Article

"The Impact of Recent Developments in the European Economic Community on National Labour Law Systems"

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The Impact of Recent Developments in the E.E.C. on National Labour Law Systems

R. Blanpain

The author evaluates after some twenty years of experience, the impact of the European Economic Community on national labour laws.

It is undoubtedly necessary from time to time to evaluate the impact of the European Economic Community on national labour laws; and certainly after some 20 years of the E.E.C.

By way of generalization one may say that while the impact is growing, it is certainly not yet overwhelming: there is no such thing as European Labour Law.

Neither at the moment of creation of the Common Market, nor during almost 20 years of existence, were member states prepared to yield autonomy in the social field in general, and in labour law in particular.

This is so even in the context of the ambitious social action programme which was accepted by the Council of Ministers on January 22, 1974, and which contained the following phrase: «without seeking a standard solutions to all social problems or attempting to transfer to community level any responsibilities which are assumed more effective at other levels». The social action programme focusses on three main objectives:

— full and optimal employment;
— improvement of the standard of living and working conditions;
— growing participation by employees in economic and social decision-making within the community.

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Unless otherwise specified, it will be referred to simply as the Committee.

The Council of Ministers of the E.E.C. had to match the strong language of the European heads of State and Prime Ministers at the Paris Summit of 1972. The Heads of State had pointed out that firm and decisive action in the social field was as important as the realization of the economic and monetary union.

In order to achieve its goals the European Commission proposed no less than 24 points to be realized before 1976.

Some were realized, namely those concerning,

— the 40 hour week (for 1978) and the 4 weeks paid holiday (for 1978);
— equal pay;
— collective dismissals;
— equal opportunity;
— the creation of a European Foundation for the improvement of living and working conditions;
— the creation of a European Centre for the Development of Vocational Training.

It would thus be unfair to say that the Community has not developped any labour law provisions, and that no progress has been made, but at the same time one has to recognize that labour law has remained mainly a national affair. This applies to the acts and regulations enacted by national parliaments and governmental agencies; with regard to the rules laid down by collective agreements, within the framework of the autonomy of the social partners. Much lipservice is paid, but there is not yet the reality of transnational, international, multinational or European labour relations, which would result from agreements at the appropriate level.
However, there has been some effect, and the impact is increasing.

THE TREATY OF ROME

The Treaty of Rome (1957) contains two fundamental ideas concerning social policy:

1. assuring a «high level» of employment (art. 104), which the treaty envisages ensuring through:
   1. free movement of labour;
   2. the European Social Fund[1];
   3. a policy of vocational training.

[1] The Fund meets 50% of expenditure incurred by the State or by the public body for the purpose of:
ensuring productive re-employment of workers by means of
— vocational training;
— resettlement allowances.

2. the approximation (art. 100) of legislation in particular, and harmonization of social policy in general, in order to promote working conditions and an improved standard of living for workers (art. 117).

APPROXIMATION OF LAWS AND SOCIAL HARMONIZATION

These constitute another goal of the European Community[2]. Where the approximation of laws is meant to cover areas which directly affect the organisation or functioning of the market, or the distortion of competition, social «harmonization» is a goal in itself. Approximation does not necessarily mean progress; social harmonization in the sense of article 117, on the contrary, does mean improving standards!

Harmonization will, however, be mainly self-generating; a consequence of the «functioning of the market» which will favour the harmonization of social systems. Where the functioning of the market does not suffice, the treaty provides for some specific measures and for close co-operation between member states.

If we consider the treaty and its possible uses, we can evaluate its impact on national labour law through three main trends. These trends are:

the idea of non-discrimination;
the protection of employees in case of mergers, concentrations and amalgamations;
workers' participation in management.

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[2] Art. 3 states that the activities of the Community shall include:
...
(h) the approximation of the laws of Member States to the extent required for the proper functioning of the Common Market.
Art. 100 reads:
«the council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the Common Market»; while art. 101 regulates the case of legislative differences which distort the conditions of competition.
Finally art. 117 underlines «the need to promote improved working conditions and an improved standard of living for workers so as to make possible their harmonization while the improvement is being maintained», («harmonization of progress»).

NON-DISCRIMINATION

THE FREE MOVEMENT OF LABOUR WITHIN THE E.E.C.

In 1974 the Community employed 6,4 million foreign workers of whom 1,7 million were community workers. These last were mostly Italians (800,000) and Irish (450,000). This means that a majority of foreign workers are not protected by the community regulations as such.

Freedom of movement entails the abolition of discrimination based on nationality between workers as regards employment, remuneration and other conditions of work.
Nationals of other member states have, first of all, equal access to employment. Tests — medical, professional or any other — based on nationality are null and void. Workers from community countries are free to move and to look for a job.

Exceptions are made in two cases:

1. Access to a job may be limited by the condition that the candidate knows the language, as necessitated by the nature of the job;
2. A job may be refused if the worker does not possess the necessary qualifications.
   Here difficulties may arise, while the mutual recognition of qualifications between countries is still not regulated. Foreign community workers also enjoy *equality of treatment with regard to remuneration and other conditions of work* (Title II) The principle of equality of treatment is a puzzling and far-reaching one.

Let's take the Ugliola case, which came up before the European Court of Justice in Luxemburg[3]. Salvatore Ugliola, an Italian national employed in Germany, went back to his native country to perform his military service: the German Arbeitsplatzschutzgesetz requires that military service be taken into account when calculating job seniority. Ugliola asked the German Labour court to allow the periods spent on national military service in Italy to be taken into account in his state of employment, Germany, to the same extent that such periods are taken into account for the benefit of national workers of that state.

The German government stated before the European Court that these legal provisions were part of military law, not labour law; and that they therefore were outside the Treaty of Rome, whether or not they had an impact on « conditions of work or employment ». The Court

[3] October 15, 1969, *J.C.P.*, 1970, II, 16204, note G. Lyon-Caen.

refused this formal argument and ruled that all measures — whatever their formal nature — which have a «material» (real) effect on conditions of work, fall within the scope of the principle of non-discrimination.

The German government insisted, however; stating that there was no discrimination based on nationality, given the fact that the military service rules were not intended only for Germany nationals, but for all those who completed their military service in Germany! It was the fact that Ugliola was performing his military service in Italy — not his Italian nationality — that prevented him from benefiting from a law, which had only territorial — not national — ramifications. The Court ruled that the military service law was founded on nationality, and that the non-application of the law would constitute indirect discrimination in favour of German nationals, which is as unacceptable as direct discrimination[4].

Finally, the German government advanced that the right of free movement of labour is subject to limitations justified on grounds of public policy, public security or public health (art. 483 of the Treaty). The Court implicitly restricted these limitations to the right to accept offers of employment and concluded that the principle of non-discrimination regarding wages and working conditions could not be subject to limitation for reasons of public policy.

The judgment of the European Court is of double importance: equality of treatment covers all legal measures having an effect on wages and working conditions; it forbids indirect, as well as direct, discrimination! Equality of treatment applies to individual as well as collective labour law: wages, dismissals, reinstatement or re-engagement after unemployment; social and tax-advantages; vocational training. The foreign worker, a national of any member country, is also entitled to join unions, and so enjoy the benefits of union membership, including the right to vote; and is eligible for election to bodies which represent the workers (works councils and the like). He may not, however, participate in the running of public agencies or fulfil a public function, so he cannot be a judge, for example, within the framework of the labour court.

The principle of equality has had a considerable impact on national laws. The Belgian act on works councils had to be changed to extend its application to community workers. The same goes for the

[4] See also SOTGIU, 11/4/1973, V.D. Soc. 1974, p. 174, note G. Lyon-Caen.

French law stating that the «délégués de personnel» should be able to «read and write» the French language, a judge from Mulhouse decided! Italian workers were not eligible for works councils as they were not able to read or write French, so the French law had to be adapted.

So much for European law. What about reality? Much depends here on the teeth with which the European regulations are equipped. The regulation on the free movement of labour declares that any law, regulation or administrative action of a member state contravening the provisions of the regulation shall not apply; and that any discriminatory clause in a collective agreement shall be null and void.

We have all, however, learned from general experience that such legal sanctions may be worthless in practice unless accompanied by affirmative action from government agencies.

EQUAL PAY FOR MEN AND WOMEN

The equal pay principle has been the subject of many European deliberations. The latest, and probably the most important, is the Council directive of February 10, 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

The European Council took quite a progressive stance; it adopted a fairly extensive definition: equal work means «the same work or work to which equal value is attributed». When a job classification is used it must be based on the same criteria for both men and women.

Pay refers to all aspects and conditions of remuneration. The directive lays a number of obligations upon the member states:

The Member States are obliged to:

1. abolish all discrimination arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay;
2. take necessary measures to ensure that provisions appearing in collective agreements, wage rules, wage agreements or individual contracts of employment which are contrary to the principle of equal pay are, or may be declared, null and void, or may be amended;
3. in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied.

They shall see that effective means are available to take care that this principle is observed;

4. take care that provisions adopted pursuant to this directive, together with the relevant provisions already in force, are brought to the attention of employees by all appropriate means, for example at their place of employment;
5. take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking, or to any legal proceedings aimed at enforcing compliance with the principle of equal pay;
6. introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process after possible recourse to other competent authorities;
7. put into force the laws, regulations and administrative provisions necessary in order to comply with the directive within one year of its notification (art. 8, 1), and immediately inform the Commission thereof.

Member states shall also communicate to the Commission the texts of the laws, regulations and administrative provisions which they adopt in the field covered by this directive.

Finally within three years of the notification, all the necessary information must be provided to the Commission to enable it to draw up a report on the application of the directive.

Recently, in April 1976, the European Court, which had already ruled that equal pay concerned only direct wages and not indirect wages (like e.g. pensions), judged — in the Defrenne case — that art. 119 of the treaty providing for equal pay is self-executing in force. It also decided however that claims could be made for the period after 1976.

EQUALITY OF TREATMENT BETWEEN MEN AND WOMEN WORKERS

On the 9th February 1976, a new directive was promulgated, containing the principle of equality of treatment for men and women as regards access to:

— employment (all jobs, all levels);
— vocational training (general education, initial and advanced training and retraining);

— promotion (in accordance with individual qualifications);
— working conditions (including dismissals).

The directive also provides for

— the elimination of discrimination based on sex, or on marital or family status, and
— the adoption of appropriate measures to provide equal opportunity.

The directive is, like the others, addressed to governments.

Governments shall — abolish laws, and annul provisions and collective and individual agreements which discriminate;
— ammend to that end protective laws, regulations and agreements.

Governments are also asked to take steps to ensure standards of education and promotion, and to provide for the possibility of recourse to the competent authorities and to the judicial process; further to take measures to protect employees against dismissal or any other serious wrong consequent upon a complaint, and finally to inform the employees of their rights.

THE PROTECTION OF WORKERS IN CASE OF MERGERS, CONCENTRATIONS AND AMALGAMATIONS

Dismissals are no longer primarily a sign of an unfavourable economy; they have become more and more the expression of structural modifications. In cases of rationalisation and transformation of production techniques, the reduction in personnel is often the declared objective of the measures adopted.

A social policy which tries — within reasonable limits — to avoid making the worker the victim of technical and economic progress is needed.

These were some of the leading ideas in the report which the Commission published in 1972. In line with this report a possible harmonization could deal with the following points:

1. reason for dismissal, with the possibility of reintegration;
2. periods of notice;
3. severance payments and assistance;
4. role of workers' representatives and the authorities;

5. protection of certain categories of workers (younger, older, and female workers);
6. special conditions in case of collective dismissals.

The directive of 17/2/1975 deals with the approximation of the laws of the member states relating to collective redundancies.

This directive lays down two main rules:

— the employer must inform the workers' representatives and consult with them «with a view to reaching an agreement» covering ways and means to avoid collective redundancies; or, while reducing the number of workers, mitigating the consequences;
— the employer must notify the public authority.

The dismissals only have effect thirty days after notification, on top of the individual term of notice.

Under certain conditions within member states this period can be reduced or extended to 60 days or even longer.

No sanctions are foreseen for employers who do not consult with the workers' representatives.

Another proposed directive, which is so far still in the pipe-line, concerns «the acquired rights»: the safeguarding of employees' rights and advantages in the case of mergers, takeovers and amalgamations.

Within the European Community one can notice a rapid increase in the number of concentrations at both national and community level. Between 1962 and 1970 the annual total of amalgamations in the six original member states rose from 173 to 612, i.e. a three and a half fold increase in nine years. In some member states, the increase in the number of amalgamations has reached the point where 50 % of their total industrial turnover is accounted for by one hundred of the largest industrial undertakings.

It is clear that changes in the structure of undertakings through concentrations can have far-reaching effects on the welfare of employees in the undertakings affected. The laws of member states do not always take the interests of employees sufficiently into account. This is particularly true where such changes are carried out in accordance with civil law rules governing transfers, which give employees no legal rights vis-à-vis the new employer as regards the maintenance of the employment relationship.

The aim of the proposed directive is to protect employees from the loss of acquired and future rights in the event of the transfer of an

undertaking by introducing provisions affording protection and some safeguards, namely:

— the transfer of the employment relationship and acquired rights of the worker from the transferor to the transferee in the event of a change of ownership;

— the protection of employees against dismissal on the sole ground of a transfer of an undertaking or an amalagamation;

— the provision of information (2 months before the completion of a transfer), and consultation and negotiation with the employees' representatives regarding the interests of the employees affected.

WORKERS' PARTICIPATION IN MANAGEMENT

Although there are not, as yet, any actual rules covering workers participation in management, many far-reaching proposals have been made, and a wide debate has taken place which has furthered national developments.

Within the framework of the European Company Statute it is envisaged that 1/3 of the supervisory board of the European company, which appoints and supervises the management board, shall consist of representatives of the shareholders, and another 1/3 of representatives of the employees. These two groups shall co-opt independent members representing «general interests» for the remaining 1/3.

This suggested structure was the result of very intensive debate throughout the Community; the formula was worked out by the European Parliament, and is based on a broad political consensus.

The European Company statute also includes provisions for the representation of the employees of European companies by means of a European Works Council, and gives the legal capacity necessary for European-wide collective agreements.

In the proposed Vth Directive on the harmonization of company law (1972), and in its recent (15.51975) green paper on workers' participation, the European Commission has opted for a formula with regard to workers' participation — the German formula, the Dutch, or another one — whereby workers or their representatives should have a seat on the supervisory boards of companies.

Undoubtedly things will move slowly, but they will certainly move. Workers, or their representatives, now have a seat on the board in:

Germany, Netherlands, Denmark, Luxembourg, Sweden, Norway, Austria. There are proposals in France, and the issue is being discussed in the U.K. and Ireland.

The participation disease is spreading, and the necessary groundwork is being laid for European measures.

CONCLUSION

1. Labour law is still mainly and overwhelmingly national law. It will remain so for a long time.
2. But, the inescapable fact is that common markets favour the harmonization of rules.
3. Up until now, particular attention has been paid to:
   — the idea of equality (freedom of movement, equal pay, equal opportunity), banning discrimination;
   — the protection of workers in the case of transfers, mergers:
   — collective dismissal
   — acquired rights;
   — workers' participation: sitting on the boards of companies.
4. But, in order fully to evaluate the impact of the Community, one has also to take into account the important influence of regular contact between ministries of labour, employers' organizations, trade-unions and research specialists; this process of cross-fertilization greatly influences the labour policies not only of individual countries, but also of the EEC itself.

Les conséquences des derniers développements de la C.E.E. sur les régimes des relations de travail.

Dans cet article, l'Auteur fait un exposé des répercussions de la Communauté économique européenne sur les lois ouvrières des différents pays qui en sont membres. D'une façon générale, on peut dire que les répercussions vont en s'accroissant, mais on ne saurait affirmer qu'il existe une législation européenne du travail. À aucun moment depuis l'institution du Marché commun, les États membres ont songé à céder leur autonomie dans le domaine de la législation sociale non plus que dans la législation du travail en particulier.

Le conseil des ministres de la Communauté a accepté en principe au mois de janvier 1974 un programme social ambitieux qui contenait le texte suivant: « Sans rechercher des solutions identiques à tous les problèmes sociaux et sans tenter de transférer

au niveau de la Communauté des responsabilités qui sont assumées plus efficacement à d'autres niveaux» le programme d'action sociale de la Communauté vise à atteindre trois buts: le plein emploi, l'amélioration du niveau de vie et des conditions de travail et une plus grande participation des travailleurs aux décisions d'ordre social et économique à l'intérieur de la Communauté.

Pour atteindre un tel objectif, la Communauté veut réaliser pas moins de 24 points de son programme: entre autres l'établissement de la semaine de 40 heures et quatre semaines de vacances pour 1978, la reconnaissance du principe de l'égalité du traitement pour des postes comparables, le règlement de la question des licenciements collectifs, l'égalité de chances pour les travailleurs des pays membres, la création d'une Fondation européenne pour l'amélioration des conditions de vie et de travail, l'établissement d'un Centre européen pour le développement de la formation professionnelle.

En matière de législation du travail, il ne serait pas juste d'affirmer que la Communauté n'a rien fait, mais, en même temps, il faut reconnaître que la législation est demeurée une affaire nationale.

S'il n'y a pas encore de véritable législation multinationale, le traité de Rome en 1957 contenait tout de même deux idées fondamentales: la recherche du plus haut niveau d'emploi possible et l'harmonisation de la politique sociale dans son ensemble. En regard de ces principes, il faut retenir trois points: l'idée de non-discrimination, la protection des employés à l'occasion des fusions d'entreprises et la participation des travailleurs à la direction.

L'Auteur traite d'abord du problème de la non-discrimination. En 1974, la Communauté employait six millions quatre cent mille travailleurs, dont un million sept cent mille provenaient de pays membres de la Communauté, principalement des Italiens et des Irlandais. On a mis de l'avant le principe de la liberté de mouvement des travailleurs des pays membres à l'intérieur de la Communauté, ce qui implique l'abolition de la discrimination en matière d'embauchage, de rémunération et de conditions de travail. Les nationaux des États membres ont droit à l'obtention d'un emploi tout comme les travailleurs du pays, où ils demandent un emploi c'est-à-dire que les exigences fondées sur la nationalité sont interdites. Donc, les travailleurs des divers pays de la Communauté peuvent postuler des emplois partout à l'intérieur de celle-ci. Il y a deux restrictions à ce principe cependant: d'une part, l'accès à un emploi peut se trouver limité par le manque de connaissance de la langue du pays membre, si la nature de l'emploi le requiert. On peut également refuser un emploi à un travailleur si celui-ci ne possède pas les qualifications requises. Ce dernier point soulève des difficultés par ce que les exigences en matière de qualifications varient selon les divers pays.

Sur un autre plan, celui de l'égalité de traitement en matière de rémunération, la Cour européenne de justice au Luxembourg, dans l'affaire Uglioda, a décrétée que l'égalité de traitement doit s'appliquer à toutes les mesures légales ayant effet sur les salariés et les conditions de travail. En conséquence, toute discrimination directe ou indirecte, individuelle ou collective est prohibée. Il en est ainsi pour ce qui est du droit syndical. L'application de ce principe a eu une influence considérable sur l'évolution des législations nationales. C'est ainsi que, en Belgique et en France, la législation relative aux comités d'entreprise et aux délégués du personnel a dû être modifiée pour respecter ce principe.

Le principe «à travail égal salaire égal» a fait également l'objet en 1975 d'une mesure qui s'efforçait d'égaliser d'un pays à l'autre les normes d'application de cette

règle. Ainsi, pour une classe d'emplois donnée, on doit utiliser les mêmes critères pour les hommes et pour les femmes. Les États membres doivent communiquer au Conseil les textes de lois, de règlements et autres dispositions administratives qu'ils adoptent en cette matière.

Finalement, la Communauté s'est penchée sur la protection des travailleurs à l'occasion de fusions des entreprises. La politique sociale vise à éviter que le travailleur soit victime des changements technologiques ou économiques en préconisant l'obligation pour les employeurs de justifier le licenciement et de considérer la possibilité de réintégration, l'obligation de donner un avis de congé, le paiement d'indemnité de départ, la protection particulière de certaines catégories de travailleurs, l'établissement de conditions spéciales à l'occasion de licenciements collectifs, la sauvegarde des droits acquis des employés dans les cas de fusions d'entreprises.

En ce qui concerne la participation des travailleurs à la direction des entreprises, il n'existe pas encore de règles écrites, mais beaucoup de propositions ont été mises de l'avant. Un projet de loi européenne sur les compagnies énonce que le tiers des membres du conseil de surveillance, qui désigne et supervise le bureau de direction serait formé de représentants des actionnaires, le deuxième tiers formé des représentants des travailleurs. Ces deux groupes auraient à désigner par cooptation les membres du troisième tiers, des personnes indépendantes représentant les intérêts généraux de l'entreprise.

Considérant en terminant l'évolution de la Communauté dans le domaine du travail, l'Auteur conclut que la législation du travail est encore principalement une législation nationale, que, inévitablement, l'existence de marchés communs, favorise l'harmonisation des normes d'un pays à l'autre, que, jusqu'ici, on a accordé une attention particulière à l'égalité de traitement des travailleurs, à la protection des travailleurs à l'occasion des fusions d'entreprises et des licenciements collectifs ainsi qu'à la protection de leurs droits acquis. Enfin, on ne peut ignorer que la multiplication des contacts entre les ministres du travail, des dirigeants syndicaux et patronaux et des spécialistes en droit du travail des différents pays sont de nature à influencer les politiques du travail non seulement dans les pays pris individuellement, mais aussi dans l'ensemble de la Communauté.

Corrigenda

Authorship of the article entitled "Collective Bargaining in University Faculties: Pros and Cons" appearing in *Relations industrielles,* Vol. 30, no 4, 1975 should have attributed co-authorship of that article to Richard Deaton, Assistant Director of Research for CUPE.
