Centre for European Law and Legal Studies (CELLS)

SCHOOL OF LAW

www.law.leeds.ac.uk/european

UNIVERSITY OF LEEDS

On-line papers

DANIEL CUYPERS

The Challenges of EU Discrimination Law for Old Labour Law

Volume 2, 2013

CELLS on-line papers are part-funded by the EU Commission's Jean Monnet Programme (via the Jean Monnet ad Personam Chair held by Dagmar Schiek). The support is acknowledged with gratitude.

The Challenges of EU Discrimination Law for Old Labour Law

*Prof Dr. Daniel Cuypers, Professor University of Antwerp**

Abstract

The paper uses Belgian labour law and its response to EU non-discrimination law as a case study for the tensions between EU Non-Discrimination Law and traditional labour law ("old labour law"). The author conceives of this as a productive tension, because non-discrimination law in general responds to current workers' citizenship claims in a knowledge and information society with its ever more flexible and individualised employment relationships. These citizenship claims tend to focus on individual rights, and demand the modernisation of labour law ("new labour law"). However, the author also considers trade unionism and collective structures (which remain exceptionally strong in Belgium) as an indispensable element of labour law and submits that there will always be tensions between collective interest representation and discrimination law. He proposes a number of ways on how this tension can be used productively by including non-discrimination principles and mechanisms for mainstreaming equality in collective bargaining processes at different levels.

I. Introduction

National labour systems are deeply rooted in long-standing traditions, and thus remain a corner stone of social stability and confidence of the working population. Through their link with national social policy, they have resisted Europeanization and remain a stronghold of national competences, but they have also been slow to integrate modern, rights-based paradigms of labour law. This paper analyses the responses of Belgian labour law to EU non-discrimination law as an example of the effects of these tensions, which can be productive in the author's view.

In the author's view the tension between EU non-discrimination law and Belgian labour law traditions also mirrors a tension between "old" and "new" labour law. The term "Old Labour Law" is used to characterise a system of Labour and Employment Law characterized by collective representation of workers through trade unions, high level of trade union membership and coverage by collective bargaining agreements, a tendency to homogeneous employment conditions rather than diversification. It is "old" because its roots reach back in time much farther than EU Law.[1] "New Labour Law" not only reflects changes in the national system due to globalization and European integration, but also responds to challenges caused by the changed profiles of "new workers" with higher levels of education, and corresponding lower levels of loyalty, reflecting a higher degree of flexibility and individualisation.[2] These younger trends have led to shifts in the paradigm of "justice" and "fairness" in labour relations, for example the shift from "family wages" to individual wages, from remuneration based on seniority or age to wages based on achievement, the shift from collectively agreed compensation for dismissal to judicial control of fair dismissal in individual cases.

* Many thanks to Patrizia Zanoni, Christian Bayart, Dagmar Schiek and Johan Meeusen for their critical and constructive remarks on this paper. This paper, however, only reflects the author's personal opinions.

1 Cf. A. Jacobs, 2009 b.

2 Cf. N. Lindstrom, 2011; critical: A. Somek, 2011, 26 ff.

The European Union has traditionally focused on economic integration with the vision of the internal market and has not intervened in national labour laws. But this "living apart together relationship" is no longer sustainable and has become the source of increasing discomfort[3]. As a result of legal milestones such as the Treaty of Amsterdam (1997) and the Charter of Fundamental Rights (2000) and the Treaty of Lisbon (2009) the relationship between the internal market and labour law has altered fundamentally[4]. A serious debate is needed not only on very practical problems in the implementation of European Discrimination Law (EDL), but also on the fundamentals and the future of national labour law[5] and EU social policy. This paper reflects some contributions to this debate emerging from discussions with Belgian judges and representatives of social partners.

The paper proceeds as follows. Its first part analyses the impact of European Labour Law (ELL) in general and European Discrimination Law (EDL) in particular on "old labour law", exemplified by the systems and traditions in Belgium. It commences with a short description of Belgian labour relations, and proceeds to trace the impact of EDL before 2000 and the subsequent reception of the new generation of EDL, which again instigated growing concerns about ELL as an undermining factor of traditional national labour law. The part closes with a synthesis of frictions between collective bargaining and discrimination law.

The second part of the paper analyses in more detail the relationship between EDL and collective bargaining (CB), in order to develop some constructive conclusions. It starts with a recapitulation of the role of CB in European Social Policy and proceeds to the frequently controversial role of collective labour agreements in implementing EU labour law with a focus on discrimination case law. Next, the role of collective bargaining in furthering substantive equality is highlighted, concluding that that achieving the purposes of EU Discrimination Law depends on collective bargaining, and demonstrating how this is reflected in recent case law by the ECJ. The paper ends with a plea for a constructive dialogue between ECJ and collective partners.

II. Challenges from European labour law (and discrimination law) to traditional labour law

1. Belgium: a stronghold for unions and collective bargaining

Belgium has a long tradition of labour law, whose legal foundations where laid in the years 1900 and 1922 as answers were formulated for "the social question".[6] In the *interbellum* period, collective bargaining became crucial for the steady progress of labour law and social security, despite the severe economic crisis after 1929. In 1944, after World War II, industrial relations resumed keeping to

[3] U. Liebert, 2011, 47-73.

[4] D. Schiek, 2012, 242; D. Schiek, 2011b, 17-46; A. Jacobs, 2009a; S. Guibboni, 2013.

[5] R. Blanpain, 2012.

[6] Loi sur le contrat de travail, 10 mars 1900, *Moniteur belge*, 14 mars 1900; Loi sur le contrat d'emploi, 7 août 1922, 16-17 août 1922. The inequality of notice periods reflected the social difference of white and blue collar workers and based on very different political factors (1900- differentiated voting rights, 1922: one man-one vote) and social factors (white collar workers were regarded not a be part of the "social question"). This discrimination remained legally in force until 2013 and was altered only after a judgment of the Constitutional Court of 7th July 2011, N° 125/2011, http://www.const-court.be. (Summary in English). Old labour law can be very tough, indeed !

their traditional path. Experiments imposed by foreign powers as they occurred in post-war Germany were unknown. Steady progress continued through the post-war decades. In the 1960s social progress was enhanced through two monumental pieces of legislation, the Act on Collective Labour Agreements (1968) and the Employment Contract Act (1969), which still form the basis of Belgian labour and employment law with its traditional emphasis on collective bargaining, creating strongholds which even the national Parliament hesitates to tamper with until the present day.

Despite several economic crises the system remained functional due to constant repairs, until today. Belgium workers and unions never had to suffer serious social cutbacks compared to other nations, e.g. the UK during the Thatcher-era or Southern European Countries in recent years during the Euro-crisis, and Belgium certainly did not experience two major legal revolutions as Eastern Europe. Industrial relations are thus based on respected and solid foundations aged for more than one century. Although somewhat old-fashioned, the social system basically commands high levels of trust. Pressure emerges from globalization and new trends in European Law, enhanced by shifts in public opinion. Recently, this has resulted in a stalemate in collective bargaining at federal levels on important issues such as wage indexation and the distinction between blue and white collar workers. The question, on which public opinion is divided, is whether the system remains capable of continuous adaptation.

As a result of the solid social system and strong tradition of collective bargaining, trade union membership remains very high in Belgium and still comprises 80 % of the workforce in the private sector. The Belgian trade unions experienced the largest increase in membership among all OECD countries between 2003 and 2008 (+6.8%)[7]. Workers are thus not fleeing from union protection. They are seeking shelter (legal protection) in union membership, although their recent political vote does not always correspond with the ideological roots of their unions. Despite the fact that they are losing grip on the legislator, Belgian trade unions still provide legal assistance and service for their members and are still accepted to express the opinion of the working people, especially in case of recent collective dismissals. The employers themselves are also equally highly or3ganised in numerous organisations, although it seems that recently they have to suffer more “free riders” too.

As a result of strong union membership, Belgium is used to very intensive collective bargaining on three levels: federal, industry and company level. Every important aspect of labour law is determined by collective bargaining with striking social maxims: e.g. working time: (controlled flexibility), wage determination (indexation of wages), redundancy-plans (early retirement schemes).

2. The influence of ELL before 2000

Although ELL was affecting Belgian NLL before the year 2000, the result of ELL was in general a levelling up of working conditions for European target groups[8] and only on limited issues. Before the year 2000 there was a kind mutual understanding between European social law and trade unions. Despite the different angles there was no clear conflict between foundations of social policy and EU discrimi-

[7] 3rd in Europe: behind Finland and Sweden: European Foundation for the improvement of working conditions, *Trade Union Membership 2003-2008*, Dublin, 2009, p.8, Document only available on www.eurofound.europa.eu/docs/eiro/tn0904019s/tn0904019s.pdf (26th August 2013), C. Barnard, 2012, p. 59.

[8] See ECJ, 27 June 1990, 33/89, Kowalska [1990] ECR 02591 § 9: “[…] *in a case of indirect discrimination the members of the class of persons placed at a disadvantage are entitled to have the same scheme applied to them as that applied to other workers, on a basis proportional to their working time . That ruling applies equally to discriminatory provisions in a collective agreement*”.

nation law. Paying women and migrating workers equal pay combined a dynamic free market and social progress.

Respecting this context, the Belgian Constitutional Court and Labour Courts in Belgium did not interfere actively in the collective bargaining process and they did not question the foundations of NLL. Public authorities acted more as a legislative notary to social bargaining. Labour law was negotiated and afterwards enshrined by Parliament. It was not "imposed". Labour Law was "common law", in the meaning of "living law", emerging from the social reality and bargained by social negotiators, close to the work floor, often creating rules that mattered more to workers than State Law[9]. The social partners were organizing the labour market quasi autonomously and if they referred to the federal government, it was mainly for reasons of financing their new social initiatives. Although constant "ad hoc" bargaining does not always lead to logical and systematic results, this seemed to be the inevitable result of social compromise and only an incentive for further refining collective bargaining.

3. European Discrimination Law after 2000

The emergence of new EU discrimination legislation in the beginning of the 21st century, in particular Framework Directive 2000/78 based on the Treaty of Amsterdam, generated a new dynamic in labour relations. Several citizens and lawyers argued that the EU was aiming too high and acting as a moral crusader[10]. Employers, in particular Belgian employers, rightly felt that their discretion in hiring was seriously limited. Others rightly put it this way: the arbitrariness is banned, the freedom remains, but in general the entire wealth of a nation benefits from more social inclusion[11]. Anyway: discrimination law brings the hiring criteria in the spotlight of a broad social policy. The managerial prerogative of the employer remains in place provided it can stand a legal test: hiring criteria move from private to legal control[12]. Indeed, hiring becomes a central issue in the inclusive labour market policy, thus bringing a substantial part of national labour law under the scope of EDL.

Perhaps as a compensation for strong employment protection laws, the discretion of employers in Belgium in determining hiring criteria was traditionally large.[13] The difference between hiring and firing certainly was substantial. The dichotomy between hiring (labour market) and firing (employment protection) was not only a matter of different employment legislation. In fact, at this very moment there is a clear distinction between federal and regional competences for both linked aspects of the labour market in Belgium. Labour law and employment law are strictly federal competences. Labour market regulations remain a regional competence, though governed by federal framework legisla-

---

9 In the Ehrlichian sense: Marc Hertogh (ed .), *Living Law,* 2009.

10 M.E. Storme, "De fundamenteelste vrijheid: de vrijheid om te discrimineren" (T*he most fundamental freedom: the right to discriminate*), *Vivat academia / Verbond van Vlaamse Academici* – 126 (2005), p. 3-27, Lecture at the audience of rewarding the Freedom of Speech-Price. Also criticizing the moralizing in European Discrimination role from quite a different perspective: A. Somek, 2011, 83-92; also p. 105: "*Mere moralistic stultification of human conduct is not an appealing candidate for a principle of law*".

11 O. De Schutter, 2011.

12 ECJ 19th april 2012, C-415/10, *Meister*, nyr (1st October 2013).

13 This is clearly demonstrated in the Feryn-case: ECJ, C-54/07, [2008] ECR 05187. The employer confirms the traditional view on the employers discretion in hiring, confirming stereotypes and seeing little wrong in his public statement. In general trade unions did not interfere much with the hiring process. This case marks clearly the end of "old" habits under pressure of EDL.

tion. This leads to a divide not only in institutions but also between soft law (incentives for hiring, diversity schemes, and combating stereotypes) and hard law (dismissal protection). Belgian labour law might thus be criticised as for providing stronger protection for insiders than for outsiders. In addition, Belgian trade unions were not safeguarding equality for labour market entrants very resolutely, but protected employees quite actively against discriminatory dismissal.

Case law about discrimination in hiring was very limited; it only emerged concerning discrimination of migrant workers and women, triggered by ELL. The implementation of ILO-Convention n° 111[14] by Collective Bargaining Agreement (CBA) n° 38[15] in 1983 and the extension to other grounds of discrimination in hiring did not lead to litigation. This changed fundamentally with the European Framework Directive 2000/78[16]. The obvious Anglo-Saxon origin of discrimination law is one of the main causes of difficult reception of discrimination law in continental legal systems[17]. In Belgium trade unions claimed to be the champions of equal treatment of workers. Collective bargaining was the main (almost exclusive) highway to more equality, both formally (wage levels) and substantively (redistribution of profits). The very fact that the national social security system is also based on a tripartite decision and financing basis, allowed a nationwide redistribution of income: from capital to labour and social security. It seems that many functions of discrimination law in Anglo-Saxon countries in fact substituted for gaps in protective legislation for workers (e.g. dismissal law)[18]. Discrimination Law equalizes where national union power was lacking to achieve a minimal standard of dismissal protection and complemented the redistributive function of collective bargaining.

However discrimination law differs fundamentally from collective bargaining in many aspects (cf. sub 6°).

The role of governmental institutions too changed substantially. Before 2000, the Ministry of Labour in the Belgian administration was merely a notary of registered CBA's. The rather formal control by the Ministry changed into a substantial control, due to claims of governmental responsibility in case of making discriminatory clauses obligatory despite European legislation[19].

Labour Tribunals and Courts were invited more than before to judge on equality principles and hence became more critical about the contents of the bargaining results. Presently EU discrimination law is implemented in Belgian through case law. However, judges remain very cautious in their control of collective bargaining. Some scholars and lawyers deplore this cautious case law. Despite the new

---

[14] ILO, C111 - Convention, 1958, Convention concerning Discrimination in Respect of Employment and Occupation, Entry into force: 15 June 1960 *http://www.ilo.org/dyn/normlex/en*. Ratified by Belgium on 22nd March 1977.

[15] Collective Bargaining Agreement n° 38, 6th December 1983, *Moniteur belge*, 28th July 1984, amended in 1991, 1998, 1999, 2004 and in 2008.

[16] A. Somek, 2011, p. 2: "*Prior to the promoting of inclusion and flexibilization, European social legislation and industrial relations used to have their point in protection and redistribution*".

[17] See also D. Schiek, 2011a

[18] Quote «*Mécanisme d'origine européenne, suspecté, comme le droit de la non-discrimination en général, d'avoir une connotation anglo-saxonne prédominante… Bref, il nous serait à ce point peu familier qu'il ne devrait, au final, être adopté que dans la stricte mesure de ce qui est nécessaire pour se conformer aux exigences de "l'Europe*", J.F. Neven, S. Gilson, F. Lambinet, 2013 : The authors however try to refute the quote in the article.

[19] G. Cox & K. Leus, 2012.

function of courts and tribunals, labour law is still regarded as "living law", law that emerges from social relations, from the social partners themselves who often face difficulty in reaching a compromise. The respect of the compromise as a truce to guarantee social peace explains hesitating judges to interfere with the terms and conditions of that delicate compromise. Taking an active part in social policy is not a role Belgian judges generally really like to claim. The very fact that lay judges in Labour Tribunals and Courts are representatives of social partners certainly does contribute to the non-confrontational relationship between courts and social partners[20]. Their presence explains the traditional respect of "living law". In their view labour law is the guardian of social dialogue and not so much a lever to increase equality by judge made law.

The new role of several governmental institutions enhances the "tripartite" relationship in the collective bargaining process, be it that the separate and not always coordinated approach of very different governmental institutions and courts can sometimes be quite confusing in a traditional bilateral collective bargaining process.

4. The impact of the equality principles on Belgian Labour Law

The impact of the new wave of EU discrimination law on old Belgian employment contract law and collective bargaining agreements (CBA) is substantial.

In this article only some fundamental issues that emerged recently are highlighted.

1. Age-discrimination: many CBAs with age-related wage schemes were revised. In many cases this resulted in seniority-based wage schemes[21]. This prevented a levelling down of wages, but in fact made workers with high seniority more expensive. In order to balance resulting costs, there is now more reluctance to settle conflicts arising from collective dismissal by early retirement schemes. Instead, there is now a programmatic commitment to increasing the participation of older workers in the workforce in principle. Its implementation in practice, though promoted by the Minister of Labour, frequently is not successful, since social partners at times still agree on early retirement schemes.
2. Disability and unfair dismissal: the Framework Directive started a trail of case law questioning the effect of disability on unfair dismissal. Traditionally, Belgian case law has been rather lenient to dismissals based on long absences by workers. Now the question arises in how far the employers have to provide reasonable accommodation to prevent dismissal. There can be little doubt that EDL will alter NLL substantially[22].
3. Working conditions and religion: Belgian courts are undecided if an employer can ban the headscarf on the basis of dress codes in work rules, but criticism increases based on international and EU law both influenced from a human rights perspective.[23]

---

[20] The main reason of the presence of lay judges is to judge labour disputes on a more pragmatic basis and not only by "legal reasoning": G. Franssen, J. Van Houtte, F. Van Loon, D. Cuypers & J. Laenens, *De arbeidsgerechten en hun lekenrechters*, Antwerpen, Intersentia, 2005, ix+196 p.

[21] C. Engels, 2012, 157-199.

[22] The recent ECJ case in Ring and Skouboe Werge (11th April 2013, C-335 & 337/11 nyr) was all but anticipated by the Labour Court of Antwerp 21th November 2011 (A.R. 2010/AA/334) which found the dismissal of a dock worker suffering from diabetes to be unfair because of lack of reasonable accommodation; although the dismissal was in line with official regulations and work rules.

[23] K. Alidadi, M.C. Foblets, J. Vrielink, 2012.

4. Harassment: in conformity with EDL harassment procedures have been renewed and revived. Many complaints were filed, and case law on the subject is proliferating[24] although most parties still seem to prefer discrete settlement through ADR (Alternative Dispute Resolution).

Moreover, it seems that the principle of equality is gaining importance in case law outside the classic scope of gender discrimination and European free movement of workers. On a matter, not quite unrelated to EDL, more particularly on the distinction between white collar and blue collar workers, the Belgian Constitutional Court in a Judgement of 7th July 2011, declared the distinction concerning notice periods unconstitutional[25]. For the first time in Belgian history, the Constitutional Court is undermining one of the pillars of the Employment Contract Act (1978), thus inviting the legislator and the social partners to rethink old Belgian Labour Law.[26]

5. EU law as a potential threat to social system?

In recent years, trade unions have grown more suspicious about the EU. The traditional view that European Labour Law was essentially creating social progress is not so obvious anymore. Of course, trade unions have been challenged by different European developments lately and they feel that their traditional bargaining power is being curbed. It is clear that European law reflects a more neoliberal vision than that is reflected in EDL[27].

There are many aspects of recent European developments that destabilize the traditional system. We can briefly list up some of the most important factors.

1. The debate about flexi-curity, started by the European Green Paper[28], has generally been perceived in Belgium as a threat to traditional labour law[29]. Although many authors tried to explain the double meaning of the notion, it is generally perceived to bring more flexibility than security[30].
2. Collective industrial action has been limited by the ECJ (Viking, Laval- cases in 2007). This case law has led to a general feeling that, despite the good intention formulated in art. 3.3 of the consolidated EU-Treaty, free market principles are stronger in the EU than the social priorities[31],
3. The impact of age-discrimination on collective dismissals as described above under I, 4°, 1°. Lower financial compensation may of course incite more workers to be active, but there can be little doubt that in many cases older workers now have to accept lower wages in their new jobs, instead of previous pension schemes. Although it is clear that the social system in general benefits as a whole from this evolution in the long run, it is equally clear that the

[24] J.F. Neven, S. Gilson, F. Lambinet, 2012.

[25] Belgian Constitutional Court, N° 125/2011, *http://www.const-court.be*. (Summary in English).

[26] W. Vandeputte, 2011.

[27] A. Somek, 2011.

[28] *Green Paper European Commission,* 22 november 2006, *Modernising Labour Law to meet the challenges of the 21th Century*, 15 p., http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0708en01.pdf (16 September 2013)

[29] W. Vandeputte, 2011.

[30] D. Cuypers & E. Verhulp, 2008.

[31] F. Dorssemont, 2011.

newly laid off older workers do not perceive longer careers as social progress. It also limits the alternatives at the bargaining table[32].

4. The recent EU measures of "new economic governance" in response to the euro currency crisis[33] are considered an infringement on national autonomy based on a strong collective bargaining tradition[34]. Trade Unions join the ILO-criticism on these measures and concern is growing on the issue of the limitation of collective bargaining[35]. "*Since there is no supranational alternative in sight, national clienteles loyally support their national systems and defend their scarce resources against those whom they believe to be outsiders*".[36]

5. The increasing pressure in the name of free movement on official procedures such as prior electronic registration that mainly have the objective to facilitate social law enforcement by social inspections. Finding the equilibrium between free movement and guaranteeing social protection and avoiding social dumping seems to be more difficult than expected[37].

Despite the fact that many fears about the weakening of law enforcement seem to be exaggerated, it remains clear that the traditional levelling up of ELL has met a counterpart in other measures that seem to favour a levelling down ("social dumping"). The tension between the economic European level and the national social level is growing[38].

As a result, feelings grow that social competition in the EU will not necessarily lead to a levelling up of social conditions in the Union as a whole. In fact migrating workers, working under the protection of the EU Posting Directive[39], are not paid equally and mostly at lower rates than national citizens. In this context there is evidently pressure to lowering social standards under the impetus of European free movement law.[40]

---

[32] C. Engels, 2012.

[33] In brief: for a short official description with references to regulations: *http://ec.europa.eu/economy_finance/economic_governance/* (16 September 2013).

[34] S. Guibboni, 2013.

[35] e.g. S. Clauwaert and I. Schömann, *The crisis and national labour law reforms: a mapping exercise*, Working Paper by the ETUI, Brussels, 2012.04, 19 p.: *http://www.etui.org/Publications2/Working-Papers/The-crisis-and-national-labour-law-reforms-a-mapping-exercise (16* September 2013)

[36] A. Somek, 2011, 36.

[37] ECJ, C-577/10, 19th December 2012, *Commission v. Kingdom of Belgium*, nyr. Better know in Belgium as the "Limosa-case": registration of foreign workers.

[38] D. Schiek, 2012, 242.

[39] **Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services,** *Official Journal L 018 , 21/01/1997 P. 0001 – 0006; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0071:en:HTML* (16 September 2013).

[40] J. Visser & JE Dølvik JE, 2009.

6. Collective bargaining versus discrimination law

What are characteristic elements of "old" collective bargaining in opposition to European discrimination law principles[41] ?

Collective Bargaining	Discrimination Law
• Workers collectively	• Worker as an individual
• Worker as a worker	• Worker as a citizen
• Employer as contract-party	• Employer as authority
• Power	• Law
• Industrial action	• Legal action
• Compromise	• Accountability

Collective bargaining unites the workers collectively. Discrimination claims tend to focus on the individual worker or on minority groups. This constitutes a potential threat to union cohesion, since lone riders might breach solidarity within the ranks. Collective bargaining is more based on the solidarity between fellow-workers who derive their identity from their being part of the group. Social relations are based on class stratification and social rights derive from collective strength. Discrimination law empowers individuals more as individual citizens than in their capacity as members of a workforce, claiming fundamental rights within the work environment, not only against the employer but also against fellow workers.

The horizontal effect of the equality principle in work relations shifts discussions from a pure contractual basis (an economical perspective) to a legal basis (a rights perspective). As part of the State system neither the employer, nor the trade unions, are free to negotiate fundamental rights. There can be little doubt that discrimination law limits the scope for collective agreements. EDL does not only limit the contractual freedom of the employer but the contractual freedom of collective partners as well.

As described earlier, this leads inevitably to a growing role of governmental institutions, in particular of labour tribunals and courts and of governmental non-discrimination agencies. In fact, it is a shift in industrial relations from a bi-polar system of industrial relations to a tri-polar system. Tripartism in industrial relations puts the State and the governmental institutions back in a hierarchical higher position than the two social partners.

The empowerment of individuals makes it harder for unions to maintain ranks and convince co-workers to respect collective agreements. Employers are not certain that, even after long negotiated agreements with the unions, the CBA will uphold in case of legal flaws. These legal flaws in the CBA can't be repaired by new collective bargaining, but will be attacked by other actors, sometimes outside the traditional industrial relationship. In the employers' mind, it is no longer certain that the cost he agreed upon in the CBA will be final. By legal action the total cost of CBA might be much higher, anyhow more uncertain. Compromise does not necessarily lead to a legal and industrial peace.

From a rights perspective on discrimination law, the cost for employers in implementing discrimination law is not considered to be relevant, but from the "economist" point of view the labour costs are not neutral[42]. One might of course rightly state that the gain for the economy as a whole will be

[41] C. Bayart, 2008.

[42] A.C.L. Davies, 2009.

higher in case of less discrimination, but this point of view does not take into account the very fact that individual companies will suffer and that national economies which already bear high labour cost will suffer in a global competitive economy in the process of levelling up. The levelling up effect of implementing discrimination law might reduce to zero any remaining margin for wage negotiations in Belgium for the next decade to come, thus frustrating other wage claims form unions. The price of more equality is no longer only for social partners to negotiate: it becomes part of the legal system, thus confusing the line between law and social policy.

Driven by EDL, Belgian labour courts and tribunals are asked to judge the contents of CBA's more substantially. Traditionally lawyers were more of a nuisance in collective bargaining, since social partners focused on the agreement, not on its legal consequences and phrasing[43]. The spirit was more important than the phrasing (as it is in any relationship). Now, lawyers and legal experts are asked to take part in the framing of clauses in order to prevent legal flaws, but this legal advice often sets in motion a second round of negotiations.

It is unfair to blame EDL exclusively for this evolution to a growing power from lawyers in labour law. All other aspects in daily life, like education, sports, media etc. are in a strong process of "Juridification". It looks more a fundamental societal evolution than a deliberate undermining plot, but the fact remains that lawyers are using the discrimination tool very often to get their way.

7. Interim conclusion

In the general context of the current economic crisis, EDL is fundamentally altering old Belgian labour relations. There can be no doubt that collective bargaining has become difficult. Belgian labour tended to be the product of social partners. Labour law was essentially collective bargaining, the legislator acting as a notary public other than as an active State, in order to respect the freedom of collective bargaining, one of the pillars in ILO-law.

Now both employers and unions lose grip on social policy. It is understandable that they do not welcome this loss of power as it constitutes the main pillar of collective bargaining. EDL thus has a profound impact in a double sense: it mutates employment contract law and it renders collective bargaining more difficult. The present global economic situation narrows the margin for collective bargaining even more substantially

II. New perspectives for collective bargaining

In the second part of this paper we focus on the relationship between EDL and collective bargaining in order to deduct some constructive conclusions.

[43] A notorious social arbitrator once said on this problem: "If you want everything to be clear in a CBA, you will never have a CBA".

1. The role of collective bargaining in European Labour Law

The problem with collective bargaining in ELL is the very fact that it is deeply embedded in national industrial relation systems. Within EU Member States a great variety of systems exist and so it is difficult for European Social Policy to find a common ground. Different legal rules apply in every important aspect[44]:

- Actors (trade unions, legal position role and importance of trade unions, other employee representatives, employers' organisations, …);
- Processes of collective bargaining and social dialogue
- Levels of collective bargaining (national, sectoral, enterprise-level, workplace, …)
- Outcomes (function and legal status of collective agreements)
- Collective bargaining coverage and trade union density.

2. Collective bargaining agreements (CBA) and implementation of ELL

CBAs are within the scope of application of the Directive to the extent that they deal with topics within explicit scope of Directive. This principle harks back to the earliest case law ECJ on sex discrimination.[45]

Member States may entrust social partners with implementation of (parts of) a Directive. Social partners may conclude agreements laying down anti-discrimination rules applying to matters which fall within scope of collective bargaining. Of course these agreements must respect the minimum requirements of European Directives and national implementing measures.

Member States remain accountable under EU Law for the implementation of Directives. Although directives do not bring CBA's explicitly under material scope of Directives (see e.g. art. 3 Framework Directive), due to the lack of horizontal effects of directives[46], it is clear that CBA's are covered by Directives. (See e.g. art 14 and 16 Framework Directive[47].)

The track record of CBA seems rather negative in the case law of the ECJ. In several commentaries on the limits of labour law concerning equal opportunities the scepticism against social partners is

---

[44] A. Jacobs, 2009b; C. Bayart, 2008.

[45] See - with respect to art. 141 EC-Treaty (now: Article 157 TFEU) : See ECJ, 43/75, Defrenne II [1976] ECR 455; see – with respect to Directive 76/207 : ECJ, C-165/82, *Comm. / UK* [1983] ECR 3431 [11]. "*The directive thus covers all collective agreements without distinction as to the nature of the legal effects which they do or do not produce. The reason for that generality lies in the fact that, even if they are not legally binding as between the parties who sign them or with regard to the employment relationships which they govern, collective agreements nevertheless have* ***important de facto consequences*** *for the employment relationships to which they refer..... The need to ensure that the directive is completely effective therefore requires that any clauses in such agreements which are incompatible with the obligations imposed by the directive upon the member states may be rendered inoperative, eliminated or amended by appropriate means*."

[46] R. Blanpain, 2008, p. 106-107; C. Barnard, 2012, p. 87; Nonetheless States may be hold responsible: ECJ, C-6/90 and C-9/90, Francovich [1991] ECR 5357.

[47] Art. 16 Framework Directive:

Member States shall take the necessary measures to ensure that:

(a) …;

(b) any provisions contrary to the principle of equal treatment which are included in contracts or ***collective agreements****, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organizations are, or may be, declared null and void or are amended.*

great[48]. In fact, in many cases, old labour relations, as laid down in rules by CBA came into conflict with the new paradigms of EDL. And the infractions were numerous.

We have seen CBA under scrutiny of the ECJ concerning[49]:

a) The use in CBA of discriminating criteria in award of benefits/pay[50]
b) Lack of transparency in pay system set up under CBA[51]
c) Use of discriminating criteria in determination of scope of CBA[52]
d) Separation of bargaining units producing CBA's more favourable to one group compared to the other[53].

It comes to no surprise that age discrimination has been so many times the subject of questions to the ECJ. Other discrimination grounds seem to provoke less discussion.

Because other discrimination grounds mostly concern the hiring process itself, it is essentially more difficult for discriminated people to prove the discriminating criteria that cause social exclusion[54]. Age discrimination concerns "insiders" that are in a stronger position to claim. In the case of age discrimination most issues are quite apparent and with the legal document (CBA) in hand, quite easy to prove.

Because social partners are particularly aware of the problems in these traditional CBA and of the shift in paradigm concerning age, all stakeholders are sensitive about age discrimination, hence provoking more cases. Age discrimination is very "visible" in CBA. Wage schemes are clear targets for justification debates. Age discrimination was in many countries and legal systems of old Europe widely accepted in wage schemes. The age-related wage schemes of the past reflected an old type of worker. Since most (male) workers had (many) children, the cost of education leads to higher costs of workers as they grew older and moreover they had to increase their savings, in view of a pension system that was often not sufficient to maintain a decent standard of living. Employers also have an interest to retain their most skilled and experienced workers and avoid their hiring by competitors. Perhaps one might say that the "seniority question" also reflects a shift in economy and social policy. Experience becomes less valued as a growing asset based on traditional craftsmanship in times of rapid technological and social changes. However, wage policies by a company do not take into account general social policies. It is for the state to regulate, compensate or stimulate family relationships. EDL certainly seems to strengthen this evolution and new state "interference".

In a new social order, in which pension systems are far more complicated and efficient and in which child care and education cost are no longer the most important concern of the average worker, the necessity of the age-related wage schemes loses ground. Moreover, in many cases, seniority-related wage schemes seem to partially substitute age based wage schemes. Seniority is well accepted in the

---

48 A.C. Neal, 2012, 31-72.

49 C. Bayart, 2004, 409.

50 ECJ, C-184/89, *Nimz*, [1991] ECR I-297.

51 ECJ, 109/88, *Danfoss* [1989] ECR 3199.

52 ECJ, C-281/97, *Krüger* [1999] ECR I-5141.

53 ECJ, C-127/92, *Enderby* [1993] ECR I-5535*;* See however ECJ, C-400/93, *Royal Copenhagen,*[1995] ECR I-1275.

54 ECJ, C-54/07, *Feryn,* [2008] ECR I-05187.

social order that protects insiders and encourages loyalty. Too much focus on seniority leads to early retirement schemes that have a negative impact on participation of elder workers and moreover they do not seem to combat youth unemployment rates. The shift (as in Belgian CBA) from age to seniority based wage schemes is an adjournment, not a solution to the underlying fundamental problem.

3. Fostering equal treatment through social dialogue

However, it is clear that CBA's play an important role if understood as part of the "social dialogue" provisions in European Law.

Social dialogue provisions are contained in Article 13 (1) Framework Directive, Article 11 (1) Race Directive and Article 21 (1) of the Recast-Directive. These provisions confirm the obligation on Member States to promote social dialogue. The purpose of fostering equal treatment evidently concerns the social partners. However it seems that discrimination lawyers are underestimating the value and use of collective bargaining. At least in other fields of ELL, the role of social dialogue in realising the purpose of legislation and enhancing its effective enforcement is more obvious, for example in the Framework Directive on health and safety at work.[55] Perhaps the more controversial role of CBA in the history of gender-discrimination was weighting too much on new constructive paths that put more trust on social relations.

The point is that collective agreements in the past often discriminated indirectly because they reinforce stereotypes, or just reproduce the way society is organised. EDL may also to shape "New Labour Law" - if collective bargaining and industrial relations in general are utilised for supporting a culture of rights in the work place, which then adequately reflects the changes in the world of work.

The social partners dispose of several critical powers that really can render EDL effective. They consist e.g. of monitoring workplace practices, negotiating non-discriminatory collective agreements and codes of conduct, they can research matters of discrimination law, and can engage in exchanges of experiences and good practices in promoting equal opportunities.

Belgian authorities have attributed importance to setting up new frames of collective bargaining concerning "diversity plans". The new framework of this collective bargaining is, due to Belgian constitutional competences, built on the level of regions[56]. Mainly because of this constitutional level, many of these measures lack traditional "hard labour law" and consist mainly of "soft law". However this does not mean that soft law is of no importance.

The very essence of CB is transforming "soft law" into new "hard law". Soft law generates very often hard law in the form of collective bargaining agreements.

Critics however, are not entirely wrong when they state that by the very nature of soft law, soft law attracts employers and union representatives that already welcome EDL. Employers who are discriminating are not touched by this "soft" method.

In our opinion this opposition between soft and hard law should not be overrated. Discrimination law remains essentially hard law, especially concerning the sanctions. It is however easy to observe that even hard federal labour law regulations are not always respected. The enforcement of hard law de-

[55] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work *OJ L 183, 29.6.1989, p. 1–8.*

[56] M. Van de Voorde, 2011.

pends on strong stakeholders. It is important that legal rules are accepted as being important by both partners.

4. Why EDL needs collective bargaining

As analysed above, there are frictions between discrimination law and collective bargaining. This opposition is of course inherent to discrimination law itself which empowers individuals instead of institutions like trade unions.

Trade unions have also to adapt to changing environments. One can't blame only EDL as an isolated factor. EDL represents also a shift of paradigm in old labour law. The worker as an individual becomes a new concept, called "the new worker", often represented by younger workers, who attach less value to loyalty (as reflected in seniority and collective action). Trade unions try to cope with it. On the one hand they want workers to act and feel as a group; on the other hand they have to recognize the growing differences between workers. Coping with minorities and workers who are distinct in fact and by law on discrimination grounds, without threatening the unity has become a fundamental concern in internal reflection of trade unions.

Even more seriously, the very notion of "equality" is questioned fundamentally. Under one of fundamental principles of "old labour law", workers' (legal) protection depends and differs corresponding to the strength of their organization. This encourages workers to join the union, and in return they achieve more security and higher wages. Inequality is thus inherent to the system of collective bargaining process itself. This tension is clearly demonstrated by the ECJ in the Enderby-case. In this case the Court stated that separating bargaining units may lead to discrimination as a result of different power relations[57]. The power of the law to change those inequalities is limited.

Thus, the ECJ interferes with a fundamental autonomy in union organization. This dictate of equality by EDL to unions is of course, a very sensitive element in intra-union relations.

EDL and the ECJ bring to light that the principle of equality in itself is questionable. Trade unions have historically considered the struggle for equality to be a power struggle. For them the aim was social policy and social progress with higher wages as a result of collective action and collective bargaining. Social progress had two purposes: generating social justice, but also the redistribution of business profits. Equality meant for them: a fair treatment and a fair share in wealth. The equality notion at the basis of discrimination law is a more individualistic, market based equality[58].

Absolute equality is an impossible aim to reach in a free market society, but by negotiating equality, social progress can be achieved. There will never be full equality, since wages differ from employer to employer, from industry branch to industry branch. As long as there is a market economy, full equality will remain an illusion. This is perhaps why the terminology has shifted to "equal opportunities"[59], which is more neutral concerning the outcome of the process. As J.M. Barrie had observed and put it bluntly: "*There never will be equality in the servants' hall*".[60]

---

[57] ECJ, C-127/92, *Enderby* [1993] ECR I-5535.

[58] A. Somek, 2011, 91-111.

[59] "*Falling somewhere between formal and substantive equality lies the notion of equality of opportunity*": C. Barnard, 2012, 293.

[60] The Admirable Crichton, Act I (1903) *http://en.wikiquote.org/wiki/J. M. Barrie* (2nd September 2013).

The weakness of the old system lies in the very fact of the compromise as such. On the one hand collective bargaining creates more equality. On the other hand it very often confirms existing inequalities. By negotiating differential wage schemes, the trade unions become part of the system itself with its inherent inequalities among branches in industries, companies and workers. Hence, collective bargaining is also about *engineering and balancing inequalities and differences in view of socio-economic policies.* By clinging to outdated distinctions, inequality is upheld. EDL shifts the responsibility to revise old distinctions from social partners to the legal system. EDL compensates for the lack of solidarity between members of the work force[61].

Due to differences in union strength and silent compromises CBA also enshrined inequality, since they decided who was to receive more pay and who was not. This hidden aspect of confirming inequality was brought to the surface, thanks to the concept of "indirect discrimination". And the problem was often that CBA was an easy victim because of the visibility of inequalities. Hence the impression that social progress itself, by essence marching with different speed in collective bargaining, was under fire.

Union organization in itself confirmed existing inequalities based on different power relations. But the trade unions are certainly not the only ones to blame for not taking action, since employers too are very much afraid of the levelling up effect of more equality claims. Their concern for uncertain and rising wages in a highly priced labour market equally limits their determination to address wage discriminations.

And so we come once more back to the fundamental notions in our legal system. The notion of equality is by itself a troublesome (or very open) notion. The question what kind of workers is worthy of higher pay is a very troublesome question, threatening social order. The role of trade unions in defining and upholding this questions is the heart of the debate. The very idea of what constitutes comparable situations that should be treated equally and what constitutes different situations that demand different treatment, is a very vague and highly political concept. It is by nature a political and ethical decision, translated into legal consequences[62]. In our opinion, there is little lost to humbly accept that state law in general and EDL in particular may set up a framework for more equality and equal opportunities, but that law by itself will not create more equality.

Real equal opportunities in employment are often created on the work floor and on a daily basis by those who work together. As Manfred Weiss points out, in Germany "works councils" have a pivotal role for inducing social progress and implementing EDL on the shop floor[63].

Many concepts of equality law (and of EDL) are not "self-executing". It is e.g. clear that in order to obtain a better work-life balance daily accommodations have to be introduced to keep older people and young parents at work. EDL can forbid age discrimination, but it cannot create better working conditions for older people nor can it create child care facilities and change traditional gender roles.

"Reasonable accommodation" in case of disability constitutes another example. It is clear that the very fact of "reasonable" depends on factual circumstances (the nature of professional requirements, the size of the company, technology etc.). Attempts to regulate what is reasonable by very

61 A. Somek, 2011, 138.

62 A. Somek, 2011, 124-126.

63 M. Weiss, 2012, 231.

detailed instructions are bound to fail. What matters is that social partners are obliged to take these principles into account when bargaining. The bargaining and discussion process itself will generate ideas and solutions. The very fact that equal opportunities can be "claimed" as a concrete and enforceable right in all circumstances is essentially wrong and explains the very reluctance of partners at the table. Law of course, in so far as it compels to reflect and offers solutions, is very important and powerful, but there will be no substantive equality in the workplace if the co-workers and employers feel that they are asked to achieve the unachievable. The conservative back-lash by authoritarian morality may weaken the implementation of discrimination law. More sadly it will destroy good will that is needed to bring the parties to the table in order to negotiate the possibilities and solutions.

Even in the case of "reasonable accommodation" for religion, collective bargaining helps. Two very recent judgments of the European Court of Human Rights in Strasbourg about religious symbols at the workplace, underline this in the margin of the reasoning of the Court. The Court does not mention collective bargaining explicitly, but the difference in outcome in the Eweida-case[64], as compared to the Chaplin-case[65] is striking. In the Eweida case, the dress code for British Airways staff was discussed after disciplinary measures and altered as a result of this internal discussion. In the Chaplin-case, it is striking that the company had already had a discussion on the dress code for nurses with religious objections before the claim was made. The company had clearly tested claims of reasonable accommodation. Although the court does not mention collective bargaining as a decisive factor, it certainly made a difference in the justification motives. The balancing test of the employer holds firmly in the Chaplin-case, but does not survive the scrutiny of the court in the Eweida-case. Although collective bargaining is not as such a guarantee for quality, the bickering at the bargaining table certainly offers a better perspective on the issues at stake and a more solid justification.

This explains, in my opinion, why so many cases of age-discrimination come to the Court of Luxemburg. The questions to the Court were already on the bargaining table. Discrimination on the basis of origin and race are usually not on the bargaining table but live in the hearts and mind of partners and hide in prejudices. This why there are often not visible in CBA and hence produce little litigation.

This essentially not "self-executing" character of fundamental rights in the workplace does not come as a surprise. Other fundamental rights such as privacy at work are also highly vague concepts and can better be put into practice in collective bargaining on the work floor. One can discuss much about surveillance cameras but the exact spot to hang them, is of utmost interest also to balance the right of privacy and the legitimate restrictions. The balancing of interests in view of article 8 of the European Convention is served very well by collective bargaining and is regarded as an important procedural safeguard for infringements on privacy rights.

Law may provide the "stick" for more equal opportunities, but it is necessary to win the heart and minds of all involved to really create equal opportunities. This implementing strength of collective bargaining is exactly the very strength of collective bargaining. It is not about conflict in general, it should primarily bring together stakeholders on the work floor to put problems on the table in order to find solutions, so fostering real and substantial equal opportunities. Equality should be taken into

64 European Court of Human Rights, Judgment 15th January 2013, Cases 48420/10, 59842/10, 51671/10 and 36516/10, concerning Eweida.

65 European Court of Human Rights Judgment 15th January 2013, Cases 48420/10, 59842/10, 51671/10 and 36516/10, concerning Chaplin.

account when redistributing resources, but it should not be placed in opposition to the process of re-distributing resources and opportunities by negotiations.

This fight for the hearts and minds of actors, who operate on a daily basis with measures that might indirectly constitute discrimination, is important[66]. One can only dream of an inclusive workplace, in which the majority of the workers feel the need to participate as actively and co-responsible as in health and safety regulations. A sincere and profound awareness concerning factors that might lead to indirect discrimination is not easily acquired. It takes time to master the delicate discrimination tools inherent to EDL, since indirect discrimination is often related to old prejudices that have to be revised, also in the minds of colleagues.

European Union law lacks the tools for effective implementation. For sanctions, it must rely on Member States. They have a duty to provide efficient procedures for the enforcement of EDL[67]. One of the main functions of trade unions is precisely litigation in order to guarantee the rights of employees so they can support their members in litigation. This legal service by trade unions is one of the reasons why trade union membership is so high in Belgium. Legal advice and legal aid are appreciated highly by their members. For unions litigation is embedded in collective relations. The better the understanding with employers, the more trade unions seek settlements outside the court system. After failure in negotiation, they prefer qualified intervention from governmental authorities to solve the question. And in case of litigation they often suggest questions for the Court in Luxemburg to the judge. This explains why Belgium has such a high rate of litigation on the European level. Moreover in many cases of legal debate, social partners wait for answers from Luxemburg. In a Belgian Labour Law context, unions still represent the hard core of "civil society".

Qualified legal assistance is essential in implementing European Union Law and trade unions are a strong force in implementing EDL. No wonder why some countries sometimes fail to really implement EDL in labour relations and do not produce any questions to the Court. If unions are weak, this hiatus may be filled up by other organizations in civil society, but if major players are missing, the State Institutions may sound like hollow formal structures with little impact. When discussions actually start, case law will generate itself. And it will only come to strong cases after strong bargaining. During the bargaining process claims become accentuated, sharpened to a relevant legal answer. More important still: are the union representatives in their role as defenders of workers' rights protected against dismissal. This is not a concern for European Labour Law, but it makes a substantial difference. In Belgium union representatives are strongly protected against unfair dismissal[68] and unions are sometimes pivotal in organizing witness protection, which will lead to the conviction of the employer in discrimination cases[69].

In short: in building inclusive societies, we should recognize that more substantive equality can be reached by a more deliberative theory concerning ideas and ideals of justice[70]. This is the reason

---

66 Cf. A. Somek, 2011: stating that discrimination law is in essence about indirect discrimination law.

67 General rule : art. 9 FD – art. 7 RD – art. 17 GD.

68 Shop Stewards under NCBA nr. 5 (1971): 1 year salary. Members of works councils from 2,5 years up to 8 years of salary as compensation in case of unjustified dismissal: Act of 19th March 1991, *Moniteur belge,* 29th March 1991.

69 Labour Appeal Court Gent, 2009/AR/260, 28th December 2010, *Rechtskundig Weekblad* 2011-12, 1304.

70 P. Kapai, 2010.

why old labour relations and old labour tools are not only obstacles but also present opportunities to move social progress[71]. "*In the case of trade unions, while in the past they may well have been part of the problem, at least in some countries, there are grounds for optimism that they are increasingly part of the solution*" [72].

5. The turning point of the ECJ?

The lack of specific provisions concerning the crucial role of CBA in EDL is understandable, but the lack of specific implementation provisions on social dialogue has some major disadvantages. The implied role of CBA has contributed to a rather more reactive than proactive contribution of social partners to equal opportunity policies.

In our view EDL and in particular recent case law by the ECJ provides a new and substantial role for CBA. This positive perception of CBA is highly desirable in view of an effective social policy fostering equal treatment[73].

The main characteristics of CB that lead to so many procedures are also valuable tools for enhancing constructive social policy. CBA may perform an important role in the justification of potential discriminatory policies. Social partners, arguing about criteria for wage schemes, in their discussion provide adequate information about the legitimate aim, the appropriate and the necessary means to justify distinction that may lead to inequality. This discussion is essential to give the judge better information to judge indirect discrimination.

In fact, public discussion brings better to surface the existing prejudices and deals with them. This is always better than utter silence and unquestioned managerial prerogative. As Alexander Somek puts it bluntly: "*Antidiscrimination law may be very useful .. But it cannot supply the core of a social model*"[74].

6. Mutual dialogue between the ECJ and the collective bargaining system

The ECJ has already accepted the role of collective bargaining as a justification[75]. In the case of *Royal Copenhagen* the Court stated that collective bargaining can be taken into account as a justification[76]. In *Palacios de la Villa* the Court accepted collective bargaining as a justification for age related distinctions. The Court confirmed that social partners have a large margin of appreciation, just like state authorities[77].

[71] M. Smith, 2012.

[72] R. Hyman et al., 2012; S. Moore, 2011.

[73] U. Liebert, 2011, 73.

[74] A. Somek, 2011, 18.

[75] C. Bayart, 2004, 409.

[76] ECJ C-400/93, *Royal Copenhagen* [1995] ECR I-1275.

[77] ECJ C-411/05, *Palacios de la Villa* [2007] ECR I-8531

The case law of the ECJ concerning age discrimination is a fine example of growing recognition of collective bargaining as a major factor in the social policy. The ECJ has elaborated a very impressive set of clear rules.

1. Firstly, the legislator has a wide margin of appreciation for justification[78]
2. Secondly, social partners have a large margin of appreciation for justification[79]
3. However: the wide margin of appreciation may not undermine the principle of non-discrimination[80]
4. CBA must respect principle of non-discrimination[81]
5. A state may only make CBA obligatory if it respects the principle of non-discrimination[82]
6. A transitional period to eliminate age discrimination is allowed[83].

The last case of Hennings & Mai is of particular interest. Here the ECJ case law seems to come to a conclusive point. It is so important that the whole text deserves to be quoted:

> *"65. The Court has repeatedly held that the social partners at national level may, on the same basis as the Member States, provide for measures which contain differences of treatment on grounds of age, in accordance with the first subparagraph of Article 6(1) of Directive 2000/78. Like the Member States, they enjoy a broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (see Case C-411/05 Palacios de la Villa [2007] ECR I-8531, paragraph 68, and Case C-45/09 Rosenbladt [2010] ECR I-0000, paragraph 41). In the context of that discretion, the difference of treatment on grounds of age must be appropriate and necessary for achieving that aim.*
>
> *66. "The nature of measures adopted by way of a collective agreement differs from the nature of those adopted unilaterally by way of legislation or regulation by the Member States in that the social partners, when exercising their fundamental right to collective bargaining recognised in Article 28 of the Charter, have taken care to strike a balance between their respective interests (see, to that effect, Rosenbladt, paragraph 67 and the case-law cited)."*
>
> *67. "Where the right of collective bargaining proclaimed in Article 28 of the Charter is covered by provisions of European Union law, it must, within the scope of that law, be exercised in compliance with that law (see, to that effect, Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union ('Viking Line') [2007] ECR I-10779, paragraph 44, and Case C-341/05 Laval un Partneri [2007] ECR I-11767, paragraph 91)."*

The Court goes to the heart of the matter: EDL and collective bargaining should not be perceived in opposition only. Collective bargaining is about striking a balance between conflicting interests of workers, different employees, consumers' demands and social policy. It is not above EDL, but it benefits from a broad discretion in establishing social progress. The recognition of the right of collective bargaining and collective action in a positive light counterbalances the earlier case law of Viking and Laval, which in the perception of the unions, was rather a threat to their collective action.

---

78 ECJ C-144/04, *Mangold,* [2005] ECR I-9981*;* C-250/09 en C-268/09, *Georgiev*, [2010] I-11869

79 ECJ, C-411/05, *Palacios de la Villa*; C-45/09, *Rosenbladt* [2010] ECR I-09391; C-297/10¸ *Hennigs & Mai*, [2011] ECR I-07965

80 ECJ, C-159/10, *Fuchs & Kohler*, *[*2011] ECR I-06919

81 ECJ, C-45/09, *Rosenbladt*; C-297/10, *Hennigs & Mai*.

82 ECJ C-45/09 *Rosenbladt*.

83 ECJ C-297/10, *Hennigs & Mai*.

III. CONCLUSIONS

There can be little doubt that EU Discrimination Law challenges traditional employment contract law and collective bargaining, especially in the countries of old Europe. Discrimination law and collective bargaining bear different characteristics and sometimes may conflict seriously.

Hence, collective bargaining and EU discrimination law have a special relationship which has not always been perceived as a positive one. Indeed it challenges traditional settlements and traditional notions about equality among workers themselves.

The point is that collective agreements in the past often discriminated indirectly because they reinforced stereotypes, or just reproduced the way society is organised. EDL may also shape "New Labour Law" - if collective bargaining and industrial relations in general are utilised for supporting a rights culture in the work place, in which then adequately reflects the changes in the world of work. Collective bargaining in the future should also pay more attention to those new and different groups of workers (who are protected by EDL) and their claims.

Economic and social integration are interacting and interdependent. The emerging notion of European citizenship and especially the ratification of the Charter of Fundamental Rights are moving the European Union away from its traditional economic approach straight into essential national labour law issues[84].

However, collective bargaining remains a formidable tool in social policy in old labour countries, where unions still have real negotiating power. It complements and compensates for non-democratic authoritarian and moralizing discrimination law made solely by judges and lawyers[85]. In fostering the dialogue on equal opportunities, the social partners remain not only privileged but also essential partners. They provide the link between discrimination legislation and effective enforcement. They provide tools for prevention of and effective remedies against discrimination and also tools for the justification process of differences in treatment.

The notion of equal opportunities is by itself a vague notion, and concepts remain unclear. Discrimination law may be considered as a "stick", but in order to really create real equal opportunities, the hearts and minds of people on the work floor have to be won. An open, transparent and democratic debate provides a setting for all to create real equal opportunities.

A more explicit recognition by the European Court of Justice of the positive impact of CBA to create equal opportunities certainly would create more good will of old traditional labour forces in "old Europe". Discrimination law is about empowering, not only of the vulnerable groups, but also of strong stakeholders to create a framework for equal opportunities. In order to achieve its purposes EDL needs to integrate organized labour in its social policy[86].

Bibliography

K. Alidadi, M.C. Foblets, J. Vrielink. (2012), *A Test of Faith*, Ashgate, Surrey-Burlington.

C. Barnard (2012) *EU Employment Law*, Oxford, University Press.

[84] Cf. e.g. S. Haverkort-Speekebrink, 2012; D. Schiek, 2012; S. Guibboni, 2013.

[85] Cf. fundamental criticism of A. Somek, 2011.

[86] A. Somek, 2011, 175.

C. Bayart (2004) Discriminatie tegenover differentiatie, Arbeidsverhoudingen na de Discriminatiewet Arbeidsrecht na de Ras- en Kaderrichtlijn, Brussels, Larcier

C. Bayart, (2008) *The role of the social partners and collective bargaining under EU discrimination law,* Presentation at the Equinet seminar of 12th June 2008 in Sofia (not published).

R. Blanpain, (2012) *Hebben de vakbonden nog een toekomst*, Brugge, die Keure

S. Clauwaert and I. Schömann,(2012) *The crisis and national labour law reforms: a mapping exercise*, ETUI,: Brussels (*http://www.etui.org/Publications2/Working-Papers/The-crisis-and-national-labour-law-reforms-a-mapping-exercise*)

R. Blanpain, (2008) *European Labour Law*, Wolters Kluwer International, Alphen aan den Rijn.

G. Cox & K. Leus, (2012) De rol van de beginselen van behoorlijk bestuur in de collectieve arbeidsverhoudingen: de legaliteitstoets bij neerlegging en algemeenverbindendverklaring van cao's in H. Bocsteins e.al. (ed.) Omtrent behoorlijk bestuur van collectieve arbeidsverhoudingen. Scripta manent Jan Rombouts, Intersentia, Antwerpen, 2012, 129-184.

D. Cuypers en E. Verhulp, (2008) *Flexicurity and Employment Protection, a Happy Marriage?* in F. Pennings, Y. Konijn, A. veldman (eds), *Liber Amicorum Teun Jaspers*, *Social Responsibility in Labour Relations*, Wolters Kluwer Law International, 331-350.

A.C.L. Davies, (2009) *Perspectives on Labour Law*, Cambridge.

S. Deakin and G. Morris (2009) *Labour Law*, Hart, Oxford.

O. De Schutter (2001) *Discriminations et marché du travail*, Peter Lang, Brussel.

F. Dorssemont, (2012) 'How the European Court of Human Rights gave us Enerji to Cope with Laval and Viking 'in M.A. Moreau (ed.) *Before and After the Economic Crisis. What implications for the "European Social Model"?,* Cheltenham, Edward Elgar, 217-235.

C. Engels (2012), 'Active Ageing and Labour Law in Belgium', in F. Hendrickx (ed) , *Active Ageing and Labour Law*, Antwerp, Intersentia, 157-199.

S. Guibboni (2013) *European Citizenship, labour law and social rights in times of crisis*, Paper at the FOD-WASO- conference, Brussels, 18th September 2013, 37 p.

S. Haverkort-Speekebrink, (2012) European Non-Discrimination Law. A Comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf, Antwerp, Intersentia

Hertogh, Marc (ed .) (2009), *Living Law: Reconsidering Eugen Ehrlich,* Oxford, Hart.

R. Hyman, A. Klarsfeld, E. Ng, R. Hac, (2012) *Introduction:* Social regulation of diversity and equality, *European Journal of Industrial Relations*, 18:279 , 279-292.

A. Jacobs (2009a) The Social Janus Head of the European Union, in J. Wouters e.al. (eds)., European Constitutionalism beyond Lisbon, Antwerp, Intersentia, 111-128.

A. Jacobs (2009b) *Collective Labour Relations*, in B. Hepple & B. Veneziani (eds.), *The Transformation of Labour Law in Europe*, Hart, Oxford-Portland, 201-231.

P. Kapai (2011) Building inclusive societies: the role of substantive equality, ideas of justice and deliberative theory, in J. Motmans, D. Cuypers e.a. (editors), Equal is not enough: challenging differences and inequalities in contemporary societies, Conference Proceedings, Antwerp, Policy Research Centre, 2011, 24-42, *www.ua.ac.be/daniel.cuypers/documents*.

U. Liebert (2011) 'Reconciling market with Social Europe ? The EU under the Lisbon Treaty', in D. Schiek , U. Liebert, H. Schneider (eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon*, Cambridge, University Press, 47-73.

N. Lindstrom (2011), Constitutionalism between normative frameworks and the socio-legal frameworks of societies in D. Schiek , U. Liebert, H. Schneider (eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon*, Cambridge, University Press,74-94.

S. Moore (2011), 'Eyes and Ears in the Workplace: The Developing Role of Equality Representatives', in T. Wright H. Conley, *Gower Handbook of Discrimination at Work*, Gower, Surrey, 265-277.

A. C. Neal (2012) 'Active Ageing and the limits of Labour Law', in F. Hendrickx, *Active Ageing and Labour Law*, Antwerp, Intersentia, 31-72.

J.F. Neven, S. Gilson, F. Lambinet, (2012) Le partage du fardeau de la preuve en matière de harcèlement et de discrimination, *Tijdschrift voor Sociaal Recht/Revue de droit social*, 2012/4.

D. Schiek (2011a) 'Age discrimination before the ECJ – conceptual and theoretical issues' 48 (3) *Common Market Law Review,* 777-799

Schiek, D (2011b) 'Re-conceptualising European Economic and Social Constitutionalism: A normative perspective' , in: D. Schiek , U. Liebert, H. Schneider (eds.) (2011), *European Economic and Social Constitutionalism after the Treaty of Lisbon*, Cambridge, University Press, 17-46

D. Schiek (2012*) Economic and social integration. The challenge for EU Constitutional Law*, Cheltenham-UK, Edward Elgar

D. Schiek, (2012b) 'Book review of A. Somek, Engineering Equality,' *Common Market Law Review*, 49:2, 842-845.

D. Schiek , U. Liebert, H. Schneider (eds.) (2011), *European Economic and Social Constitutionalism after the Treaty of Lisbon*, Cambridge, University Press,

M. Smith (2012) 'Social regulation of the gender pay gap in the EU', *European Journal of Industrial Relations*, 2012 (18), 365-380.

A. Somek (2011) *Engineering Equality*. *An Essay on European Anti-Discrimination Law*, Oxford, Oxford Press,

W. Vandeputte (2011) *Ontslagrecht tussen arbeidsmarktdenken en ontslagbescherming, Onderzoek naar de modernisering van het Belgische ontslagrecht,* KU Leuven: Ph.D. Thesis, (Research on the modernising of Belgian employment protection law)

M. Van de Voorde,(2011) Indicators for a just and widely supported affirmative action policy: a brief overview of the Flemish employment equity and diversity policy, in J. Motmans, D. Cuypers et al. (editors) *Equal is not enough: challenging differences and inequalities in contemporary societie*s, Conference Proceedings, Antwerp, Policy Research Centre, 76-100, www.ua.ac.be/daniel.cuypers/documents.

J. Visser, JE & Dølvik JE (2009), 'Free movement, equal treatment and workers' rights: Can the European Union solve its trilemma of fundamental principles?' *Industrial Relations Journal*40:6, 491–509.

M. Weiss (2012) *Active Ageing and Labour Law in Germany*, in F. Hendrickx (ed.), *Active Ageing and Labour Law*, Antwerp, Intersentia, 215-231.