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Considerations on Further European Labour Law Minimum Standards

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Here, the notion of Labour Law refers to those regulations dealing with employment relationships or collective labour relations, thus not to issues in respect of employment policy and social security. “Minimum standards” refers to normative requirements of the Union, wherefrom the Member States may deviate solely to the benefit of employees. European Union Law regulates only part of those issues that Europeans traditionally associate with the area of Labour Law. Following the wishes of the Chamber of Labour, this article will outline, in respect of which issues (within the traditional scope of Labour Law regulation) it might be promising to endeavour an initiative for new Union Law minimum standards. It should be mentioned that the following considerations do not necessarily represent a recommendation by the author to adopt one or the other of these initiatives considered below.

1. Sectors regulated and not regulated by Union Law

The assignment mentioned requires outlining, which issues have already been covered by European Union Law and which not.

Traditionally, Labour Law is seen as a complex of provisions specifically for employed persons. The terms 'employee' or 'employment relationship' are therefore the "cornerstones" of Labour Law. European Union Law uses the term of employees[1] in primary law; however, it does not define it. The secondary law too does not define it. The ECJ defines the term primarily with regard to free movement of workers and has oriented it towards organisational subordination.

[1] Art 45, 153, 157 TFEU

Union Law does not include any particular rules for a special group of self-employed persons, who, although they are not employees, are nevertheless economically dependent or dependent on one or several contracting partners / clients (parasubordinate or economically dependent workers). European Union Law regards all non-employees as self-employed persons within the meaning of European Union Law. Similar to most national rights it is thereby required to specify the status of an employee. European Union Law does not include any rules, which would facilitate the status of an employee in individual cases, as, for example, does a presumption rule.

What European Union Law has regulated largely is the access to the labour market of the Member States. Basically, all Union citizens enjoy free access. There are, however, temporarily still some restraints and reciprocal restrictions that some old Member States (among them Austria) have imposed on citizens of some new Member States. The same applies to citizens of the European Economic Area and Switzerland. Basically, the Member States are entitled to regulate access for other third country nationals themselves; however, relatives of EU migrant employees have the right to work in any other Member State. Union Law and Treaties provide the citizens of a number of states, who are legally working in a Member State, with the right to enjoy the same working conditions as national residents.

The most-far reaching rules of Union Law among those that concern (also) the field of Labour Law are included in anti-discrimination standards.[2] They demand that the Member States ban and effectively punish direct and indirect discrimination based on expressly disapproved characteristics – in particular gender, nationality, ethical origin, age and disability. However, the bans themselves are only partly (and only to a lesser degree) minimum standards. In respect of most of the characteristics mentioned, the bans have a dual effect. Giving priority to a certain group is only to a certain degree permitted as a "positive measure"; there are, however, already relevant authorisations in place. Therefore, only the provisions related to the sanctions against discrimination can be regarded as genuine minimum standards.

European Union Law does not include any rules on the obligation to work as the primary requirement for ascertaining employees, for example in respect of the required description of these duties as well as the possibility of unilateral changes implemented by the employer. It regulates, however, the maximum weekly and daily working hours as well as the minimum rest periods (Directive 2003/88/EC). The Working Time Directive, however,

[2] In particular Art 45, 157 TFEU; Directive 2006/54/EC; Directive 2000/78/EC; Directive 2000/43/EC.

permits Member States to opt out of this regulation with the approval of individual employees. Union Law already provides for an entitlement of paid annual leave (Art 7 Directive 2003/88/EC).

Already extensively regulated are issues on occupational safety and health.[3] However, these regulations only apply to employees within the meaning of the Directive and not to other self-employed persons.

European Union Law does not include any regulations concerning remuneration itself. Art 153 Paragraph 5 TFEU in fact even expressly excludes any regulation on this basis of competence.[4] There is no indication of another competence for the Union-wide regulation of a minimum wage (fixed for example in relation to the national median salary). However, it is not excluded that other regulations based on Art 153 TFEU may have an impact on remuneration.[5]

European Union Law does not include any rules of risk distribution in employment relationships, in particular no regulations on the obligation to pay wages if the service is not provided for economic reasons (corporate or business risk) and no regulations on (reducing) the liability of the employee. There are also no rules on collateral duties of employees, e.g. restrictions concerning post-contractual prohibitions of competition (which affect employability). Further, European Union Law includes - aside from the ban on discrimination and health and safety standards - no standards concerning the collateral duties of the employer. In particular, the ban of unfair terms of Directive 93/13/EEC is only applicable to consumer contracts and not to employment contracts.

European Union Law already includes measures for the protection of pregnant workers, in particular a right to maternity leave (Directive 92/85/EEC). It also regulates the right to parental leave (Directive 96/34/EC and now Directive 2010/18/EU).

European Union Law already prohibits the discrimination of part-time work and supports the change between full and part-time work (Directive 97/81/EC).

European Union Law does not comprehensively, but only fragmentally regulate the termination of the employment relationship. Art 153 Paragraph 1 lit d) TFEU would entitle also to regulate the "protection of employees upon termination of employment"; this, however, requires unanimity in the Council. This seems to be one of the reasons why Union Law does currently not include any general rules on restricting termination, not even by

[3] Compare in particular the Framework Directive 89/391/EEC.

[4] "(5) 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."

[5] Compare ECJ C-307/05, Del Cerro Alonso, ECR 2007, I-7109 para. 31 ff.

procedural requirements. The anti-discrimination standards, however, also apply to terminations, which potentially puts a large number of dismissals under the burden of justification. (Only) procedural requirements are provided for mass redundancies (Directive 98/59/EC), however this Directive contains neither restrictions as to the content nor the requirement of a social plan. Union law obliges the MS restricting the use of fixed-term contracts, although the boundaries are rather wide (Directive 1999/70/EC). Apart from that, discrimination due to such time-limits must be prohibited. The fate of employment contracts in case of a "transfer of undertaking" has been regulated (Directive 2001/23/EC): the contracts are transferred; any termination because of the transfer of undertaking must be prohibited.

The temporary employment of personnel (Directive 2008/104/EC) has been regulated since 2008. Apart from protecting temporary employees, the Directive also protects temporary employment agencies against any restrictions of their activities.

European Union Law does not regulate the implementation and enforcement of its provisions in respect of the Labour Law, in particular the enforcement of the rights of individual employees, in any great detail. In general, Union Law demands effective and deterring sanctions, which must not lag behind of those of the national law for comparable rights.[6] So far, however, there is no general rule, which does expressly prescribe that the positions provided for by Union Law have to be implemented officially by public authorities on their own imposing sanctions, or that a collective right of action has to exist. This applies in particular to cases where citizens, referring to the fundamental freedoms of self-employed, work in another Member State, but are in fact working there under a contract of employment. The rulings of the ECJ, however, rather aggravate implementing "effective" controls and sanctions.

Something, which has been regulated for quite some time is the posting of workers in the framework of the provision of services across borders (Directive 96/71/EC). Many have (mis)understood this Posting of Workers Directive as a minimum standard. In 2007, the ECJ decided that the Posting of Workers Directive regulates conclusively, which of its working conditions the work-state may prescribe for posted employees.[7] The Posting Directive too does not regulate the controls and sanctions, which are required for its implementation; here too, the rulings of the ECJ rather resist "effective" controls and

[6] Malmberg (Editor), Effective Enforcement of EC Labour Law, 2003. Although in 2007, the Commission had recognized that the hearing on the Green Paper had shown the need for better implementation (IP/07/1584), it had subsequently not engaged in further activities.

[7] ECJ C-341/05, Laval, ECR 2007, I-11767 para. 80 f.

sanctions.

The right of association has not been extensively regulated by the Union. Pursuant to Art 153 Paragraph 5 TFEU, it may also not be regulated on the basis of Art 153. Collective agreements have also not been regulated by the Union. It is a controversial point to which extent the Union may regulate these agreements - in particular transnational collective agreements - on the basis of Art 153 Paragraph 1 lit f) TFEU[8]; in any case this would require unanimity in the Council. Pursuant to Art 153 Paragraph 5 TFEU, the Union must not regulate the right to industrial action on the basis of Art 153. And the Unions does not regulate it in any other way. However, the ECFR now includes the right to collective negations and to collective actions. .

With regard to representations of employees at the place of work, the Union currently regulates the right to information and consultation (Directive 2002/14/EC) as well as the European Works Council (Directive 94/45/EC). This Directive regulates both the organisation and the material right; the one on information and consultation only the material right. There are currently no guidelines for organising the representation at work below the level of the European Works Council. In respect of the representation of employees in a corporate body (workers' participation at supervisory board level), European Union Law has not formulated any independent regulations; it only tries to avoid that corporate amendments alone allow this representation to be reduced in trans-border cases.

Finally, it is worth mentioning that the Union does not normatively regulate unemployment benefits. It is questionable, whether it would have the required competence to do so, for example to determine a minimum benefit for a certain time, depending on the active efforts of the unemployed person to seek employment (leaving everything else to the Member States). The efforts of the EU to provide flexicurity always emphasise the importance of sufficient protection of job seekers, also in order to improve the reasonableness of an easy/easier termination of the current employment relationship.

2. In search of new European minimum standards

1. Selection criteria

Various selection criteria are relevant in respect of the search of those unregulated "blank areas" of Labour Law governed by European Union Law, for which initiatives for minimum standards might be conceivable and promising. These criteria are in particular the

[8] "f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5;"

following three:

- Political goals, which can be pursued with minimum standards;
- Regulatory authority and thereby possibility of regulating minimum standards;
- Political chances of the success of an initiative.

a. The first selection criterion concerns the *political goals*, which are pursued with the regulation of minimum standards.

Activities of the Community and the Union respectively on Labour Law may pursue different targets. *Syrpis* has named three possible aims:[9] social policy objectives, hence the strengthening of the position of the labour force and/or the improvement of working conditions; economic targets, such as high employment, efficiency and undisturbed competition; as well as integration objectives, among others by removing obstacles with regard to mobility and competition performance. Another goal would be the Union Law's response to the opening of the markets to make it easier for (national) Labour Laws to accept open borders (e.g. by transnational collective agreements) or with other requirements of Union Law (e.g. free movement of services). Over the past months, a special aspect of integration objectives has been discussed in connection with the crisis of the Euro and various Member States. As the monetary union can no longer absorb different developments (development of wages and productivity) and regulations of national labour markets by adjusting exchange rates, it seems – according to some - necessary to increasingly orientate national labour markets and their regulations towards a common idea (development of an "Economic Governance").

Minimum standards primarily serve social policy objectives, which can be effectively pursued on the basis of their implementation. Minimum standards can also be used to pursue the aim to react to new situations, which were caused by opening both borders and the internal market. The current Labour Law Directives contain - apart from the Posting of Workers Directive and partially the ban on discrimination - only minimum standards.

On the other hand, minimum standards are far less suited to pursue purely economic targets, such as increasing efficiency and competitiveness and creating new jobs. As a rule, economic targets cannot be specifically influenced or promoted by regulations, from which Member States are allowed to deviate for the benefit of employees. Much the same applies to pursuing integration objectives. Integration objectives are best realised when differences in the legal situations are removed. Minimum standards, however, inevitably fulfil this function

[9] *Syrpis*, EU Intervention in Labour Law (OUP, 2007).

only to a certain degree. Hence, minimum standards are not suited to pursue purely economic targets or integration objectives as primary objectives.

Over the past year, however, the emphasis of the activities of the EU with regard to the Labour Law has been placed less on social policy objectives than on economic und integration-related objectives (see Item 2 below).

From the point of view of Austrian employees, there are in particular two different but not contrasting objectives for measures of the Union on Labour Law to be considered: firstly, continued improvement of the position of employees; secondly the safeguarding of Austria's (existing) social policy standards also within the Union, by raising the minimum standard also for other Member States. The latter also improves the competitive position of the Austrian industry within the EU (albeit not her position in the world). Austrian employees probably regard the second of the two objectives mentioned as the more important: the safeguarding of Austria's existing social policy standards, in particular also by measures, which react to the opening of borders and allow Member States to maintain higher social standards, should they wish to do so.

Occasionally the fear is voiced that introducing a new Union's minimum standard could cause some Member States to subsequently reduce their higher national standards. This would be a necessary consequence in case of full harmonisation. Concerning minimum standards, it depends primarily on national policy whether this path is adopted. The introduction of a minimum standard, which is below the national standard, does not provide a direct reason; on the contrary, it can even support the higher national standard if it contributes to reduce the differences in standard within the EU. Apart from that, most Labour Law Directives on minimum standards do already contain a "no regress clause".[10]

These objectives, which were named from the point of view of Austrian employees, could at least partially also be pursued by regulations of the Union that apart from minimum also provide for maximum standards and thereby for a "regulative corridor" (e.g. notice period between x weeks y months; redundancy payment between c and y weekly wages; unemployment benefit between x and y percent). So far, such regulations have not been considered for the reason alone that the Member States always wanted room for improving their social policy.[11] With regard to the new initiatives mentioned concerning an "economic

[10] Compare ECJ C-162/08 Lagoudakis, ECR 2009 I-00000.

[11] So far, the EU seems also in other areas the EU to have made very little use of the variant of corridor regulations.

Government", the political wish for such corridor regulations could now be presented as a contribution to more unified rules for the labour market. Provided the Austrian standard lies within the regulation corridor established by the Union, those corridor regulations would also safeguard Austria's existing social policy standards, even if they would subsequently put a cap on the national scope for action.

b. The second criterion on selecting subjects for initiatives on minimum standards is the possibility of the Union to specify (only or also) one minimum standard. This is above all a question of the *regulatory authorities of the Union*.

Primarily relevant is Art 153 TFEU (previously Art 137 EC) on social policy, which (only) permits the adoption of Directives, which contain minimum standards.[12] This competence belongs to the shared competences, in respect of which the Union is bound to the principles of subsidiarity and proportionality.[13] In addition, Art 153 TFEU states that the Union only "supports and supplements the activity of the Member States" in the areas referred to therein. Other bases of competence of the Union, which are at most relevant to the Labour Law, are hardly suitable to carry minimum standards.

Pure minimum standards - on the basis of Art 153 TFEU - can be used primarily to pursue social policy objectives and the target of reacting to the opening of the borders. In particular, they can be used to pursue - from an Austrian point of view – the objectives of safeguarding existing standards of protection and, associated therewith, the intra-Community competitive position as well as - probably secondary - improving also Austrian standards of protection (the latter being relevant from the point of view of Austrian employees).

As mentioned before, pure minimum standards, in contrast, can only to a limited degree pursue economic or integrationist objectives. However, these objectives too could be pursued with the mentioned regulations establishing a "regulation corridor". Such regulations, however, cannot be based on Art 153 TFEU.[14] One could then perhaps consider as a basis of competence Articles 114 - 116 TFEU related to measures to adapt the legal and administrative provisions of the Member States, which are concerned with the establishment and the functioning of the internal market. However, the here primarily relevant Art 114, which allow majority decisions, is not available here, because pursuant to its Paragraph 2 this does not apply to "provisions on the rights and interests of employees". Although this

[12] Art 153 Paragraph 4: "The provisions adopted pursuant to this Article: — shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties."

[13] Art 5 TEU; Art 4 TFEU.

[14] Something different would only apply if one would - as happened recently in respect of decisions to "save the Euro" - interpret the Treaties extremely "generously" in order to react to "urgent situations"

restriction does not apply to the competences based on Art 115 and 116 TFEU, the then additional requirements, however, are likely to be difficult to meet in respect of Labour Law regulations.

c. The third criterion on selecting subjects for initiatives on minimum standards concerns the *chances of success*. The central issue is that the monopoly for initiatives concerning the legislation of the Union, continues to be mainly with the Commission (Art 294 Paragraph 2 TFEU), which in addition may at any time change its proposal - as long as a Council decision has not been taken - during the course of the proceeding to adopt a legal act of the Union (Art 293 Paragraph 2 TFEU). Thus, neither a group of Member States nor the European Parliament is therefore in a position to formally initiate the proceedings for adopting a new Directive. The same applies to an agreement of the social partners within the scope of the European social dialogue, which can only be only be implemented as a Directive by the Council on the proposal of the Commission (Art 155 Paragraph 2 TFEU). In my opinion, this restriction of the right of initiative for secondary law is incompatible with the principles of a democracy; it is, however, reality. Hence, the current political agenda of the commission, its current policy trend, is central for the chances of success. Apart from that, one should not forget that it is essential in respect of draft laws on social policy to involve the European social partners, which could be inclined to take charge of the initiative.

Apart from the monopoly of initiative of the Commission and its current preferences, one must also consider the majority requirements within the scope of legislation based on Art 153 TFEU. Directives based on Art 153 TFEU are always adopted by ordinary procedure of legislation of the EU; thus, a qualified majority is sufficient. Some of the matters named in Art 153, however, require unanimity in the Council. Concerning the Labour Law, this applies in particular to the "protection of workers where their employment contract is terminated" (lit d) as well as to the "Representation and collective defence of the interests of workers and employers, including codetermination, subject to Paragraph 5" (lit f).[15] Directives on general protection against dismissal or on regulations on cross-border collective agreements therefore require unanimity in the Council. Even in respect of those matters where a qualified majority is sufficient, one has to bear in mind that some Member States are sceptical of any initiative for new Labour Law regulation, be it because of fundamental reasons or because they fear a deterioration of their competitive position within the Union.

A relevant question seems to be whether initiatives for Labour Law-related

[15] Unanimity is also required for regulations concerning "social security and social protection of employees" (lit c) and "conditions of employment for third-country nationals legally residing in Union territory" (lit g).

lawmaking at Union level should primarily achieve an improvement of standards at national level or primarily a safeguarding of these standards in the internal market. Initiatives, which pursue the second objective, seem to be more promising, in particular, when they also generate "added value" for employees in Member States with low social standards

Three subject areas will be examined hereinafter: firstly, issues, which result from the current agenda of the EU; secondly, issues, which arose through the opening of the borders and thirdly issues concerning traditional Labour Law. It is, however, not possible to completely sound out the area of possible initiatives. It should be repeated that these considerations do not necessarily include a recommendation by the author to adopt any of the initiatives considered.

*2. **Political agenda of the Union***

a. On the agenda

EU Commission and Council regularly determine the main emphasis of their work for the near future. On 03.03.2010, the new Commission Barroso II adopted the proposal for the new strategy "EUROPE 2020 - A strategy for intelligent, sustainable and integrative growth",[16] and suggested that the European Council would decide its main points at its 2010 Spring Conference. However, at its meeting in March 2010, the Council made only partial decisions.[17] Subsequently, the Commission has adopted a proposal for a "Council Decision on guidelines for the employment policies of the Member States. Part II of the Europe 2020 Integrated Guidelines ". [18] The Council has debate this proposal in June 2010, but not yet fully approved.

So far, the new Commission has not yet presented a new Social Agenda. The last Social Agenda dates from 2008.[19] Hence, the Commission Barroso II has not yet expressed any concrete priorities with respect to Labour Law.

The **Social Agenda 2008** commented as follows on lawmaking in the Community as a measure for implementing the Social Agenda: "The EU has established a solid legal framework for the wellbeing of Europeans. …. In some cases, new legal provisions by the Community may represent a solution, provided there is general agreement concerning the relevance of the respective provisions and that there is clear proof of their added value. In

[16] Communication KOM (2010) 2020

[17] Conclusions - 25./26. March 2010, EUCO 7/10 10.

[18] COM(2010) 193/3. The previous (integrated) Guidelines on employment policies of the Member States 2008 - 2010 originate from 2008: 2008/618/EG: Decision by the Council dated 15th July 2008 on Guidelines on employment policies of the Member States ABl. L 198 dated 26.7.2008, page. 47-54

[19] Communication of the Commission dated 2.7.2008, COM(2008) 412 final

view of the newly emerging problems (e.g. in the areas of discrimination, healthcare and security), new forms of labour organisation (e.g. European Works Councils, reconciliation between work and family life) and the jurisdiction of the European Court of Justice (e.g. in the areas of working time, social security, cross-border healthcare), the existing legal provisions have to be adapted and tightened.

Apart from that, it is vital that the existing legal provisions are applied and implemented effectively. Often, a lack of knowledge or inadequate coordination and cooperation between national bodies lead to problems in respect of proper implementation. In order to solve these problems, the Commission will, based on its Communication 'A Europe of Results - Applying Community Law'[20], cooperate with Member States, social partners and other stakeholders."

Three main issues are at the centre of the **Strategy Europa 2020**: – Smart growth: developing an economy based on knowledge and innovation; – Sustainable growth: promoting a more resource efficient, greener and more competitive economy; – Inclusive growth: fostering a high-employment economy delivering social and territorial cohesion. The Strategy names five *key EU objectives*, of which two are relevant to the Labour Law itself:

- "75 % of the population aged between 20-64 years should be employed." The employment rate of the population aged 20-64 should increase from currently 69 % to at least 75 %, including through the greater involvement of women, older workers and the better integration of migrants in the work force.[21]

- The number of people living below the national poverty lines should be reduced by 20 million.

In addition, the Commission Communication names seven *leading (flagship) initiatives*, of which two plus an additional one might be relevant to Labour Law:

- "Leading initiative 'Agenda for New Skills and Jobs' to modernise labour markets by facilitating labour mobility and the development of skills throughout the lifecycle with a view to increasing labour participation and better matching jobs and skills.

- Leading initiative "Youth on the Move": introduction of a framework for the employment of young people to reduce youth unemployment: in agreement with the Member States and social partners the entry of young people in the work force shall be promoted by

[20] COM(2007) 502 dated 5.9.2007.

[21] The Communication says among others: "In spite of progress, Europe's employment rates – at 69% on average for those aged 20-64 – are still significantly lower than in other parts of the world. Only 63% of women are in work compared to 76% of men. Only 46% of older workers (55-64) are employed compared to over 62% in the US and Japan. Moreover, on average Europeans work 10% fewer hours than their US or Japanese counterparts."

vocational training, practical training or other working experience."

- "Leading initiative 'European Platform against Poverty' in order to ensure social and territorial cohesion such that the benefits of growth and jobs are widely shared and people experiencing poverty and social exclusion are enabled to live in dignity and take an active part in society."

Of particular interest for the Labour Law is the objective "Inclusive Growth". "Inclusive growth means empowering people through high levels of employment, investing in skills, fighting poverty and modernising labour markets, training and social protection systems so as to help people anticipate and manage change, and build a cohesive society." A statement reads as follows: "Implementing flexicurity principles and enabling people to acquire new skills to adapt to new conditions and potential career shifts will be key."Apart from that, reference is made to "fighting poverty": Before the crisis, 80 million people were at risk of poverty, of whom 19 million were children. 8 % of employees earn so little that they are living below the poverty line. Particular affected are the unemployed.

In its conclusions, the Commission states the responsibilities, which it wants to assume to promote integrative growth at EU level. The following tasks are relevant to the Labour Law:

"- to define and implement the second phase of the flexicurity agenda in cooperation with the European social partners and to investigate, how economic transitions can be better managed, unemployment better combated and the employment rate increased;

- to adapt the legislative framework in accordance with the principles of "intelligent" regulation to changing employment patterns (e.g. working times, location) and new risks in respect of occupational safety and health;

- to ease and support the mobility of employees within the EU, to improve the harmonisation of supply and demand, providing the necessary financial aid through structural funds, in particular the European Social Fund (ESF), …;

- to strengthen the capacities of the social partners and to fully exploit the problem solving potential of social dialogue at all levels (EU, national/regional, sectoral, or company level), …."

The Communication states: "The Member States in turn are required

- to implement their national flexicurity concepts … to reduce the segmentation of the labour market and to ease transitions as well as the reconciliation between work and private life;

- to regularly examine and monitor the efficiency of tax and benefit systems so that

work is worthwhile. Thereby, particularly emphasis should be placed on the situation of low-skilled people and measures, which make the path to self-employment more difficult, should be abolished;

- to actively promote new forms of balancing work and private life as well as the extension of working life and to ensure more gender equality."

The proposal for the employment policy guidelines includes the guidelines 7 to 10 of the ten integrated guidelines on Europe 2020. The overall number of the guidelines was reduced from 24 to 10. The new guidelines 7 and 8 as well as 10 are relevant to the Labour Law.

"Guideline 7: Increasing labour market participation and reducing structural unemployment

Guideline 8: Developing a skilled workforce responding to labour market needs, promoting job quality and lifelong learning

Guideline 10: Promoting social inclusion and combating poverty"

Guideline 7 states the following: "Member States should integrate the flexicurity principles endorsed by the European Council into their labour market policies and apply them, making full use of European Social Fund support with a view to increasing labour market participation and combating segmentation and inactivity, gender inequality, whilst reducing structural unemployment. Measures to enhance flexibility and security should be both balanced and mutually reinforcing. Member States should therefore introduce a combination of flexible and reliable employment contracts, active labour market policies, effective lifelong learning, policies to promote labour mobility, and adequate social security systems to secure professional transitions accompanied by clear rights and responsibilities for the unemployed to actively seek work. … Member States should increase labour force participation through policies to promote active ageing, gender equality and equal pay and labour market integration of young people, disabled, legal migrants and other vulnerable groups. Work-life balance policies with the provision of affordable care and innovation in work organisation should be geared to raising employment rates, particularly among youth, older workers and women, in particular to retain highly skilled women in scientific and technical fields. Member States should also remove barriers to labour market entry for newcomers…"

Guideline 8 states among others: "Quality initial education and attractive vocational training must be complemented with effective incentives for lifelong learning, second-chance opportunities, ensuring every adult the chance to move one step up in their qualification, and

by targeted migration and integration policies, …Member States should develop systems for recognising acquired competencies, remove barriers to occupational and geographical mobility of workers, promote the acquisition of transversal competences and creativity, and focus their efforts particularly on supporting those with low skills and increasing the employability of older workers; … Investment in human resource development, up-skilling and participation in lifelong learning schemes should be promoted through joint financial contributions from governments, individuals and employers."

Guideline 10 states among others as follows: "Member States should put in place effective anti-discrimination measures. … Benefit systems should focus on ensuring income security during transitions and reducing poverty, in particular among groups most at risk from social exclusion, such as one-parent families, minorities, people with disabilities, children and young people, elderly women and men, legal migrants and the homeless.“

b. Potential issues for initiatives

These documents show that it is definitely not the primary intention of the Commission in respect of Labour Law, to pursue social policy objectives by new legal provisions. The Social Agenda 2008 only names discrimination, healthcare and security, European Works Councils and reconciliation between work and family life explicitly as subject matters of legislative measures by the EU; in addition, working time is also mentioned as a reaction to the rulings of the ECJ,. The implementation of legal provisions is named as a problem, but not as a subject matter for new lawmaking.

This corresponds to the fact that during the past years the Community - if one leaves aside anti-discrimination standards - has regulated the Labour Law less by new laws (Directives as minimum standard) than more by trying to influence it by soft law (Coordination - OMC).

The Commission sees the tasks in the area of working life and Labour Law respectively less in the realisation of social policy goals but primarily in the realisation of economic targets and integration objectives. At this point, I want only to refer to the emphasis on a "modernisation of the labour markets“. Over the past years, in particular economic targets were at the top of the priorities of the EU concerning working life. The Agenda of the EU on employment was and is still especially orientated towards the major target of creating more jobs and subsequently primarily on *employability* and *flexicurity.* Hence, in large areas it is aimed at more flexibility, increase of efficiency and competitiveness and the pursuit of integrationist targets and thereby far less on the pursuit of social policy goals.

However, as mentioned above, purely economic and integration-related targets can not or only with great difficulties be promoted or implemented by minimum standards; normally, there is tension between the two. At the same time, the Agenda contains some points, which can be promoted by minimum standards.

I shall try in the following, to explain the abstract objectives of the Agenda on the example of concrete subject matters. Issues concerning the protection against discrimination are no longer referred to; one should only bear in minds that further respective minimum standards are possible with regard to sanctions. Issues in respect of occupational health and safety will also not be referred to.

(1) A very important objective of the Agenda is the *reconciliation between work and family life*. The documents repeatedly mention that transitions and the reconciliation between work and private life should be made easier and that new forms of balancing work and private life, hence of work and parenthood as well as work with care responsibilities within the family have to be found. These are two separate issues: first the transition between family work and working life and secondly the reconciliation between work and private life. This issue is addressed in more detail below.

(2) Another important objective is the *Flexicurity Agenda*, i.e. the combination of flexibility and security: The flexicurity principles have to be implemented.[22] The "second phase of the Flexicurity Agenda (should be) defined and implemented with the European social partners; it should be explored how economic transitions could be managed better". "The measures to increasing flexibility and security should be balanced and strengthen each other." "The concept of flexicurity should harmonise the requirements of employers and employees - hence flexibility and security. That way, the secure transition from one job to another can be made easier for employees, without affecting the competitiveness of companies. This makes it possible to also retain the European Social Model."

This includes both external flexibility (transition from one job to another) and internal flexibility inside companies. In particular, "flexible and secure contractual arrangements" are mentioned as an element.

External Mobility concerns Labour Law in respect of the regulations on termination. This kind of mobility can only in some cases be promoted by minimum standards. One might regard the provision that the employment contract is transferred in case of a transfer of undertaking as a relevant contribution. However, the present regulation does hardly require a

[22] Compare Council of the EU 23.11.2007 Developing common principles for the flexicurity approach - Draft of conclusions of the Council Rates, 15497/07, SOC 476, ECOFIN 483.

significant improvement of the existing minimum standard. The ECJ has already extensively interpreted the scope of the regulation and also safeguarded the legal consequences. Apart from that, external mobility can only be promoted to a very limited extent by minimum standards, as such standards can only increase or safeguard the national standard of protection against termination (dismissal) but never are able to an existing national standard. Minimum standards can contribute to external flexibility solely by strengthening the element of security in the area of social benefits after job losses.

Internal Mobility can also be hardly promoted by minimum standards because provisions, which safeguard the current position of employees, rather hinder than promote internal mobility. Minimum standards can at best indirectly promote mobility if they protect employees in respect of changes/transitions, i.e. when they make it easier for him or her to accept the change. Such a contribution could be made by regulations, which ensure that any worsening of the working conditions is not detrimental to the employees in case of a termination if it occurs only slightly later after the worsening,.However, these and other "confidence-building" measures are so much geared towards the respective national regulation environment that they are hardly suitable for a regulation at Union level, as long as the Union itself has not regulated the protection against dismissal. A relevant minimum standard, however, is unlikely to be regarded by the Commission as a contribution to flexicurity.

It is one objective of the Agenda to improve the harmonisation of supply and demand on the labour market among others by labour mobility. The documents repeatedly state that *segmentation of the labour market* should be reduced and that mobility should be increased; this corresponds with the flexicurity approach. Economically, this concerns the use of employees in that working relationship where they are economically the most productive. This is often hampered by national regulations, which either in case of changing employers or changing from being self-employed to working under an employment contract and vice versa result in losses based on change. Here, a minimum standard could counteract this (only) by ensuring that employees are not worse off after such a change than before.[23] In concrete terms, this would mean that previous working periods with another employer must not be treated worse than previous working periods with the same employer. However, such guidelines would weaken the option of the employer to reward loyalty to the company and

[23] In contrast, full harmonisation could restrict regulations, which link advantages to remaining with the same company. The ban of discrimination because of age and gender could have a similar effect if one deduces from these also restrictions for regulations, which link advantages to previous working periods. Currently, this can only be said in respect of crediting low hour jobs.

would probably contribute to diminish the significance of previous working periods for the rights of employees. Although one could regard this - indirectly - as a contribution to flexibility and mobility, it is, however, hardly to expect that this will be seen as a sufficient reason to legislate. Another example for legislation promoting change would be to restrict contractual agreements, which hinder a change initiated by the employee, such as agreements on post-contractual employment restrictions or which state that employees giving notice themselves have to reimburse their employer with any costs related to vocational training. Here are large differences between national regulations; however, from Austria's point of view, there is no urgent need for a regulation at Union level.

Finally, the change between dependent and self-employed employment could be promoted by committing the Member States to improve the legal position of those self-employed who are not employees but are working for the same contracting partner in economic subordination over a longer period (special regulations for economically dependent workers). It is, however, questionable whether regulations for these persons could be adopted on the basis of Art 153 TFEU.

(3) One further objective of the Agenda is the promotion of *getting the (long-term) unemployed into work*. The willingness to return to work is often reduced by the fact that social benefits paid to the unemployed are sometimes (much) higher than the wages paid for a low-paid job, so that the overall income after getting back to work is lower than before. A minimum standard could regulate that additional earnings may reduce social benefits - in a certain area of income, determined in relation to national average/median earnings - only up to a certain percentage of the benefit (during a determined period).

(4) One additional objective of the Agenda is the promotion and improvement of *lifelong in-service training* and thereby of employability. A respective minimum standard could commit employers (and employees) that each employee should attend a certain number of hours per year to further his professional training, whereby the employer would (only) have to assume part of the costs. In-house training programmes, which would teach skills that could also be applied outside the company, would have to be taken into account. In the event that no such training facilities have been provided by the end of the employment relationship, the employer would be obliged to finance a respective training course at a public institute.

(5) An objective both of the Agenda and the new guidelines is the improved access of *young professionals* to the labour market.[24] In many countries, in particular graduates with

[24] Guideline 9 says: "Remove barriers to labour market entry for newcomers." It also says: "The entry of young

a tertiary education background face long periods of unemployment or are forced to take low-paid jobs ("work experience"). A minimum standard could introduce regulations, which restrict such disadvantages for economically valuable activities.

(6) In connection with fighting poverty and exclusion, the new documents also address the problem of the *working poor*: "8 per cent of people in work do not earn enough to make it above the poverty threshold." Even if this figure does not refer to full-time employees, there are in Member States without a national minimum wage doubtlessly also some full-time employees, whose salary is below the national social subsistence minimum. However, as said before, the EU cannot determine a minimum wage based on Art 153 TFEU; it is also unable to prescribe it as a relative wage (hence, a wage based on the national median salary). Art 153 Paragraph 1 lit c) TFEU - "Social security and employee protection" – could at best possible cover a Directive that stipulates a minimum amount of social benefits to be paid to employable, but (partially) unemployed job seekers and that is determined in relation to the national median salary (or a national minimum wage). Such a minimum benefit for job seekers could - as a *reservation wage* - fulfil a similar function as a national minimum wage. However, such a regulation would require unanimity in the Council, which will be hard to achieve. Apart from that, Art 153 Paragraph 4 TFEU must also be considered.[25] After all, in states without a national minimum wage, a social benefit, which is supposed to serve also as a reservation wage, might motivate employers to take advantage of the "bandwagon effect".

(7) Another objective of 2008 is the fight against *illegal employment*. The EU has recently adopted a Directive against the employment of illegally staying third-country nationals.[26] The working conditions of employees and the competitiveness of their employers, however, are not only put at risk by illegally employed persons without legal residence, but by any kind of illegal employment, including illegally employing third country nationals with legal residence and thus employing EU citizens, in particular because the products of this illegal employment are able to freely circulate on the internal market. Hence, the Union would not only have the task, but also the responsibility to take care of these consequences of the internal market. A relevant minimum standard could in particular strengthen the law enforcement in favour of illegal workers, especially including the right of action of third parties against illegal employment itself (injunction).

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people into the working world shall be promoted by vocational training, practical or other work experience".

[25] "The provisions adopted pursuant to this Article: — shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,"

[26] Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

3. ***Consequences of open borders***

(1) The *Posting of Workers Directive* is currently in the forefront of the discussion. In particular, the trade unions of some old Member States demand a revision, which would either transform the Directive into a minimum standard or which would extend the options to request the application of the Labour Law of the work state. The Commission did not see any reason in 2009 to take any respective initiatives. In particular, an initiative on the transformation into a minimum standard is highly unlikely, in particular as in view of the ECJ judgments Lavel and Rüffert, the question as to the reconciliation with free movement of services would arise. However, in 2010, the Commissioner in charge gave a hint that they are considering to make some changes to the Posting of Workers Directive,[27] e.g. with regard to administrative cooperation and information and to introducing clear rules for an effective implementation. However, politically not only many new Member States are against a revision of the Directive to the detriment of postings, as well some labour unions in old Member States oppose any revision because they fear that any reformulation might worsen their situation rather than improve it.

(2) Practically of equally great significance as the content of the Labour Law regulations is - especially in case of transnational circumstances such as postings - the possibility to control the compliance with the rules of Labour Law. Regulations on *control options* primarily concern the question, what means can be used and when a Member State can check (ex ante or only ex post) whether a certain working relationship is subject to Labour Law and whether also the participants treat their relation as an employment relationship. The opening of the borders for free movement of services has seen the number of relevant problematic cases rise. In general, the country of origin will seldom be interested in controlling the compliance with the rules of the work state. Currently, national control measures of the work state are quickly confronted with obstacles based on court decisions of the ECJ.[28] A Union regulation, situated in secondary law, could be an accompanying measure to the opening of the borders, to give the Labour Law - the purely national and that adopted implementing a Directive - also in transnational cases that effect, which the Community legislator expects for its own Labour Law regulations. A regulation on control measures

[27] Speech by Commissioner Anders on 17.3.2010 (Speech-10-100) in Oviedo: "I am not yet convinced of the need for a complete overhaul of the Directive as it stands. But that does not mean that we should not look for solutions to improve aspects where we feel the implementation of the Directive has been less satisfactory — such as the lack of administrative cooperation, effective enforcement, information or a lack of clarity on controls. President Barroso underlined last year to the European Parliament that he is fully committed to considering a legislative proposal to improve legal certainty and ensure the Directive is applied and enforced more uniformly across the Member States."

[28] Compare Communication COM(2006) 159: Guidelines on the posting of workers in the framework of the provision of services "; Communication COM(2007) 304: Posting of workers in the framework of the provision of services.

however then would at least in effect cover all situations, not only those at transnational level. This would overall contribute to safeguarding the standards of Labour Law. The question, however will arise whether the EU has the required competence.[29] Apart from that and above all, some, in particular some new Member States could have reservations against a control regulation if they should interpret it - falsely - primarily as a measure aimed at their citizens.

(3) Another consequence of opening the economic areas is the significance of "national boundaries" also for the *collective regulation* of working relationships. Economic and social circumstances are often far more similar in border regions of neighbouring Member States than in areas of the same Member State that are far apart. There is currently no secure basis for *transnational collective agreements*. The Commission is currently (only) dealing with transnational collective agreements at company level. In particular, in cross-border economic regions the requirement for cross-border sectoral agreements is probably greater. Even if, due to different legal environments (Labour Law, social contributions and taxes), transnational collective negotiations would be very difficult in practice, it would be logical in an internal market to create the appropriate legal basis and opportunity for such transnational agreements. However, the problem is more relevant in other Member States such as Germany and France than it is in Austria.

4. "Traditional" Labour Law

(1) The safeguarding of the area of application of Labour Law within the scope of traditional Labour Law does not only continue to be an important issue but also a possible subject of EU legislation. This would involve regulations, which directly concern the area of application, similar to regulations on control options (see 3 above).

Direct regulations on the *area of application* can either "define" the area of application or contain a rule in case of doubts when classifying a concrete working relationship. A definition of employees or employment relationships at Union level seems for several reasons not to be a suitable object for a regulation initiative at present. More promising could be the attempt to establish a *presumption rule*, which refutably presumes the status of employee if certain conditions apply (presumption basis). A presumption rule at Union level would not affect the employee definitions of the Member States and of Union Law, but practically lead to a rapprochement of these definitions. Such a presumption rule is also relevant from an Austrian perspective. The issue will be dealt with in more detail below.

[29] This is an example of the assumption that due to the current competence situation, the Union is able to influence many areas, but that neither it nor the Member States will have the opportunity in future to effectively regulate the problems that this caused.

Further one could think about regulations, which concern the question how far the contractual “right” of the employee to refuse a specific working task or to be substituted by someone else excludes the status of employee, especially in cases where the national regulation implements Union Law. From an Austrian point of view, however, such a regulation would not have priority because Austrian Courts - in contrast to some other countries - have already established barriers. The same seems to apply to the regulation of work on call, hence of constellations, where the worker does not commit himself in advance to provide work (casual worker). With regard to this constellation, the competence concerning the regulation based on Art 153 TFEU could also be questioned.

(2) In most Member States, the content of employment contracts has gained in significance over the past years in relation with collective regulations and law, also because employers - not least thanks to the Notification Directive - are increasingly using written employment contracts. It would probably be the responsibility of the EU to adopt certain minimum standards on the *contractual structure of collateral and primary duties* of the employment contract under the heading "working conditions". This would in particular apply to a ban of "unfair terms" in employment contracts; the EU has adopted such a prohibition for consumer contracts. It would also be worth considering establishing duties of “consideration” for both contracting partners - within the meaning of "duty of mutual trust and confidence" in the English law - as a minimum standard. Both issues issue will be dealt with in more detail below.

(3) Some years ago, the Commission had started to think about a Directive on *data protection* in employment relationships. It did, however, not pursue the idea any further, probably because one regards the general regulations of the Data Protection Directive 95/46/EC as sufficient. However, its general clauses in particular those concerning employment relationships are often too vague and/or unclear. The cases of intensive monitoring, which were broadly discussed in various countries since 2008, could prepare the way for a new attempt to introduce such a Directive. Such an initiative would in particular become relevant if the opinion prevails that the Data Protection Directive contains a conclusive regulation, i.e. not a minimum standard. National regulations on employee data protection would then not be allowed to go beyond the level of protection of the Data Protection Directive.

(4) A Union-wide regulation concerning a (relative) *minimum wage* seems to be barred already for competence reasons alone. Apart from that, 21 of the 27 Member States

currently already have such minimum wages; however at very different levels.

(5) The Union already has a regulation on upper limits regarding working times and rest periods. A change has been on the Union's agenda for years and continues to be controversially discussed. For that reason alone, it will not be dealt with here in more detail. Apart from that, the Commission has pointed out that the average working time in the EU is below that of other major industrial nations, so that a reduction of the upper limits would hardly suit the Commission.

(5) Various existing regulations in the Union Law relate to *termination* and thereby could suggest considering a general regulation on termination and on protection against dismissal. This would not only be intellectually interesting, but would also take the fact into account that the existing directives on limitation and transfer of undertaking are equally "in a state of limbo". The practical significance of both guidelines greatly depends on the national environment with regard to protection against dismissal; both Directives have far less practical significance in Member States with weak protection against dismissal than in states with strong protection against dismissal. However, a minimum standard on the protection against dismissal does not only require a proposal by the Commission, but also unanimity in the Council. Both will be difficult to achieve. The Commission regards protection against dismissal more than a hindrance for efficiency and employment and there are quite a number of Member States, which are opposed to it or to any form of European regulation.

(6) The flexicurity principles also target "*flexible and binding employment contracts*". Here too applies that minimum standards can hardly promote flexibility directly, but only indirectly by increasing security and legal security in case of flexible employment relationships. The three existing Directives on "atypical employment relationships", hence on part-time work, fixed-term employment contracts and on temporary work, are widely regarded as such regulations that increase security of flexible employment. The improvement of the legal situation of these atypical employment relationships, however, is seen by some with scepticism, because it would weaken so-called normal employment relationships. Thus, some demand to limit the use of so-called atypical employment relationships, for example through quota regulations. The Commission will hardly support such plans. Slightly realistic are at best changes to the regulation of atypical employment relationships themselves.

In any case, the current regulation of the Fixed-term Directive against the improper use of repeated limitations is little effective. This is demonstrated by the relevant national regulations in Spain and Great Britain, which do not really obstruct repeated limitations over

a longer period, but seem to be compatible with the Directive (so far, the Commission has not initiated any infringement proceedings). As said before, the practical significance of restrictions on limitations, however, depends very much on the national environment of the protection against dismissal; in Great Britain for example, it is far smaller than in Spain because the protection against dismissal is significantly less. It is therefore questionable, to which extent isolated measures for the promotion of unlimited employment relationships are sensible. One could also consider - taking the example of France - a limitation bonus, which has to be paid at the end of the employment relationship. Although this minimum standard would lessen the disadvantages of limitations (only) financially and reduce the incentive for employers to use limitations, it would not contribute to secure employment relationships.

With regard to the Part-Time Work Directive, one could consider specifying the ban on discrimination in more detail. The current formulation is very general. However, bans on disadvantages and discriminations have hardly been specified in more detail by the EU legislator itself.

The Temporary Agency Work Directive has only been recently adopted so that one has to wait for the first reactions.

(7) Finally it ought to be considered that the Union Law regulates the implementation and enforcement of the Labour Law guidelines of the EU in more detail. Such a guideline on enforcement, however, can only be based on Art 153 TFEU insofar as it concerns the non-compliance with standards, which have been specified by the Union Law itself, not, however, by purely national Labour Law standards. Nevertheless, such a regulation would also have an effect on purely national regulations.

Currently, the *implementation of the individual legal positions* of employees towards their employer is very different in the Member States. Some Member States leave the implementation of most rights - also those concerning pay and leave - to the individual; other Member States (also) provide for rights of action by trade unions; only a small number of Member States (in particular France) provide for enforcement through authorities (with penalties). A Union-wide provision of state competences on the enforcement of Labour Law rights would significantly influence and change the primarily private law nature of individual Labour Laws in many Member States. That is why the required approval is questionable. The subject of control options has already been mentioned. It is also relevant from the point of view of purely national circumstances and the traditional Labour Law.

Currently, the *limitation* of claims in time by employees from their employment relationship has been regulated at national level. This also applies to those issues, for which

provisions of the Union Law exist. As limitations are primarily concerned with remuneration and as Labour Law Directives, which are based on Art 153 TFEU, (may) only marginally concern remuneration claims, the area of application of a Directive on the limitation of Labour Law claims would be rather restricted.

Any non-compliance with the Labour Laws also harms those competitors of the employer, who adhere to it. The Union could support these law-abiding enterprises by enabling them to take effective action against competitors who systematically ignore the Labour Law. Actions for *unfair competition* come to mind.[30] Currently, these actions in question are often possible in accordance with the national competition law; however, the basis for these actions is again and again called into question. However, an EU regulation on actions between enterprises, if at all, can only be based on Art 153 TFEU, as it concerns the non-compliance with standards, which have been provided by the Union Law itself. The scope of a relevant Directive would go significantly further than the one on limitation. Apart from that, a guideline that is restricted could motivate the Member States to expand it.

5. Three problem areas in particular

a. Presumption rule

The prevailing opinion in the states of the EU links the need of protection of persons who perform personal work for someone else primarily to the work in organisational subordination.[31] The - longer – term/duration of the contractual relationship, however, is rarely used (openly) for legitimating protection rules. Several reasons (new work techniques, new methods of personnel management and coordination) are responsible for the fact that organisational subordination today is far more difficult to establish than in the past. The term 'grey area' between employed and self-employed is used more and more frequently. With regard to a longer contractual relationship, these difficulties could be eased by a refutable presumption in favour of the status of the employee.

Such presumptions do exist in some Member States, but they are not very widespread in the old ones.[32] Being one of them, the Netherlands introduced in 1999 a legal, refutable presumption of an employment contract, which applies if someone regularly works

[30] Compare as "Example" Directive 2009/22/EC on injunctions for the protection of consumers' interests (codified version). However, the unfair business-to-consumer commercial practices in the internal market only concerns consumer-relevant unfair competition.

[31] Compare *Rebhahn*, The concept of employee in a comparative perspective, RDA 2009.

[32] Compare *Rebhahn*, The concept of employee in a comparative perspective RDA 2009.

at least 20 hours per month against pay for a period of more than three months.[33]

With regard to legal competence, a presumption rule is something like an annex to other material regulations; hence it can be based on Art 153 TFEU to the extent as it concerns the scope of regulations, which were adopted on the basis of this competence. Initially, a Union-wide presumption rule could only be adopted ("tested") as an annex to one or several Directives, where safeguarding the area of application seems to be of particular importance also from the Union's perspective. One could consider the Directives on Postings, Working time or Transfer of undertaking.

Firstly, the presumption basis requires that any work is carried out personally and secondly for a certain period. Whether additional details are required remains to be debated. In any case, the presumption basis should not have the regulative structure of a “type” and should only build on organisational elements of the concrete performance relationship. One could phrase the basic facts as follows: The status of an employee is refutably presumed if the person regularly works for another person/company for more than three months and if this work is essentially of a personal nature. An additional alternative or partly cumulative requirement could be: coordinated cooperation; the employee works essentially only for the contracting partner, a fact, which the contracting partner recognises on concluding the contract; an average minimum number of weekly working hours; a minimum and upper limit for the average monthly pay.

Such a presumption has a lot going for it. If phrased well, it could achieve clarity and reduce disputes, which in turn would save litigation costs. It could also alleviate the problem of bogus self-employment (workers, who from a legal perspective fulfil the status of an employee, but who are not treated as such by the contracting partner). Like all rules on burden of proof, it too has an impact on the material law: it would partially have the same effect as an expanded concept of the term employee, because argumentation and burden of proof would be transferred to the contracting partner. In material terms, however, it would significantly lag behind an expanded concept of the term employee. What perhaps speaks against introducing a presumption might be the concern that in cases, which are not clear cut, companies would be reluctant to conclude any contracts. A clear contractual provision, which excludes legal subordination and the respective implementation of the contract, however, would enable companies to avoid applying Labour Law rules.

[33] Art. 610a BW: „Hij die ten behoeve van een ander tegen beloning door die ander gedurende drie opeenvolgende maanden, wekelijks dan wel gedurende ten minste twintig uren per maand arbeid verricht, wordt vermoed deze arbeid te verrichten krachtens arbeidsovereenkomst.“

One has to bear in mind that every presumption rule - due to the fact that it potentially also covers non-employees - might be regarded as a regulation, which might infringe upon free movement of services and freedom of establishment. With its decision in the case Commission/France in 2007, the ECJ has rejected a national presumption rule,[34] which, however, also concerned social security. The justification concerning a secondary law presumption rule should in any case by easier than it is for national presumption rules. The specifications of the facts, assessed by the ECJ in 2007 could lead to the fact that at least this judgement does not oppose every refutable presumption. It will be possible to justify a presumption, which is both based on a certain period of work and restricted to Labour Law, by reasoning with the protection of employees especially when the status of employee is unclear. From what one can see, it does not appear as if - with regard to Community law - any national, refutable presumptions in favour of the status of employee with regard to Labour had been objected against.

The Directive 1999/70/EC concerning the Framework Agreement on fixed-term work, is probably not opposed to a regulation, which refutably presumes the status of an employee only in respect of - planned or actual - longer duration of the working relationship. The Part-Time Work Directive 97/81/EC does not oppose a legal regulation, which refutably presumes the existence of an employment contract in respect of employees who are regularly working longer periods for one contracting partner. Based on this presumption, the existence of an employment contract is not excluded with regard to other part-time employees. The disadvantages suffered by such part-time employees, embedded in this presumption, appear to be justified in view of the advantages of the beneficiaries, because the advantage cannot be achieved in any other way.

b. Unfair terms and collateral duties

(1) The legal situation with regard to controlling contract clauses in employment relationships, even if the clauses are part of General Terms and Conditions of the employer, vary from Member State to Member State. Some countries, such as Germany have attached great importance to the control of General Terms in their Labour Law; for others, among them Austria, this aspect is currently still irrelevant or hardly relevant.

So far, the EU has not adopted a special Directive on the regulation of contract clauses in employment relationships. With regard to consumer protection, however, the EC had already in 1993 adopted the Directive 93/13/EEC on Unfair Terms in Consumer

[34] See Fn. 68; ECJ Rs. C-255/04, Commission/France, ECR 2006, I-05251.

Contracts. Although the purpose of the Directive has been stated as the "alignment of the legal and administrative provisions of the Member States", the Directive only wants to set a minimum standard. Discussions are now underway, to which extent the Consumer Protection Law of the EU should be "fully harmonised", i.e. set a minimum and maximum standard at the same time.

Employment contracts are not subject to the same regulation requirements as consumer contracts, which are frequently and increasingly concluded at cross-border level. At least the regulation technique of the Unfair Terms Directive can be used as a starting point for considerations on Labour Law, should a similar need for regulation arise.

The Unfair Terms Directive demands that "unfair" clauses are non-binding. Art 3 of the Directive contains a kind of general clause on the central term of "unfair" clause; an Appendix to the Directive contains a long list of clauses, which have to be seen as unfair. The examples of this Appendix are hardly relevant to the Labour Law. In contrast, the general clause of Art 3 Paragraph 1 is also of interest here: "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer".

Pursuant to Art 3 Paragraph 2 "Contractual terms must always be regarded as not being individually negotiated when they have been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract." Pursuant to Art 5, clauses must be written in "plain and intelligible language." What is important is that the issue of unfairness of a clause, according to Art 4, neither concerns the main subject matter of the contract nor the adequacy between the price or the remuneration and the services or the goods, which represent the exchange (quid pro quo), provided these clauses have been written in a plain and intelligible language.

It should be reviewed to which extent it would be possible and sensible to adopt a parallel regulation for employment contracts. Extending the standard, which has been specified in case of consumer contracts, to employment contracts, would certainly meet the demand of the Commission for secure employment relationships as well as the demand for flexible and protected employment relationships. In particular, introducing flexibility frequently presupposes additional contractual agreements. Reviewing these clauses as to whether they correspond to good faith, may increase the willingness of employees to accept this flexibility. In addition, such clause monitoring contributes to the adjustment of competitive conditions. The adjustment for those countries, in which the monitoring

benchmark so far has been lower, will not be achievable without additional costs.

It should subsequently be considered, which clauses should be included into the Appendix of an Unfair Employment Clauses Directive. One option would be to introduce clauses on carrying resp. shifting the business and economic risk and associated with it on working time flexibility, further on the reimbursement of training costs or on post-contractual prohibitions of competition.

(2) Independent of the issue of clause monitoring, one should also consider a Directive on *collateral duties* in employment relationships. However, it would only be possible to structure collateral duties of the employer as minimum standards. A minimum standard within the meaning of 153 TFEU will only be able to restrict but not to establish collateral duties of the employee.

Regulations on collateral duties of employer and employees - within the meaning of loyalty duties - and on risk distribution will probably come under Art 153 Paragraph 1 lit b) TFEU, if one interprets the core competence "Working conditions" generously. Hence, they could be regulated by Directives, which are adopted within the ordinary process of legislation.[35] The exact content of the mentioned competence, however, is controversial.

With regard to *Collateral duties of the Employer* it might be an idea to standardise a general clause and/or individual duties, whereby the acceptance of the general clause would probably be more widespread. Such a clause could be modelled on the regulation in the Netherlands. There, the law has determined for a long time that the employer has to behave as a "goed werkgever", hence as a "good" or "correct" employer.[36] The regulation is significant in three respects. Firstly, it has an impact on instructions by the employer (in Germany, this is based on § 315 BGB (Civil Code) according to which the determination of performance has to be fair and just). Secondly, it requires from the employer to comply with principles of procedure in employment relationships (hearing and substantiation). This aspect, though on a different basis, is also emphasised in France and Great Britain (reasonable employer). Finally, the regulation is regarded as a gateway for new developments, such as the application of fundamental rights in employment relationships. From an Austrian point of view, in particular the first, but also the second feature is relevant.

As said before, a minimum standard based on Art 153 TFEU can only restrict *Collateral duties of the Employee*, but not "positively" regulate them. With regard to a

[35] "(1) With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: … b) Working conditions, …"

[36] Now Art 7:611 of the Civil Code. A parallel rule with regard to the employee can be found here. Compare *Heerma van Voss*, Goed wergeverschap (1999)

general clause, such a minimum standard would then require - if one looks again at the regulation in the Netherlands - that no more may be required of an employee than of a "good employee". Parallel to this, collateral duties could also only be "negatively" regulated, for example that duties resulting from the employment relationships may not have an "unreasonable and intensive" impact on an employee's private life or that employees may only be asked to supervise/monitor other employees, if they have clearly and openly been instructed thereto.

c. Reconciliation between work and family life, in particular through protection against dismissal

The improved reconciliation between work and family life by "new forms of balancing work and private life" is one of the central issues on the political programme of the EU. It addresses both the responsibility of looking after children, but also the (in particular long-term) care of relatives. Labour Law can consider these responsibilities in particular in respect of the following three topics:

- The reconciliation between work and private life; hence the coordination of the duties from employment relationships with the requirements of family life;

- The considerations of family obligations in case of terminating employment relationships and of job search;

- The transition between family work and working life;

Union Law already covers some of these aspects by the ban on discrimination. Discrimination due to pregnancy and in connection with the birth is regarded as gender discrimination. The Gender Equality Directive 76/207/EEC also provided for including disadvantages based on the family status. The new Directive 2006/54/EC no longer does this. The ECJ also regards the mother looking after a disabled child as being discriminated against.[37] Furthermore, the ban on discrimination based on gender, can also be understood in such a way that disadvantages, because of the care responsibilities in respect of children and relatives in need of care, are regarded as indirect discrimination, because these responsibilities are predominantly fulfilled by women.

Apart from that, the Union Law currently only regulates parental leave. The respective Directive was recently enacted in modified form (Directive 2010/18/EU); this new Directive must be implemented by 2012. It is highly unlikely that a new initiative on central issues in this Directive will be successful before then.

[37] ECJ C-303/06 - Coleman, ECR 2008 I-05603.

With regard to any measure in favour of persons, who have small children or who will have children in the near future, one should consider the fact to which extent such a measure might motivate employers to recruit other persons. Their subsequent decision to employ older persons might have an impact on a higher employment rate and the non-discrimination of older people; it does, however, not promote the reconciliation between work and family life.

(1) With regard to coordinating the duties from employment relationships with the requirements of family life, the Union Law currently includes no specific regulations apart from the Directive on Parental Leave.

A relevant minimum standard could specify that the employer have to adequately take into account responsibilities concerning the care of children and relatives with regard to his unilateral decisions, which he takes in employment relationships and which could have an impact on the responsibilities mentioned. One aspect to be considered concerns in particular one-sided changes of the schedule or the extent of working time or like changes of the workplace. A minimum standard then could either only address the relationship to the employer or request that the responsibilities mentioned be sufficiently taken into account. However, as the decisions mentioned are frequently taken by the employer deciding between several employees (who should be transferred or work longer), a minimum standard could also prescribe that the responsibilities mentioned are given priority compared to other interests of other employees.

In Clause 3, the Parental Leave Directive provides for a right of employees for time off work in urgent cases. "Member States … shall take the necessary measures to entitle workers to time off work … on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable. Member States … may specify the conditions of access and detailed rules for applying clause 3.1 and limit this entitlement to a certain amount of time per year and/or per."

This regulation is structured rather narrowly. Firstly, it does not include any claim for continued pay during the time off work and secondly, the scope too seems to be rather limited ("urgent"). Here, one could consider an extension. This extension would in my opinion be preferable to the later mentioned crediting of the period of parental leave without work or performance (period of rest) as period of service, because the former amendment would serve the objective of reconciliation of family and work better than the latter.

(2) In accordance with the suggestion of the Arbeiterkammer, here should be addressed further the protection against dismissal with specific regard to reconciliation

between work and family life.

Similar to the previous regulation in the Directive 96/34/EC, Clause 5 para 4 of the Appendix of the Parental Leave Directive 2010/18/EU states: "In order to ensure that workers can exercise their right to parental leave, Member States … shall take the necessary measures to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave in accordance with national law, collective agreements and/or practice." This guideline is not restricted to the minimum duration of the parental leave in accordance with the Directive (4 months) but applies to the entire period, for which the national law applicable provides for parental leave - without work or with part-time work, up to the maximum term, specified in the Directive, of eight years. Hence, the Member State is not able to scrap the protection against dismissal, say after a period of five years. The ECJ has not looked in detail at this termination barrier.[38] One could consider understanding the barrier in the Parental Leave Directive in the same way as the one in Art 4 Paragraph 1 of the Transfer of Undertakings Directive 2001/23/EG, even if their phrasing is clearly different; the guideline in this Directive is far more detailed. If one pursues this suggestion, then the application or use of the parental leave shall not in itself (as such) constitute a cause for dismissal. However, this " shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce." It is neither likely nor, in my opinion, desirable to strengthen the specific protection in this respect any further.

Apart from that, one should consider the significance of looking after children and care with regard to the general rules on protection against dismissal. As the Union does not regulate the protection against dismissal itself and has no intention to do so in the near future, the only option will probably be a relational regulation. The Union could require for example that the responsibility of looking after children and caring for relatives shall be as much or even more taken into account when justifying a dismissal as are years of service with a company or age. Such a rule might still be a minimum standard. It is, however, questionable whether this can be attributed to the competence to regulate 'equal treatment' (qualified majority) or whether it has to be attributed to the competence 'termination regulation' (unanimity required).

(3) Another question concerning parental leave is how far a period of parental leave without work will be taken into account for the advancement - in accordance with the

[38] The judgment C-116/08, Meerts, ECR 2009 I-00000 concerned a dismissal, the ECJ, however, was only consulted on compensation and did not address the admissibility of the dismissal during the parental leave.

collective agreement as well as with other claims, which depend on the length of the period of service. At least in some Member States the employee's entitlements (still) depend heavily on the length of the period of servives rendered to the specific employer.

Austrian law currently does not provide for this "crediting" or only partially (§ 15f Paragraph 1 Maternity Protection Act [MSchG]). Clause 5 p. 2 of Directive 2010/18/EU determines, as does the previous Directive: " Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights, including any changes arising from national law, collective agreements and/or practice, shall apply." What emerges from the new judgments of the ECJ on the Parental Leave Directive is the fact that this provision does not oblige the employer to credit the parental leave. The credit is also not demanded by the ban on gender discrimination. Hence, a tightening of the Directive with regard to make crediting this period obligatory might be considered. However, in my opinion - apart from the financial burden for the employer associated with it – such a tigt´htening is not very convincing if one wants to maintain a certain dependency of rights on the period of service in the first place. An increasing equal treatment of working times and times off work in employment relationships undermines in my opinion the meaningfulness of such regulations.

4th June 2010 Robert Rebhahn