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GUIDE TO EUROPEAN LABOUR LAW

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LIST OF ABBREVIATIONS

CFREU	Charter of Fundamental Rights of the EU
CJEU	Court of Justice of the EU
CoE	Council of Europe
EEC	European Economic Community
EED	Equality in Employment Directive
ECB	European Central Bank
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECS	European Cooperative Society
ECSR	European Committee on Social Rights
EEC	European Economic Community
EGAF	European Globalisation and Adaptation Fund
EP	European Parliament
ESC	European Social Charter
ESF	European Social Fund
EU	European Union
EWC	European Works Council
MS	Member State
OMC	Open Method of Coordination
PWD	Posted Workers Directive
RED	Race Equality Directive
SE	Societas Europea
SED	Sex Equality Directive
SME	Small and medium enterprises
SNB	Special Negotiating Body
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the EU

1 CONSTITUTIONAL INTRODUCTION

1.1. Two Europes

The Continent of Europe actually embraces two kinds of "umbrella" organisations: the COUNCIL OF EUROPE (CoE), with headquarters in Strasbourg and the EUROPEAN UNION (EU) (formerly European [Economic] Community) with headquarters in Brussels, Luxembourg and Strasbourg.

There are noticeable differences between these two organisations, in:

	CoE	EU
Membership	ca. 50 MS	27 MS
Ambitions	limited	many
Competences	few	large
Institutional strength	low	high

1.2. History of European labour law

The Council of Europe had little ambitions in the field of labour law. The main exceptions we will encounter are in the Chapters of this book about Fundamental Rights and Free movement.

Initially also the EEC did not have many ambitions in the field of labour law. During the first 15 years of the EEC almost the only rules adopted in the field of labour law were in EU Regulations on the item of Free movement of Workers.

In the years 1970-2000 the call for more European Labour Law became increasingly louder. It led to social policy agenda's of the European Commission, working Programs of European Social Partners and the first two dozens of social legislation.

From 2000 the call for less European Labour Law has been growing in action for "Better Law Making", the "Fitness checks", the Refit-program, the "Cutting Red Tape" campaign and the policy of a "Return of competences to Member States". It is only since about 2015 that there has been a turn towards to more European Labour Law, especially after the publication of the European Social Pillar.(see chapter 1.9)

Nevertheless, a book about the essentials of European Labour Law can be as thin as one quarter of a book about German, Polish or Italian Labour Law. The employment relations in Europe still have mostly a national dimension and politicians and social partners therefore prefer them to regulate on a national scale. Moreover, the legal basis and decision-making procedures for creating EU labour law are not very favourable.

1.3. The legal basis for EU Labour Law

The European Union can only issue legislation when there is a proper legal basis for it in the EU Treaties. Between 1957 and 1991 the EEC Treaty lacked a clear and comprehensive basis for issuing labour and social security law legislation. This has been remedied in 1991 and 1997 by changes in the EU Treaties which have provided such a basis, which is now laid down in Art. 153 (1) TFEU.

However, this comprehensive basis is in the subsequent paragraphs of this article clothed in reservations about the interest of SME's (Art. 153 (2b) TFEU), an emphasis on non-harmonisation (Art. 153 (2a TFEU) and financial equilibrium (Art. 153 (4), the minimum character (Art. 153 2b and 153 (4) TFEU) and a few important exceptions in art. 153(5) TFEU.

Moreover, there is the general reservation of the principle of Subsidiarity (Art. 5 (3) TEU and Protocol 2).

Until recently the EU institutions have not felt embarrassed by these reservations to issue new social measures, but notably the exception of Art. 153(5) may become a serious hurdle in the actual ambition to adopt a directive on minimum wages (see par. 6.8). This has raised the question whether there are more competences in the EU Treaties that can be used to circumvent the reservations of Art. 153 TFEU, such as Arts. 115 TFEU (harmonisation) and 352 TFEU (residual competences).[1]

1.4. Decision-making procedures

Until ca. 1986 all legislative power in the EEC was concentrated in the Council of Ministers, which could only act with unanimity. The European Parliament had only an advisory capacity. Since 1986 (Single European Act) this has changed step by step by more decision-making by qualified majority (= ca. 21/22 of the 27 EU countries) in the Council of Ministers and by more influence of the European Parliament. As far as labour

1. See Monti II proposal on strike law (COM (2011) EMPL/093.

legislation is concerned the provision, Art. 153 (2) TFEU, divides the social area into two segments:

- Items about which it can be decided jointly by the European Parliament (with simple majority) and the Council of Ministers (acting with qualified majority), and
- Items to be decided by the Council of Ministers with unanimity, in which the European Parliament still has only an advisory role.

There is a provision, the so-called passerelle clause (Art. 153 (2, last line TFEU), which allows the transfer of the latter items to the former category, but this clause has not yet been activated.

A problem with all the items mentioned in art. 153 TFEU, is that they are not well defined, which can lead to Court Cases (See UK vs Council, 1996).[2]

1.5. Labour law decision-making based on specific competences and decision procedures

Since the oldest EEC Treaty a number of social measures could be founded on specific competences and decision-making procedures. Actually, they are on:

- Free movement (Art. 46 TFEU): EP + Council with qualified majority
- Company Law (Art. 50(2)(g) TFEU: EP + Council with qualified majority
- Social security (Art. 153 (1) and 21 (3) TFEU): Council with unanimity
- Social security (Art. 48 TFEU): EP + Council with qualified majority but with an "emergency brake"
- Social security (Art. 79(2) TFEU): EP + Council with qualified majority but with an emergency brake 'light"
- Social Fund (Art. 164/177 TFEU): EP + Council with qualified majority, but within overall budget indirectly based on unanimity
- Transport (Art. 95 TFEU): Council with unanimity
- Equality m/f (Art. 157 TFEU): EP + Council with qualified majority.

2. CJEU, 12.11.1996, C-84/94 (UK vs. Commission).

1.6. Preparing and enforcing EU Labour Law

EU legislation takes place on proposals of the European Commission, which plays a strong role in the process of preparation and negotiation and afterwards monitoring the implementation of the EU rules by the Member States.

One of its instruments is the competence of the Commission to bring infraction procedures against the Member States to the Court of Justice of the EU.

The institution of the Court of Justice of the EU (CJEU, in the past called ECJ) - either the Court itself or the General Court or specialised courts (art. 19 TEU) - guarantees the legality and superiority of EU labour law. It does so notably by:

- Review procedures (Art. 263-264 TFEU)[3]
- Infraction procedures (Art. 258-259 TFEU)
- Preliminary rulings procedures (Art. 267 TFEU)

1.7. Legal shape of EU law

EU Labour law is mainly given the shape of Regulations or Directives (Art.288 TFEU). Other instruments are Decisions, Recommendations, as well as Guidelines (art. 148 TFEU). Since the years 2010-2012 we must not neglect that European Institutions may also influence labour law of debtor MS by way of financial crisis interventions.

Regulations are the strongest form of EU legislation, as they are directly binding (= binding even without help of national provisions of the Member States) and in their horizontal effect (binding between private parties like employers and employees).

In Labour law, however, mostly the EU measures have the form of Directives. This form leaves the Member States more liberty in implementation; they may even be implemented by collective agreements (Art. 153(3) TFEU). However, they have the disadvantage that their direct binding force and horizontal effect often is not ensured. However, this disadvantage may sometimes be remedied by a number of doctrines, such as the general principle that national courts must apply national law in loyalty to EU law and the possibility of reparation of damages against the State (Francovich

3. See e.g. CJEU, 8.12.2020, C-628/18 (Poland and Hungary).