Europeanization and Globalization 4

Gerald G. Sander · Vesna Tomljenović
Nada Bodiroga-Vukobrat *Editors*

Transnational, European, and National Labour Relations

Flexicurity and New Economy

Springer

Europeanization and Globalization

Volume 4

More information about this series at http://www.springer.com/series/13467

Gerald G. Sander • Vesna Tomljenović •
Nada Bodiroga-Vukobrat
Editors

Transnational, European, and National Labour Relations

Flexicurity and New Economy

Springer

Editors
Gerald G. Sander
University of Applied Sciences
Hochschule für öffentliche Verwaltung und Finanzen Ludwigsburg
Ludwigsburg, Germany

Nada Bodiroga-Vukobrat
Faculty of Law
University of Rijeka
Rijeka, Croatia

Vesna Tomljenović
General Court of EU
Luxembourg, Luxembourg

ISSN 2366-0953 ISSN 2366-0961 (electronic)
Europeanization and Globalization
ISBN 978-3-319-02218-5 ISBN 978-3-319-02219-2 (eBook)
https://doi.org/10.1007/978-3-319-02219-2

Library of Congress Control Number: 2018946693

Printed on acid-free paper

This Springer imprint is published by the registered company Springer International Publishing AG part of Springer Nature.
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Preface

The changing nature of work relations has been inspiring labour lawyers and researchers from around the world for decades. As work patterns evolve with societal changes, the work we know and recognise as 'standard' may soon become a true rarity. New technologies give rise to the completely new work forms, escaping conventional definitions and categorisations. Their regulation has recently become the topic of the most heated public debates. The existing legal instruments seem too rigid and incapable of resolving many issues arising with the proliferation of the new flexible forms of employment.

We, as editors, take great pride in presenting you this collection of papers by various esteemed authors from different legal backgrounds, dedicated to the topic of new and emerging forms of labour relations. Contributions to this volume have been collected over the last 3 years, and many of them were presented at various conferences organised by the Jean Monnet Inter-University Centre of Excellence Opatija and the University of Rijeka – Faculty of Law. Contributions were updated.

Security of employment is a matter of the past. The old model of almost lifelong employment relationship, accompanied by acceptable wage for the worker and his/her loyalty and obedience in return, is in decline. The new world of work enters the scene, with new concepts and demands. Employability, flexibility and flexicurity are its defining features.

European countries introduced flexible labour markets forced by the need to stay competitive at the time of powerful economic changes. As much as flexibility and/or flexicurity undoubtedly have positive effects, there is also another side of the coin that should be analysed. Many chapters in this volume attempt to bring some new insights into this ongoing debate. In many instances, new patterns of work develop in the shadows or at the margins of traditional labour law, such as work on demand in the sharing economy. Although these work arrangements bring new opportunities for economic development and are even preferred by workers and enterprises alike, they are also raising new concerns given their precarious nature. Legislators in majority of EU countries have to struggle with this and other challenges presented

before them, not least because labour and social security legislation has to adapt to the new circumstances.

Majority of chapters in this volume have resulted from a combined research within two projects: 'Flexicurity and New Forms of Employment (Challenges Regarding Modernization of Croatian Labour Law)', no. UIP-2014-09-9377, funded by the Croatian Science Foundation, and 'Social Security and Competition', funded by the University of Rijeka. Both projects have brought together a group of outstanding academics. We would like to extend our gratitude to all researchers who have contributed to the projects and to this volume. The experience confirms that exchanging best practices and mutual learning, as well as connecting the academic community, decision-makers and legal practitioners is the best way to address our common concerns. We sincerely hope that this book will serve as a valuable contribution for further informed discussions on this topic.

Rijeka, Croatia — Nada Bodiroga-Vukobrat
Luxembourg, Luxembourg — Vesna Tomljenović
Ludwigsburg, Germany — Gerald G. Sander
13 December 2017

Acknowledgments

We express our thanks to the European Commission and the Jean Monnet Programme for their helpful support, which was essential for this enterprise. Also, we owe our sincere gratitude to Springer Verlag for recognising the value of our efforts and for its continued support to our scientific endeavours.

Research conducted for the purposes of writing the majority of contributions in this volume has been partly supported by the Croatian Science Foundation project no. UIP-2014-09-9377, 'Flexicurity and New Forms of Employment (Challenges Regarding Modernization of Croatian Labour Law)', as well as by the University of Rijeka project no. 13.08.1.2.03, 'Social Security and Market Competition'.

Contents

Transformation of Employment Relations and Social Dumping in the European Union: The Struggle Between David and Goliath?

Mario Vinković

Abstract In this chapter, we would like to focus on the link between social dumping and transformation of employment relations in the European Union through both the discourse of normative solutions starting with the establishment of the common European market and recent provisions of secondary legislation that favour social dumping or provide it with an alibi for legitimate development within the EU. The history of the principle of equal pay for equal work and work of equal value for women and men of the then Article 119 of the Treaty Establishing the European Economic Community clearly suggests that the introduction of the central principle today can be attributed to the fear of using the 'benefits' of social dumping, i.e. achieving competitive advantage within the established common European market. A few decades later, the problem of the posting of workers and the judgments of the Court of Justice, primarily in the relevant *Laval* and *Viking* cases, raise questions about the interdependence of social dumping and the transformation of employment relations in the EU. It is therefore justified to ask whether social dumping is fading away in the EU or whether, deeply rooted in employment relations in the European Union, by selective use of a range of political and economic interests and controversial contextualisation, it leaves a strong mark in the constant struggle between economic freedoms and social rights of workers.

1 Introduction

The historical development of labour law in the nineteenth and twentieth centuries and at the beginning of the twenty-first century testifies to permanent transformation, unavoidable development and consequently modernisation and flexibility of individual and collective employment relations and workers' rights across the world. In that context, modernisation does not necessarily have to be exclusively positive for workers' rights as social and political transition, economic changes and accelerated

M. Vinković (✉)
University of Osijek, Faculty of Law, Osijek, Croatia
e-mail: mario.vinkovic@pravos.hr

G. G. Sander et al. (eds.), *Transnational, European, and National Labour Relations*, Europeanization and Globalization 4, https://doi.org/10.1007/978-3-319-02219-2_1

economic development have consequently caused further disintegration of those parts of the world where labour standards are applied appropriately or even go beyond the framework set by the International Labour Organization (ILO), from those in which the struggle for fundamental labour standards is still ongoing. In this respect, trade union responsibility is constantly growing, and trade unions' power, influence and membership are, as it seems, globally in decline.

It is unquestionable that in a constant struggle for profit and striving to achieve an ever better market position, the markets of highly developed countries are seeking for ways to reduce labour costs, as well as to achieve technological savings and the proximity of essential natural resources and raw materials. Service provisions are also affected by similar considerations and business policies, in which the cost of service is unavoidably affected, inter alia, by the cost of labour of those providing the service in question. The aforementioned practice of the employer and the service provider is not illegal or forbidden, but it can directly or indirectly lead to the use of the benefits of social dumping.

In this context, the transformation of labour law in the present EU at the beginning of its historical development implied primarily only the transformation necessary for the functioning of the common European market in the 1950s and 1960s, and only later did it gain its social goal and articulated the need to protect fundamental human rights and workers' rights, owing to the normative activities and the influence of the Council of Europe (COE) and ILO sources, and also the harmonisation of national legislation of Member States with the *acquis communautaire*. The most obvious example thereof is certainly the area of equal treatment, primarily in the context of equality of women and men and later prohibition of discrimination in the world of work, employment and access to services, as well as on the basis of racial or ethnic origin, belief, disability, sexual orientation and age.[1] The development of this area will show not only the new legal status of the Charter of Fundamental Rights of the EU after the Lisbon Treaty but also the permanent development of equality law.

This transformation resulted, inter alia, in reducing but not eradicating the pay gap between men and women and led to a greater degree of protection in the workplace, particularly when it comes to protection against unlawful dismissal;[2] however, the question raised here is whether it has offered sufficient protection to occupations and jobs in terms of on-call working or teleworking, where the employer's requirements regarding flexibility are extremely high and where doing such jobs, that is, the area of searching for and providing a particular service, can imply not only different states but also continents. Moreover, have such jobs favoured taking advantage of the benefits of social dumping outside the EU? Bear in mind that call takers in the London information service are often female or male workers living and working in India or Pakistan. Over the last few decades, the freedom of movement for workers and cross-border mobility in the EU have been

[1] See Hepple and Veneziani (2009), pp. 1–12.

[2] See Hepple and Veneziani (2009), p. 4.

characterised by a series of normative activities and the adoption of legal sources of European law, as well as extensive practice of the Court of Justice. The adoption of the relevant directive[3] in the context of freedom to provide services provided limited protection for posted workers, raising at the same time a whole range of open questions due to judgments passed by the Court of Justice, primarily in the *Laval*[4] and *Viking*[5] cases, as well as the actions and protests of local unions in the countries to where the workers are posted. From the perspective of workers' rights, it is doubtful whether the aforementioned judgments and existing practice have enabled the existence of legal social dumping in the European Union. Moreover, is this just a new dimension in relation to the freedom of movement for workers and the problems of social dumping that were intensively written about and explored during the great wave of EU enlargement?[6]

Hence, in this chapter, we will discuss social dumping and its correlation with the transformation of employment relations primarily through two topics where it either undoubtedly emerges or is raised as an open question, i.e. equal pay for equal work and the posting of workers. But before that, the notion and context of social dumping should be highlighted.

2 Social Dumping: Concept and Context

Although quite a lot has been written about social dumping in the European Union, although it was the subject of numerous political and economic discussions and academic research, the concept of social dumping has not been defined in EU law yet. This was confirmed on 14 August 2015 by Marianne Thyssen, the European Commissioner for Employment, Social Affairs, Skills and Labour Mobility, in a written response to the European Parliament on the definition of social dumping.[7] It was unusual for the union of states for which nearly 20 years ago Aarle had stated that due to its high level of integration, it had a strong incentive to monitor fiscal policies leading to tax competition and social dumping.[8]

Catherine Barnard, who, inter alia, has been dealing with this topic in a sovereign and superior way for many years, refers to the concept of social dumping by quoting

[3]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 L18, 21.1.1997.

[4]C-341/05 *Laval un Partneri Ltd.* v. *Svenska Byggnadsarbetareförbundet and ors* [2007] ECR I-11767.

[5]C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* v. *Viking Line ABP and OU Viking Line Eesti* [2007] ECR I-10779.

[6]Vaughan-Whitehead (2003), pp. 1–567; Meradi (2012), p. 137.

[7]See Parliamentary questions, 27 May 2015, E-008441-15.

[8]Aarle, in: Moser and Schips (2001), p. 211.

Zitting and pointing out that the term implies *the idea that you replace an employee with a cheaper one coming from somewhere else*.[9]

Aware of the absence of a universal and generally accepted definition, the European Parliament believes that the concept of social dumping, inter alia, *covers a wide range of intentionally abusive practices and the circumvention of existing European and national legislation (including laws and universally applicable collective agreements), which enable the development of unfair competition by unlawfully minimising labour and operation costs and lead to violations of workers' rights and exploitation of workers*.[10] In its social aspect, the concept can lead to discrimination and unequal treatment of workers in the EU.[11] The European Parliament therefore focuses on different international practices and also national laws and universally applicable collective agreements, which may lead to violations of workers' rights and their exploitation, preventing at the same time fair competition.

In their recent research, primarily through a political and economic discourse, Bernaciak et al. criticise the vast number of scientific definitions of social dumping, which often mix different, incompatible concepts and do not rely on empirical research, considering that it is actually a practice of stakeholders in the market that violates or avoids existing social regulation with the aim of ensuring short-term competitive advantage over other market competitors.[12]

Taking into account numerous reasons, practices and phenomena in the European market for which it made an independent report on social dumping and the adopted Resolution on social dumping,[13] the European Parliament stresses, inter alia, the other two aspects of social dumping, i.e. the economic aspect, which implies unlawful practices such as undeclared work or other abusive practices leading to market disturbances and damage to SMEs and companies that do business fairly, and the budgetary and financial aspect, which is reflected in non-payment of taxes and social security obligations, thus jeopardising the financial viability of the said system and public finances of Member States.[14] It is hence indisputable that these other two aspects of social dumping consequently have certain direct or indirect effects on the position of workers because of not only exploitative practices and possible violations

[9]Barnard (2009a), p. 311; Saydé (2014), p. 309.

[10]Report on social dumping in the European Union, European Parliament, (2015/2255(INI)), 18.8.2016, p. 8, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2016-0255+0+DOC+PDF+V0//EN.

[11]Report on social dumping in the European Union, European Parliament, (2015/2255(INI)), 18.8.2016, p. 8, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2016-0255+0+DOC+PDF+V0//EN.

[12]Bernaciak (2015), p. 11.

[13]European Parliament resolution of 14 September 2016 on social dumping in the European Union (2015/2255(INI)), P8_TA (2016)0346, 14.9.2016, pp. 1–15. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0346+0+DOC+PDF+V0//EN.

[14]Report on social dumping in the European Union, European Parliament, (2015/2255(INI)), 18.8.2016, pp. 8–9, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2016-0255+0+DOC+PDF+V0//EN.

of employment protection legislation or the application of low working standards but also the deficiencies of a social security system or non-committal on its appropriate funding. Summing up the various concepts and the meaning of social dumping correctly and in the footsteps of the first mentioned definition, Hatzidaki-Dahlström concludes that these are the cases in which employers from countries characterised by low wages post workers to countries that pay high wages, applying at the same time their national legislation or employment conditions to these posted workers. This may cause higher unemployment of more expensive labour force in the host country, which threatens living standards, as well as the unacceptable exploitation of workers coming from countries with lower labour costs.[15] Hence, the concept implies different practices pursued by employers or Member States, which, due to low labour standards, give companies competitive advantage rather than productivity, which undoubtedly leads to 'transnational' social legislation, which has to be prevented.[16] It can be conceptualised 'as a practice undermining European social cohesion and solidarity'[17] and also as a form of reverse discrimination in situations where foreign companies are allowed to export lower social standards to the markets of other countries.[18] Undeclared work is a special problem, i.e. informal posting of workers among Member States, false posting, as well as work of third-country nationals who do not have appropriate work permits and legal status in the EU.[19]

All these clearly suggest that social dumping has a direct impact on the transformation of employment relations in the EU: sometimes positive, when the fight against it is directed at normative activities that need to disable it, which consequently affects a whole range of aspects of labour law and employment relations (equal pay, working conditions, social protection, regulation of employment of third-country nationals, collective labour law, the role and importance of trade unions, works councils, etc.), and sometimes negative, when the interpretation of national authorities and competent courts regarding the relationship between economic freedoms and social rights is at the expense of the protection of the interests and rights of workers.

3 What Did the Transformation of Labour Law and Employment Relations Bring?

In the first 15 years in the history of European integration, labour law and social policy were primarily and almost exclusively perceived as the responsibility of Member States since there was no pressure for harmonisation and the states differed

[15]Hatzidaki-Dahlström (2007), p. 142.
[16]Barnard (2012), p. 40.
[17]Tomka (2007), p. 171.
[18]Saydé (2014), p. 309.
[19]McKay (2014), pp. 116–131.

in terms of a series of economic, social and political differences. In the 1980s, the first changes occurred concerning the role of the state in the economy and employment relations marked by a clear differentiation between the countries in the continental German and Roman area and the United Kingdom: on the one hand, welfare states relying on social institutions and pay-related policies linked to labour productivity, not primarily market prices, and, on the other hand, free market liberalism and neoliberalism, which aimed at reducing the role of the state in welfare and strengthening the role of the private sector. It was a conflict between the social market and the deregulation process in Britain.[20] Towards the end of the 1980s, the long-standing clash of conservative politics represented by British Prime Minister Thatcher and the efforts symbolised by the President of the European Commission, Socialist Delors, to whom we owe the idea of social Europe, will be completed by passing the Community Charter of Fundamental Rights of Workers, which was adopted in 1989 by all Member States except the United Kingdom.[21] The Charter will eventually get the primarily interpretive potential by inspiring the Court of Justice, but it will only be kept at the level of a political document since, based upon the principle of subsidiarity, the implementation of rights guaranteed by the Charter remains within the competence of Member States rather than the Community. This is consequently also linked to the then perception of the United Kingdom that social policy is almost a 'symbol of national sovereignty'. As stressed by Shaw, the Charter will ultimately have a 'benchmarking role' later in the integration of social policy into the Treaty of Amsterdam (1999)[22] and be used as 'inspiration' for the adoption of 13 new directives in the area of European labour law (health and safety of fixed-term, temporary and pregnant workers; collective redundancies directive revision; etc.). Moreover, it will be the keystone of the 'constitutionalisation of fundamental rights', whose process will continue until the Charter of Fundamental Rights was proclaimed in Nice 2000, in which a set of labour and social rights was clearly articulated.[23] However, before that, i.e. in the early 1990s, the Treaty of Maastricht (1992) will promote employability, growth and living standards, not only by removing barriers to the free movement of labour, capital and goods within the common market but also through the monetary union; however, because of the British pressure, the Social Chapter was included not in this Treaty but in a special Agreement on Social Policy signed by the then 11 Members States, with the exception of the United Kingdom. Thanks to the Blair government, the Social Chapter will later be included in the aforementioned and far-reaching Treaty of Amsterdam.[24] The resistance and loud debates that followed were not surprising because of the differences that existed between the United Kingdom and continental

[20]Bruun and Hepple (2009), pp. 43–47.

[21]Bruun and Hepple (2009), p. 48.

[22]Shaw (2000), p. 62.

[23]Bruun and Hepple (2009), p. 48 and p. 53.

[24]Bruun and Hepple (2009), p. 48.

Europe and the fact that European social policy never intended to be 'social policy stricto sensu', but it was created as a form of 'social regulation'.[25]

In the field of collective bargaining, the establishment of the Economic and Monetary Union incited discussions on the necessary cross-border coordination of collective bargaining in order to prevent unhealthy competition in terms of wages and working conditions and, after that, resulted in the adoption of the Doorn Declaration of 1998, for which the ETUC stated that it should be extended to the whole Eurozone. Moreover, at the beginning of the new millennium, there were two approaches to collective bargaining, i.e. a 'defensive' approach, according to which internationalisation would jeopardise the importance and the process of collective bargaining, and the other that 'favoured greater coordination at European level'.[26]

Bruun and Hepple believe that the development of socio-economic regulation in the EU started in the last decade of the twentieth century, which faced, on the one hand, the challenges of globalisation that spurred greater harmonisation and coordination of economic, labour and social policies and, on the other hand, 'an EU intervention that was limited to certain aspects of labour law'.[27]

Veneziani analytically suggests that the setting of minimum social standards in Europe at the end of the twentieth and beginning of the twenty-first centuries was preceded by the periods of restructuring and deregulation of standard employment contracts in the 1980s. Moreover, he clearly portrays the 'five deviation periods' that had a strong influence on labour law and, we dare add, employment relations. The first deviation refers to the duration of the employment contract, i.e. the transition from indefinite-term contracts to fixed-term contracts with a view to ensuring labour market flexibility. The second deviation refers to changes in working time as a result of technological changes, participation of women and young people, early retirement, where the employment contract is used as 'labour cost-saving policy'. The third deviation refers to employee availability, where they lose their decision-making ability, the impact on their free time and working time, the duration and frequency of work-related obligations, as well as the nature of their duties (as they are also obliged to work in the future). The fourth deviation suggests the occurrence of a three-way employment relationship, which involves some new parties when compared to the traditional two-way employment relationship (employment agencies, current atypical contractual arrangements that are often in the grey zone). And, finally, the fifth deviation is related to the transformation of the workplace that is relocated away from the office, factory and traditional workplace to working from home, working remotely, teleworking and the like.[28]

There are many causes and indicators of the transformation of labour law, as pointed out by Hepple through systematic research, and consequently, I would add, of employment relations (privatisation of employment services, the fight against

[25]Maslauskaite (2013), p. 13.

[26]Bruun and Hepple (2009), p. 51.

[27]Bruun and Hepple (2009), p. 57.

[28]Veneziani (2009), pp. 99–128.

discrimination, active employment policy, social security system, social dialogue, etc.). These reasons, of course, are not exhausted; they are conditioned by social and ideological circumstances, policies, socio-economic circumstances, differences in legal culture and work culture, the application of legal methods in the continental and the Anglo-Saxon legal systems.[29] Labour legislation is the result of a constant struggle between 'different social groups and competitive ideologies', and in line with Hepple's conclusion, the relationship between 'the power of capital and the power of organised workforce and civil society' will always be important for its development and transformation.[30] However, the transformation that leads to non-standard employment is to the detriment of the rights of millions of workers, and it leads to stratification into those protected by the labour law rules and regulations and those to whom these rules and regulations do not apply, which can in turn lead to 'the new political dynamics'[31] and certainly raise a question whether this is a one-way road, a path that will permanently change labour law, making it largely impotent for the deflation of work-related rights of an exceptionally large number of people who will no longer be protected, hundreds of millions of whom will be left at the mercy of others in almost every part of the world, because if labour law is transformed such that it no longer protects justice in the labour market, it will lose its legitimacy, as pointed out by Arthurs.[32] However, Weiss believes that changes make labour law adapt to the new reality in the field of employment because it is not meant to be used as a tool that will supersede a weaker party. It has to respond to new challenges in the field of employment, but it cannot extend to solving 'all the misery in the world because it will lose its function'.[33]

Globally speaking, states may be considered responsible for solving problems in national labour markets, but as a result of recent globalisation of the labour market, some problems are at the same time related to competition and workers in other countries.[34]

Over the last decades, EU labour legislation has responded to the challenges of globalisation by means of harmonisation and coordination processes in those areas where sovereign rights have been transferred to the supranational level and where the EU competence is not questionable. Moreover, the aforementioned normative momentum and the practice of the Court of Justice are often considered to be steps forward in the pursuit of protection, but our discussion is also inevitably provoked by reflections on legal social dumping on EU territory mentioned at the beginning of our story. The freedom to provide services and posted workers is a topic that fits entirely into the above claim mentioned by Mundlak. In addition, what is the role of European companies in the fight against social dumping in third countries?

[29]See Hepple (2011), pp. 34–36.
[30]Hepple (2011), p. 42.
[31]Arthurs (2011), p. 21.
[32]Arthurs (2011), p. 29.
[33]Weiss (2011), p. 49.
[34]Mundlak (2015), p. 300.

Academic research of a number of practitioners and scientists in the field of labour law deals with relations of hard law and soft law in this context, the diplomatic and solemnly intoned content of the code of social responsibility and business in the European and world's largest companies, but circumventing the rules and deepening poverty in the underdeveloped world is an indisputable fact and a cruel reality, especially in today's conditions of the recovery from the global financial crisis and recession, when the only interest is to achieve economic growth, as before the crisis, when the only interest of banks was to achieve rapid and high profits to the detriment of long-term investment and human resource development.

However, based on empirical research, as early as in 2001 and 2002, Kucera maintained that there is no evidence that, due to comparative advantage, rich countries choose countries with less control over basic international labour standards for their direct investment, stressing at the same time that the economic arguments for labour standards and workers' rights are much wider than the ratio of labour productivity and labour costs and that it is necessary to further investigate the relationship between workers' rights, political and social stability, human capital and foreign direct investment in developing countries.[35] From the perspective of labour lawyers, such allegations provoke questions about the interests that the companies have in mind when deciding on the relocation of production processes and direct investment in third countries because, as pointed out by Nobel Laureate Stiglitz at the same time, 'in the arena of international economic policy, the commercial and financial interest is far more lenient than the interests of labour and consumer interests'. Moreover, he reminds that development does not imply 'only capital accumulation and efficient resource allocation, but the transformation of the whole society in terms of equality, sustainability and democratic development that respects workers' rights, including the right to the freedom of association and the right to collective bargaining'.[36]

For the transformation of labour law, as pointed out by a number of prominent experts, apart from the role of the state, the social teaching of the Church[37] is not less relevant either, which has been dominant on the European continent and influential in terms of social institutions, their development and social activity during the last decades. But one gets the impression that it is slowly losing its influence, allow me to say, becoming an extremely decent and quietly articulated thrust, the mechanism of a more subtle action, devoted exclusively to ethics and morality, that seems to be losing power among its own congregation.

Limited by functionality and the scope of this chapter, when dealing with this topic, we do not have to go beyond the EU borders, although a very simple-minded approach can clearly portray social dumping—it starts with the relocation of production processes to the European periphery (or influx of workers from the periphery to the rich Member States, their high living and social standards) and then to the Far

[35]Kucera (2001), pp. 1–34; Kucera (2002), pp. 31–69.

[36]Stiglitz (2002), p. 25 and p. 27.

[37]Hepple and Veneziani (2009), p. 5 and 26; Hepple (2011), p. 40.

East, the countries in Asia and Africa, with a questionable level of both the protection of workers' rights and respect for international labour standards. Europe has been dealing with social dumping for decades since the very beginning of the functioning of the common market, and this struggle between David and Goliath has not come to its end. The freedom of movement for workers and the freedom of provision of services provoke research of the phenomenon of social dumping, such that the relation thereto will be observed through the prism of incorporating the principle of equal pay for equal work and work of equal value and the mutual relationship of social dumping and the posting of workers. How much has social dumping affected the transformation—consciously or unconsciously, directly or indirectly?

4 Old Friends: The Fear of Social Dumping and the Introduction of the Principle of Equal Pay for Equal Work and Work of Equal Value

The history of Article 119 of the EEC Treaty[38] (renumbered as Article 141 TEC by the Lisbon Treaty), now Article 157 of the TFEU, is quite well known and frequently mentioned in academic analyses, research and discussions. That is why we will not make a mistake by saying that the fight against social dumping and the introduction of the principle of equal pay for equal work and work of equal value for women are old friends whose companionship lasts for the last 60 years.

But at the very beginning of the common market, it was not possible to assume what far-reaching consequences that article would have for the development and transformation of European labour law and employment relations in the European Union. In the heated discussions on its integration into the EEC Treaty, it was perceived as a kind of concession to France because of its fear of possible social dumping in the common market because the possibility of achieving the principle of 'equal pay for equal work' was somewhat 'weaker than the ILO standard of equal pay for work of equal value'.[39] At that time, France was the only of the six historic members that integrated solutions from the ILO Convention (1951) No. 100 Concerning Equal Remuneration for Men and Women Workers for Work

[38]Article 119 of the Treaty on the European Economic Community specifies that "each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer. Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job." Available at: http://ec.europa.eu/archives/emu_history/documents/treaties/rometreaty2.pdf (last accessed 1 March 2017).

[39]Hepple (2009), p. 138.

of Equal Value into its national legislation,[40] unlike Belgium, Germany and Italy, which also ratified the Convention but by then did not incorporate into their national labour legislation the provision governing equal pay for equal work and work of equal value for women and men.[41] That is why there was justifiable fear that they would gain competitive advantage on the common market in relation to France, because they were not obliged to pay women for their work as much as they did for work of men. This would be particularly noticeable in industries that are predominantly based on women's workforce, as well as in cases where, due to a better position in the market, production is relocated towards a cheaper women's workforce.

Although the ILO was to adopt Convention No. 111 on Discrimination (Employment and Occupation),[42] which would significantly mark the process of equality development in labour law at the global level, the aforementioned principle, i.e. 'limited non-discrimination provisions', was introduced in the Treaty for purely economic reasons on the common market.[43] This caused a two-decade delay in the development of anti-discrimination law, i.e. equality law provisions in European labour legislation. However, Hepple points out that by that time, the principle of formal equality was already well incorporated but not fully realised in the practice of individual members,[44] which would not be irrelevant in subsequent activities and discussions that would articulate and then initiate the development of a wider concept of equality in European labour law. Everything changed in the mid-1970s because of both the far-reaching decision of the Court of Justice in the *Defrenne 2* case,[45] which establishes horizontal and vertical direct effect of Article 141 of the Treaty and promotes equal treatment of women and men to the fundamental principle of EC law,[46] and the adoption of relevant directives, which reactivate the process that began unconsciously long ago.[47] On these grounds, thanks to, inter alia, normative interventions and especially the interpretive potential and judicial

[40]C100—Equal Remuneration Convention, 1951 (No. 100), Geneva, 34th ILC session, 29 June 1951. Entry into force 23 May 1953. Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100 (last accessed 15 March 2017).

[41]Hepple (2009), p. 137.

[42]C111—Discrimination (Employment and Occupation) Convention, 1958 (No.111), Geneva 42nd ILC session, 25 June 1958. Entry into force 15 June 1960. Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111 (last accessed 15 March 2017).

[43]Shaw et al. (2007), p. 369.

[44]Hepple (2009), p. 130.

[45]C-43/75 *Defrenne* v. *SABENA* (No. 2) [1976] ECR-455.

[46]Shaw et al. (2007), p. 369.

[47]Primarily Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L45, 19.2.1975, and 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, OJ L39, 14.2.1976.

activism of the Court of Justice in a number of important cases[48] and also the advocacy of feminist movements and feminist legal theory, EU primary and secondary legislation on equality of women and men in terms of pay, working conditions and social security has developed for the last 40 years.[49] The *Defrenne 2* court judgment is noteworthy not only because the Court, in addition to the primary economic objective of Article 141, emphasised its social dimension but also, as pointed out by Barnard, because for the first time it tried to find a 'balance between the economic and the social dimension of the Union'.[50]

Looking at the issue from today's perspective, it becomes clear that this article was directly or indirectly used, inter alia, as an interpretative basis for the protection of motherhood or a particular biological state of pregnancy in EU law and also for the promotion of the need for a more even distribution of business and family responsibilities, which would result in the introduction of gender-neutral parental leave. In addition to all the aforementioned positive factors on EU territory, it was in fact used as the basis for the protection of women's rights and the development of the concept of gender equality in the world of work. The European Parliament's report on social damping released last year stresses the gender pay gap problem and vulnerability of women in the context of social dumping, despite a number of legal sources and soft law mechanisms that we have at our disposal today. Moreover, it points to the consequence of greater exposure of women to the risk of poverty at an older age because the pay gap leads to a pension gap.[51] However, what we want to stress here is the fact that this article is primarily incorporated in the *acquis* because of its economic goal; women's rights and gender equality were not even an afterthought 60 years ago. Yet we can thank the fear of social dumping, which will be later reinterpreted by the Court of Justice on the basis of specialised ILO sources, feminist legal theory, judicial activism and the promotion of equality to one of the highest values of the legal order of the European Union for making this 'by-product' achieve such excellent results in the observed, long-term period. After the normative struggle, there remains only a more complex one—the struggle for the implementation of normative solutions and generally accepted civilisation standards in everyday life.

[48]Cases that define more precisely the importance, definition, legal nature or scope of "pay" in the context of the principle of today's Article 157 of the TFEU. Cases like C-342/93 *Gillespie* v. *Northern Health and Social Services Boards* [1996] ECR I-475, C-170/84 *Bilka-Kaufhaus* v. *Weber von Hartz* [1986] ECR 1607, C-256/01 *Allonby* v. *Accrington and Rosendale College* [2004] ECR I-873, C-171/88 *Rinner-Kühn* v. *FWW Spezial-Gebäudereinigung GmbH and Co. KG* [1989] ECR 2743, C-129/79 *Macarthys Ltd.* v. *Smith* [1980] ECR 1275, etc. as well as cases in which a human rights approach or the spread of criteria in terms of the concept of equal pay can be noticed, like C-69/80 Worringha and Humphreys v. Lloyds Bank [1981] ECR 767. See also Velluti (2010), p. 91.

[49]Vasiljević (2016), p. 57.

[50]Barnard (2009a), p. 317.

[51]Report on social dumping in the European Union, European Parliament, (2015/2255(INI)), 18.8.2016, p. 6, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2016-0255+0+DOC+PDF+V0//EN.

5 Posting of Workers and Social Dumping

Posting of workers is a topic that is intensely linked to social dumping issues because of both fears of cheap workforce[52] that emerged in the wake of the 2004 and 2007 enlargements of the European Union and controversial judgments of the European Court of Justice in the *Laval and Viking* cases, which have recently caused numerous scientific analyses and comments by top labour law authorities. In comparison with the principle of equal pay under Article 141 of the EC Treaty, which was included in the Treaty of Rome because of the fear of social dumping and which has had, as an important by-product, a direct and indirect impact on a number of transformation processes in European and national labour legislation and employment relations of the Member States to the present day, from our perspective, and especially thanks to the decisions in these cases, the posting of workers in the context of social dumping has had a rather negative effect on the protection of workers' rights and the transformation of employment relations. Observed through the focus of the primary goal of integration—to create a common market without internal barriers—giving priority to economic freedoms over social rights is not surprising but the way of interpretation,[53] in which various manoeuvring mechanisms or, more precisely, interpretations are used to justify apparent social dumping on the common market. Moreover, it is de facto enacted by the above-mentioned judgments.

Removing all obstacles to the free movement of workers was one of the initial goals of the common market, which aimed at achieving greater competitiveness and optimal workforce allocation. Another category of cross-border movement has also developed in the common market besides the freedom of movement of workers, which, in the context of social dumping, becomes interesting in the cases of those countries that, after the said wave of enlargement, opened up their markets to workers of new Member States without introducing a transitional regime, with the primary goal of having a higher inflow of cheaper workforce from new Member States affecting their own national 'problems', mainly high labour costs consequently reduced by that inflow. This category refers to workers posted by their employers to another EU Member State for a certain period of time in relation to the one they are employed in. The legal basis of the posting of workers rests in this case on Articles 56 to 62 TFEU relating to the freedom to provide services, which cater to exclusively economic interests of the Union.[54] The posting of workers within the scope of the provision of services is governed in a secondary legislation by the provisions of Directive 96/71/EC,[55] while, as outlined by Orlandini,[56] Directive

[52] See Lalanne (2011), pp. 211–234.

[53] See Bercusson (2007), pp. 1–42; Bodiroga-Vukobrat and Horak (2008), pp. 72–74.

[54] See Kovács et al. (2013), pp. 473–474.

[55] 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 L18, 21.1.1997.

[56] See Orlandini (2017), p. 1.

2014/67[57] was adopted for the purpose of dealing with 'fraudulent posting'. The social security of posted workers is regulated through Regulation 883/2004[58] and Regulation 987/2009.[59]

According to Directive 96/71/EC, posted workers are second-class workers[60] because pursuant to its Article 3 and the relevant practice of the ECJ, only the 'hard core' provisions of host country labour legislation apply to them, i.e. the legal rules stated *expressis verbis*.[61] Barnard notes that these rights are the minimum standards, and their list should be viewed as 'a ceiling, not a floor'.[62] Pursuant to Article 3(1), the list of working conditions that must be guaranteed to workers in the host country includes the following as the maximum of rights: statutory minimum wage (some Member States do not have the prescribed minimum wage, and in some it is set by the provisions of autonomous sources of rights, i.e. collective bargaining, not the law), the longest working hours, the shortest rest periods, the shortest paid vacation, conditions of hiring out of workers, protection of pregnant women, young mothers, children and young workers, equal treatment for men and women, and health, safety and hygiene regulations. The complexity of limits on the rights of posted workers who actually enjoy only the minimum rights in the host country, which are, as limited and minimal as they are, additionally questionable due to a specific socio-political context and, in particular, the differences in the national rules of the Member States, is further complicated by the fact that in certain cases of posted workers, the said provisions of Directive 96/71/EC may raise the question of applying the applicable law in contractual relations within the context of Rome I Regulation.[63] Barnard's careful analysis suggests that the provisions of Article 9 (2) of the Rome I Regulation and Article 3(10) of the Directive are mutually complementary, so that for posted workers, countries cannot introduce additional requirements in relation to those referred to in Article 3(1) of the Directive. Moreover, only exceptionally and in practice almost never, host countries will be able to insist on applying additional or their own legal rules to temporary/posted workers, i.e. they will be able to expand their national legislation. However, this exception is only possible if it relates to a 'public policy exception', i.e. the possibility of

[57]Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L159, 28.5.2014.

[58]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 L166, 30.4.2004.

[59]Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L284, 30.10.2009.

[60]See Kovács et al. (2013), p. 475.

[61]See C-319/06 *European Commission* v. *Grand Duchy of Luxembourg* [2009] ECR I-4323.

[62]Barnard (2012), p. 223.

[63]Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L177, 4.7.2008.

derogating from the rules referring to the freedom to provide services, which must be interpreted very strictly and which may be related to a ban on forced labour or monitoring compliance with legislation on working conditions.[64] In other words, Directive 96/71/EC 'only coordinates which national labour legislation will apply'; it does not 'harmonise' the substantive content of the provisions of national labour law to be applied to posted workers.[65] In the Viking case, however, the European Court of Justice held that the right to take collective action to protect the rights of workers constitutes a legitimate interest and basically justifies the restriction of one of the fundamental economic freedoms and that the protection of workers is one of the reasons encompassed by the concept of 'public interest', but almost at the same time in the *Laval* case, it believed that the use of collective action to ensure the signing of a collective agreement by Laval cannot be justified,[66] thus making social rights, namely the right to strike, subordinated to economic freedoms, i.e. the freedom to provide services.[67]

The difference in the treatment of posted workers to whom the legal rules relating to the freedom to provide services and those under the scope of the freedom of movement for workers apply is unquestionable, and it is rather difficult to approve of it from the labour law position, especially considering that they often carry out the same or very similar work based on ordinary labour law relations. The European Court of Justice has only economic arguments for making such a difference, in the words of labour law, we dare say, 'excuses'. Economic reasons have an advantage over social rights and equal treatment of workers, and, as a rule, it is not allowed to apply to posted workers other legal rules than those contained in Directive 96/71/EC. Moreover, the right to strike is also restricted to the workers of the host country, although it is simultaneously recognised as a 'fundamental right' if the strike is undertaken for the purpose of achieving equal treatment of posted workers and as a form to combat obvious social dumping.[68] It is indisputable that the Directive clearly distinguishes more than one type of posted workers, and therefore its ratio is not disputed, but what should be disputed is a different treatment of workers performing the same job in the same country and in the same EU territory, as EU nationals, enjoying at the same time a completely different legal treatment and degree of protection. Attempts to at least alleviate this kind of legal treatment,[69] if not make

[64]C-319/06 *European Commission* v. *Grand Duchy of Luxembourg* [2009] ECR I-4323, para. 29 and 50; Barnard (2012), pp. 231–233.

[65]Barnard (2014), p. 4.

[66]Barnard (2009b), pp. 36–36; *Laval un Partneri Ltd.* v. *Svenska Byggnadsarbetareförbundet and ors* [2007] ECR I-11767, para. 77; C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* v. *Viking Line ABP and OU Viking Line Eesti* [2007] ECR I-10779, para. 108.

[67]See Syrpis and Novitz (2014), pp. 297–305.

[68]C-341/05 *Laval un Partneri Ltd.* v. *Svenska Byggnadsarbetareförbundet and ors* [2007] ECR I-11767, C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* v. *Viking Line ABP and OU Viking Line Eesti* [2007] ECR I-10779; Kovács et al. (2013), p. 410.

[69]See Bruun et al. (2012), pp. 279–306.

it equal in the context of the economic and social dimension of the European Union, where the former dominates from the very beginning to the present day, which should not be surprising because it is an integral part of economic integration and the creation of a common market, have obviously failed, but they should not be systematically obstructed *pro futuro*. As EU citizens, workers make an inseparable part of its social identity and an important lever of economic development, and in that sense, equal treatment in this area would also be necessary, furthermore because attempts have failed to reach out to fictional companies, which do not carry out their activity in the country posting workers but are established only with the aim of exploiting Directive 96/71/EC and avoiding the application of the legal rules of the country to where workers are posted.

In the context of critical analysis of *Laval and Viking* judgments, Wendeling-Schröder stresses the need to distinguish between the nature and the meaning of fundamental economic freedoms and fundamental rights; economic freedoms are 'essentially different' from fundamental rights since fundamental rights are to be developed by legislators and courts; they reflect 'social progress' of Member States, whereas fundamental economic freedoms have only 'the function of a common market service' and 'nothing more'.[70] The *Laval and Viking* cases are assessed by Barnard as a major challenge for the EU Justice Court in trying to reconcile the interests of companies and trade unions; making the decision in favour of the companies leads to allegations of support for social dumping and undermining the European social model, while the decision in favour of the unions would disable the countries of Eastern Europe to enjoy the 'comparative advantages of their cheap labour' and hence 'greater prosperity'.[71] It is indisputable that in these cases, there was some balancing between the economic and social dimension through the prism of 'proportionality and justification', which is why collective action is considered a 'restriction', and the Court is prevented from protecting social interests by such a strict approach.[72] However, in a later and very detailed analysis of the aforementioned judgments, Barnard finds that Article 3(7) of Directive 96/71/EC allows the country in which the service is provided to offer a higher level of social protection to posted workers in terms of the rights referred to in Article 3(1) of the Directive,[73] and with its deep and constructive interpretations it leaves to the Court room for future use of the potential of judicial activism. Aware that the Court may not like the proposed solutions or be willing to change the provisions of the *Laval* judgment, Barnard concludes that it is the beginning and not the end of the discussion on these issues, which, besides the interpretation of the Directive, impose much deeper and more complex constitutional issues referring to division and balance of power between Member States and the EU.[74]

[70]Wendeling-Schröder (2009), p. 30.

[71]Barnard (2008), p. 263.

[72]Barnard (2008), p. 264.

[73]Barnard (2014), p. 6.

[74]Barnard (2014), p. 15.

The transformation of employment relations and social dumping is undoubtedly in direct connection, especially in the context of posted workers and the relocation of manufacturing processes of highly developed countries, both in the European peripheral countries and beyond the EU borders. Therefore, new and far more effective legal mechanisms are needed, which will not encourage social dumping, as well as far more responsible and moral patterns of behaviour in the business world. Time and results of the initiatives to amend Directive 96/71/EC will tell whether this is possible in the conditions of neoliberal capitalism, which is showing its face on European soil, too.

6 Concluding Remarks

In this overview, we tried to answer the question of how the concept of social dumping in the European Union has influenced the transformation of employment relations through two examples, i.e. the principle of equal pay for equal work and work of equal value for women and men and the posting of workers in the framework of the provision of services. It is about a longer period of time in which social dumping has always served primarily economic interests, not social rights. At the very beginning, Article 141 of the EC Treaty (ex Article 119) was integrated into the text of the Treaty because of the fear of achieving competitive advantage on the common market of those Member States that have not ratified relevant ILO conventions. Its primary function at that time was not the protection of women's rights and equality in the labour market, but its by-product over the long term has resulted in the development and transformation of employment relations, which put gender equality in the primary focus and promote it as one of the fundamental principles of the EU legal order. A few decades later, in the context of posted workers in terms of the freedom of provision of services and the discussions on the relationship between social rights and economic freedoms, the EU Court will favour economic freedoms, legalising in a way social dumping, this time to enable the use of cheap labour of workers posted from poorer Member States to rich EU Member States. This enables stratification of workers' rights to those who fall under the freedom of movement of workers and those who make up the second class, less protected and more exposed to violation of their fundamental labour rights, i.e. posted workers. Social dumping has been used two times as a factor for the preservation of economic interests of rich countries and at the expense of workers' rights, indirectly affecting labour costs and weakening the role of unions. Consequently, the transformation of employment relations associated with social dumping in the context of women's rights can be considered as superior achievement whose beginnings were rather random, while today the resistance to the strengthening of social rights and the dominance of economic freedoms can be considered intentional and conscious. Numerous controversies over these issues have resulted in a whole series of high-quality papers and reflections trying to discover the meaning or to offer solutions *pro futuro*. As Catherine Barnard writes, the discussion is at the

beginning, but we should not underestimate the words of Friedrich Nietzsche, who says: 'That for which we find words is something already dead in our hearts.' There remains hope that future normative activities and judicial activism of the EU Court of Justice will deny the poetics of these words.

References

Arthurs H (2011) Labour law after labour. In: Davidov G, Langille B (eds) The idea of labour law. Oxford University Press, Oxford, pp 13–29

Barnard C (2008) Social dumping or dumping socialism. Cambridge Law J 67:262–264

Barnard C (2009a) Fifty years of avoiding social dumping? The EU's economic and not so economic constitution. In: Dougan M, Currie S (eds) 50 years of the European treaties; looking back and thinking forward. Hart Publishing, Oregon, pp 311–342

Barnard C (2009b) Internal market V. Labour market: a brief history. In: De Vos M (ed) European union internal market and labour law: friends or foes? Intersentia, Antwerp, pp 19–44

Barnard C (2012) EU employment law. Oxford University Press, Oxford

Barnard C (2014) Posting matters. Arbeidsrett 11(1):1–28

Bercusson B (2007) Assessment of the opinions of the advocates general in *Laval* and *Viking* and six alternative solutions, advice to the ETUC. King's College London, London. 31 October 2007. https://www.etuc.org/IMG/pdf/TTUR.Viking.Solutions.Oct._2007.ETUC.f.pdf. Accessed 2 Feb 2017

Bernaciak M (ed) (2015) Market expansion and social dumping in Europe. Routledge, London

Bodiroga-Vukobrat N, Horak H (2008) A more liberal and economic, and a less social, approach: the impact of recent ECJ rulings. Croat Yearb Eur Law Policy 4:49–74

Bruun N, Bücker A, Dorssemont F (2012) Balancing fundamental social rights and economic freedoms: can the Monti II initiative solve the EU dilemma. Int J Comp Lab Law Ind Rel 28:279–306

Bruun N, Hepple B (2009) Economic policy and labour law. In: Hepple B, Veneziani B (eds) The transformation of labor law in Europe, a comparative study of 15 countries 1945-2004. Hart Publishing, Oregon, pp 31–57

European Parliament Resolution of 14 September 2016 on social dumping in the European Union (2015/2255(INI)), P8_TA (2016)0346, 14.9.2016, pp 1–15. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0346+0+DOC+PDF+V0//EN. Accessed 3 Feb 2017

Hatzidaki-Dahlström L (2007) Latvian building worker: social dumping or social protectionism – the ambiguities of the Laval case. RHDI 60:139–152

Hepple B (2009) Equality at work. In: Hepple B, Veneziani B (eds) The transformation of labor law in Europe, a comparative study of 15 countries 1945-2004. Hart Publishing, Oregon, pp 129–163

Hepple B (2011) Factors influencing the making and transformation of labour law in Europe. In: Davidov G, Langille B (eds) The idea of labour law. Oxford University Press, Oxford, pp 30–42

Hepple B, Veneziani B (eds) (2009) The transformation of labor law in Europe, a comparative study of 15 countries 1945-2004. Hart Publishing, Oregon

Kovács E, Vinković M, Bankó Z (2013) Posting of workers in Croatia and Hungary. In: Drinóczi T, Župan M (eds) Law – regions – development. Faculty of Law University of Pécs/Faculty of Law University of Osijek, Pecs/Osijek, pp 473–496

Kucera D (2001) The effects of core workers rights in labour costs and foreign direct investment: evaluating the "conventional wisdom". Discussion paper DP/130/2001. International Institute for Labour Standards, Geneva, pp 1–34

Kucera D (2002) Core labour standards and foreign direct investment. Int Labour Rev 141:31–69

Lalanne S (2011) Posting of workers, EU enlargement and the globalization of trade in services. Int Lab Rev 150:211–234
Maslauskaite K (2013) Social competition in the EU: myths and realities. Notre Europe/Jacques Delors Institute, Paris
McKay S (2014) Transnational aspects of undeclared work and the role of EU legislation. Eur Lab LawJ 5:116–131
Meradi G (2012) Social failures of EU enlargement, a case of workers voting with their feet. Routledge, New York
Moser T, Schips B (eds) (2001) EMU, financial markets and the world economy. Springer, New York
Mundlak G (2015) Working out the right to work in a global labour market. In: Mantouvalou V (ed) The right to work, legal and philosophical perspectives. Hart Publishing, Oxford, pp 291–313
Orlandini G (2017) Posting of workers and social dumping. In: Paper presented at European Labour Law Conference "Social dumping and recent challenges for labour law in Europe: regaining the initiative", Florence, 12-13 May 2017. http://elw-network.eu/wp-content/uploads/2017/06/Orlandini-posting-speech-IT.pdf. Accessed 10 July 2017
Report on social dumping in the European Union, European Parliament (2015/2255(INI)), 18.8.2016, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//NONSGML+REPORT+A8-2016-0255+0+DOC+PDF+V0//EN. Accessed 1 Feb 2017
Saydé A (2014) Abuse of EU law and regulation of internal market. Hart Publishing, Oregon
Shaw J (2000) Law of the European Union, 3rd edn. Palgrave, Basingstoke
Shaw J, Hunt J, Wallace C (2007) Economic and social law of the European Union. Palgrave, Basingstoke
Stiglitz JE (2002) Employment, social justice and societal well-being. Int Labour Rev 141:9–29
Syrpis P, Novitz T (2014) The EU internal market and domestic labour law: looking beyond Autonoy. In: Bogg A, Costello C, Davies ACL, Prassl J (eds) The autonomy of labour law. Bloomsbury, Oxford, pp 291–308
Tomka B (2007) Social solidarity in east Central Europe, strong welfare and weak labour. In: Magnusson L, Stråth B (eds) European solidarity tensions and contentions of a concept. Peter Lang, Brussels, pp 171–192
Vasiljević S (2016) New law and values: anti-discrimination law in post-communist countries. In: Bodiroga-Vukobrat N, Rodin S, Sander GG (eds) New Europe – old values? Reform and perseverance. Springer, Berlin, pp 55–76
Vaughan-Whitehead D (2003) EU enlargement versus social Europe? The uncertain future of European social model. Edward Elgar, Cheltenham
Velluti S (2010) New governance and the European employment strategy. Routledge, Abingdon
Veneziani B (2009) The employment relationship. In: Hepple B, Veneziani B (eds) The transformation of labor law in Europe, a comparative study of 15 countries 1945-2004. Hart Publishing, Oregon, pp 99–128
Weiss M (2011) Re-inventing labour law? In: Davidov G, Langille B (eds) The idea of labour law. Oxford University Press, Oxford, pp 43–56
Wendeling-Schröder U (2009) Fundamental freedoms of the EC treaty versus the fundamental social right to take collective action, a critical comment on the new jurisdiction of the European court of justice (ECJ). In: Ales E, Jaspers T, Lorber P, Sachs-Durand C, Wendeling-Schröder U (eds) Fundamental social rights in Europe: challenges and opportunities. Intersentia, Antwerp, pp 25–36

Cross-Border Mobility, Supranational Companies and Employee Participation: No Chance for Harmonisation

Hana Horak

Abstract Cross-border activities of the companies and regulation of cross-border mergers at the European Union internal market has been and still is a problem concerning employees' participation. The basic and not easily solved problem is the application of freedom of establishment and its limitations when taking into account change of company 'nationality'. Special attention must be paid to the cross-border mergers of companies or forming of supranational companies. The transfer of company and contract from the current to the new employer will occur and affect the status of employees. It is not easy to fulfil requirements regarding the full achievement of mobility opportunities at the EU level and to balance between differences in Member State national laws through the implementation of the directives.

1 Introduction

Along with developments in the field of free movement of workers and freedom of establishment at the European Union internal market, the European Union's focus is always set on the social consequences of cross-border issues regarding companies and corporative restructuring of companies, which occurred because of the development and needs of the market economy, as well as the establishment of large companies, which are in a position to operate in a wide economic area as 'global players'.

H. Horak (✉)
University of Zagreb, Faculty of Economics and Business, Department of Law, Zagreb, Republic of Croatia
e-mail: hhorak@efzg.hr

G. G. Sander et al. (eds.), *Transnational, European, and National Labour Relations*, Europeanization and Globalization 4, https://doi.org/10.1007/978-3-319-02219-2_2