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Berlin School of Economics and Law

Collective Rights

in the European Union

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Structure of the presentation

I. Trade union rights in the EU – points of reference
II. Trade union rights in the sphere of the Council of Europe - points of reference
III. Ruling of the CJEU since the treaty of Lisboa
IV. IV. Social dialogue – in crisis?
V. Trade union collective activity besides a legal frame

Preliminary remark:

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- 17.11.2017: **Proclamation of the European Pillar of Social Rights** – Chapter 8 (Social dialogue and involvement of workers)

a. "The social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices. They **shall be encouraged to negotiate and conclude collective agreements** in matters relevant to them, while **respecting their autonomy** and the right to collective action. **Where appropriate,** agreements concluded between the social partners shall be implemented at the level of the Union and its Member States."

c. "**Support for increased capacity of social partners to promote social dialogue** shall be encouraged."

- No legally binding document!

I. 1. Trade union rights in the EU – points of reference

- The right to strike: CJEU (2007) Viking and Laval:
  - Violation of freedom of establishment (Art. 49) & the freedom to provide services (Art. 56)
  - Proportionality test: justification only (+) if:
    - legitimate aim,
    - justified by overriding reasons of public interest,
    - suited to attaining the objective pursued and
    - does not go beyond what is necessary in order to attain it.

2. Strenghtening of collective rights since the treaty of Lisbon

- Art. 28 CFR: The right to CB & the right to strike

  '*the right to negotiate and conclude collective agreements at the appropriate levels' for 'workers and employers or their respective organisations*' and, in addition, '*in cases of conflicts of interest,* ***to take collective action to defend their interests, including strike action***' (in force since Dec 2009).
- Art. 6.2 TEU: Provisions of the Charter are of "*the same legal value as the Treaties*".
- But: Art. 16 CFR guarantees "*the freedom to conduct a business in accordance with Community law and national laws and practices is recognized*" and the CJEU relys upon this provision.

3. Lets summarize: The right to strike in the EU

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- The EU has no legislative competence concerning the right to strike (see 153.5 TFEU), this is reserved to national courts.
- Nevertheless, the CJEU in its rulings gives determined specification on the legality of strike practices in EU member states.
- Article 28 EU-Charter guarantees the Right of collective bargaining and industrial action.
- The EU-Charter has to be interpreted in line with the ECHR and the rulings of the ECtHR.

4. The interlinking of EU-law with the legal instruments of the Council of Europe

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EU-Charter of Fundamental Rights:

- Article 52(3) Charter: „*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the* ***meaning and scope of those rights shall be the same as those laid down by the said Convention***.“
- “*Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and* ***international law*** *and by* ***international agreements*** *to which the Union or all the Member States are party, including the* ***European Convention for the Protection of Human Rights and Fundamental Freedoms****, and by the Member States' constitutions*”.

II. Council of Europe

- Legal sphere wider than EU: 47 member states.
- Two legal documents:
  - European Convention on Human Rights (ECHR).
  - (Revised) European Social Charter (ESC).
- Violation of rights of the ECHR can be asserted at the European Court of Human Rights (ECtHR).
- Competent authority for violations of the ESC is the European Committee on social rights (ECSR).

1. European Convention on Human Rights (ECHR)

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- **Article 11: Freedom of assembly and association**

1. Everyone has the right to freedom of peaceful assembly and to **freedom of association** with others, including the right to **form and to join trade unions** for the protection of his interests.

2. No **restrictions** shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

- The right to strike is not explicedly mentioned.

2. ECtHR-case: Demir & Baykara

12/11/2008 –No 34503/97

Influence of international standards by the ECtHR in *Demir and Baykara*

The Court, in defining the meaning of terms and notions in the text of the Convention, **can and must take into account**

- **elements of international law other than the Convention,**
- **the interpretation of such elements by competent organs, and**
- the practice of European States reflecting their common values (ECtHR 12/11/2008 –No 34503/97, *Demir and Baykara*, § 85).
- The decision was confirmed by the great chamber.

3. ECtHR: Acknowledgement of the right to strike

- Using the same method as in Demir & Baykara, in the decision Yapi Yol Sen (21/04/2009 - 689, 59/01), the ECtHR acknowledges the right to strike (of teachers in Turkey) by Art. 11 ECHR.
- The limitation of the right to strike was not considered to be necessary in a democratic society.
- The trade-offs are different than the ones from the CJEU, the right to strike is interpreted much broader.
- The approach of the ECtHR produced some controversy, because the court referred not only to international standards as ILO C. 87 and 98 or Art. 6 of the ESC (rev.), but also to the comments of the respect. supervisory bodies.

4. but: the RMT-case contained restrictions as well:

National Union of Rail, Maritime and Transport Workers –vs - United Kingdom (ECtHR, 8 April 2014, no. 31045/10)

The RMT case:

- The case was presented by a trade union to challenge the prohibition of solidarity action (in Section 244 of the Trade union and Labour Relations (Consolidation) Act of 1992) in the UK.
- The main question was, whether such interference with the right to strike can be justified:
  - Is the restriction necessary in a democratic society?
- The EctHR answered the question more restrictively (in comparison to the *Yapi Yol Sen* case).
- The Court distinguished between direct action strikes and 'secondary' strike action, where it acknowledged a wide margin of appreciation for the state.

4. Further cases of the ECtHR on the right to strike

- Trofimchuk v Ukraine (28.1.2011): no reference to the ILO-committee of experts or to the Committee on Social Rights is made.
- In Hrvatski Liječnički Sindikat v Kroatien (27.11.2014) the right to strike is acknowledged as well for TU of doctors; limitations of the right to strike must not leed to an overlong prohibition of strike activity. Nevertheless, no reference to the committee of experts or of social rights is made.
- In Tymoshenko v Ukraine (2.10.2014) the legitimacy of a strike planned by 150 employees of AeroSvit was affirmed (failure of legal reservation).

Further cases of the ECtHR on the right to strike

- Junta Rectora del Ertzainen Nazional Elkartasuna (Er.N.E.) v Spanien (21.4.2015): The absolute ban on strikes for policeofficers is accepted.
  - The decision ADEFDROMIL v France is ignored.
  - The findings of the Committee for Social Rights are ignored (*EuroCOP v Irland:* an absolute ban of the right to strike for the police is not admissable).
- Ognevenko v Russland (20.11.2018): Whereas the absolute ban on strikes for (specific) railway workers is not lawful (dismissal of striking railway worker is unlawful); railway transport is not considered to be an essential service.

Cases of the ECtHR on the right to form a union

- In Păstorul Cel Bun v Rumänien (9.7.2013) restrictions concerning the establishment of a (free) trade union by employees of the orthodox church is considered as „necessary in a democratic society“ (para. 159-172).
- ADEFDROMIL v France (2.10.2014): in principle FoA must also be guaranteed for military and police; limitations of Art. 11 ECHR have to be interpreted narrowly.

III. Ruling of the CJEU since the treaty of Lisboa

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- **CJEU 04.12.2014 (C-413/13 FNV):** The application of competition law was rejected (admissibility of provisions for freelancers in a CBA for orchestral musicians).
  - Extent of the exception for CBAs (→ Albany decision of the CJEU)
- **CJEU 08.07.2014 (C-83/13 Fonnship):** legality of strike actions by Swedish dockworkers,
  - The Swedish employment tribunal only submitted the issue of the applicability of the EEA law for clarification.
  - May a shipowner based in an EEA country who flagged out the vessel (Panama) rely upon the fundamental freedoms (arguing therefore that the strike is not admissible)? CJEU: (+), it is directly regulated in Regulation 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport.

EFTA Court 19.4.2016 (Holship)

- Not a decision by the CJEU, but the Court of Justice of the European Free Trade Association States (EFTA Court).
- Legality of strike actions taken by dockworkers for a CBA.
- The CBA requires the users of a Norwegian port to engage the dockworkers of the port's Administration Office for loading/ unloading operations (not their own dockworkers).
- Key question: is competition law applicable to CBAs (CJEU's Albany judgment, exemption of CBAs).
- EFTA Court: abuse of a dominant position (of TUs) is possible; limitation of access to market through CBA and related boycott – CBA is invalid → strike activities illegal.
- Norwegian Supreme Court: TU has to pay damages → lawsuit filed at ECtHR.

IV. Social dialogue: history of origins (1)

- With the treaty of Amsterdam the option for the Social Partners to conclude collective agreements was included into Art. 139.2 EC (now: **Art. 155.2 TFEU**).
- The text traces back to the identical wording of the Social Partners (ETUC, UNICE and CEEP).
- The SP-agreements are transposed into directives.

2. EU-Directives based upon agreements of the Social Partners

- Directive 96/34/EG, 03.06.1996 (parental leave).
- Directive 99/70/EG, 28.06.1999 (fixed-term-employment).
- Directive 97/81/EG, 15.12.1997 (part-time-work).
- The content of the SP-agreement has to be accepted, no changes admissible.
- In case of failure of the SP-negotiations, the Commission may take over, example: directive on agency work.

Further activities of the social partners

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- Framework agreement on work related stress (Oct 2004).
  - Implementation by social partners in MS (not as a directive = wish of SP).
- Framework agreement on harassment and violance at work (2007).
  - Implementation by social partners in MS.
- Framework of actions on youth employment (June 2013).
  - Implementation by social partners in MS.
- Joint Declaration of SP on better involvement of SP in economic governance process (October 2013).

Legal value of SP-agreements

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- SP-agreements are not directly legally binding, they have to be implemented.
  - Either in the MS (in accordance with the procedures and practices specific to the SP of the MS).
  - Or, in matters covered by Art. 153 TFEU (where EU has legislative power), at the joint requestof the signatory parties by a council decision (on proposal by the Commission).
- Art. 155(1) TFEU in conj. with Art. 152 TFEU might be a basis for authorization for trade union confe-derations to conclude transnational company agreements with single employers.

3. Social dialogue in crisis:

- The Social Partners of the hairdressing sector (UNI Europa and Coiffure EU) concluded a framework agreement on OSH (occupational safety and health) in April 2012 (after 2 years of negotiation).
  - Up to 70% of hairdressers suffer from work-related skin damage, which is at least ten times more than the average for workers generally.
- Arguing with its “REFIT – fit for growth” Communication from October 2013, the Commission blocked the request of the SP to pass the agreement to the Council of the EU which has to take the formal decision of a legal act (directive).
  - Censorship!

Social dialogue in crisis:

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- Next Case: Social Partner agreement from 21.12.2015 on the rights of information and consultation for civil servants and employees of central government administrations between TUNED (EPSU, CESI) and the employers' organisation EUPAE.
- The Commission again did not pass the agreement to the council – this time a lawsuit against EU-COM was filed in May 2018.

V. Trade union collective activity besides a legal frame

1. International level

- In the past 20 years > 140 international framework agreements (IFAs) have been concluded between global trade union confederations (GUFs) and transnational companies or groups.
- Partly with participation of national trade unions and/or (European) Works Councils.
- The lack of a legal frame has not been an obstacle to the development of IFAs.
- IFAs are the product of negotiations and thus instruments of industrial relations (not just CSR).

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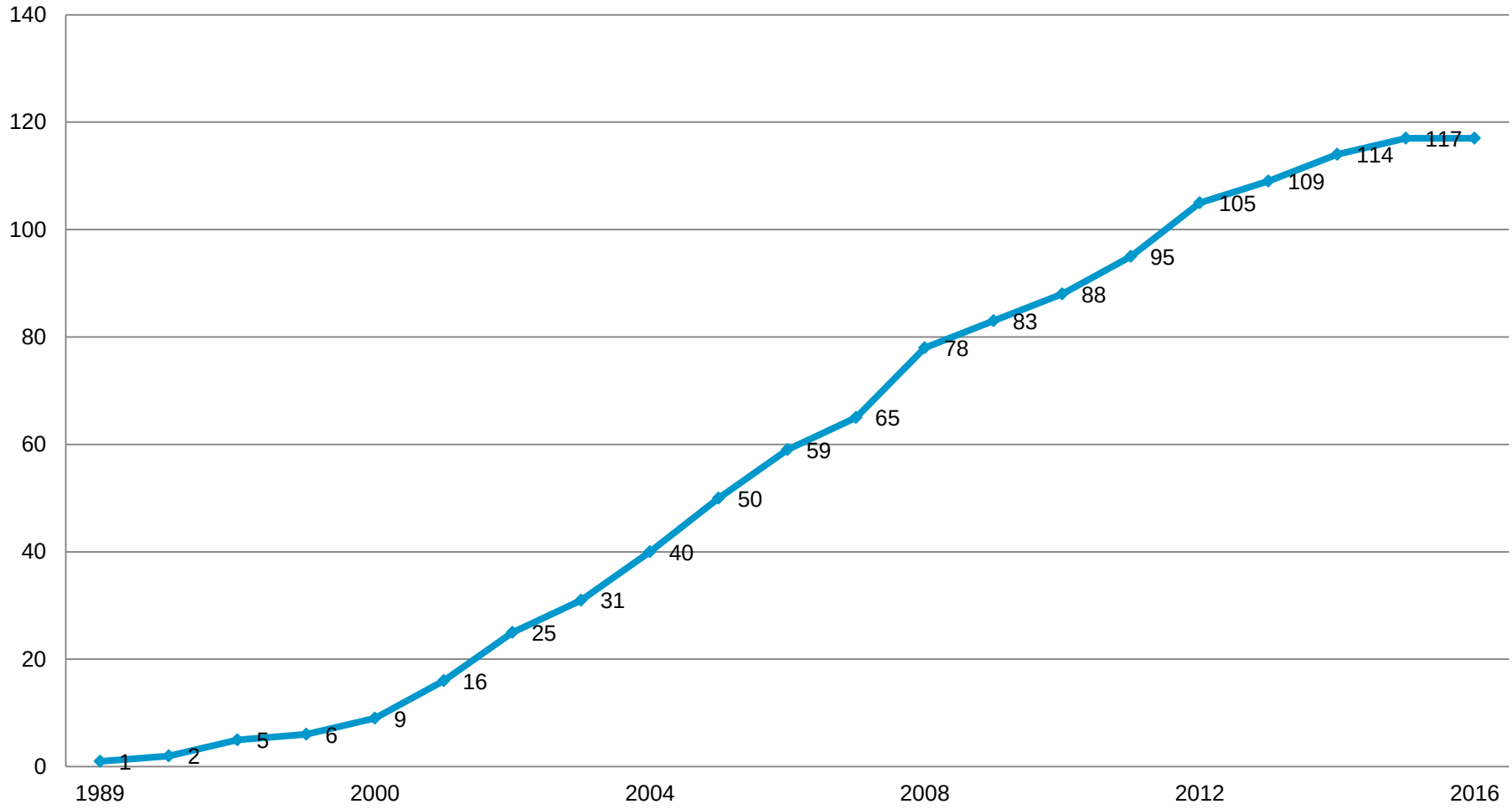
Increasing development of IFAs



Content of IFAs

- Main topic: social standards.
- Early agreements contain little more than ILO-core conventions; later, further standards were included.
- IFAs developed further and now usually contain dedicated rules on implementation and monitoring, like:
  - Complaints mechanisms;
  - annual meetings of signatory parties (partly expanded circle);
  - decentralized social dialogue.
  - reporting of management & indicators;
  - hardly any monitoring by externals.
  - In addition, some IFAs contain provisions on access to premises or neutrality in case of organizing campaigns, etc.

2. European Framework Agreements

- Content of TCAs with European scope differs (compared to IFAs):
  - Restructuring
  - Social dialogue
  - CSR
  - Data protection
  - Training
  - Equal oportunities
  - Business relation with subcontractors
  - Financial participation
- Disputes about the mandate – sectoral confede-rations reject mandate for EWC.

For further reading:

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Zimmer, Reingard:

- **From International Framework Agreements towards Transnational Collective Bargaining,** forthcoming, in: EYIEL 2019
- **Corporate responsibility in the »Bangladesh Accord«. Which regulations are transferable to other supply chains?** Expertise on behalf of the FES, Dec 2016, http://library.fes.de/pdf-files/id-moe/13072.pdf
- **Unternehmensverantwortung im »Bangladesh-Accord«. Welche Regelungen sind übertragbar auf andere Lieferketten?** Gutachten im Auftrag der FES, Dezember 2016, http://library.fes.de/pdf-files/id-moe/13040.pdf
- **The right to take collective action: Prospects for change in European Court of Justice case law in light of European Court of Human Rights decisions,** in: Trebilcock, A./ Blackett, A. (Hrsg.), Research Handbook on Transnational Labour Law, Edward Elgar 2015, S. 194-203.
- **Study on the characteristics and legal effects of agreements between companies and workers' representatives** (together with: Rodríguez, R./ Ahlberg, K./ Davulis, T./ Fulton, L./ Gyulavári, T./ Humblet, P./ Jaspers, T./ Miranda, J.M./ Marhold, F./ Valdés, F.), on behalf of the EU-COM, 2012: http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId =214

Thank you very much for your attention!

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