the organisation and minimum teaching of the Baccalaureate – 16-18 years), there are several contents related to the EU that must be taught in every region and to every student in that

[43] H. Álvarez Cuesta, "La lucha contra el cambio climático y en aras de una transición justa: doble objetivo para unas competencias representativas multinivel", *Revista de trabajo y Seguridad Social. CEF,* 469, 2022, pp. 89-120; H. Álvarez Cuesta, "La lucha contra la crisis climática en la Ley de Cambio Climático en España: ¿una verdadera apuesta por una transición justa?", *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, 10, No. 1, 2022.

[44] https://www.boe.es/buscar/act.php?id=BOE-A-2022-3296

[45] https://www.boe.es/buscar/act.php?id=BOE-A-2022-4975

[46] https://www.boe.es/buscar/act.php?id=BOE-A-2022-5521

level: Subject "Geography": assess the importance of Spain's membership of the European Union; The European Union today: its influence on everyday situations; The debate on the influence of EU policies and globalisation; Subject "History of Spain": Point out the global challenges and the main commitments of the Spanish State in the international sphere, as well as those deriving from its integration into the European Union; Spain in Europe: economic, social and political consequences of the process of integration into the European Union, current situation and future prospects; The values of Europeanism: principles guiding the idea of the European Union and a participatory approach to Community programmes and projects.

The issue of European Studies is present in many University Degrees and the study of EU Law is compulsory in all Law Faculties.

Question 14

Democracy and the rule of Law are values that can be traced back to the Spanish Constitution of 1978 that established in its art.1 a social and democratic state, subject to the rule of law. The years that passed between Franco's death and joining Europe were considered a test of the Spanish autonomous capacity to implement this core of principles, inspired of course by international treaties and comparative Constitutional Law. The EEC in 1986 was seen as a reinforcement of them, but not as a direct source. Thus, these subjects have been considered mainly as an "internal" affair, as a development of the "Social State" of the Constitution, and not a "European" issue[47].

In any case, the last Rule of Law Report (2022)[48] by the European Commission did not highlight any issue concerning fundamental social rights. The problems were mainly detected in the fields of Justice and the fight against corruption.

Question 15

Sadly, public opinion considers it mainly an Economic Union. The austerity measures in the previous economic crisis ruined the image of the EU for many people. From a dynamic agent of transformation, it came to be seen as an actor of restrictions in the benefit of other countries.

Even if the support in the official surveys was still clear[49], 35% considered that EU membership was bad for Spanish salaries, and more than 50% considered

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[47] M. E. Casas Baamonde, Primacía del derecho de la Unión Europea y Constitución. ¿Qué derechos fundamentales?, *Derecho de las relaciones laborales*, 10, 2019, pp. 937-951.

[48] https://ec.europa.eu/info/sites/default/files/23_1_194017_coun_chap_spain_en.pdf

[49] https://www.cis.es/cis/export/sites/default/-Archivos/Marginales/3240_3259/3256/Es3256mar.pdf

that membership was bad for the prices of goods and services. However, a great majority supports the development of a common social policy (76.8%) and considers that the main priority of the EU should be advancement in social and political rights (30.5%), the establishment of a minimum European wage (25.7%) and the passing of a binding Charter of social rights (10%)[50].

From the academic point of view, I think that the common opinion is that the EU is nowadays endowed with all the powers that it needs to implement a Social Union. What is missing, however, is the political will to put into practice.

From the political point of view, it is difficult to identify strong opinions on the issue. The Spanish Presidency in 2023 will be the moment to show leadership in this field.

[50] Even if according to official surveys, the greatest benefit of the EU is "peace among Europeans".

SWEDEN

Martina Axmin, Birgitta Nyström, Annamaria Westregård[1]

Question 1

a. Swedish national authorities and courts are aware of EU-worker's rights. Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers is implemented in several Swedish acts.[2] The tasks referred to in Article 2.2 of the Directive are allocated to the National Board of Trade (*Kommerskollegium*), which is a governmental agency.

The most common problems encountered by EU citizens in Sweden arise due to not having a Swedish personal identity number (*personnummer*). By law, anyone who intends to live in Sweden for more than one year must be registered in the Population Register (*folkbokföringsregistret*).[3] People who move to Sweden must therefore notify the authorities in order to get themselves registered, at which point they are assigned a personal identity number.[4] This means that only those who intend to stay in Sweden for more than a year are registered in the national Population Register while those who intend to stay for less than a year are not. The requirements for residence registration may be difficult for some categories of persons to fulfil, for example, a union citizen jobseeker who under EU law has a right to stay up to six months.

The personal identity number is, effectively, proof that one is legally resident in Sweden and carries practical weight in everyday life. The personal identity numbers are systematically used by the municipal, regional and state public bodies as means of identification of the individual for purposes of taxation, social security, social assistance, healthcare, education etc. Private and commercial actors, such as banks, retail chains, use the numbers to manage their schemes.

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Axmin has written the answers to questions 1, 2, 11 d, 13, 14.

Nyström has written the answers to questions 3, 4, 5, 6, 7 a b d, 8 a, 9, 10, 11 b-c and e, 12.

Westregård has written the answers to questions 7 c, 8 b.

Axmin and Nyström have together answered questions 11 a, 15.

[2] See eur-lex.europa.eu/legal-content/SV/NIM/?uri=CELEX:32014L0054.

[3] Section 18 of the Population Register Act (1991:481).

[4] Section 3 of the Population Register Act (1991:481).

A substitute identification number, the so-called a coordination number (*samordningsnummer*) enables Swedish public authorities and other organizations with a public function to identify people who are not currently – and have never been – registered at an address in Sweden. Coordination numbers are assigned by the Swedish Tax Agency on request. All government authorities have the right to request a coordination number to be issued for an individual. The system with coordination numbers has been discussed, due to problems verifying the identity of the person seeking such a number.

Over the years, however, there have been several petitions concerning difficulties connected to the Swedish personal identity number and the coordination number. A Government Inquiry has recently looked into the issue of the population register and coordination numbers.[5] New rules concerning the Population Register are suggested to enter into force in September 2022, for example, that a person moving to Sweden shall appear in person at the National Tax Authority.[6] New rules regarding coordination numbers are to be further investigated.

b. In 2014, the Swedish Population Register Act was amended in order to state that an EU citizen's right to be registered as a resident in Sweden depends on whether s/he has a right of residence under the Citizens' Rights Directive.[7] This means that EU citizens seeking to move to Sweden must have sufficient resources to support themselves and comprehensive sickness insurance. Before the change to the law, an EU citizen who intended to stay in Sweden for more than a year was automatically registered as a resident, meaning that s/he would be entitled to access welfare services in Sweden, so there was no need to require comprehensive sickness insurance. With the change to the law, those moving to Sweden must now have sickness insurance upon arrival in the country. However, this has resulted in some people experiencing difficulties in getting registered as residents in Sweden, in part because the concept of comprehensive sickness insurance has been interpreted narrowly by the national administrative courts.[8]

   In 2016, a Government Inquiry submitted a report that highlighted 'vulnerable EU citizens' (refers to individuals who are citizens of another EU country and who do not have a right of residence in Sweden).[9]

[5] Government Inquiry Report SOU 2021:57.

[6] Government Bill prop. 2021/22:217.

[7] Section 4 of the Population Register Act (1991:481).

[8] See for example the Administrative Court of Appeal in Jönköping, case number 1964-17, judgment of 8 December 2017 and the Administrative Court of Appeal in Gothenburg, case number 3622-17, judgment of 3 January 2018.

[9] Government Inquiry Report SOU 2016:2.

The difference between EU workers and EU non 'economically active' citizens has to some extent been contested, mainly by academics and NGOs.[10] The issue has been a salient issue in the press.

Question 2

a. For benefits provided by the Swedish social security system a distinct concept of residence applies. The concept of residence contained in the Social Insurance Code (2010:110) is distinct from but confusingly similar to that contained in the Population Register Act (1991:481). Both contain a one-year rule: people moving to Sweden are considered resident if their intention is to stay for at least a year.[11] Both acts provide that a person is considered resident in Sweden (and thus eligible for residence-based social security benefits) if his/her actual place of residence (*egentliga hemvist*) is in Sweden.[12] However, a major difference between the Social Insurance Code and the Population Register Act is that under the former there is no requirement that an individual must have a right of residence under the Citizens' Rights Directive in order to be regarded as resident.[13]

   The Government has been positive to the Commission's proposal for amending Regulation 883/2004 and the proposal that Member States should have a right to limit access to social benefits by economically inactive mobile citizens.[14]

b. The Swedish child allowance benefit was introduced already in 1948. Being one of the first measures taken to lay the foundations of the Swedish welfare state, no basic change has been made in the benefit since its introduction. To our knowledge there is no growing opposition in Sweden to the principle that the country of work of the parent(s) is responsible for paying child allowances, even when the child resides elsewhere. The reason for this is, likely, that the Swedish child allowance is a flat-rate benefit. It does not take into account the cost of living in the state of residence of the child.

[10] Zillén K., *Barn i välfärdsstatens utkant (*Children on the fringes of the welfare state), Uppsala, Iustus förlag, 2019. Lerwall L., 'Rätt till utbildning för icke folkbokförda personer' (The right to edcuation for persons not registred as resident), *Svensk Juristtidning,* 2017. pp. 299–318 and Amnesty International *Sweden: a cold welcome. Human rights of Roma and other 'vulnerable EU citizens' at risk,* www.amnesty.org/en/documents/eur42/9403/2018/en/, visited 3 August 2022.

[11] Chapter 5, Section 3 of the Social Insurance Code (2010:110). See also the Guidelines of the Social Insurance Agency 2017:1.

[12] Chapter 5, Section 2 of the Social Insurance Code (2010:110).

[13] In HFD 2014 not. 20, the Supreme Administrative Court found that the Social Insurance Agency could not deny a British couple who had lived in Sweden for two years the Swedish social security benefits housing allowance on the grounds that they did not have a right of residence in Sweden under the Population Register Act.

[14] Regeringskansliet (Government Office), Faktapromemoria 2016/17:FPM54.

In case HFD 2014 ref. 64, the Supreme Administrative Court found that a person residing in Sweden (although Latvia still being the competent state according to Regulation 883/2004) was entitled to Swedish child allowance. Here reference was made to C-611/10 and C-612/10 *Hudzinski-Wawrzyniak*.[15]

Question 3

a. There are few workers from other Member States working in Sweden.[16]

   The number of workers posted to Sweden is increasing. In 2019 about 85,000 postings were registered at the Swedish Work Environment Authority[17], encompassing about 40,000 individual employees. In 2020 almost 88,000 postings were registered, encompassing about 40,000 individuals. In 2021 over 117,000 were registered, encompassing almost 55,000 individuals. The most frequent sectors are construction and manufacturing industry. During 2018 more than half of the registered postings concerned the construction sector. It is questioned if these figures are the correct ones. It is supposed that many postings are not registered.[18]

   The number of third country nationals working in Sweden has increased during the last 10-year period. It was estimated that more than 28,000 persons with a temporary work permit were working during some period 2018. This should be compared with the total number of employed persons in Sweden; about 5 million persons.[19] (About third country nationals, see also under c).

   After the COVID-19 pandemic, there are several sectors in Sweden that are reporting problems finding workforce, for example hotels and restaurants, qualified industry workers, transports. There is also a lack of nurses and teachers. The lack of qualified workers in the health sector is a long-standing problem.

b. 'Fair movement' is a topical in Swedish discussions. The Swedish labour market model is built upon the right to organise, the right to collective bargaining and the right to take industrial action. There is a clear overweight for self-regulation by the social partners in collective agreements over state regulation in legislation. State regulations in the form of legislation etc. in the

[15] Judgment *Hudzinski-Wawrzyniak*, joined cases C-611/10 and 612/10, EU:C:2012: 339.

[16] European Commission, *Annual report on intra-EU labour mobility 2021(2022)*.

[17] Arbetsmiljöverket (Swedish Work Environment Authority), www.av.se.

[18] See Sjödin, E. & Wadensjö, E., *25 år med utstationering av arbetstagare till och från Sverige – Reglering, omfattning och arbetsmarknadseffekter* (25 years with posting of workers to and from Sweden - regulations, extent and effects for the labour market), SIEPS 2020.

[19] Herzfeld Olsson, P., "Konsten att inkludera arbetskraftsmigranter i den svenska modellen" (How to integrate migrant workers into the Swedish labour market model), *Juridisk Tidskrift* 2019–20 No. 3, pp. 638–670.

labour market is normally only used when the social partners are unable to find a common solution in collective agreements and for implementation of EU law.[20] The *Laval*-decision (C-341/05, 2007)[21] from the CJEU was met with astonishment because it challenges fundamental ideas on the Swedish labour market about social dumping and fair competition. The social partners are supposed to find fair and sound compromises in their collective agreements. The individual employee´s rights are protected by the trade union, and it is also the trade unions that supervise that adherence to rules on the labour market are followed. Traditionally, statutory legislation in the labour law area has only regulated a few basic issues, and the labour market has mainly been regulated by mans of collective agreements. This state of things began to change in the 1970s when several new and important laws were issued and is even more obvious after Sweden became a member of the EU and must implement EU law by statutory legislation. Collective agreements are still a very important way of regulating the Swedish labour market – maybe still the most important. Labour legislation is normally compulsory, but there is a possibility to deviate from many provisions by collective agreement. There are no statutory rules in Sweden concerning wages. Wages are regulated in contracts, that is the employment contract between the individual employer and employee, or in collective agreements. Collective agreements cover almost 90 per cent of the Swedish workforce. The traditional way to combat unfair competition in Sweden is that the trade union asks the employer to bargaining and to conclude a collective agreement. If the employer refuses, the traditional reaction is that the trade union gives notice of industrial action and have the possibility to use industrial action in order to force the employer to sign the collective agreement for the sector in question.

Swedish employers´ organisations tries to organise foreign employers operating in Sweden and hereby Swedish collective agreements become applicable also to foreign employees.

c. There are discussions concerning essential workers in critical occupations. This does not however concern essential workers from EU countries. They mainly focus on highly qualified third country nationals.

   It is quite easy to get permission to work in Sweden if you are a third country national. The aim of this is to attract qualified essential workers. The employee

[20] See Adlercreutz, A. & Nyström, B., *Labour Law in Sweden*, Wolters Kluwer, 3rd ed. 2021, General Introduction Chapter 3; Kjellberg, A., *The Nordic Model of Industrial Relations, Studies in Social Policy, Industrial Relations, Working Life and Mobility*, Vol. 2022, No. 2, Department of Sociology, Lund University; Fahlbeck, R. & Mulder, B. J., *Labour and Employment Law in Sweden*, Skrifter utgivna av Juridiska fakulteten i Lund, 2009.

[21] Judgment *Laval*, C-341/05, EU:C:2007:809.

must present a binding contract of employment. Pay and working conditions must be comparable to the collective agreement for the sector or what is customary for that type of work. There is a bottom line for pay at SEK 13,000 (about EUR 1,200). In practice, this has led to unqualified third-country workers in, for example, restaurants and the agriculture that comes to Sweden and, in some cases, are met with unacceptable conditions. The control system has been strengthened several times to prevent or condemn situations with very low salaries, non-permitted deductions from salaries, poor work environment etc.

In 2021, the Swedish Migration Board[22] handled about 5,500 applications for work permit concerning seasonal work, mainly concerning picking wild berries. The same year the Migration Board handled over 6,000 applications from third country employees in the IT and engineering industry. For 2022, the Board estimates that there will be approximately 7,000 applications for work permits for berry picking, these applications concern only employees from Thailand.

Question 4

a. There is no significant outflow of workers from Sweden in any sector (except maybe for the health sector, see below), although salaries for qualified educated workers in several other Member States are higher than in Sweden. It happens that young people who rather recently have taken an academic degree, but still not have a family, go abroad to work for a few years, but they usually return to Sweden after a while. The outflow has not caused any problems, except maybe when it concerns qualified nurses. The outflow of nurses from Sweden to other countries is worth noticing. Most of them go to Norway but also other EU/EES countries. Norway is not a member of the EU, but Norway belongs to the EEA (European Economic Area), which means that free movement of workers also applies to Norway. (There has been free movement between the Nordic countries since the 1950s.) Norway and Sweden have a long border together, they have a common history, and the languages are very similar. Pay is higher in Norway and working conditions in the health sector are considered to be better in Norway. To some extent, also medical doctors and dental nurses educated in Sweden goes abroad. The very south of Sweden and the east part of Denmark, that is an EU Member, are only separated by a bridge over Oresund. Swedish nurses, but also employees in shop keeping and restaurants, are working in Denmark, and very often still lives in Sweden; they are cross-border workers.

22 www.migrationsverket.se.

Sweden and Denmark also have much in common, have benefited from free movement between the Nordic countries and the languages are quite similar.

b. There are no measures in Sweden as the one described in the questionnaire. And as far as we know no such measures have been discussed.

c. No.

Conflicts between fundamental freedoms and social rights

Question 5

a. Directive 2018/957 is transposed into Swedish law; by amendments to the Posting of Workers Act 1999:678. In Sweden, pay is normally regulated through a collective agreement. Pay could also be (and often is) regulated in the private contract between the employer and the employee. There are no rules in Swedish law concerning pay. To be in conformity with the *Laval* case (C-341/05, 2007)[23], Section 15 of the Posting of Workers Act requires (among other things) that demands for a collective agreement, supported by industrial action, should be in accordance with what is prescribed in a national collective agreement for the sector in question. This means that industrial action is unlawful if the trade union demands pay not in accordance with the national collective agreement. Further, pay regulated in a collective agreement for posted workers is not allowed to be on a higher level than a Swedish employer is bound to pay in a comparable situation. Posted workers, that are not members of the trade union having concluded the collective agreement, according to the Posting of Workers Act, have the right to the same treatment concerning pay as those employees that are members. Collective agreements that could be applicable in posting situations are accessible on the webpage of the Swedish Work Environment Authority (*Arbetsmiljöverket*).[24]

   There are considerable problems with the very complicated rules concerning posting of workers, and we can suppose that there also is a 'black market' where the rules are not applied (mainly agriculture, construction, restaurants, transports).

b. There are no Swedish court cases that concerns the civil law rules in the Posting of Workers Act.[25] There are, however, rules in the Act that are of a

[23] Judgment *Laval*, C-341/05, EU:C:2007:809.

[24] www.av.se

[25] In AD 2012 No. 42 an employer from Lithuania posting construction workers to Sweden voluntarily had

public law nature. Administrative penalty fees can be imposed for violation of the rules on reporting obligations, documentation etc. There are some cases in administrative courts concerning such penalty fees.

Temporary work agencies are regulated in Sweden according to the Hiring Out of Workers Act 2012:854, which is an implementation of the EU Directive 2008/104/EC. Temporary work is considered to have a potential to lead to problems for employees and temporary work agencies were forbidden in Sweden until the beginning of the 1990s. Today, there are no restrictions, the employers in the sector are heavily organised, and it is one of the sectors most regulated in collective agreements in Sweden, about 92 per cent of the employees are covered by collective agreements. According to the Posting of Workers Act, some rules in the Hiring Out of Workers Act should be applied when posting by temporary work agencies, i.e. the principle of equal treatment, protection of pregnant women and young people, non-discrimination. The employer who uses a temporary worker shall inform the temporary work agency about the employment conditions that shall apply.

There are a few criminal cases that concerns human trafficking or violation of work environment regulations that has led to accidents.

Question 6

a. Yes, the right to conduct business and its potential conflict with labour law has been dealt with in a few cases by the Swedish Labour Court. First, in the *Laval*-case (C-341/05 and the following decision by the Labour Court[26]). This case was related to the construction business. It could be worth mentioning that the changes in Swedish legislation in order to be in conformity with the CJEU´s decision in the *Laval*-case (the so-called Lex Laval) was criticized by the ILO Committee of Experts on the Application of Conventions and Recommendations related to ILO Conventions Nos. 87 and 98.[27] Additionally, Lex Laval was considered not to be in conformity with the European Social Charter. The European Committee on Social Rights found a violation of the right to bargaining collectively and the right to strike.[28] Secondly, there is the *Fonnship*-case (C-83/13, 2014)[29] that concerned a vessel sailing between EEA states, and the employer following industrial action taken place in a

signed a Swedish collective agreement. The question in the case was if the employer had breached the collective agreement in view of the posting of worker directive and some Latvian rules.

[26] Judgment of the Labour Court, AD 2009 No. 89.

[27] Committee of Experts, ILO Observations 2012.

[28] Collective complaint No 85/2912.

[29] Judgment *Fonnship*, C-83/13, EU:C:2014:20.

Swedish harbour signed a collective agreement approved by the International Transport Workers´ Federation. Here, the CJEU gave the Swedish Labour Court much more room for its decision that it did in the *Laval*-case. The Swedish Labour Court found in its decision in *Fonnship* that the restrictions in the free movement of services were not acceptable in the case, they were not proportionate.[30]

b. The general idea is that the right to strike is a fundamental right. It is protected under the Swedish constitutional law and the right is specified in the Co-determination Act 1976:580. There are few restrictions on the right to strike in the Co-determination Act. Such restrictions are more frequent in national collective agreements. After the CJEU´s decision in *Laval* new restrictions concerning the right to strike was introduced in the Co-determination Act, the so-called Lex Laval. The Swedish Labour Court has followed the decisions from the CJEU, that seems to take the standpoint that market freedoms are more important than fundamental rights.

Question 7

a. Concerning anti-discrimination law, Sweden tried to follow EU legislation and case law already before Sweden became a member of the Union in 1995. Since Sweden became an EU Member, Swedish antidiscrimination legislation has continued to update and adapt to EU law. In 2009 several laws in the discrimination area were amalgamated into the Discrimination Act 2008:567. There are some Swedish case law concerning discrimination, mainly dealing with gender discrimination. Only a couple of cases have dealt with discrimination on grounds of ethnicity, disability, age, and religion.

Discrimination on religious grounds have never been a topical issue in Sweden, religion is seen as something that could be a part of one´s private life, not relevant in the labour market. After increasing immigration to Sweden, a couple of cases have appeared in the Labour Court. In a case 2017[31], the Labour Court found that a female dentist was not discriminated against when she was forbidden to shield her arms. The Court did a proportionality test and found that health and security for patients were more important. In a case 2018[32], the Court decided that an employer who had interrupted the job interview when the female applicant refused to shake the male manager's hand was guilty of discrimination on religious grounds. In this case the Court referred to case

[30] AD 2015 No. 70.
[31] AD 2017 No. 65.
[32] AD 2018 No. 51.

law concerning the European Convention on Human Rights and the CJEU´s decisions in case *ADDH* (C-188/15, 2017)[33] and case *G4S* (C-157/15, 2017)[34].

Reasonable accommodation is required according to the Discrimination Act. The Labour Court stated in a judgment 2013[35] that it was not reasonable to require, among other things, considerable changes in job schedules to allow for a bus driver who had had a heart attack to continue work. From 2015 the Discrimination Act requires accessibility for persons with disabilities. In a case 2017[36], the Labour Court found that the costs for deaf interpreters enabling a deaf teacher to lecture was so considerable that this was unreasonable.

Developments around equal pay seems still to be needed. Although there have been developments during the last decades, and the pay gap has decreased, there are considerable differences in men's and women's pay, pensions and life earnings for men and women. There are many reasons for this; one important explanation is that men and women work in different areas of the labour market. Another is that the responsibility for children is still viewed as mainly a mother´s task. Anti-discrimination legislation does not seem to be the best way to solve these problems, and no further legal developments in this area is required from a Swedish point of view. The pay gap between men and women has continuously decreased and in 2021, the gap was 9.9 per cent; women in Sweden earn 90.1 per cent of men´s wages. After considering, for example, age and education, there is a gap of 4.5 per cent that cannot be explained by objective factors.[37]

From a Swedish perspective, no developments at EU level are required. The proposed transparency directive KOM (2021) 93 final[38] will introduce many formal rules and could pose a danger to the Swedish model for setting wages in negotiations and collective bargaining. The Swedish Government assessed the proposal as too detailed and without consideration to national traditions of wages setting. Ultimately, the proposal was not considered to be against the subsidiarity principle. Swedish employers are negative to the proposal, while the trade unions are cautiously positive.

[33] Judgment C-188/15, EU:C:2017:204.

[34] Judgment C-157/15, EU:C:2017:203.

[35] AD 2013 No. 78.

[36] AD 2017 No. 51.

[37] *Löneskillnader mellan kvinnor och män 2021. Vad säger den officiella lönestatistiken?* (Differences in wages between women and men in 2021 according to official statistics) *Medlingsinstitutet* (the State Mediation Office), 2022. www.mi.se

[38] Proposal for a Directive of the European Parliament and the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through transparency and enforcement mechanisms.

The decision from the CJEU in *Braathens* (C-30/19, 2021, see below question 10 e)[39], has caused debate in Sweden and will probably lead to legal changes. The decision from the CJEU in this case raises concerns for damages to the Swedish negotiation and conflict resolution model.

b. The acquis in the area of working time is implemented in the Working Time Act (1972:672), the Work Environment Act (1977:1160) and the Holidays Act (1977:480). All three Acts have been changed in order to adapt to EU law. Working time is traditionally regulated in collective agreements in Sweden. The detailed regulations in the working time directive and the case law concerning the directive are seen as a problem. Regulations in collective agreements (within some boundaries prescribed in law) are considered to be a better alternative than general legislation and allow flexibility in different areas of the labour market.

   The CJEU´s decision in *Simap* (C- 303/98, 2000)[40] lead to changes in the Working Time Act and reorganisation of working time in Swedish hospitals.

   There is almost no case law from Swedish courts in this area. The labour market parties are usually not interested in a court decision in these cases. If there are any disputes in the area, the social partners usually solve the dispute within their own dispute resolution system (dispute negotiations). The Labour Court stated in a case 2020[41] that the relevant circumstances in the case was not comparable with the case *Tyco* (C-266/14, 2015)[42]. It has been questioned how Sweden could fulfil the requirements in the CJEU´s decision in *CCOO* (C-55/18, 2019)[43], and how such a decision could be implemented in the modern labour market. The CJEU´s decision seems surreal, not adapted to working life of today.
   The Swedish reactions to CJEU´s case law in the working time area could definitely not be called hostile, but it has caused some irritation and questioning of the Court´s knowledge of modern working life.

c. There are, as of now, no specific regulation focusing on platform work in Sweden. General labour legislation is applicable on platform workers classified as employees in the binary Swedish legal system, where a person performing work is either an employee or self-employed. The employment concept is wide and inclusive, according to the 1982 Employment Protection Act, and

[39] Judgment *Braathens*, C-30/19, EU:C:2021:269.
[40] Judgment *Simap*, C-303/98, EU:C:2000:528.
[41] AD 2020 No. 7.
[42] Judgment *Tyco*, C-266/14, EU:C:2015:578.
[43] Judgment *CCOO*, C-55/18, EU:C:2019:402.

covers both the concept of 'workers' and that of 'employees' referred to in other countries.

The Swedish Labour Court has not yet had an opportunity to decide whether platform workers in the collaborative economy (gig economy) are employees or self-employed in a labour law perspective. However, in two cases (Taskrunner AB and Tipptapp AB) the Administrative Court[44] decided that the platform companies in question were not "employer" according to the 1977 Work Environment Act, and the Act was therefore not applicable on platform workers. The decision was based on an overall assessment out of the purpose of the Work Environment Act. In another case[45] (Cool Company AB), the Administrative Court of Appeal in Stockholm had to decide who was responsible for the work environment of an umbrella company[46] worker and if the 1977 Work Environment Act was applicable. The umbrella company worker had started working on the assignment before the contract between the umbrella company and the client was signed and was therefore not considered to be employed by the umbrella company. The special business model in which umbrella companies operate was of particular importance for the outcome of the case. According to the court, an employment relationship only exists for the period during which there is a signed contract and only for the duration of the assignment.

Contrary to other parts of the labour statutory legislation, the 1976 Co-determination Act also includes solo self-employed persons classed as 'dependent contractors'. The social partners can therefore bargain and conclude collective agreements for 'dependent contractors' (Sections 7–9, 10, 26–7, 41 of the 1976 Co-determination Act). So, although platform workers are not

[44] The Administrative Court of Appeal in Gothenburg judgment of 19 November 2021, case number 4120-21 (Taskrunner AB) and judgment of 9 December 2021, case number 6394-21 (Tipptapp AB).

[45] Administrative Court of Appeal in Stockholm judgment of 30 October 2019, case number 5725-18. The Supreme Administrative Court denied by a final decision review permit. Decision of 15 January 2021 case number 6245-19. Appealed judgment from Stockholm Administrative Court the 18 June 2018, case number 3944-17.

[46] The Swedish umbrella companies' business model is that the umbrella company worker (to be) finds an assignment. He either bids for work on a digitalized platform or finds it in some other way. If successful, the umbrella company worker (to be) negotiates both the working conditions and the remuneration with the client. The umbrella company worker (to be) then makes sure the client has signed a contract with the umbrella company. The umbrella company worker is employed by the umbrella company on a short fixed-term employment contract for the duration of the assignment. When the work is done, the client is invoiced by the umbrella company. Once the client has paid the umbrella company, the platform worker is credited his remuneration, after deductions for tax, social security contributions, and the umbrella company's commission. See Westregård A., "Looking for the (fictitious) Employer – Umbrella companies: The Swedish Example", in Becker U., Chesalina O. (eds.), *Social Law 4.0: New Approaches for Ensuring and Financing Social Security for the Digital Age*, Nomos (Baden-Baden), 2021, pp. 203-227. Elektronisk publicering 17 December 2020, Social Law 4.0 eBook (2020) / 978-3-8487-7149-3 - Volume (2021) - Issue | Nomos eLibrary (nomos-elibrary.de).

classified as employees, they can still be regarded as 'dependent contractors', which is a far wider concept (Judgment of the Swedish Labour Court AD 1987 no 21, AD 1994 no 104 and AD 1998 no 138). Most platform workers are therefore covered by the collective rights, and it is possible to regulate their conditions in collective agreements.

In Sweden, the largest white-collar union has concluded collective agreements with a few platform companies directly.[47] Those collective agreements are not written specifically for platform workers and do not deal with the specific problems they face. Instead, the sectorial collective agreement for temporary work agencies and the sectorial collective agreement for media sector are applied. The Swedish Transport Workers' union and Fodora concluded a collective agreement concerning food delivery by bike the 1 April 2021 to 30 April 2023. The agreement does not apply to truck delivery. The collective agreement is the only one in Sweden with focus on that kind of platform work. The platform workers are considered employees according to the collective agreement.

d. ILO Conventions are (almost) always cited by the legislator in the *travaux préparatories* (legislative working papers) to legislation, and so is the European Convention on Human Rights. During the last decades the Labour Court also refers to ILO Conventions when appropriate, but the European Social Charter is never mentioned in Swedish case law.

The conflict between EU law, ILO conventions and the European Social Charter was obvious in the *Laval* case where the Swedish legislation implementing the CJEU´s decision in *Laval* (Lex Laval) was criticised by the ILO Committee of Experts and was found to be in conflict with the Social Charter (see question 6 a). If this conflict had occurred in a Swedish court, the court would have had to follow EU law because of the obligations following from the membership of the EU.

Question 8

a. There are no demands for new developments in EU social policy in Sweden. Social policy is considered to be very important in the EU perspective, but it is a widespread opinion that rules on EU level do not sufficiently take into account different national systems. Sweden has a very well-functioning system for wage setting (negotiations) and for regulating the labour market (in the first

[47] Söderqvist, C.F./Bernhardtz, V., *Labor Platforms with Unions Discussing the Law and Economics of a Swedish collective bargaining framework used to regulate gig work*, Union Working Paper 2019:57.

instance by means of collective agreements). It is considered a problem that EU law is too detailed and must, in principle, be implemented by legislation. The area of labour legislation has increased considerably after Sweden became a member of the EU in 1995. Rather often these new statutes are not in harmony with the rest of the Swedish system. It is also considered a problem that the limits prescribed in TFEU Article 153.5 concerning pay, right of association and the right to strike are not respected by the CJEU or other EU institutions.

b. The 1982 Employment Protection Act, the 1977 Work Environment Act, the 1977 Annual Leave Act, the 1982 Working Hours Act and the 2008 Discrimination Act are all more or less non-applicable to strictly self-employed and that includes EU law that are implemented into the labour legislation. The only exemption that also applies to self-employed is the concept of the 'dependent contractors' from the 1976 Co-determination Act mentioned above, question 7c. (here is no EU legislation involved).

   A basic social security system for all, where the work-based insurances secure the income of individuals if they are out of work, is important in the Swedish labour market model. In Sweden, both employees and self-employed are covered by unemployment benefits, sickness and injury benefits, parental benefits, retirement and old age benefits. With the exception of the unemployment insurances, those social security insurances are all mandatory. For a long time, the aim in Sweden has been to construct statutory regulations that give traditional employees and the genuinely self-employed similar social protection. Entrance to social insurances and calculation of benefits differ between employees and self-employed and entrance is generally more favourable for employees than it is for self-employed.

Question 9

a. Sweden has not introduced the single currency Euro and has not completed the third stage of EMU process. The processes around the European Semester and the Country Specific Recommendations have been criticised. For example, Swedish trade unions have considered this complex report- and surveillance-procedure to be more about paperwork than the creation of work opportunities. Those who are critical nevertheless admit that there is an advantage in the information process.

b. Cannot answer this question.

Question 10

a. Fundamental rights on the labour market traditionally play a minor role in Sweden. The Scandinavian welfare state and its objectives, in relation to rights-based legal thinking, explains that Sweden has paid little attention to fundamental rights. The new Instrument of Government (a part of the Swedish Constitution) from 1974 contains a list of fundamental rights including non-discrimination and the right to industrial action. After becoming a member of the EU in 1995 and implementing the European Convention on Human Rights as a Swedish law the same year, it is evident that Swedish courts have been more aware of fundamental rights.

It is mainly in criminal proceedings in the general Swedish courts that the courts have referred to the Charter of Fundamental Rights. In a few cases before the Swedish Labour Court the Charter has appeared, mainly in the arguments from the parties. In 2018[48], in a case concerning discrimination on the ground of disability, the Discrimination Ombudsman invoked Articles 15 and 47 of the Charter in support for the argument for adjustment and annulment of a rule in a collective agreement. The Labour Court found no ground for this in the Charter.

b. Cannot give an answer here because there is almost no Swedish case law.

c. See b.

d. See b.

e. In the so called *Braathens* case on an internal Swedish flight, a passenger with Chilian origin was taken out by the pilot for a second security control. The passenger claimed discrimination and asked for damages EUR 1,000. Before the court the flight company agreed to pay EUR 1,000 without recognising discrimination whatsoever. According to Swedish legislation (the Code of Judicial Procedure), it was not possible in this situation to have the merits of the alleged discrimination examined by a court. The Swedish Supreme Court requested a preliminary ruling concerning the interpretation of the directive 2000/43/EC Articles 7 and 15 read in the light of the Charter of Fundamental Rights. The CJEU stated in *Braathens* (C-30/19, 2021)[49] that Swedish law infringes Articles 7 and 15 of the Directive read in the light of Article 47 of the Charter, and that the national Court, in a case between private persons ensure that judicial protection for litigants flowing from article 47 by disapplying,

[48] AD 2018 No. 42.

[49] Judgment *Braathens*, C-30/19, EU:C:2021:269.

if necessary, any contrary national provisions. Disapplying national law (in this case provisions in the Judicial Procedures Act) could have serious effects on other parts of national law and practice and could lead to increased workloads for the courts. The flight company Braathens, after studying the decision from the CJEU, confirmed before the Swedish Supreme Court that discrimination had taken place. Hereby, there was no longer any uncertainty that was prejudicial for the claimant and the Supreme Court rejected the case. This means that there hitherto is no example of a Swedish court setting aside Swedish legislation because of the Charter in a horizontal situation. The Swedish Supreme Court, by asking for the preliminary ruling in this case, has shown its awareness of the CJEU´s practice in horizontal situations where the Charter plays a role. In Sweden, the *Braathens* case and the questions posed by the members of the Supreme Court, when they rejected the case, have resulted in ongoing discussions concerning this in the Government Office.

Question 11

a. Yes, Swedish procurement laws (2016:1145, 2016:1146, 2016:1147) contain rules on social rights. According to the Swedish Public Procurements Act, a contracting authority should take environmental considerations, and social and labour law considerations into account in public procurement, if the nature of the procurement so justifies.[50]

   This has been a somewhat controversial question in Sweden. Earlier Swedish procurement legislation was criticised because trade unions and many scholars were of the opinion that Swedish law was narrower towards social rights than necessary within the limits of EU law. Also, when transposing the new EU-directives on public procurement there were some discussions concerning the proposed rules about social rights, but the 2016 Acts now contain rules about social rights.

b. Sweden, being such a mall country, have many large and multinational companies. Many of these (H&M, IKEA, Volvo etc.) have a long tradition of codes of conducts, of certain kinds of agreements with suppliers, and agreements with international trade unions.[51]

c. Trans-national collective agreements have been concluded by Swedish firms.

[50] Chapter 4, Section 3 of the Public Procurement Act (2016:1145),

[51] Pereira F. A., *Global Framework Agreements. A Response to Urgent Global Labour Concerns,* School of Economics and Management. Lund University, 2020 (diss.).

d. If the Swedish connection is close enough, this is possible. Swedish private international labour law is mainly regulated by EU law.

As for civil cases, the general rule is that the court for the place where the defendant resides is competent. A corporation, partnership, cooperative, association or similar society, foundation or similar institution is considered to reside at the place where the board has its seat or, if the board has no permanent seat or there is no board at the place from which the administration is carried out. This rule also applies to municipalities or similar public authority.[52]

As for criminal cases, the nationality principle applies. In other words, the person was at the time of the offence a Swedish citizen or an alien habitually resident in Sweden and if the act is also punishable under the law of the place where it was committed (dual criminality).[53]

e. No. It has been discussed.

f. No.

Question 12

The link between climate change and social justice have been noticed, but no real action has yet been taken.

CSR and other codes of conduct often deals with both employment rights and responsibilities for the environment.

Question 13

a. Education on EU is covered in the curriculum for lower secondary school, upper secondary school as well as for higher education. However, it is not covered in the curriculum for primary school. The aspects that get the most space deal with factual knowledge about the EU, such as the history of the EU, institutions, cooperation, trade and the labour market.

Swedish students are also very well educated in the English language, which makes it possible to communicate and receive information across borders. At university level it is rather common to study abroad for a period.

In 2007, the National Agency for Education published a report on education on EU in upper secondary school.[54] A general conclusion was that many

[52] Chapter 10, Section 1 of Code of Judicial Procedure (1942:740).

[53] Chapter 2, Sections 2 and 5 of the Criminal Code (1962:700).

[54] The National Agency for Education, *EU-undervisningen i gymnasieskolan* (Education on EU in upper secondary school), Report 308.

students had little interest in EU issues. At the same time, the report found that the students' knowledge had increased when they left school and that the school had importance for increasing students' knowledge of the EU.

b. The Swedish National Agency for Education (*Skolverke*t) is the governmental authority for the public school system. The agency issues regulations, general recommendations, and national tests. The Swedish Council for Higher Education (*UHR*) is the governmental agency tasked with providing support to higher education. It does so by, for example, issuing regulations and general recommendations.

Question 14

There have been no legislative amendments to anti-discrimination law in recent years. As for recent case law, most cases have concerned issues in relation to disability, religion, and sexual orientation.

In a Government Inquiry from 2021 there are suggestions for amendments in Swedish discrimination legislation.[55] Among other things, strengthened legislation for protection from discrimination and harassment from third parties is suggested.

Question 15

Important questions are raised here. They are not discussed in these terms in Sweden, but there are, of course, ongoing discussions in different discourses concerning both common values and social developments in EU. Common European values are considered to be an important basis for both individual Member States and the Union.

The population in Sweden is, according to different surveys, one of the most positive to the European Union and Social Union. At the same time, a slight majority thinks that social issues should be dealt with at the national level.[56]

The *Laval*-case challenged fundamental rights in the Swedish labour market. Recent new directives and suggested directives, as well as recent case law from the CJEU (for example *Braathens*, see above question 10 e) is looked upon as an unnecessary, and potentially harmful intervention in national labour markets.

[55] Government Inquiry Report SOU 2021:94 *Ett utökat skydd mot diskriminering* (Extended protection against discrimination).

[56] European Commission, *Social Issues - Sweden,* 2266 / 509, file:///C:/Users/jur-mam/Downloads/ebs_509_fact_se_sv.pdf, visited 21 August 2022.

A topical issue in Sweden is the proposed Directive on adequate minimum wages in the EU.[57] It has been questioned if EU has the competence to adopt such a directive and if Sweden has transferred competence to EU to do this. From both the employers' and the employees' side the proposal is looked upon with reluctance. The directive will have consequences for the wage-setting system in Sweden and it is perceived uncertain how further developments will be, especially in consideration of the jurisprudence the CJEU.[58]

[57] Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, COM(2020) 682 final.

[58] Sjödin, E.," European Minimum Wage: A Swedish perspective on EU´s competence in social policy in the wake of the proposed Directive on minimum wages in the EU', *European Labour Law Journal*, 2022, pp. 1-19.