

Deregulation of labour law at any price

Introduction

Since 2008 national governments in all 28 European Union member states have undertaken, under the umbrella of the EU's deregulatory agenda and its chosen approach to crisis management, fundamental reforms that have triggered a veritable storm of inequality and insecurity for workers. In several cases, what is more, the terms of the regulatory or legislative provisions underpinning these reforms represent infringements of fundamental social rights obligations to which the states in question have subscribed under international, European, or national law.

Several major areas covered by individual and collective labour law are affected. These include working time, atypical employment, and dismissal protection law, as well as collective bargaining systems. The reforms affect individual member states in different ways. While the 'programme countries' – i.e. those currently in receipt of, or having in the past received, financial assistance from the EU as a bailout to cope with the crisis (i.e. Greece, Ireland, Portugal and Cyprus) – face drastic reform requirements via Memorandums of Understanding (MoUs), other member states are required to implement 'Country-Specific Recommendations' (CSRs) issued by the European Commission under the so-called 'European Semester' procedure. This distinction notwithstanding, all the reforms implemented are structural, being designed to pursue one and the same objective, namely, a reform of labour markets effected predominantly through the provisions of labour law and intended to secure greater flexibility by, among other things, loosening 'hire and fire' provisions, legitimising the curtailment of labour rights, and weakening collective bargaining actors and processes.

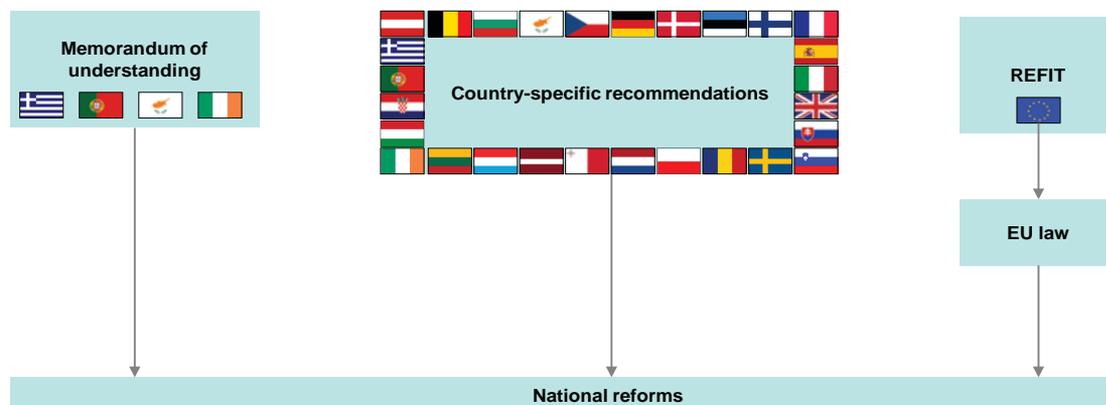
This chapter firstly critically addresses the sources of the reforms and the question of their legality. Secondly, it conducts a stocktaking exercise in relation to the last five years of significant labour law reforms, focussing on the deregulatory waves as they affect working time, atypical employment and dismissal protection law. Finally, the chapter gives an overview of (trade union) reactions to austerity measures in terms of litigation initiated at the international, European and national levels.

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The European sources of labour law reforms and the role of the 'Troika horse'

Figure 4.1 Different sources of reforms



Source: ETUI own research.

Where do reforms come from?

While labour law reforms are adopted at national level in the member states, the impetus and initiative for such reforms have their roots in the European Union's management of the financial and economic crisis, followed by the sovereign debt crisis, and in its new economic governance programme. At this European level, two main tools can be identified: the country-specific recommendations (CSRs) for most member states and the memorandums of understanding (MoU) for the programme countries. Another development that will affect European legislation – in this area and more generally – is the recent introduction by the European Commission of a new Regulatory Fitness and Performance Programme (REFIT) that will impact on the entire EU legislative stock and, in particular, the social field (see the subchapter on information and consultation rights under attack in this Benchmarking Working Europe give, chapter 7, page 94).

To understand the significance of the CSRs it is necessary to go back to 2010 when the European Commission presented, as a successor to its earlier Lisbon strategy, the so-called 'Europe

2020 strategy'. The principal aim of the new strategy is to deliver more growth that is simultaneously 'smart' – by means of additional investment in education, research and innovation; 'sustainable' – by, among other things, moving in the direction of a low-carbon economy; and 'inclusive' – by boosting job creation and reducing poverty (European Commission 2010). In order to ensure that the Europe 2020 strategy delivers on these goals, a system of economic governance has been put in place to coordinate policy actions between the EU and the national levels. Since 2011, the Commission has launched reviews of the economic and social performance of each EU member state and, on an annual basis, it draws up the CSRs for the purpose of guiding national policy reform. Such recommendations are elaborated in the framework of the European Semester, set by the European Commission as a yearly cycle of economic policy coordination, to ensure that all member states that have committed to achieving Europe 2020 targets actually do translate them into national targets and growth-enhancing policies. Following presentation of the Annual Growth Survey, the EU Heads of State and Government issue EU guidance for national policies at their Spring meeting so that member states can submit their stability or convergence programmes as well as their national reform programmes. The European Commission then carries out an assessment of the

programmes and proposes CSRs to be endorsed by the European Council (Clauwaert 2013).

Interestingly, CSRs are not actually binding, although they do represent strong incentives for action by member states which are required to provide regular evidence that the recommendations have been heeded in national legislation and/or policy action. Those member states that sign an MoU are, on the contrary, bound by a bilateral agreement concluded with the 'Troika', a recently formed 'body' composed of the European Commission, the European Central Bank (ECB) and the International Monetary Fund (IMF).

The MoU is thus another instrument, alongside the CSR, whereby the EU is able to impose conditions upon those member states that have entered a European economic adjustment programme. These countries are Greece, Ireland, Portugal, as well as Latvia, Romania, Hungary and Cyprus. An MoU is a detailed 'adjustment programme' negotiated between the national 'caretaker government' and the European Commission, together with the ECB and in liaison with the IMF (i.e. the components of the abovementioned 'Troika'), spelling out the terms of the conditionality attaching to the financial assistance facility. Insofar as the memorandum relates to economic policy, an economic adjustment programme is issued specifying the

The European sources of labour law reforms and the role of the 'Troika horse'

Figure 4.2 Overview of the number of CSRs per country compared to the 'social' CSRs for 2011-2012, 2012-2013 and 2013-2014

		AT	BE	BG	CY	CZ	DE	DK	EE	ES	FI	FR	HU	IT	LT	LU	LV	MT	NL	PL	RO	SE	SI	SK	UK		
CSRs 2011-2012	total	5	6	6	7	6	4	5	4	7	5	5	5	6	6	4	–	5	4	7	–	3	6	6	5	117	46.15%
	'social'	2	3	3	3	3	1	2	1	4	2	4	2	2	2	3	–	3	2	3	–	1	3	3	2	54	
CSRs 2012-2013	total	7	7	7	7	6	4	5	5	8	5	5	7	6	6	5	7	6	5	6	–	4	7	7	6	137	44.52%
	'social'	2	2	2	3	3	1	2	2	5	2	3	3	3	3	2	3	3	2	2	–	1	4	5	2	61	
CSRs 2013-2014	total	7	7	7	–	7	4	3	5	9	5	6	7	6	6	6	7	5	4	7	8	4	9	6	6	142	40.14%
	'social'	3	4	3	–	3	1	1	2	4	2	4	3	2	3	3	3	2	2	2	3	1	2	2	2	57	

Source: European Commission country-specific recommendations; Clauwaert (2013).

measures that have to be implemented at national level in return for access to the agreed financial support. Within this framework, a range of measures address structural reforms of the labour market and social security provision, coupled with major privatisation plans and fiscal adjustments designed to make labour less costly for businesses. Aspects specifically covered here include detailed wage reforms via the decentralisation of wage bargaining and changes in the wage-setting mechanisms so as to allow the local level to opt out from the wage increases agreed at sectoral level; the introduction of subminima wages for youth and the long-term unemployed; the revision of important aspects of the law governing dismissals and redundancies, as well as of atypical employment regulations; and the revision of the unemployment insurance system. There is a fixed deadline for implementation of such reforms and regular monitoring of the national implementation initiatives takes place according to a three-month cycle. The MoUs have, since their creation, come in for some heavy criticism, on several counts. Alongside questions about the legality of the Troika itself, as well as of the changes introduced in the Treaty architecture to allow the setting up of a new European economic governance, some of the measures imposed on member states via such memorandums fail to comply with provisions of international, European and

national (constitutional) law and have already been subject to judicial review, as will be detailed in the last section of this chapter. The European Parliament, moreover, has recently launched an enquiry to report on the role and operations of the Troika, expressing its concern about, amongst other things, this entity's lack of democratic legitimacy.

Meanwhile, the European Commission introduced, in August 2013, a new Regulatory Fitness and Performance Programme, referred to for short as REFIT. This exercise has the twofold aim of, first, mapping and screening the entire EU legislative stock in order to identify burdens, gaps and inefficient or ineffective measures; secondly, reviewing and setting out the next steps in the process which will take the form of, as appropriate, a simplification or a repeal of existing legislation (European Commission 2013a and 2013b). REFIT is the latest Commission initiative in the framework of its longstanding agenda in this area: better law-making (2002); simplification of the regulatory environment (2005); better and smart regulation (2007 and 2009); all leading up to the fitness check of 2010. The REFIT initiative encompasses the entire EU legislative acquis and, in particular, the social dimension including health and safety, labour law in terms of working conditions and worker participation, but also vocational qualifications and public procurement. In accordance

with the Commission's smart regulation agenda, the main outcomes of the REFIT initiative will be threefold: 1) simplification: EU law is screened and evaluated to ensure that it is working as intended and so as to identify any inconsistent, unnecessary or ineffective measures as well as any opportunities to simplify the legislation ('Regulatory Fitness'); 2) consolidation: integration within a single new act of an earlier legislative act and all its successive amendments and corrigenda (including certain developments stemming from ECJ case law), after which the new act passes through the full legislative process and repeals all preceding acts included in the recast; and 3) recast: identical to codification, except that, unlike codification, recast involves new substantive changes, as amendments are made to the original act during preparation of the recast text (Interinstitutional Agreement 2001).

In a nutshell, therefore, it can be seen that the labour law reforms that have been taking place in Europe since the outbreak of the financial and economic crisis in 2008 have their roots in the European Union's liberal approach to social legislation that became manifest under, in particular, the Barroso Commissions I and II. It is an approach that further gained steam during the crisis and that has now become an inherent part of the new European economic governance process.

Working time, atypical employment and dismissal protection law under attack

Figure 4.3 Announced and/or adopted changes to IR/CB systems and certain aspects of labour law

	AT	BE	BG	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK
Reform of Industrial relations and collective bargaining systems (incl. decentralisation of CB)		●	●	●				●	●	●	●	●	●	●	●	●		●			●	●	●	●			●	
Changes to individual/ collective dismissal rules		●		●	●			●	●		●	●	●	●		●	●	●			●	●	●	●	●	●	●	●
Changes to working time legislation	●	●			●	●	●		●		●	●		●	●	●	●	●			●	●	●	●	●	●	●	●
Changes to rules on atypical contracts	●	●	●		●	●	●	●	●	●	●		●	●	●	●	●	●			●	●	●	●	●	●	●	●
Creation of new types of contract in particular for youth		●	●		●	●		●	●		●	●	●	●		●	●	●			●	●	●	●	●	●	●	●

Source: ETUI own research.

Note: No data available for Malta.

General deregulatory trends

Labour law reforms in the member states are manifold and their introduction has been spread over time. What all have in common, however, is that they are structural reforms designed to boost business flexibility, to reduce the alleged complexity and strictness of labour law, using the financial and economic crisis as a pretext to carry out reforms that in some countries – Hungary being a significant example – would have been adopted anyway. Reforms may either deal, in separate acts, with one or more of the numerous issues at stake or they may, alternatively, address the issues cumulatively, in a single act. Reforms may also address the same areas at different points in time during the crisis, further relaxing prior amendments and/or extending earlier reforms initially deemed to have been issued for a limited period of time to adapt to some aspect of the crisis situation. A further common feature of the reforms is that all address, in a rather systematic and cumulative manner, essential areas in which labour law provides protection: working time, atypical employment contracts and protection against dismissal/redundancy, as well as

collective bargaining, to name only the most important of the numerous issues at stake (Clauwaert and Schömann 2012).

The roots of the narrative that accompanies the reforms are to be found in the economic analysis of the labour markets in Europe carried out by, amongst others, the OECD. These efforts have entailed the elaboration of indicators designed to compare, for example, the stringency of employment protection law, with the aim of demonstrating that, the stricter the labour law, the less flexibly the labour market can operate, thereby creating segmentation that is damaging to employment and growth. Interestingly, however, the OECD did consider it appropriate to note that, 'by contrast, the effectiveness of legislation in protecting workers might not be well captured by these indicators' (OECD 2013). Along similar lines, the World Bank has elaborated indicators on which, it is claimed, labour market reforms should be based. Employment protection, for example, should be replaced by taxation as a means of making the protection offered by labour law less costly for employers (Muller 2011).

The issue of working time is of particular importance because of the way in which, in the labour market reforms, it is treated as a key adjustment mechanism, predominantly for the purpose of satisfying employers' needs for cost reductions and greater flexibility. This particular

bias can be observed at both national and European level in the latest attempts to revise Directive 2003/88/EC concerning certain aspects of the organisation of working time. Reforms introducing flexible working time adopted in the member states comprise measures entailing a threefold aim: 1) to increase working time duration by extending maximum working time and making changes to overtime and time-off provisions, often without, or with only reduced, compensation; 2) conversely, to allow employers to shorten working time duration, using short-time schemes for example, with the aim of preserving jobs in companies temporarily experiencing low demand; and 3) to allow employers to adjust the allocation of working hours to suit their needs. As is readily apparent, such reforms give precedence to productivity and competitiveness over workers' health, safety and wellbeing; they can be seen, what is more, as impeding job creation. Short-time schemes, meanwhile, can be sustained only when used to deal with a cyclical and not a structural shock, for in the latter case they will lead to increased labour market segmentation. Moreover, short-time working has direct short-term negative effects for workers insofar as it reduces their purchasing power and thereby forces them to contribute to the survival of the company by themselves bearing part of the cost of short-time working (see Lang et al. 2013b).

Working time, atypical employment and dismissal protection law under attack

Figure 4.4 Development of the number of social CSRs from 2011-2013

		CSRs 2011–2012	CSRs 2012–2013	CSRs 2013–2014
Wages	Reviewing wage indexation	5	4	2
	Wage-setting mechanisms	8	7	7
EPL	Employment protection legislation	6	8	4
Labour market participation	Women	6	9	5
	Older workers	8	7	12
	Tax disincentives for second earners	3	2	3
Youth	Youth Guarantee	0	0	12
	Transition from school to work via companies	0	2	5
	Apprenticeships/work-based learning	9	12	8
	'Drop outs'	4	7	6
Pensions	Link pensionable age to life expectancy	13	12	11
	Reducing early retirement	12	11	10
Vulnerable	Social protection systems	4	2	5
	Quality social services	0	1	2
	Targeting social assistance	2	4	3
Child poverty	Effective child support	0	1	2
	Childcare facilities	6	7	9
Tax	Shift tax burden away from labour	9	9	10

Source: European Commission country-specific recommendations; Clauwaert (2013).

In relation to reforms of atypical employment contracts, one of the main characteristics of the measures has been to diminish the protection provided by existing regulations. Such steps lead to greater precariousness for workers employed in the diverse forms of 'atypical' employment relationship which include fixed-term and part-time contracts but also temporary agency work contracts (with the evidence showing, in this latter case, that most of the amendments made in this area relate to the implementation of Directive 2008/104 on temporary agency work). Additionally, the introduction of new types of contract that are often less protective and that target specific groups of workers, mainly the young, has become a recurrent feature of reforms (Lang et al. 2013a).

Looking specifically at reforms of the provisions governing fixed-term contracts, evidence shows that the quality of this particular form of atypical work has drastically worsened because of the relaxation of a range of preventive measures that were intended to curb abuse and discriminatory treatment of fixed-term workers. In many cases, the reforms adopted combine a threefold set of provisions: 1) amendments relating to the requirement for statement of objective reasons justifying the renewal of such employment contracts and relationships; 2) extension of the maximum total duration thresholds for successive fixed-term

employment contracts; and 3) increase in the number of renewals allowed for fixed-term contracts. However, increasing the maximum duration permitted for a fixed-term contract, thereby increasing the period during which workers find themselves in an atypical situation, serves to undermine the effect of the 'anti-abuse' provisions contained in the Directive 1999/70/EC on Fixed-Term Work. Such measures further prevent, what is more, the likelihood of fixed-term contracts becoming a stepping stone to open-ended employment (see Lang et al. 2013a).

In the same vein, and turning to the adoption of new types of contract, evidence confirms that some member states have opened up ways of circumventing the legal framework of the Directives on fixed-term work and part-time work by using the possibilities offered by these Directives to exclude from their scope certain contracts that frequently offer less employment protection than standard contracts, for example, by weakening rights to unemployment or social benefits, severance pay, or offering reduced wages. Such contracts are implemented with the idea of 'helping' particular categories of workers, i.e. young and older workers, mainly those who have been affected the most by the recession. Here too, according to governments (and employers), the main aim of the reforms is to turn non-traditional forms of employment into a good stepping-stone

to open-ended contracts. However, the example of the Greek 'youth contract' measures to hire people up to the age of 25 on wages 20 per cent lower than the previous rate for first jobs, with a two-year probationary period, no social contributions for employers, and no entitlement to unemployment benefits at the end of the contract, has been shown to violate the rights to vocational training, social security and fair remuneration enshrined in the Council of Europe's (Revised) European Social Charter (see Cases 65 and 66/2011).

The protection afforded atypical workers has been particularly affected by the impact of the economic crisis, placing these workers in an increasingly precarious situation and contravening both the letter and the spirit of European law. The measures in question have contributed, at the same time, to a more segmented labour market. Accordingly, what is intended as a 'stepping stone' to better quality jobs often turns into a way of 'trapping' workers in precarious employment.

Finally, the main features of the dismantling of the protection of workers against unfair dismissal/redundancy range, in practice, from a widening of the grounds for dismissal, a loosening of the notice period, a reviewing of the requirement for advance notification, and a reduction of the severance pay due, as well as of the right to demand

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compensation or reinstatement and /or the possibility of out-of-court dispute resolution procedure, to the reorganisation of redress, i.e. access to court. The aim of the reforms is to increase the scope for avoidance of employment protection and of recourse to the (labour) tribunal in case of dispute, in particular by raising the seniority threshold for access to employment protection rights and increasing the fees payable when filing a case.

Turning to the rules governing collective redundancies, reforms can be seen to have raised the thresholds for qualifying dismissals as collective redundancies, thereby enabling circumvention of collective redundancy rules. In order to simplify collective redundancy procedures, some member states have amended the obligation contained in Article 4 of Directive 98/59/EC to obtain an authorisation from the relevant public authorities before making workers redundant on economic grounds. Reforms have also amended the employer's duty to consider other measures before termination of employment and have loosened, for example, their obligation to put in place a social plan for the benefit of workers made redundant. The criteria for selection of employees for dismissal have also been relaxed, even though this violates the terms of ILO convention 166 which apply insofar as national measures do not detail the selection criteria to be applied when a worker is dismissed. Selection criteria are of particular importance to ensure that protected groups of workers, such as workers' representatives, are not dismissed in an arbitrary manner on the pretext of the collective termination of employment (see ILO 2011).

Not only does the European Commission's deregulation agenda contravene primary and secondary European hard law on employment protection, but it has led to further precariousness of the workforce and, in combination with other reforms, to the impoverishment of the working population, thereby violating the fundamental workers' and social rights as enshrined in the EU Treaty and other European and international treaties.

Since the onset of the financial and economic crisis, most member states,

and in particular those that – unlike Germany – did not reform their employment protection law prior to the crisis, undertook a relaxation of their regulations on individual or collective dismissals, sometimes coupled with reforms of working time arrangements and atypical employment law, while decentralising collective bargaining systems and restructuring public services. Additionally, specific rules have been established for small businesses, with the general effect of excluding them from the scope of employment protection law. Furthermore, national public services, social security and welfare systems/benefits (in particular in the area of pensions) have been reformed within the framework of the European Commission's austerity programme. Taken together, these far-reaching reforms have severely damaged the protective role of labour law and social security provision.

Fighting the dismantling of labour law via litigation

Figure 4.5 National trade union litigation actions (constitutional court, human rights commissions, ombudsman, referenda, etc.)



Source: ETUI own research.

Litigation as a trade union battle field

All over Europe, trade unions, as well as individual citizens, are increasingly taking it upon themselves to fight anti-crisis measures via litigation.

Several austerity measures issued by the Troika and implemented at national level have impacted labour law in such a way that both individuals and trade unions have decided to bring cases before official International Labour Organisation (ILO), EU or Council of Europe bodies.

In Greece for instance, the General Confederation of Labour, the Civil Servants' Confederation, the General Federation of Employees of the National Electric Power Corporation, and the Federation of Private Employees, with support from the International Trade Union Confederation (ITUC), in 2010 presented to the ILO Freedom of Association Committee a complaint against national implementation measures taken in Greece since 2010 within the framework of the international loan mechanism agreed with the Troika. The measures in question related to the suspension of and derogation to existing

collective agreements, as well as derogation in pejus and decentralisation of collective bargaining. The ILO Freedom of Association Committee found that the measures adopted were indeed in violation of ILO Conventions 87 and 98.

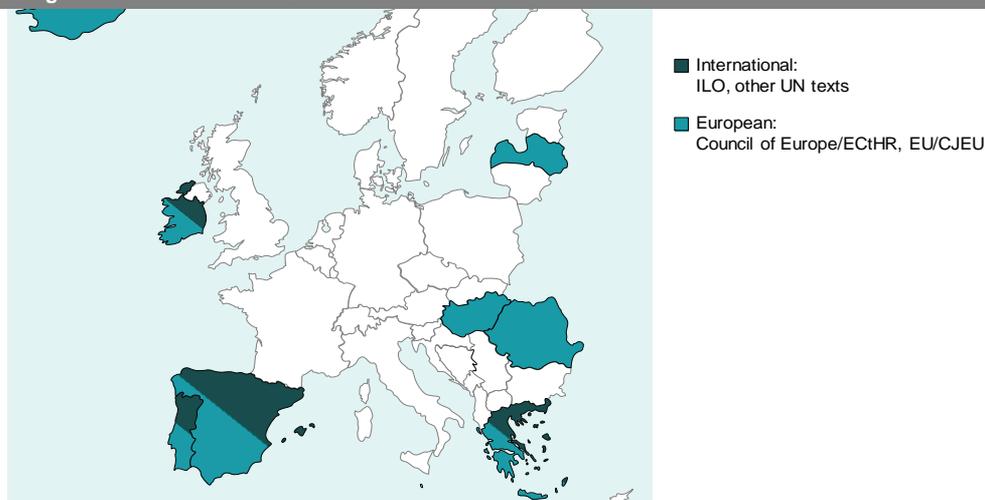
In the same vein, the General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants' Trade Unions (ADEDY) lodged complaints (65 and 66/2011) with the Council of Europe's European Committee of Social Rights (ECSR) against the Greek government and the austerity measures taken in Greece in the framework of the international loan mechanism agreed with the Troika, in particular Act no. 3899 of 17 December 2010. This piece of legislation first of all made it possible to dismiss a worker, during the probationary period of an open-ended contract, without notice or severance pay. Secondly, it allowed a company-level collective agreement to derogate from provisions collectively agreed at sectoral level, resulting in a deterioration in working conditions for the employees concerned. Thirdly, in companies with no trade union presence within the workforce, a company-level collective agreement could be concluded by trade unions at a different level (i.e. a sectoral trade union or federation). The ECSR found that this new legislation infringed a range of fundamental social rights enshrined in the

Revised European Social Charter: Art. 4 Right to fair remuneration (Complaint 65/2011); Art. 7 Right of young persons to protection, Art. 10 Right to vocational training, and Art. 12 ESC Right to social security (Complaint 66/2011) (Council of Europe 2011). Furthermore, in five more complaints (complaints 76-80/2012) submitted by Greek pensioners' trade unions, the ECSR found austerity measures introduced in 2010 and 2011 and consisting of new measures aimed – mainly in the public sector – at the lowering of primary and supplementary pensions and associated payments (e.g. Christmas, Easter and holiday bonuses), alongside the introduction of a pensioners' social solidarity contribution, to be in violation of Article 12§3 of the Social Charter which provides for the effective exercise of the right to social security and under which Contracting Parties commit themselves to endeavour to gradually raise social security provisions to a higher level (Council of Europe 2012)

The European Court of Human Rights (ECtHR) too is increasingly issuing rulings on alleged violations, represented by the terms of specific austerity measures, of the European Convention of Human Rights. Although some of the complaints lodged have been declared inadmissible (e.g. C-73469 Nagla v. Latvia, C-57657/12 Koufaki v. Greece), in other cases the ECtHR ruled that certain austerity measures were indeed in breach

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Figure 4.6 Trade union litigation actions at international level



Source: ETUI own research.

of the Convention. For example, in several cases against Hungary the imposition of a 98% tax on the upper bracket of severance pay due in cases of individual dismissal was in breach of article 1 of Protocol n° 1 of the Convention on the right to property (e.g. C-66529/11 NKM v. Hungary).

At the EU level, and in addition to the complaints against national implementation measures imposed by the Troika, changes in the architecture of the Lisbon Treaty – such as the setting up of the European Stability Mechanism as an intergovernmental organisation under public international law, as well as the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, also called Fiscal Compact, which had been adopted as emergency measures in the context of crisis – raise a series of legal issues in terms of competences, scope and the possibility of judicial review. Such amendments have indeed led, in many cases, to infringement of fundamental social rights enshrined at the international, European and national constitutional levels. A landmark judgment, the *Pringle v. Government of Ireland* (CJEU C-370/12) case, in which the Irish Supreme Court was seeking a preliminary ruling, concerned the compatibility of the Treaty establishing the European Stability Mechanism (hereafter ESM Treaty or ESMT) with EU law. The case focussed on the legal validity – or

otherwise – of adopting as matters ‘of exceptional urgency’, in an area of exclusive EU competence, crisis measures in the form of intergovernmental acts. Additionally, the question was raised of the legal validity of, first, the ESMT itself and its compatibility with the principles and provisions of the EU Treaties, given that it entered into force prior to the formal amendment of the Treaty which was conditional upon ratification by all member states; and, secondly, the recourse to the simplified revision procedure (Art. 48 (6) TEU) to amend the Treaty. The question of whether the ESMT constitutes a violation of the right to effective judicial protection under Art. 47 of the EU Charter of fundamental rights was also raised. The CJEU held that the treaty amendment confirmed the competence of the member states to conclude a treaty such as the ESMT, while seeking to ensure the compatibility of that Treaty with EU law through the imposition of strict conditionality. The CJEU further ruled that the ESMT was compatible with EU law, interpreting the ‘no bailout’ clause as allowing grants of financial assistance to member states in need when the stability of the euro area as a whole is at risk.

With the *Pringle* case, however, the CJEU constitutionalised the requirement of strict conditionality, so as to assert the ESM’s compliance with EU law. Yet, as argued by Van Malleghem (2013), conditionality alters domestic democratic

policy-making. It also involves a social deficit, as programme countries are compelled to progressively dismantle their social welfare systems in order to comply with strict budgetary requirements. Even more strikingly, the CJEU omits to mention that European institutions are bound by the European Charter of fundamental rights, as stated in Art. 51 (1) of the Charter according to which: ‘the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.’ Pursuant to Art. 51 (1), at least the European Commission and the European Central Bank fall under the scope of application of the Charter of fundamental rights. Indeed, the link between, on the one hand, the ESMT and the Fiscal Compact and, on the other, the Lisbon Treaty, and their respectively different relations to EU law, creates a great deal of confusion and generates a European hegemony of economic governance principles and structures over member states and other European fields of European law. The pending CJEU case C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins*, may

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perhaps supply an answer to the question of the compatibility with the Charter of fundamental rights of the memorandum of understanding concluded with Portugal as a condition of financial assistance from the European Financial Stability Mechanism (EFSM) and the European Financial Stability Facility (EFSF). Recent evidence has shown, furthermore, that initiatives taken by the Troika in imposing austerity policy measures represent an infringement of EU primary law including the Charter of fundamental rights (Fischer-Lescano 2013). Indeed, the financial and economic crisis, followed in a number of member states by the sovereign debt crisis, do not represent a state of emergency such as to prevent EU institutions from complying with EU law. The European Commission and the Central Bank have violated EU law, and in particular fundamental rights, by the adoption, for programme countries, of disproportionate conditionality that has led these countries to dismantle their labour law and social security systems. Furthermore, the approach adopted by the EU institutions in its use of the European Stability Mechanism disregards core competences of EU law.

Such developments are at odds with the European values and principles of economic, social and territorial cohesion, as well as of solidarity among member states, social justice and protection, equality between women and men and solidarity between generations. Nor are they in keeping with a sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aimed at full employment and social progress, or a high level of protection.

Finally, constitutional reviews conducted in some member states have identified certain anti-crisis measures as violations of national constitutional principles and values. Member states where this is the case include the following: Hungary in 2010; the Netherlands in 2012; Germany in 2012; Greece and Austria in 2012; Poland in 2013; as well as Estonia in 2012. In 2013, the Portuguese constitutional court saw fit to revoke national implementation measures of the economic austerity plan agreed with the Troika that would, among other things, have made it easier to lay off civil

servants. The court ruled such a measure to be unconstitutional insofar as it violates the guarantee of secure employment and the principle of trust between employer and employee.

As is evident from the above instances, cases are increasingly being brought, at different levels and by different actors, to contest the devastating impact of austerity measures. While the outcome of complaints lodged so far has been variable, it can only be expected that more cases will come to the fore as austerity reforms continue to be pursued.

Conclusions

Attacks on individual and collective labour law have to stop now

This chapter demonstrates the alarmingly adverse impact of labour law reforms, enacted under cover of the economic and financial crisis, on workers' rights in particular and on fundamental social rights in general. The recent national-level reforms frequently constitute further deregulation of labour law provisions that have been already relaxed in the past in response to political or employer demands for greater workforce flexibility; they thus represent, in most cases, a backward step in terms of workers' protection, as well as a real threat to any remaining hopes of European social integration.

Indeed, since 2008, the European Union's deregulatory agenda and crisis management practices have led all member states to engage in hard-hitting and wide-ranging reforms of their labour and social law, as well as of the regulations governing their public sectors. The national governments' zeal in this respect has hardly been curbed by the numerous international and national signals that such reforms constitute violations of fundamental social rights which, in accordance with their obligations under international, European and national law, the governments in question are required to observe and to promote.

On 14 September 2011, in an address to the European Parliament, former ILO Director-General Juan Somavia stated, 'Respect for fundamental principles and rights at work is non-negotiable, even in times of crisis when questions of fairness abound.(...) We cannot use the crisis as an excuse to disregard internationally agreed labour standards'. This warning has clearly fallen on deaf ears. In particular, it has not been heeded by the current European Commission members and their leader Mr. Barroso.

In spite of the lack of evidence that the financial and economic crisis is in any way attributable to existing labour law provisions in the member states, hardly a single essential stone in the edifice of individual and collective labour law – be it working time, atypical employment, employment protection law in respect of individual or collective dismissals, or collective bargaining systems – has been left unturned.

Over and above the deregulation of labour law in the interests of flexicurity arrangements and adaptability at a time of crisis, this is a full-blown exercise in the deconstruction of labour law with complete and utter disregard for existing labour standards enshrined in international, European and national law.

The instruments and institutions created and the means employed at European level (Memorandum of Understanding, Country Specific Recommendations, European Stability Mechanism Treaty, Fiscal Treaty, etc.) for the promotion of such reforms, together with the requisite narrative backup scenario describing the so-called 'emergency situation' and the need for reform, simply do not stand up to sound legal investigation and scrutiny. The legality of the austerity measures themselves can indeed be contested and is, quite rightly, increasingly subject to question.

Slowly but steadily, international and European human – and social – rights bodies, like the ILO, the European Court of Human Rights, the European Committee for Social Rights, but also national – constitutional – courts faced with complaints about austerity measures as envisaged and/or implemented, condemn these measures as being in clear and blatant breach of the international, European and national fundamental rights and obligations that these institutions have been set up to guarantee and safeguard.

And yet these rulings continue to be ignored by European-level and national policymakers. The European Commission, in particular, has affixed a large 'wanted' stamp on the whole corpus of individual and collective labour law and has, via the recently adopted REFIT programme, done the same 'erga

omnes' with the EU *acquis communautaire*, including the existing provisions in crucial social fields like information and consultation rights and health and safety protection at work. The financial reward for member states reporting back to Brussels on the success of their labour law reforms may be high, but the highest price is paid by society at large, and by workers in particular.

This 'outlawing' of individual and collective labour law has to stop. After five years of austerity measures of this sort, it is abundantly clear that they have not worked, that this much-hailed route out of crisis is ineffective and singularly ill chosen. For more people than ever are out of work, and more of those who still have jobs are numbered among the 'working poor' or have hardly any decent statutory protection rights remaining to them. It is time, therefore, for a radical change of course and for a move away from austerity to 'social investment', as demanded by, among others, the European trade union movement. It is to be hoped that, unlike Mr Somavia's alert two-and-a-half years ago, this call will not fall on deaf ears. It is to be hoped, above all, that it will be heard and heeded by the new European Commissioners, and by the new members of the European Parliament to be elected in May 2014.