

Isabelle Schömann

Building a European legal strategy for protecting health at work

Laurent Vogel
ETUI

Elected Confederal Secretary of the European Trade Union Confederation (ETUC) at the Congress held in Vienna in May 2019, Isabelle Schömann is committed to many issues, from basic human rights to corporate governance and workers' participation. In her work as a researcher at the European Trade Union Institute (ETUI) from 2005 to 2016, she made significant contributions to the development of a trade union labour lawyer network. In her subsequent advisory capacity at the Regulatory Scrutiny Board (RSB), she had the opportunity to explore "from the inside" how European Union law is drafted. The RSB is an independent body within the European Commission which issues opinions on impact assessments developed in the legislative process. We asked Ms Schömann what we could expect from a legal strategy focusing on the Court of Justice of the European Union (CJEU).

➔ **Rulings by the Court of Justice of the European Union on occupational health are not in huge abundance, and yet the general area of social protection provides the backdrop for the largest number of directives. In practice, only two directives have led to relatively well-established case law, namely the Working Time Directive and the Pregnant Workers Directive. Shouldn't this set alarm bells ringing?**

Isabelle Schömann — I agree, this area has been left pretty much untouched. While European Union case law in relation to equality between men and women has played an important role in how matters have developed nationally, it has had only a modest impact in the domain of health and safety. It would be naive to conclude from this that everything is perfect and that the Member States are applying all the occupational health directives. That would mean that the objectives of the directives had been met. We know full well that this absolutely is not the case, as broadly demonstrated by the 100 000+ deaths per year resulting

from cancers caused by insufficient preventive measures in the workplace. The current Covid-19 crisis has also highlighted serious deficiencies in workplace prevention. The EU's legislative arsenal is an important asset, despite its weaknesses and shortcomings, and must be updated in various areas. European case law would be an even more welcome addition to the arsenal, especially since we have established that the labour inspectorates are in crisis. They have insufficient resources, and their operations are, at times, hampered by the executive. I can recall one particular labour inspector subjected to disciplinary measures in France for having imposed the mandatory supply

of masks nursing homes must provide to their staff. He was criticised for failing to observe the latest circulars issued by the Ministry of Labour, even though his actions were broadly based on principles of prevention enshrined in EU law. Let us recall, after all, that one of the fundamental principles of European law is that the Member States must guarantee the application of the law, for instance through the actions of the labour inspectorate.

At a seminar organised by the ETUI in January 2020, three trends became apparent with regard to cases before the CJEU on occupational health. One, the case law is largely focused on working time and

The current Covid-19 crisis has also highlighted serious deficiencies in workplace prevention.

The implications of any breakthrough at European level are felt throughout the Member States.

pregnant workers. Two, any development in other matters depends very much on whether the trade unions are prepared to devise a legal strategy which also addresses the European dimension. And three, the vast majority of references to the Court for a preliminary ruling come from three countries only: Spain, Germany and the United Kingdom. Let us not forget that, as far as social rights are concerned, the reference for a preliminary ruling is the most frequently used and the most effective form of action. It involves the trade union initiating legal proceedings before a national court, in the course of which it identifies a question on the interpretation of EU law which is relevant for the purposes of resolving the dispute; the national court must then agree to refer the question to the CJEU.

➔ **Some will object that these are time-consuming and resource-intensive proceedings...**

That is why it is so important to draw up a legal strategy. Clearly there is no need to escalate every dispute to the European level. It is a matter of identifying the most important issues for further promoting our social rights and of choosing the cases with the greatest chance of obtaining a favourable line of judgments. The implications of any breakthrough at European level are felt throughout the Member States. The principle of the primacy of EU law means that, from the seed of a dispute before the national court, case law is created and subsequently enforced in the 27 Member States. The time and resources devoted to proceedings before the EU judiciary can therefore have a multiplier effect. On the basis of one individual case, these proceedings can strengthen social rights nationally and, at the same time, contribute to solidarity by providing interpretations of EU law which will be of use in the other countries of the EU. This mechanism was clearly at work in proceedings involving working time. There is no reason to believe that this could not happen in the other areas of occupational health and safety.

➔ **In terms of the Covid-19 crisis, can you think of any areas in which EU case law might have a positive role to play?**

I will give you just one example: the coronavirus pandemic has underlined the importance of having a powerful tool for action at our disposal, namely the right for workers to withdraw their labour if they face a serious and immediate danger. Disputes have arisen regarding this individual right associated with the perception of risk and the effectiveness of preventive measures. In Belgium, the right of withdrawal has been asserted collectively by 1 300 bus drivers from Brussels' intercommunal public transport company. A Belgian labour court will, for the first time, be required to adjudicate in a specific dispute concerning this right to withdraw labour. In some other countries — especially in France and Spain — the case law is relatively systematic, thus giving rise to greater legal certainty. At European level, the Court of Justice has never had the opportunity to give a preliminary ruling on a question relating to the right of withdrawal set out in the OSH Framework Directive. Had there been such a ruling by the European judiciary, it would have been binding across the Member States whilst allowing for interpretations that would be more favourable to the workers, pursuant to the relevant national law. The Framework Directive sets out other provisions which may be relied upon in relation to the current situation: the risk assessment must be reviewed each time that new

circumstances arise, collective protective measures concerning the organisation of work must be given priority, and employers must consult workers and their representatives. So here we have a practical tool like the right of withdrawal, and its use likewise involves the employer's compliance with all the prevention requirements laid down in European Union law.

➔ **In practical terms, what can the ETUC do to support the affiliated trade union organisations' development of a European legal strategy for occupational health?**

We are currently building a support structure. We have called it "ETUCLEX". It will support legal strategies developed by the national trade union confederations and the European trade union federations from different sectors. ETUCLEX will have various functions, namely to provide advice and expertise, to arrange experience-sharing opportunities, to promote greater coordination and cooperation between the trade unions and to take stock jointly of our experiences, whether positive or negative. Access to justice continues to be a key concern. Without proper access to the court system, many of these rights do not exist beyond the paper on which they are written. ETUCLEX's activities are not solely concerned with the Court of Justice of the European Union. They cover all courts with a role to play in safeguarding the interests of workers. As part of this, the right of workers to protect their own life and health is a basic human right. Taking action through the courts also conveys the message that businesses must be regulated by public rules and that employers must not be allowed to exercise any discretion in that environment. Our vision is not confined to litigation. We envisage the legal strategy as part of a much broader picture comprising campaigns, petitions and complaints to the authorities. From early 2021, we will be launching a website and organising training opportunities so that our work can move forward into a fully operational and visible phase. ●



↵ **Isabelle Schömann, Confederal Secretary at the European Trade Union Confederation, heads ETUC policy on, notably, fundamental human rights and workers' participation. Photo: ©ETUC**