TONIA NOVITZ Madrid, 17th October 2015

Some thoughts on austerity measures –
EU Law, human rights law & social dialogue

Many thanks to the organisers of this event for inviting me here to participate. It has been a significant opportunity to hear about the impact of austerity on collective labour rights in Europe. In my brief presentation I will offer just a few further thoughts on the austerity measures discussed today – from the perspective of EU law, human rights law and social dialogue (or I should say – protest!)

SLIDE 1: Austerity measures

Austerity measures have taken a wide variety of forms – as we have seen. While it may be a mistake to single out just a few, when there are significant differences in national practices, structural reforms and their effects, - there are significant commonalities of experience. These came out of the country reports we heard today.

The following have emerged as key aspects of legal reform during the crisis- whether due to pressure from Memoranda of Understanding (in bailout packages) or so-called 'softer' recommendations from the Commission-

Governments have taken action to

1st – increase so-called 'flexible' employment – or as it is more accurately called casual and precarious employment

2nd - devise new forms of so-called 'collective bargaining' which do not involve independent trade unions

3rd - to reduce national level and sectoral bargaining - replacing this with bargaining (often without trade unions) at enterprise level and ending extension of collective agreements by law

4th – and finally – action has been taken to inhibit the political voice of trade unions such that they are no longer informed or adequately consulted in relation to labour law reform.

I'd like to briefly examine the significance of these changes which are inconsistent with the established recognition of collective agreements under EU law.

Yet – that fact has not been a concern for the Commission.

So what do we do? Do we revert to human rights complaints? And how do we return to social dialogue in the face of such developments?

SLIDE 2 – The worker who is not a worker – and the collective bargaining that is not collective bargaining

What is perhaps most impressive in the context of austerity measures is the 'doublespeak'.

We might start with -

The worker who is not a worker

This is all about creation of a 'flexible' labour market – and the legal tools used to achieve this.

Austerity measures are aimed at reducing the size of public spending and therefore the public sector. More workers are designated 'non-workers' so that they are easier to dismiss. In this way the wage budget can be kept low.[1]

- For e.g. in Greece, we saw a series of legislative measures institutionalising new forms of 'flexible employment' (to keep labour costs to a minimum).[2]
- A feature of the Portuguese labour market has been the so-called 'false green receipts (or tickets)'. Workers there present green coloured receipts to provide proof for tax purposes that they are self-employed, while their actual working conditions are those of ordinary workers – they have just been stripped of their employment rights.[3]

In the UK, in terms of competitive imitation (even without a MoU), we have the rather skilfully engineered 'employee-shareholder' who has exchanged key employment rights (such as protection from unfair dismissal) for a doubtful £2,000 share in their employer's business.[4] These are the UK workers who are not workers.

In the UK, we also know to our cost that independent contractors (such as agency workers) are denied protection from trade union discrimination and blacklisting.[5] This means that a growing segment of the workforce can be penalised for exercising collective labour rights.

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[1] For this general austerity-related trend, see John Peters, 'Neoliberal convergence in North America and Western Europe: Fiscal austerity, privatization, and public sector reform' (2012) 19(2) *Review of International Political Economy* 208 especially at 218 et seq. See also Raymond Torres, ' European labour markets in crisis' (2013) 152 *International Labour Review* 167 at 168.Stefan Clauwert and Isabelle Shomann, *The Crisis and National Labour Law Reforms: Am mapping exercise* ETUI Working Paper 2012.04, at 10 et seq.

[2] Aristea Koukiadaki and Leferis Kretsos, 'Opening Pandora's Box: The sovereign debt crisis and labour market regulation in Greece' (2012) 41 ILJ 276.

[3] Hermes Augusto Costa, 'From Europe as a model to Europe as austerity: the impact of the crisis on Portuguese trade unions' (2012) 18 *Transfer* 397 at 405.

[4] The Growth and Infrastructure Act, s.31 inserting s.205A into the Employment Rights Act 1996.

[5] *Consistent Group Ltd v Kalwak and others* [2008] IRLR 505 CA. John could speak on Blacklisting cases… *Smith etc.?*

'Employee shareholders' do not seemingly lose their worker status, but what kind of bargaining is it when the workers in question are entirely vulnerable to dismissal?

This brings us to the -

Collective bargaining that is not collective bargaining

Trade unions who operate across a country are considered to create wage rigidities – perhaps because they are aware of terms and conditions elsewhere and are skilled in negotiations?

So the strategy has been to enable

(i) bargaining at the level of the workplace and
(ii) without trade unions

For e.g. in Greece negotiating rights over terms and conditions have been granted to non-union employee groups (or 'associations of persons'). The enterprise level agreements that emerge then can undermine national collective bargaining terms.[6]

Once again, we see other governments instituting such practices even when not strictly required by any formal externally-driven bailout requirements – for e.g. the Hungarian government has (from January 2013) given employers what has been described as a 'secret weapon' by entitling 'puppet' works councils to negotiate collective agreements where there is no union.[7]

What these changes do – the worker who is not a worker – the collective bargaining that is not collective bargaining – is undermine what EU law recognises as collective bargaining.

One key example is EU law protections for collective agreements under competition law (created in the *Albany* case).[8]

We know now, from the *FNV Kunsten* case,[9] that collective agreements which cover 'genuine' workers will continue to be immune from challenge under EU competition law, but not those who are actually (under contractual arrangements) independent contractors. That case says that the employer cannot evade obligations by *falsely* designating workers as independent contractors.

[6] Neatly summarised in K D Ewing and John Hendy, *Reconstruction after the crisis: a manifesto for collective bargaining* (Institute of Employment Rights, 2013), 37; and Koukiadaki and Kretsos at 291-3.
[7] Imre Szabo, 'Between polarization and statism – effects of the crisis on collective bargaining processes and outcomes in Hungary' (2013) 19(2) *Transfer* 205 at 211.
[8] Case C-67/96 *Albany International* [1999] ECR I-5751.
[9] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden*, unrep. Judgment of 4 December 2014.

But this case states that an employer can genuinely hire workers (for example through agencies) so as to evade the obligations that would otherwise arise under employment law. Arguably, this and use of umbrella companies as a mode of hire and payment is a practice now rife in Europe – for e.g. among budget airlines.[10]

A problem of course is that the right of collective bargaining and action under the EU Charter of Fundamental Rights 2000 (given Treaty status under Art. 6 of the TEU) refers only to 'workers'.

What do we do about the changing nature of the labour market following implementation of austerity policies?

At least Article 11 of the European Convention on Human Rights applies to 'everyone'. I'll come back to the question whether a human rights approach will really help us…

What the facts of the *Kunsten* case do demonstrate is that, regardless of how we are designated by a contract, we are all workers doing the same job. The fact that half an orchestra is hired on a different type of contract to the other half does not stop them playing together. There is an overarching social solidarity here to which we need to return.

A third feature of austerity measures are the attempts by Government to [SLIDE 3 –] end national sectoral wide bargaining (and its legislative extension)

The Troika has generally opposed centralised national level collective bargaining seeing this as insufficiently flexible.[11] Examples again include Greece[12] and Romania[13] where we see legislative dismantling of established systems.

This determination to end national level collective bargaining is all the more absurd because collective agreements of 'general application', rendered universal through legislation, are treated as an important threshold requirement for the creation of rights under EU social policy.

It is very clear from recent case law of the CJEU, that only national level, sector wide agreements, imposed by law [applicable to all workers], can be recognised as setting minimum terms and conditions of employment for posted workers.

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[10] http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/industrial-relations-in-the-airline-sector and http://www.lrdpublications.org.uk/publications.php?pub=WR&iss=1651&id=idp7973184.
[11] Costa at 408.
[12] Koukiadaki and Kretsos, at 290.
[13] Aurora Trif, 'Romania: collective bargaining under attack' (2013) 19(2) *Transfer* 227 at 231-2. This was achieved by legislation in 2011 which no longer enables cross-sectoral agreements and imposed new requirements in respect of 'representativity'.

That conclusion was reached by virtue of the judgment of the Court of Justice in Case C-346/06 *Rüffert v Land Niedersachsen* [2008] ECR I-1989. And despite a recent attempt by AG Mengozzi to mitigate its application to public procurement [in Case C-115/14 *RegioPost*] this would seem to remain good law. The result of ending national level collective bargaining is that no entitlements for posted workers can be set through collective bargaining.

Finally, Governments stand accused in the context of the bailout packages of [SLIDE 4 –] Silencing social dialogue

Trade unions were active in the wake of the financial crisis. There are significant examples of trade unions engaging with private and public employers to negotiate solutions to save jobs, often through temporary adjustments to wages and working time. [14] So, it has been observed that in countries such as Germany,[15] Slovakia[16] and Poland,[17] some trade union bargaining strategies have been successful.

This was not however the case for many of those countries subjected to the conditions imposed by the Troika bailouts and accompanying Memoranda of Understanding. In Greece and Romania, for example, unions have organised industrial protest on a previously unprecedented scale.[18] But they were not allowed influence over the policies adopted.[19]

The treatment of trade unions raised concerns in the ILO *Report on the High Level Mission to Greece* (2011) para. 304.

In *Case 2820* [complaint by Greek General Confederation of Labour (GSEE) – and others] the ILO Committee on Freedom of Association declared [in November 2012 at para. 1003]:

'the Committee … urges, as a general matter, that permanent and intensive social dialogue be held on all issues raised in the complaint.'

The ILO Committee of Experts also noted in 2013 that creation of a space for inclusion of social partners in policy-making was vital.

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[14] Vera Glassner and Maarten Keune, 'The crisis and social policy: the role of collective agreements' (2012) 151 *International Labour Review* 351 at 369. They also observe that 'the crisis has strengthened the trend towards inclusion of social policy issues in collective agreements'.
[15] Jason Heyes, 'Flexicurity in crisis: European Labour market policies in a time of austerity' (2013) 19(1) *Transfer* 71 at 78.
[16] Marta Kahancova, 'The demise of social partnership or a balanced recovery? The crisis and collective bargaining in Slovakia' (2013 19(2) *Transfer* 171.
[17] Vera Glassner, 'Central and eastern European industrial relations in the crisis: national divergence and path –dependent change' (2013) 19 *Transfer* 155 at 165.
[18] Costa at 406-7, where two general strikes led to unprecedented solidarity between branches of the Hungarian trade union movement, but only one major trade union confederative body, the União Geral de Trabalhadores (UGT) signed the tripartite agreements confirming measures agreed with the Troika.
[19] Trif at 233.

This takes us back to the notion that social dialogue is to be promoted at EU level by the Commission under Art. 154 of the TFEU.

But also under the EU Charter of Fundamental Rights now appended to the TEU under Art. 6 TEU.

Art. 12 of the Charter on 'freedom of assembly and of association' provides for 'freedom of association at all levels, in particular in political, trade union and civic matters' which seems lacking in the context of austerity..

The Commission has said that it will renew its emphasis on social dialogue in 2015[20] but we have yet to see evidence of this manifested in EU law or the measures sought under the European Stability Mechanism.

Or do we have to rely instead on Article 10 and 11 of the European Convention on Human Rights?

This may be an imperfect solution – given the clear reluctance of the ECtHR to intervene.

While the European Committee on Social Rights has criticised for austerity measures (in the case of Greece)[21] – the ECtHR has been remarkably quiet.

In the context of collective labour rights the ECtHR has been willing to allow states, such as the UK, a wide margin of appreciation – as illustrated by Appn No. 31045/10 *RMT v UK* 8 April 2014. So much so, that the UK's anomalous all out ban on secondary action – despite its absurdity in current labour markets – was upheld as lawful.

In a judgment in September this year (2015), *da Silva Carvalho Rico v. Portugal*,[22]

[20] European Commission, *A New Start for Social Dialogue* (Brussels: 2015).
[21] See finding of breach of Article 12(3) in Nos. 76-80/2012 culminating in **Resolution Res ChS (2014) 10** on 2 July 2014.
[22] Application no. 13341/14, judgment of 24.09.15:
'43. The Court notes the Portuguese Constitutional Court's conclusion in its rulings of 2013 and 2014 that the CES was a proportional measure, in particular given its extraordinary and temporary nature (see paragraphs 17-20 above).
44. In this connection, in examining whether the appropriate balance was struck, the Court takes cognisance of the fact that the CES, and other austerity measures, were adopted against the background of an actual and unexpected budgetary crisis in Portugal. In this regard it further notes that the Portuguese Constitutional Court has delivered different rulings on the issue of social rights (see paragraph 21 above) in which it grounded its decisions on the principle of the "proviso of the possible" (reserva do possível, known in German as the Vorbehalt des Möglichen), according to which a State cannot be forced to comply with its obligations in the framework of social rights if it does not possess the economic means to do so. In this context, the budgetary constraints on the implementation of social rights can be accepted as long as they are proportionate to the public aim pursued (see paragraphs 37-38 and 41-42 above) and do not reduce social rights' claims to purely symbolic sums (mutatis mutandis, Vistiņš and Perepjolkins, cited above, 129, 25 October 2012). The international recognition of the country's economic situation indicates that the present budgetary

the European Court of Human Rights found that reduction of a pension (by 4.6%) following austerity measures did not constitute a breach of Article 1 of Protocol 1 of the European Convention on Human Rights. The measure was prescribed by law, in defence of legitimate interests and regarded as proportionate. The State's *'margin of appreciation'* – even if externally dictated – was sufficient to protect the measure from scrutiny. [This provides an interesting contrast to the finding that there was a breach of the right to social security under the ESC, found by the ECSR.]

I am not confident that a civil & political human rights approach will help.

This may be due to a lack of education on the part of the judicial community in the Council of Europe or European Union

They do not seem to register the profound effects that austerity is having on the fabric of our industrial relations system (and society).

It seems to me that **we need a social rights – labour law oriented – response to the austerity reforms.**

And to fight to keep attention on the changes needed in this domain under domestic and EU law.

So we need social dialogue –

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constraints constitute an imperative, which however did not reduce possessions originating in a statutory social right's claims to a level that deprives the right of its substance (see for cases of total deprivation of a social pension, Kjartan Ásmundsson, cited above § 44 and Moskal v. Poland, no. 10373/05, § 74, 15 September 2009, and for cases of "wholly insufficient" social pension, Larioshina v. Russia (dec.), no. 56869/00, 23 April 2002; Kutepov and Anikeyenko v. Russia (dec.), no. 68029/01, § 62, 25 October 2005; Budina v. Russia (dec.), no. 45603/05, 18 June 2009, and Huc, cited above, § 59, 1 December 2009).
45. The Court then notes that the CES reduced the applicant's annual pension by EUR 1,286.88 (4.6% of her total annual social security benefits) in 2013 and in 2014, which amounted to a cumulative loss of EUR 2,573.56 in the two years combined. In addition, the CES was only applicable to her pension for a period of two years (2013-2014), on a year-by-year basis. The interference by section 76 of the 2014 State Budget Act with the applicant's right to peaceful enjoyment of her possessions was therefore limited both in time and in quantitative terms. The Court takes further note that the Portuguese Constitutional Court, in its analysis of the CES, considered that there were no other alternatives which could pursue the same public aims affecting the holders of social rights to a lesser degree (see paragraph 18 above). Moreover, since the legislature remained within the limits of its margin of appreciation, it is not for the Court to decide whether better alternative measures could have been envisaged in order to reduce the State budget deficit and overcome the financial crisis (see Da Conceição Mateus and Santos Januário, cited above, § 28). Thus, as regards the personal burden which the applicant sustained on account of the impugned measure in force in 2014, the Court notes that she did not suffer a substantial deprivation of income."

- but not just in the form of collaborative engagement with Commission proposals (as Brussels institutions might wish) –

we also need *protest*.

We need continued protest against the labour law austerity based measures highlighted here at this event.

Unfortunately, it is social (and political) action rather than legal action which seems the most promising route now.