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The Future of European Labour Law

I. Introduction

European labour law has always attracted Tiziano Treu´s scientific interest. His "Diritto del Lavoro della Comunità Europea" written together with Massimo Roccella was one of the very first profound and comprehensive studies on this topic. Its fifth edition published in 2009 is well known outside the Italian borders, too. If you need information or – more important – creative ideas you are well advised to consult this book.

Since the referenda in France and the Netherlands, the European project is in a political crisis. It may be followed by a crisis of the Euro avoided until now by a common effort of the member states. But saving the Euro has its price; in Greece, Portugal and Spain social cutbacks provoked protests of relevant parts of the population. For the European Union, this creates additional problems, because people could blame it to be the source of all the bad things they are suffering from.

What does this situation mean for European labour law? Will it survive or, on the contrary, go to new frontiers in the future? Which are the agents and the interests involved? This subject is a terra incognita as a legal futurology does not exist. So we may skate on thin ice if we make some first steps in this direction. In a first part, I would like to describe the main characteristics of European labour law. The second one is dedicated to the neoliberal challenges which became visible in recent years. The third part deals with some issues which can be possible topics for the future.

II. Characteristics of EU labour law

EU labour law and national labour law are closely linked. This is due not only to the fact that outside the freedom of movement for workers one will only find directives and nearly no regulations in EU law. The more important reason is, that European law normally deals with

one aspect of a case or a conflict of interests, but never contains a comprehensive substantive rule. It is difficult to conceive a lawsuit which can be solved by referring exclusively to EU law. The only exception – the EU staff rules – gets its exhaustive character only by referring to general legal principles of the Member States and to UN- and ILO-conventions as well as to the European Social Charter.

There are specific elements EU labour law picks up. It puts the main emphasis on two points.

1. Equality rights

EU law gives a lot of equality rights to employees. Equal pay between men and women according to the famous article 119 of the old Treaty became nearly a symbol of progress through Union law: Gabrielle Defrenne, the SABENA stewardess, is nowadays known by most of the law students all over Europe. The three decisions of the European Court of Justice in her case[1] were in some way a starting point to numerous activities on EU level. Equality between men and women in all working conditions was the next step later on completed by a partial extension to social security schemes and in the end of 2004 to civil law contracts. Article 13 of the Treaty of Amsterdam and the directives based on it have created a system of antidiscrimination law: No discrimination on the grounds of racial and ethnic origin, of religion or belief, of disability, age or sexual orientation. The EU Charter of Fundamental Rights has added in its article 21 new elements.[2] However, their importance is restricted to the field of application of EU-law if there will be no directives which expand it to all kinds of labour relationships.

But these are not the only equality rights. Employees coming from other Member States must be treated the same way as own nationals. To a certain degree, the directive on posted workers[3] has a similar impact; at least some fundamental working conditions of the host country are guaranteed to workers sent by their employers from another member state.[4] The famous directive on acquired rights in cases of transfer of enterprises can be seen in the same way. For at least one year, it conserves the standards employees had before the reorganisation of the undertaking took place. Employees with restructuring employers shall for some time

[1] ECJ C-80/70, ECR 1971, 445; ECJ C-43/75, ECR 1976, 455; ECJ C-147/77, ECR 1978, 1365
[2] As to their contents and their interpretation see Hölscheidt, in: Meyer (ed.), Charta der Grundrechte der Europäischen Union. Kommentar, 3rd edition, Baden-Baden 2011, Art. 21.
[3] Directive 96/71/EC, OJ 1997 L 18
[4] The field of equality is, however, much narrower than in the realm of free movement.

have more or less the same conditions as workers in a stable labour relationship. As a principle, part-time workers have to be treated in the same way as full-time employees, employees with a fixed-term contract must have the same conditions as workers with a contract for an indefinite time, temporary agency workers should be treated as those who are working with them in the same plant at comparable workplaces.

The catalogue of legal rules is impressing but equality is silent on the level of protection. It applies in very modest as well as in splendid situations. It is an extremely flexible rule. This flexibility may be indispensable regarding the different economic development of the Member States and their national sovereignty: They keep the right to establish substantive rules. Additionally, inequality can be repaired in different forms; the courts will not always extend the rights of the better placed to those in an underprivileged situation.

The above-mentioned equality rights are of a different power. Some of them – e. g. in the cases of article 13 of the Treaty of Amsterdam – are taken seriously whereas equality between full-time workers for an indefinite time and part-timers or workers with a fixed-term contract is a very weak guarantee: The directive does not only recognise and accept the fact that one group is without any protection at the end of its employment contract whereas the other is protected against dismissal. Even during the employment, a "justifying reason" is sufficient for a differentiation between the two groups of employees. One may speak of first-class and second-class antidiscrimination rules. Additionally, it may be permitted to mention that the "prohibited grounds" in article 13 refer to personal qualities; the role in the labour market or in society as such is not mentioned: No antidiscrimination rule as to social origin, lack of qualification or fortune. Article 14 of the European Convention on Human Rights as well as Article 21 of the EU Charter of Fundamental Rights pick up these points but they are still waiting of being taken seriously and implemented in the member states.

2. Procedural Rights

EU Labour Law does not grant exclusively equality rights. Its second main topic are procedural rights. "Consultation" is the magic word which shall replace the codetermination in Germany and the strike in Italy or France. The acquired rights directive provides for consultation as well as the mass dismissal directive does. The main purpose of the directive on European works councils is "information and consultation". Even in the field of health

protection and working environment Union law offers above all procedures: The risk assessment which should be realised at every working place may serve as an important example.

The outcome of the procedure is not an object of Union law. If the employer has consulted the employees´ representation in an adequate way, he is free to take his decision. A veto of the employees´ side may derive from national law as in the case of outsourcing in Sweden[5] – but Union law does not provide it. Everything which is outside the exchange of arguments is no object of EU directives – codetermination and strike seem to exist in a zone of taboo.

The procedures as such are limited to the enterprise or the group of enterprises. Negotiations on the level of the branch or the conclusion of nation-wide agreements are outside the scope of EU labour law. It would be too obvious that consultation would not be sufficient to come to an agreement in such cases.

But is the Social Dialogue not an important exception? Indeed, the European social partners can influence the legislation on EC level. If their agreements are transformed into EU law (normally a directive), its effect is enormous and goes far beyond any generally binding agreement on national level. But a consensus is reached only because the employers or both sides are afraid of an own initiative of the Commission which would lead to undesired consequences. If this "threat" does not exist or will not "function" an agreement will not be taken into account or will take place but lead to no real consequences. The telework-agreement may show it, because it is up to the national social partners to implement the agreement found in the Social Dialogue – a burial of second class, as it was called in Germany.[6] The example shows that the Social Dialogue does not imply real autonomy of the social partners. It is just a procedure to facilitate the law-making process in the European Union. One could even say that the social partners take the place of the parliament which shall only be "heard", i. e. consulted in these matters. Many people criticize it for lack of democratic structure – the Parliament as representation of the "Peoples" has even not a right of veto, the minority organisations at both sides are not involved at all.

3. Freedom and solidarity at work?

[5] Art. 38 of the Codetermination Act. See Flodgren, in: Bruun et alii (ed.), The Nordic Labour Relations Model, Aldershot 1992, p. 81 ff.
[6] In Italy where the situation seems to be slightly different it was transformed by the "accordo interconfederale 9 giugno 2004; see Roccella-Treu, op. cit., V 4.

Does EU law provide for freedom of opinion or for trade union rights at the workplace? You will have big difficulties to find any guarantee of that kind. These rights exist, however, in Union law, but they are hidden to the citizen as to the observer: The lawyer will find them as general principles derived from the Constitutions of the Member States and from International Conventions. The European Court of Justice has stated at many times on the existence and the scope of these fundamental rights. But there is a restriction of crucial importance: These rights can be invoked only in fields where Union law applies. If there is no EU rule applicable in a certain conflict no fundamental right can be invoked. The same occurs with the EU Charter of Fundamental Rights.

4. Substantive Guarantees

In very few cases, EU law provides for substantive rights. The directive on working time gives four weeks of paid holidays a year to every employee (and a working week of statistically 48 hours completed by a lot of exceptions). In case of insolvency of the employer, the employee keeps his or her wages during a period of three months before the bankruptcy takes place.

5. Evaluation

Seen from an Italian or a German experience, the outcome of more than 50 years of EU labour law seems to be rather modest. But the picture would be incomplete if we would focus exclusively on EU law. The rules briefly described are added to national labour law; seen together, the protection of the employees has been improved despite of some 30 years of deregulation policy in most of the member states. In some cases, EU law brought even new elements. If a traditional paternalistic system of health protection at the working place is completed by procedural rights it has a good chance to be more effective than before. Relying only on EU law would, on the other hand, lead to a kind of catastrophe; we could more or less find ourselves even on a lower level than the US.

Why did EU law so much concentrate on equality and procedural rights? The main reason seems to me that this kind of rules is compatible with different economic situations in the member states. Equality can be practiced in Lithuania where wages normally are at five to ten

percent of the German level, and there is no obstacle to go on with the same procedures as in other member states. Both forms of law have the advantage (rarely mentioned in discussion) not to create any problem of legitimacy: Who would be against equality? Who would be opposed to consultation? To guarantee minimum wages would on the other hand provoke broad discussions which could finally lead to "unfair" questions about the distribution of wealth and chances in our society.

III. Challenges to EU labour law

Economic globalisation has become part of daily life in Europe. Firms transfer production to China or India or buy components in countries with lower wages and lower prices. The neoliberal reaction consists in lowering the own costs, especially wages and working conditions. Taxes for the own enterprises have to be reduced. Practiced as a general principle, this leads to a race to the bottom.

Equality rights and procedural rights have some impact on the market. You cannot use female or migrant workers at lower costs openly even if the market would permit it. Procedures may complicate decisions and therefore prevent enterprises from reacting in the desired flexible way. There is a pression to reduce the standards of EU labour law.

1. Revision of directives?

To enact a directive needs a lot of patience; normally you have to wait for years. In some cases, even 30 years have not been sufficient. The rules on the European company including workers´ participation may stand as an example. This is due to different national interests but also to governments with divergent political options. In the EU, we never had a moment all governments being conservative or social democratic.

The obstacles which make the legislation process so lengthy play an important role in the adverse situation of changing existing directives and reducing the protection they give. It is nearly impossible to put away well established rules and to renounce on some equality or procedural rights. During the past 25 years, Council and Parliament managed only in a few cases to modify existing directives: The acquired rights directive and the directive on the protection of workers in the case of insolvency of the employer were changed in some minor

points. The concept as such was left, however, untouched. Attempts to change the directive on working time finally failed. EU labour law seems not to be suitable for deregulation. But can it really resist to the general trend? Help seems to come from the so-called fundamental freedoms, especially the right of establishment and the right to provide services which are interpreted by the European Court of Justice.

2. Deregulation by the European Court of Justice?

a) The first step

Article 48 of the Treaty of Amsterdam (now: art. 49 of the Lisbon version) gave the right of establishment to companies "formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union". It seems convincing that this rule implies the right to transfer the headquarters to another member state; the right to establish a subsidiary would not be sufficient.

During the last ten years, the European Court of Justice has given a very broad interpretation to the freedom of establishment. In a series of decisions, the Court has acknowledged the right of enterprises to be registered in a freely chosen member state without having a genuine link to it. In the Überseering-Case[7], two Germans went to the Netherlands in order to register a company doing business afterwards exclusively in Germany. The Court stated that Germany had to recognize the existence of the company under Dutch law. The consequences for labour law are considerable: The representation of workers in the organs of their company, especially in the supervisory board of a joint stock company or a limited company does not comprise undertakings under foreign law. Whether it would be possible for a member state to extend national rules to these companies under foreign law operating in its territory is quite doubtful.[8] Even if one would accept such a solution it is difficult to see a national legislator deciding in this way, nowadays. Would such an "extension" law not be an illegal restriction to the freedom of establishment? Would it not be at least an incentive for companies to choose the legal order of another member state? The fact that the Cartesio-Judgement accepted national rules preventing companies from moving to other member states without changing their

[7] ECJ 5.11.2002, C-208/00, NJW 2002, 3614
[8] See Thüsing ZIP 2004, 381 ff.

statute[9] is important[10] but cannot prevent the use of "Überseering" in order not to get workers´ representation on company level.

b) The second step: Viking and Laval

To put away workers´ representation in the supervisory board is a kind of deregulation which does not affect all member states and which refers only to a small part of labour law. But the freedom of establishment and the freedom to provide services have additional implications. Collective actions, especially strikes, are in contradiction to the fundamental freedoms if they aim to prevent the exercise of these freedoms or make it "less advantageous". They can be legal only if they are justified by "overriding reasons of public interest". Even if that were the case, it would still have to be "suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it."[11]

This principle can restrict in a quite massive way the right to conclude collective agreements. It applies not only to cases in which a relocation as such is at stake. To ask for a social compensation for those who become unemployed makes the exercise of the freedom of establishment "less attractive". Even in such a case, unions and workers will, therefore, need a justification. EU law as an important restriction to collective actions? That can endanger central parts of collective labour law.

The European Court of Justice was heavily criticized by numerous legal scholars in different countries. The arguments cannot be repeated in detail here.[12]

Article 137 par. 5 of the Treaty of Amsterdam (now: art. 153 par. 5) played an important role. The competences of the EU dealing with social policy shall "not apply to pay, the right of association, the right to strike or the right to impose lock-outs". If the Union is not competent to pass regulations or directives for these sectors, will the European Court of Justice be entitled to create special rules for collective actions basing itself on the so-called fundamental freedoms?

[9] EJC 16.12.2008, NZG 2009, 61
[10] See Däubler-Heuschmid NZG 2009, 493
[11] ECJ 11.12.2007 – Rs. C-438/05 - AuR 2008, 55 ff. § 75
[12] For the Italian discussion see the special issue of "Lavoro e Diritto" XXII (2008) with contributions of Ballestrero, Lo Faro and Sciarra; for Britain see Davies, Industrial Law Journal 37 (2008) 126 ff.

Another objection refers to the ECJ judgement in the "Albany" case.[13] At that occasion, the Court had declared that collective agreements were exempt from the prohibitions of anti-competitive law. Is it, therefore, not a breach in the Court´s jurisdiction to consider the "market" freedoms as a limit to collective negotiations and to collective actions?

Even if one puts aside these arguments, a big problem remains as to the interpretation of the so-called fundamental freedoms by the Court. It is worth to be considered in a more detailed manner.

The freedom of establishment was initially designed as a prohibition of discrimination, i. e. it only excluded provisions by the state of establishment which made greater demands for the nationals of another EC member state intending to take up an activity, than for its own nationals.[14] In the course of the decades, the fundamental freedoms were developed into "restriction prohibitions"; for the area of the freedom of establishment, this happened in the ECJ´s Gebhard judgement.[15] Even if domestic and foreign companies are affected in the same way, this is contrary to the fundamental freedom in question. This is meant to provide all companies established in the Union with identical market access chances. Furthermore, the freedom of establishment not only prohibits measures which are liable to make impossible or substantially impede establishment. Rather, it is sufficient if it is made "less advantageous".[16] The other fundamental freedoms have taken the same development towards a restriction prohibition.[17]

According to ECJ judgements, the fundamental freedoms have a horizontal effect at least insofar as they apply to rules set by private parties. This has been elaborated in the Bosman case for the area of the freedom of movement of workers.[18] However, the same applies to the other freedom rights. Therefore, the ECJ in the Viking decision was able to restrict itself to the statement that it is "settled case law" that Art. 39, 43 and 49 of the Treaty of Amsterdam (now: art. 45, 49 and 56 of the Lisbon version) do not apply only to the actions of public authorities but extended also to rules of any other nature aimed at regulating in a collective

[13] ECJ 21 Sept. 1999, C-67/96, DB 2000, 826
[14] See ECJ, 4 Apr. 1974 – C-167/73, EuGHE 1974, 359 par. 44 et seq.
[15] ECJ 30 Nov. 1995 – C-55/94 – ECR 1995, I-4165
[16] ECJ 3 Oct. 2000 – C 58/98 – ECR 2000, I-7919
[17] For details, see Schiek, Europäisches Arbeitsrecht, 3. Aufl., Baden-Baden 2007, Part I C par. 81 et seq; see also ECJ 27 Jan. 2000 – C-190/98 – ECR 2000, I-493 – Graf, which in par. 18 explicitly stresses that the issue at stake was not merely indirect or direct discrimination (on grounds of nationality)
[18] ECJ 15 Dec. 1995, C-415/93, ECR 1995, I-4921

manner gainful employment, self-employment and the provision of services.[19] In the different member states working conditions are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements or other acts concluded or adopted by private persons. To apply the prohibitions mentioned above exclusively to public authorities would risk creating inequality between the member states.[20]

This has substantial consequences, also with regard to collective action. In the Viking case, such action was held to be inextricably linked to a collective agreement, so that it also had to be examined against the standard set in Art. 43 of the EC Treaty, and thus required special justification.[21]

The ECJ´s decisions give the freedom of establishment and the freedom to provide services an outstanding quality as a fundamental right. Even though this has up to now not been expressed clearly enough in legal literature, the development of the fundamental freedoms into restriction prohibitions has had the consequence of creating a guarantee of free entrepreneurial activities under Community law. Whenever companies feel that they are made subject to restrictions of their freedom of action, whether by a state or by collective action, they are able to invoke the freedom of establishment or the freedom to provide services. Purely domestic cases, which fall outside the scope of Union law, only exist in local markets without any cross-border dimensions. The standard case is, that foreign group affiliates and other economic entities are present in the market, which can fight regulations imposed by the national economic supervisory bodies, or collective standards etc., by invoking their fundamental freedoms.

The consequences for the conclusion of collective agreements are particularly far-reaching. The indirect link to the employer´s freedom rights is replaced by a direct link. This means that the possibilities of action for the workers have been drastically restricted: Collective compromise and collective action taken to achieve it, are admissible only to the extent to which the opponents´ freedom of action allows exceptions. The negotiations based on equality are replaced by an unequal system, where one position is “fixed”, while the other has become an exception requiring justification.

[19] ECJ 11 Dec. 2007 – C-438/05 - Viking
[20] ECJ (note 19) par. 34. But is it not quite common that rules emanating from the state and collective agreements are governed by different principles?
[21] However, it is by no means imperative to draw a conclusion from the collective agreement as the set of rules to be controlled to collective action as such. The first refers to binding rules, the second to procedures by which to achieve them. See Ballestrero LD XXII (2008) 371, 376

IV. Perspectives

1. Stopping deregulation?

The deregulation has reached the European labour law. The first problem for lawyers is to find a way-out for the European Court of Justice which is reluctant towards an open revision of its judgements. One could refer to Art. 28 of the EU Charter of Fundamental Rights which entered into force after the Viking and Laval judgements and which guarantees the right to collective actions as part of primary Union law. The European Convention on Human Rights defines a minimum standard for the EU (art. 52 par. 3 of the EU-Charter). Considering the recent decisions of the European Court of Human Rights on collective agreements and strikes based on article 11 of the Convention[22] there is no comparable restriction by market freedoms.

2. The weak legitimacy of the Union…

Legal reasoning is not sufficient for stopping deregulation. What we need is a political discussion putting the real dimension of the problem on the table. This can be less difficult than on national level because the Union has a special need for legitimacy. Three factors seem to be important.

The Union has more difficulties to get the support of the majority than a nation state. In terms of its powers, it is only a fragment of a state for large parts of the economy; but for legal and political reasons it cannot become active in many other fields. This means that the Union supplies less public goods than traditional nation states: it can do very little, for instance, in the field of access to courts for citizens. It has very little say on the distribution of incomes, wealth and educational opportunities; nor does it have a common culture or a common language with which its citizens could identify. So economic drawback suffered e. g. by farmers or employees cannot be compensated for by a "right or wrong it´s my country".

[22] ECHR 12. 12. 2008 – 34503/97 – Demir and Baykara (German translation in AuR 2009, 269 ff.); ECHR 21. 4. 2009 – 68959/01 – Enerji Yapi-Yol Sen (German translation in AuR 2009, 274 ff.). See Lörcher, Das Menschenrecht auf Kollektivverhandlung und Streik – auch für Beamte, AuR 2009, 229 ff.

The second disadvantage of the Union is its obvious ad still continuing democratic deficit. The European Parliament, which is directly elected, has no undivided legislative power. The more important decision-making centre is still the Council of Ministers. Although this body may have an indirect democratic legitimacy, it often escapes effective control by national parliaments.

Thirdly, the lack of democratic structures is aggravated by the lack of transparency in decision-making. There is only limited control by the media and the public. Decisions are made by means of complicated procedures, often behind closed doors. No critical observers are allowed to attend, not even at the deliberations of the Council of Ministers. The individual ´s level of information depends on his or her social or political proximity to certain people in key positions. It is true that legal acts and corresponding proposals are accessible in the "Official Journal" and by internet, but there is such an overwhelming plethora that the individual is not in a position to know where to look for relevant information in a given context. In addition, the perspective horizon of many European citizens is still limited to their nation states and their national policies. To them, what happens to the EU in Brussels, at the Council of Europe in Strasbourg or at the United Nations in New York is basically a second-class reality. And even courts ignore or lightly push aside international agreements, as they traditionally do not enjoy the same dignity as acts adopted by national parliaments. Because of both factors – the well-shielded decision-making process in Brussels and the dispositions of individual citizens – what happens on the EU level is for most Europeans a "book with seven seals".

3. ….is growing weaker

These three peculiarities are relatively harmless if there are no major conflicts, and if the main objectives of the Union consist in stimulating growth and distributing wealth. However, as soon as the fair weather period is over – and it has been over since 1974 – things are quite different. The Union is losing credit not only because it has to "hurt" certain groups such as farmers and employees. It is also losing legitimacy because more and more people understand that decision-making is slow and cumbersome and that there are manifestations of national egoisms which, in turn, are used by others to justify their own egoist responses.

The broad interpretation given by the European Court of Justice to the market freedoms has aggravated the Union´s problems of legitimacy. Employees´ rights are reduced without giving convincing reasons. The privatization of public services is another important point: Why should a worker of a power plant or a transport company be a "good" and loyal European if , due to European competition principles, he loses his job or in the best of the cases one third of his wages? To protest is possible – in this case as well as in others - , but will it be heard by the competent persons in Brussels? Who are they? Special difficulties arise if a bad development is derived from decisions of the ECJ. There is nobody to correct it. If the judges continue to follow their views the only political way would be the modification of the Treaty which needs a unanimous decision of 27 member states. The Lisbon Treaty has shown the difficulties which can arise at such an occasion. The Court´s decisions are, therefore, in a way for "eternity". This makes judicial self-restraint an urgent matter – but do Viking and Laval not go far beyond this principle?

4. Social policy as a necessity

What can the Union do under such circumstances? Against this background, there seems to be no other option than to make the European market a success for all the parties involved. As we cannot really change the institutions and transform the Union into a democratic federal state we have to tackle the weak points of the European construction. Serious efforts should be made to reduce the various social problems including the diversification between the "rich" and the "poor" in the Union.[23] Under the current conditions, it is the crucial interest of the European project not to regard social policy as a more or less secondary "supporting measure" whose omission would not entail any major disadvantages. Instead, social policy must be a matter of utmost importance; it is a necessary condition for the entire process. If large sectors of the population were to become disappointed and oppose the Union instead of supporting it, the "No" or "Non" would become an overall phenomenon. Even a "nein" (coming from the Federal Constitutional Court) could not be excluded. Taking necessary steps at present, therefore, does not and must not mean drafting well-sounding programs.

5. The scientific world is less helpful

[23] Roccella-Treu, op. cit. I 13 C (p. 41 ff.)

The first point should be to take much more into account the arguments of those who criticize the Union and its (pretended) political bias. If you have a look especially into the legal reviews dealing with European law, you will not find the voice of those who are opposed to the European project as such and you will quite rarely find the voice of those who criticize the way it is shaped. The "opposition" is not really represented. Something is going wrong if the "non" prevails in the French population, but in the legal literature of the same country everybody supports the European project criticizing only minor aspects, if any. In Germany the situation is still worse. There is a lack of communication between the majority (or considerable parts) of the population and the "scientific" world. Some professors and some civil servants in Brussels should follow the example of Harun Al-Rachid and disguise themselves as ordinary men and women for getting sufficient information about the real situation of the people, their problems, their feelings, and their desires.

6. Some modest steps

Which are possible steps in the European Union? For economic reasons, it will not be feasible to go into new fields and improve, for instance, social security systems or reduce weekly working time to 40 hours. The Union can go ahead in its traditional fields where only minor costs are at stake. Let me make some concrete proposals.

Social policy can be facilitated by the guarantee of fundamental social rights. As the EU Charter of Fundamental Rights has become binding for the Union and its member states, it must become a real point of reference for social policy and the steps to be undertaken. One example would be the extension of equality rights according to article 21 of the Charter. Why not follow the example of the antidiscrimination directives based on article 13 of the Treaty of Amsterdam? One should include social positions and roles which involve a considerable risk of being treated less favourable. Self-employed workers economically depending on one contractor may serve as an example, single parents would be another one.

The magic word of "consultation" could be taken more seriously. It is not realistic to demand a comprehensive codetermination which would be a kind of export of German solutions. But why not give a right of veto to the representation of the workers if it suspends only the effect of the intended measure for some time? The existing legal situation of European Works

Councils comprises such a possibility if the consultation did not take place or was characterized by big mistakes.[24] A second step would be no revolution…

The Union could take more care for the individual worker. Why would it not be possible to establish rules on the protection of the personality at the workplace? In the field of privacy, this has been already done to a certain extent by the data protection directive of 1995. One could continue on this way. Freedom of opinion for employees as a principle of EU-law applicable to all working places from Finland to the Algarve? Would it not create a new European spirit of liberty? What about fair labour standards? Are they not the best precondition for much more innovation? Does an effective protection against dismissals not belong to fair labour standards?

There are many questions and only a few answers. But we can trust that Tiziano Treu will help all of us to get out of the difficulties. Ask him; he will certainly give you some new ideas.

[24] See for instance the famous case Renault-Vilvoorde – see Tribunal de Grande Instance de Nanterre, 4. 4. 1997; Cour d´Appel de Versailles 7. 5. 1997, AuR 1997, 299