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ECONOMIC AND SCIENTIFIC POLICY

Economic and Monetary Affairs

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Enforcement of Fundamental Workers' Rights

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DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

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STUDY

Abstract

This study provides an overview of international and European law regulating a selection of fundamental workers' rights (freedom of association and the right to collective bargaining, age antidiscrimination, the right to health and safety at work). It then analyses their enforcement in seven Member States (France, Greece, Hungary, Italy, Sweden, Netherlands and United Kingdom). On the basis of these findings, it explores possible ways forward for improved enforcement of fundamental workers' rights in the European Union, not only in times of economic crisis, but in the long term.

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CONTENTS

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
AV	Swedish Work Environment Authority
CAOs	Dutch Collective Agreements
CGB	Dutch Equal Treatment Commission
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ESC	European Social Charter (Revised)
ETA	Hungarian Antidiscrimination Code
ICECSR	International Covenant on Economic, Cultural and Social Rights
ICCPRILO	International Covenant on Civil and Political Rights
ILO	International Labour Organisation
IKA	Greek Social Insurance Organisation
MKDSZ	Hungarian Labour Mediation and Arbitration Service
SEPE	Greek Labour Inspectorate
SME	Small and Medium Enterprises
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
WHO	World Health Organisation

EXECUTIVE SUMMARY

The enforcement of fundamental workers' rights is becoming a matter of great concern in these times of economic crisis. Labour market changes due to the crisis (such as rising unemployment rates) and growing State budget deficits could lead to the adoption of measures reducing the level of protection of workers' rights. The effectiveness of national enforcement systems for workers' rights is being tested and there is a risk of taking a step backward, as the International Labour Organisation's Director General Somavia warned in a speech at the European Parliament in mid-September 2011.

This study provides an overview of the existing legal instruments, both at international and European level, that guarantee three fundamental workers' rights: **freedom of association and the effective recognition of the right to collective bargaining; age antidiscrimination; and the right to health and safety at work.** These rights were chosen out of a common core of workers' rights as contained in relevant international instruments. The study then analyses the enforcement of the selected fundamental rights of workers in a representative group of Member States: **Greece; France; Hungary; Italy; the Netherlands; Sweden; and the United Kingdom**. The study compares those national results and draws overall conclusions, highlighting common trends, identifying common problems and presenting good practices. The study concludes with a number of recommendations to improve the effectiveness of the enforcement of workers' rights in Europe.

At international level, freedom of association and the right to collective bargaining are guaranteed in numerous legal instruments, particularly those of the ILO, in view of the links between these rights and the ability of workers to secure their economic and social status. Age antidiscrimination is receiving increasing attention although international standards for the fight against age discrimination are still limited. Finally, ILO and WHO measures have extensively addressed the right to health and safety at work.

At EU level, freedom of association and the right to collective bargaining are recognised as fundamental rights in the EU but EU competence to regulate them is not entirely clear. To fight against age discrimination, the EU legislator and the Court of Justice of the EU have set more stringent requirements than the international standards. Moreover, they fight age discrimination for the elderly and the youth alike. The EU has also developed a comprehensive and advanced regulatory framework in the area of occupational health and safety.

The national legal frameworks in place in the seven Member States for the protection of the selected fundamental workers' rights do not differ to a great extent and generally provide for an effective system of enforcement of these rights. This is due in part to the **influence of international and EU law standards**, which provide for some similarities in the main national principles and rules. EU law played a major role in the introduction of the principle of age antidiscrimination and regulated its enforcement providing in particular for the reversed burden of proof which is now implemented in all studied countries. The vast international and EU acquits on health and safety at work has also provided for a sound legal framework in the seven countries, establishing high level standards for the enforcement of this right.

Finally, while international law and especially ILO Conventions had an effect on the enforcement of freedom of association and the right to collective bargaining, national enforcement traditions and cultures of social dialogue have had a greater impact on the regulation of these rights. The degree of state intervention in the exercise of these rights in the seven countries also varies. In some cases detailed rules have been developed for

recognition of trade unions for the purposes of collective bargaining (such as in France and the United Kingdom) and for collective dispute resolution (such as in Greece and Hungary). In other countries these rights are exercised mostly under so-called voluntary models, where negotiations between social partners are more often the key to any agreement or conflict resolution (such as in Sweden and the Netherlands).

The **typologies of enforcement mechanisms** for the selected fundamental workers' rights also do not differ significantly in the selected Member States. However, the way they function does vary considerably, which impacts on their effectiveness. In all analysed countries, the judicial system is recognised as the main enforcement mechanism; though each country has different specific rules on the composition of the courts, on access to them and on their proceedings. The judicial system is not always effective and user friendly, mostly due to high costs, lengthy proceedings and highly technical procedural rules.

On the other hand, alternative dispute resolution systems seem to be spreading as enforcement mechanisms. Arbitration, mediation and conciliation differ from one another: arbitrators issue binding awards for parties, while mediators and conciliators provide for other type of dispute settlements that, in some cases, can bind the parties as contracts or collective agreements. These systems are particularly adapted and effective for the resolution of collective disputes and violations of the right to age antidiscrimination. Stakeholders highlighted a number of advantages in their functioning as compared to the judicial system: procedures before these bodies are generally informal, more easily understandable and shorter than at court and their services can be free of charge. Any out-of-court settlement favoured by ombudsmen or equal treatment authorities for age discrimination is also seen as advantageous for the same reasons.

The functioning of bodies and committees for dialogue between employers and employees on all three rights is probably the enforcement mechanism that varies the most in the seven countries, because such bodies are often set up by collective agreements (although national legislation can also provide for their establishment). As to their effectiveness, it is difficult to draw conclusions as it seems to depend mostly on their structure and on the context in which they operate as well as on the national enforcement tradition and culture of social dialogue. They seem to work efficiently in some countries (as in Sweden) but the opposite might be true elsewhere (such as in Italy).

The specific enforcement mechanism represented by ombudsmen, equal treatment authorities or antidiscrimination networks has also been considered generally effective in the national reports. Some of these bodies are quite recent and their existence has been seen as a positive development which filled a gap for bodies monitoring fundamental workers' rights and especially the right to age antidiscrimination. They are effective in enforcing workers' rights thanks to their preventive actions (awareness raising and guidance) and their services for investigation, support to claims and out-of-court settlement.

Finally, the Court of Justice of the European Union and the ILO Committees represent last resort enforcement mechanisms for workers (or their representatives) and for the national courts who appeal to them on key matters related to fundamental workers' rights.

The **major problems** encountered in the enforcement of the selected fundamental workers' right in the seven Member States analysed can be summarised as follows.

For freedom of association and the right to collective bargaining, the main difficulties lie in the representativeness of trade unions and in the extent of coverage of workers by collective agreements.

Sometimes, the existence of strict criteria does not allow small parties to be represented and the exclusion of small companies or legal uncertainty on 'atypical' forms of employment (such as temporary and interim work) impedes a comprehensive coverage of workers by collective agreements. Moreover, the diminished role of tripartite bodies (gathering representatives of the authorities, the workers and the employers) and trade unions in the social dialogue at national level and the uncertainty left in the aftermath of the *Laval* case affect negatively the overall enforcement of freedom of association and the right to collective bargaining. Unclear rules and cumbersome procedures also undermine the exercise of the right to strike.

For age discrimination, the main problem lies in the widespread lack of awareness of the right to equality on this ground which is considered still relatively 'new' and not fully assimilated in the general culture of the selected countries. Moreover, legal uncertainty on the rules allowing for justified age discrimination and the contradictory indications provided by recent national legislation (mostly on older workers and pensions) and national jurisprudence weaken the enforcement of this fundamental workers' right.

The right to health and safety at work seem to be better enforced in the selected countries than the other rights. However, difficulties in the protection of health and safety standards have also been highlighted, especially in connection with the economic crisis. The limited resources of labour inspectorates, the high costs of compliance with health and safety standards for employers, the existence of shadow businesses where standards are not applied and the withdrawal of monitoring powers from inspectorates and trade unions by recent national legislative measures undermine the practical enforcement of this fundamental workers' right.

Indeed, the common trends in the **impact of recent measures adopted in Member States to address the economic crisis on workers' rights enforcement are cause for concern**. Besides the difficulties for health and safety at work just highlighted, some of these measures have also weakened the enforcement of freedom of association and the right to collective bargaining. In some cases, recent measures have negatively affected the access to and functioning of alternative dispute resolution systems for collective conflicts and, in others, trade unions' prerogatives in the enforcement of this right have been weakened including through centralisation of the decision making process on austerity measures. Moreover, recent measures to cope with the economic crisis and the ageing population dealt mostly with older workers and pension systems. Younger workers, who also comprise a vulnerable group subject to age discrimination, have often been disregarded. This has given contradictory indications on the enforcement of equality on the basis of age.

However, a number of **positive experiences** should also be highlighted.

For freedom of association and the right to collective bargaining, recognition procedures provided in some countries for attributing bargaining power to trade unions were considered as positive because they ensure legal certainty and enhance the representativeness of trade unions. Moreover, alternative dispute resolutions systems, such as arbitration, mediation and conciliation, seem well adapted and effective for collective disputes, providing workers with rapid protection in an easier way compared to the courts.

For age discrimination, the reversed burden of proof is crucial to facilitate the enforcement of this right. Furthermore, the activities of public bodies such as ombudsmen, equal treatment authorities or antidiscrimination networks with *ad hoc* remit on the right to age antidiscrimination are also essential. By providing awareness raising measures, guidance on the applicable rules, free of cost support to judicial disputes and facilitation of out-of-court

settlements, they offer the effective tools for the protection of this fundamental workers' right.

Finally, for health and safety at work, the responsibilities attributed to all actors involved (employers, employees, their representatives and the *ad hoc* committees in bigger businesses and labour inspectorates) create a widespread control of the standards, increasing the level of enforcement. In particular, labour inspections have been recognised as the most effective enforcement mechanism. New policy approaches embracing all aspects of the enforcement of this right, including awareness rising on the standards and preventive measures, represent a step forward.

Measures to facilitate access to courts such as legal aid, special rapid procedures and the possibility to obtain interim measures for the protection of workers' rights are also key to ensure the effectiveness of judicial procedures, which are still the main enforcement mechanism for the three fundamental workers' rights.

In light of the findings of the national reports, and taking into account the suggestions provided by national stakeholders consulted for the study, 14 **recommendations** are put forward to reinforce the protection of the selected fundamental workers' rights. The recommendations are intended for all decision makers and actors involved at EU, national and local level on labour market policies. As Member States are responsible for implementing and enforcing EU law and any rights derived there from within their territories, many of the recommendations below are addressed primarily at them. Nonetheless, the support of the EU institutions and in particular of the European Parliament for undertaking the proposed actions and monitoring the enforcement level of these rights is crucial for the protection of workers in Europe.

The recommendations include the following:

- Recent and upcoming national measures adopted to cope with the current economic crisis and the challenges of globalised labour markets need to be strictly monitored by European and national institutions to ensure that they do not represent a step backward in the enforcement of **freedom of association and the right of collective bargaining**. In the context of the European Semester, the European Parliament should pay special attention to this aspect in the discussions on the Annual Growth Survey and call upon the Commission and Council to monitor carefully such measures when assessing the National Reform Programmes.
- The *Laval* case of the Court of Justice of the EU supported the freedom of companies to provide services in other Member States as opposed to the right of collective bargaining of EU workers in Sweden. The clarification of the right of collective bargaining in the aftermath of the *Laval* case should be ensured to allow workers to exercise it without hesitation. The European Parliament should monitor the up-coming ILO decision on the appeals of the Swedish trade unions and take it into account in the negotiations of the draft EU Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services.
- Access to alternative dispute resolution (ADR) systems for collective conflicts should be facilitated and the provision of arbitration, mediation and conciliation services should be encouraged and supported by both the European institutions and the national governments. The European Parliament could call upon the Commission to further promote ADR systems encompassing the enforcement of collective workers' rights in its initiatives on justice for growth.
- Awareness-raising activities by all actors involved in labour market policies and clarification by the European Commission of the practical application of the **age antidiscrimination** rules stemming from EU law, especially on the possible exceptions to equal treatment, are the most important steps for the enforcement of this right. The European Parliament could consider calling upon the Commission to present a Communication clarifying the EU acquis and providing guidelines for identifying the valid exceptions to equality on the basis of age.
- Positive measures which focus mostly on older workers should be monitored by European and national institutions to ensure that they support this vulnerable group of workers without disadvantaging others. In addition, more measures should be adopted by national governments to ensure the protection of younger workers against age discrimination. The European Parliament could contribute to drawing attention to the situation of young workers, i.e. by adopting an own-initiative Resolution on their specific working conditions calling upon Member States to ensure they are not disadvantaged in comparison to workers in other age groups.
- Incentives such as insurance-related ones or financial aid by the EU and national governments to support the application of **health and safety** standards should be provided to ensure that higher costs for training and equipment do not hinder the enforcement of this right by employers hit by the economic crisis. The European Parliament could ensure the stepping up of financing efforts in this field in the negotiations of the European Social Fund 2014-2020. It could also consider the adoption of a Recommendation encouraging Member States to set up economic incentives to support the implementation of health and safety standards.
- Finally, there is a crucial need to increase the accessibility and effectiveness of the main enforcement mechanism for the selected fundamental workers' rights: the **judicial system**. The European institutions and especially the European Parliament, as the representative of the Union's citizens, could support Member States in their efforts to make law proceedings more user-friendly.

1. INTRODUCTION

1.1. Fundamental workers' rights in times of economic crisis

The enforcement of fundamental workers' rights is becoming a matter of great concern in these times of economic crisis. Labour market changes due to the crisis (such as rising unemployment rates)[1] and growing State budget deficits could lead to the adoption of measures reducing the level of protection of workers' rights. Both the UK and Greece have made cuts in the public workforce and adopted austerity measures while Italy is currently debating a modification in legislation to increase flexibility in the dismissal of workers. The effectiveness of national enforcement systems for workers' rights is being tested and there is a risk of taking a step backward, as the International Labour Organisation's Director General Somavia warned in a speech at the European Parliament in mid-September 2011.

In this context, the European institutions have an important role to play to ensure monitoring and protection of workers' rights throughout Europe. In particular, the Employment and Social Affairs Committee of the European Parliament could look closely at the respect of workers' rights in the Member States and at the impact EU and international standards have had in national measures, and use its authority to ensure that the enforcement of workers' rights is maintained and even reinforced.

1.2. The fundamental workers' rights under examination

This study[2] analyses the enforcement of a few rights selected from a common core of fundamental workers' rights in a representative group of Member States. On the basis of these findings, it explores possible ways forward for improving the enforcement of fundamental workers' rights in the European Union, not only in times of economic crisis, but in the long term.

For the purposes of the study, three fundamental workers' rights[3] were chosen out of a common core of workers' rights as contained in relevant international standards.[4] The International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work adopted in 1998 covers four 'universal rights' at work: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation. The ILO has also classified some of its 188 conventions as 'fundamental'. Since 2007, all EU Member States have ratified them. The eight ILO fundamental conventions are:

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1 Unemployment has been rising sharply in the European Union (EU) since March 2008 as a result of the global economic crisis, see 'Eurostat, *Impact of the economic crisis on unemployment - Statistics Explained*, 2.4.2012 available at: http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Impact_of_the_economic_crisis_on_unemployment.

2 This study has been prepared by Milieu Ltd. at the request of the European Parliament. The views expressed herein are those of the consultants alone and do not represent the official views of the European Parliament.

3 These rights are presented in detail in sections 2 and 3.

4 The list of information sources is included in the study. A 2008 European Parliament study (n. 19/2007 – EMPL Committee, Consortium LABOUR ASOCIADOS SLL, Association pour le Développement de l'Université Européenne du Travail, *The impact of new forms of labour on industrial relations and the evolution of labour law in the European Union*, June 2008) stated that 'core labour rights appear from the need to extract a more selective list of labour rights from the generally long lists of rights contained in different international Declarations, Charters and Agreements' (p. 103).

- Forced Labour Convention, 1930 (No. 29);
- Abolition of Forced Labour Convention, 1957 (No. 105);
- Worst Forms of Child Labour Convention, 1999 (No. 182);
- Minimum Age Convention, 1973 (No. 138);
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87);
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111);
- Equal Remuneration Convention, 1951 (No. 100).

Moreover, nearly half of ILO instruments deal directly or indirectly with occupational safety and health issues: the ILO has adopted more than 40 standards as well as over 40 Codes of Practice specifically dealing with 'fundamental principles of occupational safety and health'.[5]

A 2008 Study on 'The impact of new forms of labour on industrial relations and the evolution of labour law in the European Union' commissioned by the European Parliament also looked at the concept of core labour rights and stated that: '"core rights" means a very basic floor of rights [...] which have to do mostly with fundamental rights such as non-discrimination, freedom to work and prohibition of forced labour; prohibition of child labour; freedom of association for workers, and the like'.[6] The study also looked at workers' health highlighting that 'although there is a long-standing occupational safety and health tradition in Europe since the creation of the European Community for Coal and Steel, new forms of labour are among the drivers challenging these achievements.'[7]

From this brief overview, a number of rights identified at international level as of fundamental importance can be already distinguished. They pertain to the abolition of forced labour and child work, the freedom of association, the right to collective bargaining, antidiscrimination and health and safety at work.

Some of the identified rights (as the abolition of forced labour and child work) do not appear to raise serious concerns in the EU and do not seem to be significantly affected by the labour market changes due to the economic crisis. Therefore, they were not considered for the purposes of the current study.

The **freedom of association and the right to collective bargaining** are recognised as rights of primary importance both at international and EU level due to their particular links with the ability of workers to secure their economic and social status.[8] They were therefore selected for the purposes of this study and their relevance was confirmed in the interviews carried out with stakeholders at the national level.[9] These two rights were examined together as intrinsically linked since the primary function of workers' associations is to bargain collectively with the employers.

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5 In 2003, the ILO adopted a global strategy to improve occupational safety and health which included the introduction of a preventive safety and health culture, the promotion and development of relevant instruments, and technical assistance. See: http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/occupational-safety-and-health/lang--en/index.htm, 23.04.2012.

6 European Parliament study n. 19/2007 – EMPL Committee, Authors: Consortium LABOUR ASOCIADOS SLL, Association pour le Développement de l'Université Européenne du Travail, *The impact of new forms of labour on industrial relations and the evolution of labour law in the European Union*, European Parliament, June 2008, p. XIII.

7 Ibid., p. XVI.

8 See section 2 and 3.

9 Lists of the stakeholders consulted by country are included in Annex I of the respective national reports attached to this study.

Among the large variety of issues covered by **antidiscrimination** measures, a particular ground of discrimination had to be selected for detailed analysis. Discrimination based on religion, belief and race can occur at the workplace but also in other contexts, such as school, public services, social life, etc., which do not directly affect the situations of workers. Discrimination based on disability and sex are very broad issues which are often tackled in a specific way by *ad hoc* actions and rules which go beyond the labour dimension into medical, psychological and sociological spheres respectively and thus would be difficult to analyse within the boundaries of the present study.[10]

In contrast, **antidiscrimination based on age** is an issue which receives rapidly increasing international attention and the EU legal framework is quite advanced compared to international standards.[11] Age antidiscrimination is intended for the purposes of this study to cover both the employment relationship but also access to employment.[12] As EU citizens grow older, population ageing is likely to affect all EU Member States in the near future.[13] To look at age antidiscrimination would also be important in the context of the financial crisis because, when employers are obliged to take extreme measures, age could easily become a ground for discriminating against older workers.

On the other hand, age discrimination also represents a problem for the working youth: it is more tenuous for young people to access the labour market due to their limited experience and workplace skills;[14] they are routinely exploited by their employers and expected to work more erratic, less popular hours for less pay than equally or less-then equally experienced/skilled workers.[15] The importance of combating age discrimination in the workplace at EU level is further signified by the fact that 2012 has been designated as the European Year for Active Ageing and Solidarity between Generations.

Finally, already in 1996 a Community programme concerning safety, hygiene and health at work (1996-2002) had been established for the improvement of occupational health and safety.[16] This was followed by the Community Strategy 2002-2006 on health and safety at work entitled 'Adapting to change in work and society'[17] and the current Strategy 'Improving quality and productivity at work', running from 2007 to 2012[18], while a new one is being prepared.[19]

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[10] Moreover, disabled workers represent only a small part of the working population (UN Enable, Disability and Employment, 1998, available at: www.un.org/disabilities/default.asp?id=255.

[11] See section 2 and 3.

[12] This is in line with Article 3 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L303, 2.12.2000, p. 16 – 22.

[13]. Eurostat 'Population structure and ageing' October 2011, available at: http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Population_structure_and_ageing, 23.4.2012.

[14] Annual Report: Employment and Social Developments in Europe 2011, European Commission available at: http://ec.europa.eu/social/main.jsp?catId=113&langId=en&pubId=6176&type=2&furtherPubs=yes, 23.04.2012, p. 48.

[15] The Free Child Project, 'Youth and the Economy', 2011, available at: http://www.freechild.org/ythecon.htm Young people remain the hardest hit by the crisis and its aftermath. See Annual Report: Employment and Social Developments in Europe 2011, European Commission available at: http://ec.europa.eu/social/main.jsp?catId=113&langId=en&pubId=6176&type=2&furtherPubs=yes, 23.04.2012.

[16] European Commission, Communication on a Community programme concerning safety, hygiene and health at work (1996-2002), COM(95) 282 final, Brussels, July 1995.

[17] European Commission, Communication, Adapting to changes in work and society: a new Community strategy on health and safety at work 2002-2006, COM(2002) 118 final, Brussels, March 2002.

[18] European Commission, Communication, Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work, COM(2007) 62 final, 21.2.2007. See section 3.

[19] 'EU Strategy on Health and Safety at Work – Where We Stand and Future Priorities', speech by Commissioner Andor, Conference on Occupational Safety & Health at Work, Copenhagen, 28 June 2012, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/506&format=HTML&aged=0&language=EN&guiLanguage=en.

Member States have undertaken major developments in their policies and legislation to put these strategies into place.[20] However, at the beginning of the financial crisis in 2009, 40% of the EU citizens believed that, due to the economic crisis, the health and safety conditions at work might deteriorate a great deal.[21] A recent study carried out by Milieu[22] under contract to the European Parliament on 'Occupational health and safety risks for the most vulnerable workers' (August 2011)[23] highlights that improving implementation and enforcement of occupational health and safety legislation is necessary for the EU strategy to reach its goals. In this context, the present study will contribute to the analysis of this right's enforcement situation and put forward proposals for improving its implementation, thereby providing added value as compared to existing studies and measures.[24]

The following rights were therefore selected as representative examples of fundamental workers' rights:

- Freedom of association and the right to collective bargaining;
- Age antidiscrimination;
- The right to health and safety at work.

The three rights identified accommodate the purposes of the study also because of their nature as they represent both collective (freedom of association and right to collective bargaining) and individual rights (right to health and safety at work and age antidiscrimination); freedoms (freedom of association) and rights (right to collective bargaining and right to health and safety at work); and non-discrimination or other rights (age antidiscrimination and right to collective bargaining, right to health and safety at work).

1.3. A working definition of enforcement

The first step has been to agree, for the purpose of the study, on a working definition of enforcement so as to ensure comparability of the results of the country studies. The definition of enforcement had to be broad enough to allow national experts to identify any possible mechanisms available to workers for redress concerning the three representative fundamental workers' rights. These mechanisms could include: recourse to judicial authorities (including class actions, if relevant); other actions to specialised bodies (work councils, mediation, etc.); workers' representatives' power/actions (e.g. trade unions bargaining power); any other relevant measures (e.g. the right to strike).

In light of these considerations, the following abstract definition of enforcement was adopted for the purposes of the present study:

> *Any measure that is legally binding and/or confers some sort of (negotiating/implementing/control) power that can be activated to make sure the fundamental workers' right is respected in practice.*

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[20] The European Commission published a Mid-term review of the European strategy 2007-2012 on health and safety at work, SEC(2011) 547 final, 27.4.2011. Here, it stated that, despite the difficult socio-economic context of the past three years, the goals of the strategy remain valid.

[21] Pan-European opinion poll on occupational safety and health – June 2009 – EU27', available at: http://osha.europa.eu//en/safety-health-in-figures/eu-poll-slides-2009/Package_EU27.pdf, p. 18.

[22] Milieu leads a consortium that holds the European Parliament (EMPL Committee) Framework contract for "External expertise on regulatory and policy issues in the field of Health and Safety at Work" and has therefore developed its expertise in this field.

[23] At: http://www.europarl.europa.eu/document/activities/cont/201108/20110829ATT25418/20110829ATT25418EN.pdf, 23.4.2012.

[24] The European Commission published a Mid-term review of the European strategy 2007-2012 on health and safety at work, SEC(2011) 547 final, 27 April 2011 which focuses on the objectives of the strategy from a top-down broad perspective and it does not look directly at the enforcement of worker's rights on this field.

It was also decided that the national legal experts would consider the following correlated measures when their impact on the enforcement of fundamental workers' rights is significant:

- Measures that enable/facilitate the pursuit of enforcement measures (major reporting and evaluation activities of the situation in the country, information campaigns, etc.);
- Difficulties that discourage the pursuit of enforcement measures (administrative barriers, costs, etc.).

1.4. Overview of the study

The study provides an overview of the existing legal instruments, both at international and European level, that guarantee the three selected fundamental rights of workers. The study then focuses on the effectiveness of the national measures in place in seven EU countries for enforcing these three fundamental workers' rights.

In selecting a representative sample of EU countries for analysing the enforcement of workers' rights, the different legal and political traditions across the 27 Member States had to be taken into account.

Especially in the fields of employment, social and fundamental rights, these differences matter in the way the rights of people are recognised and enforced. It was decided to analyse the situation in the following Member States:

- Greece (EL);
- France (FR);
- Hungary (HU);
- Italy (IT);
- Netherlands (NL);
- Sweden (SE);
- United Kingdom (UK).

This group of countries represents:

- both civil law (EL, FR and IT) and common law systems (UK);
- bigger (IT, FR and UK) and smaller (EL and HU) Member States;
- southern (EL and IT) and northern (SE and UK) Member States;
- Member States which were already part of the EU before the enlargements of 2004 and 2007 (EL, IT, FR, SE and UK) and those which acceded recently (HU);
- Scandinavian (SE) as well as ex-communist traditions (HU).

Moreover, as mentioned above, quite lively public debates on workers' rights are currently taking place in some of these countries (EL, HU, IT and UK) and therefore it was considered important to examine them to ensure coverage of the latest developments in the area.

The country reports included as annexes provide an overview of the legal systems in place and practical information on the enforcement situation including any measures recently adopted to cope with the economic crisis to the extent that they affect the enforcement of

the rights under examination.[25] The study subsequently carries out a comparative analysis of those national results and draws overall conclusions at the EU level, highlighting common trends, identifying common problems and presenting good practices.

Finally, the study concludes by putting forward a number of recommendations to improve the effectiveness of the enforcement of workers' rights in Europe. The recommendations address all of the main actors at the EU and national level who could decisively contribute to the protection of workers' rights in the long term.

[25] More information on the structure of the country reports is provided in section 4. To obtain an objective and complete understanding of the situation in the Member States and assess the practical enforcement of the selected fundamental worker's rights, the national experts have also conducted interviews with selected practitioners, trade unions, workers' associations and public authorities.

2. FUNDAMENTAL WORKERS' RIGHTS IN INTERNATIONAL LAW

KEY FINDINGS

- Freedom of association and the right to collective bargaining are guaranteed in numerous international legal instruments in view of the particular links between these rights and the ability of workers to secure their economic and social status.
- Age antidiscrimination is receiving increasing international attention. However, international standards for the fight against age discrimination are still limited.
- The right to health and safety at work has been extensively addressed through ILO and WHO measures.

2.1. Freedom of association and the effective recognition of the right to collective bargaining

The **United Nations (UN)** efforts for the protection of the right to association and collective bargaining began with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948.[26] The UDHR is a milestone document in the history of human rights establishing important principles and values which were later elaborated in legally binding UN treaties. Two of its provisions are of particular interest: Article 20(1) on the freedom of assembly and association and Article 23(4) on the right to form and join trade unions.

The 1966 International Covenant on Civil and Political Rights (ICCPR)[27] is the first international human rights treaty to codify the right to freedom of association. The ICCPR elaborates on the principles of the UDHR and is legally binding on all States that have signed and ratified it. The right of peaceful assembly is grounded in Article 21 while Article 22 provides for the right to freedom of association with others, including the right to form and join trade unions. This latter provision appears in an almost identical wording in the major human rights treaties.[28] Moreover, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)[29], which is also legally binding, further guarantees trade union rights and, in particular, the right of everyone to form trade unions and national and international federations. It also guarantees the rights of trade unions to function freely and the right to strike (Article 8).

In 1998, the UN General Assembly adopted the Declaration on Human Rights Defenders[30], which provides that, for the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others at the national and international levels, to form, join and participate in non-governmental organisations, associations or groups (Article 5(b)).

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[26] Universal Declaration of Human Rights, G.A. Resolution 217A (III), U.N. Doc A/810 at 71 (1948).

[27] UN General Assembly, International Covenant on Civil and Political Rights, 16.12.1966, United Nations, Treaty Series, vol. 999, p. 171.

[28] Including the American Convention on Human Rights, Article 16; the African (Banjul) Charter on Human and Peoples' Rights, Article 10; the Arab Charter on Human Rights, Article 24.

[29] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16.12.1966, United Nations, Treaty Series, vol. 993, p. 3.

[30] UN General Assembly Resolution adopting the Declaration on Human Rights Defenders, A/RES/53/144, 8.3.1999.

Previous to any UN efforts to protect the right of association and collective bargaining, the **International Labour Organisation (ILO)**, which was then an agency of the League of Nations, looked at these rights. In 1919, the ILO Constitution referred for the first time to the freedom of association as a *principle* of special and urgent importance while in a later amendment of the Constitution the freedom of association was characterised as 'essential for sustained progress'.[31] In 1944, the ILO adopted the Declaration of Philadelphia (which was incorporated in the ILO Constitution in 1946) where it reaffirmed that the freedom of association is essential to sustained progress (Paragraph I(b)) and that 'the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures' must be achieved' (Paragraph 3(e)).

In 1948, the freedom of association obtained for the first time the status of a *right* in the ILO Convention on Freedom of Association and Protection of the Right to Organise (No. 87).[32] This Convention asserts the rights of workers and employers to establish and join organisations, to freely elect representatives and to organise themselves without the interference of public authorities.[33] This followed on the adoption of the 1947 Right of Association (Non-Metropolitan) Territories Convention (No. 84)[34], one year earlier, by the International Labour Conference which refers to the right of employers and workers to associate for any legal purpose and to collective agreements, consultations and the solution of labour conflicts. However, this Convention was applicable only to countries that had non-metropolitan territories and was ratified only by Belgium, France, New Zealand and the UK.

In 1949, the Application of the Principles of the Right to Organise and to Bargain Collectively Convention (No. 98)[35] was adopted. It aims at protecting workers against anti-union discrimination, providing that employment cannot be subject to the condition that workers do not join unions or relinquish their trade union membership (Article 1(1) and (2)). The right of employees in the public sector to organise was explicitly acknowledged in the 1978 Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service Convention (No. 151)[36] (Articles 4 and 5). The Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking Convention (No. 135)[37] (adopted in 1971) further strengthens the protection of workers' representatives against acts prejudicial to them because of their activities as union representatives or because they are members of a union or they are participating in union activities (Article 1). Finally, the Collective Bargaining Convention (No. 154)[38] (adopted in 1981) reaffirms the provision of the Declaration of Philadelphia noting that the main obligation of the ILO is to 'further, among the nations of the World, programmes which will achieve the effective recognition of the right to collective bargaining'. ILO Convention 154 is not restricted to labour unions but applies 'to all branches of economic activity'.

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31 Right to Freedom of Association, Human Rights Defenders Briefing Papers Series, April 2009, p. 3.

32 Freedom of Association and Protection of the Right to Organise (No. 87), 31st ILC session (1948).

33 In 1921, the ILO had adopted the Right of Association (Agriculture) Convention (No. 11) which provided that workers in agriculture would have the same rights as workers in industry. However, the ILO did not define the freedom of association rights for industrial workers until significantly later.

34 Right of Association (Non-Metropolitan) Territories Convention (No. 84), 30th ILC session (1947). This Convention is an instrument with interim status.

35 Application of the Principles of the Right to Organise and to Bargain Collectively Convention (No. 98), ILC 32nd session (1949).

36 Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (No. 151) Convention, ILC 64th session (1978).

37 Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking Convention (No. 135), ILC 56th session (1971).

38 Collective Bargaining Convention (No. 154), ILC 67th session (1981).

In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work[39] which commits all Members to respect and promote them irrespective of whether they have ratified the relevant Conventions (Paragraph 2). The freedom of association and the effective recognition of the right to collective bargaining are included in the Declaration, making it clear that these rights are considered universal and that they apply to all people in all States, regardless of the level of economic development.[40]

Within the **Council of Europe** legal order, the European Convention on Human Rights (ECHR) also guarantees the freedom of association (Article 11) while Article 5 of the European Social Charter (Revised) (ESC) (adopted in 1996) sets out the right to form, join and actively participate in associations designed to protect their members' professional interests (Article 5).[41] Finally, Article 6 of the ESC describes the content of the right 'to bargain collectively' by listing the actions parties can undertake in order to ensure 'its effective exercise', including active promotion.[42] According to the European Court of Human Rights, the right to collective bargaining and to negotiate and enter into collective agreements is an inherent element of the right to association, i.e., the right to form and join trade unions for the protection of one's interests as protected under Article 11 of the ECHR.[43]

Considering the impact of these international standards on the legal frameworks of the EU Member States, the doctrinal and educational work of the ILO concerning the freedom of association has had a marked influence. International labour standards do not aim at uniformity, given that national trade union systems correspond to different traditions and national constitutional systems vary greatly. Nonetheless, the principles and rules derived from the Conventions and Recommendations, the Declaration and the ILO's own Constitution regarding the 'essential content' of the freedom of association set forth quite precisely the rights of workers and the obligations of states.[44]

On the other hand, the ILO legal instruments do not provide for the same level of legal certainty with respect to the right to collective bargaining. This is due both to the ambiguity of the expression 'collective bargaining' itself and to the fact that collective bargaining is treated separately from the freedom of association.[45]

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[39] ILO declaration on Fundamental Principles and Rights at Work, ILC 68th Session (1998), available at: http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm, 19.3.2012.

[40] See: http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm, 23 April 2012.

[41] Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163. Please note that as of 22 March 2012 the following EU Member States have not ratified the European Social Charter (Revised): Czech Republic, Denmark, Germany, Greece, Latvia, Luxembourg, Poland, Spain and the UK.

[42] Article 6 states: 'With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:
1 to promote joint consultation between workers and employers; 2 to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements; 3 to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise: 4 the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into'.

[43] Judgment ECHR, 12 November 2008, Demir, points 153/154 and 145.

[44] Miguel Rodriguez Piñero y Bravo Ferrer, International protection of collective bargaining – A difficult task in Labour Law: Its role, trends and potential, available at: http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@actrav/documents/publication/wcms_111442.pdf, 23.4.2012, p. 48.

[45] Ibid.

In conclusion, freedom of association and the right to collective bargaining are guaranteed since many years in numerous international legal instruments (UN, ILO, Council of Europe) in view of the particular links between this right and workers' ability to secure their economic and social status.

2.2. Age antidiscrimination

Age is becoming one of the most important determinants of peoples' participation in the workforce worldwide. The problem of age discrimination remains high on the international agenda with various bodies focusing their attention especially at addressing discrimination against older workers.

The **UN** efforts began with the International Plan of Action on Ageing, adopted at the first World Assembly on Ageing in 1982. This plan acknowledged the need to adopt policies to meet the challenge of a growing, healthier and more active elderly population,[46] adding that older persons should be afforded the opportunity to continue working under more flexible arrangements, such as part-time.[47] The 1991 UN Principles for Older Persons similarly note that older persons should be afforded the chance to work or have access to other income generating opportunities.[48] The 1991 principles served as the foundation of the 2002 Madrid International Plan of Action on Ageing which is a political declaration that identified 35 objectives and made 239 detailed recommendations to guide the action undertaken by policy makers, including national governments. Notably, under Article 5 of this Plan the Parties commit themselves to eliminating all forms of age discrimination.[49]

Despite the growing concern over age discrimination, for the time being only few international instruments address, in varying degrees, this issue with regard to employment. The main one is the 1958 **ILO** Convention on Discrimination (Employment and Occupation, No. 111).[50] Article 1(1)(a) of this Convention requires ratifying Members to eliminate employment and occupational related discrimination on the grounds of sex, race, colour, religion, political opinion, national extraction and social origin. Even though age is not included in this list, Article 1(1) (b) of the Convention allows its Members to add grounds to accommodate domestic needs. Further, it has been suggested that Article 5 of this Convention may allow for special measures or assistance to be taken for a variety of categories, including age. During recent years, the ILO Committee of Experts on the Application of International Standards has welcomed reports that presented Members' efforts to address age discrimination though it cannot oblige countries to take such action.[51] As of 2011, 29 countries had legislation explicitly prohibiting direct and indirect age discrimination.[52]

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[46] Vienna International Plan of Action on Ageing, UN 1982 Para. 31(f), available at: http://www.un.org/es/globalissues/ageing/docs/vipaa.pdf, 23.4.2012.

[47] Ibid., para. 44.

[48] Principles for Older Persons, General Assembly Resolution 46/91 (1991), p.1.

[49] Report of the Second World Assembly on Ageing, Madrid, 8.-12.4.2002 A/CONF. 197/9.

[50] Discrimination in Respect of Employment and Occupation Convention (No. 111), ILC 42 session (1958).

[51] Age discrimination and older workers: Theory and legislation in comparative context, Conditions of Work and Employment Series No. 20, ILO 2008, p. 14, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_travail_pub_19.pdf, 23.4.2012.

[52] Australia, Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Guyana, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, New Zealand, Norway, Poland, Portugal, Saint Lucia, Slovakia, Slovenia, South Africa, Spain, United Kingdom and United States, Equality at work: The continuing challenge, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, 2011 available at: http://www.ilo.org/public/libdoc/ilo/P/09382/09382%282011-100%29.pdf, 23.4.2012, p. 49.

The second ILO standard on the issue of age discrimination derives from the 1980 ILO Older Workers Recommendation (No. 162).[53] ILO Recommendations do not impose obligations upon Members but only provide policy recommendations that may be used in the development of national policies and legislation. This Recommendation allows Members to define the specific age categories that fall under the definition of 'older workers' (Paragraph 1(2)). It further states that the employment problems of older workers should be dealt with in the context of an overall and well balanced strategy for full employment to ensure that any problems are not shifted to another population group (Paragraph 2).

The Convention on the Elimination of All Forms of Discrimination against Women,[54] adopted in 1979, also refers to the issue of age discrimination. Women may suffer double discrimination due to both age and gender. As a consequence, Article 11(1)(e) provides that State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights including the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.

Even though the international legal instruments do not refer extensively to age discrimination against younger workers, an ILO study notes that the belief that a high rate of employment of older workers can be achieved only at the expense of new, younger labour or vice versa is firmly embedded in the policy-makers' minds. The study further acknowledges that younger workers seem to be more vulnerable to age discrimination (payment of lower wages, longer probation period and greater reliance on flexible forms of employment contracts) than their older peers.[55]

Within the **Council of Europe** legal framework, the ECHR also contains a general provision (Article 14) prohibiting discrimination on any ground such as sex, race, colour, etc. The European Court of Human Rights interprets Article 14 broadly[56] and accepts arguments on other grounds of discrimination, including age.[57]

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53 Older Workers Recommendation (No. 162), ILC 66th session (1980).

54 Convention on the Elimination of All Forms of Discrimination against Womhyen, General Assembly Resolution 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46.

55 Equality at work: Tackling the challenges, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference 96th Session 2007, Report I(B), p. 38, paras. 141 – 143 available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_082607.pdf, 23.4.2012.

56 The European Court of Human Rights has established in its case-law that differences in treatment based on a personal characteristic or status by which persons or groups of persons are distinguishable from each other are capable of amounting to discrimination within the meaning of Article 14. The list of Article 14 is illustrative and not exhaustive as evidenced by the use of the words 'any grounds such as'. Case *Carson and Others v. the United Kingdom,* [2010] ECHR 338, (2010) 51 EHRR 13, 29 BHRC 22, available at: http://www.bailii.org/eu/cases/ECHR/2010/338.html, paragraph 70; See also Case *Sidabras and Džiautas v. Lithuania* 42 EHRR 6, (2004) 42 EHRR 104, [2004] ECHR 395, (2006) 42 EHRR 6, [2004] 42 EHRR 104, 42 EHRR 104, available at: http://www.bailii.org/eu/cases/ECHR/2004/395.html.

57 Francesca Klug and Helen Wildbore, Equality, Dignity and Discrimination under Human Rights Law; selected cases, Centre for the Study of Human Rights, LSE available at: http://www2.lse.ac.uk/humanRights/articlesAndTranscripts/Human_rights_equality_and_discrimination.pdf, 23.4.2012, p. 4 point 4. In the UK, in case *Regina v. Secretary of State for Work and Pensions (respondent) ex parte Reynolds (FC) (Appellant)*, Session 2005-06 [2005] UKHL 37, the Court of Appeal examined whether a rule providing reduced jobseeker's allowance and income support based on the age of the recipient (25 years old in that case) was in compliance with Article 14 of the ECHR (the Secretary of State argued that such differentiated treatment was justified as people under 25 is have lower expenses and tend to be paid less than older workers; this reasoning was accepted by the Court).

Moreover, the 1988 Additional Protocol to the European Social Charter[58] establishes the right of elderly persons to social protection including their right to remain full members of the society for as long as possible (Article 4). More recently, the Parliamentary Assembly adopted in 2011 a Resolution *Promoting active ageing: capitalising on older people's working potential* focusing on the need to adopt legislation to prohibit age discrimination and implement programmes that encourage employers and employees to have a more positive assessment of active ageing.[59]

Hence, while international attention to age antidiscrimination issues has recently increased, international instruments in this area of fundamental rights are still limited.

2.3. Occupational health and safety

The **ILO**'s mandate for work in the field of occupational health and safety is found in the Preamble of its Constitution which provides for the protection of workers against sickness, disease and injury arising out of their employment as well as in the 1944 Declaration of Philadelphia which recognises the obligation of the ILO to promote programmes for the protection of the life and health of workers in all occupations (Paragraph III(g)). The ILO has adopted more than 40 standards dealing specifically with occupational safety and health as well as over 40 Codes of Practice. Nearly half of ILO instruments deal directly or indirectly with occupational health and safety issues.[60] The most important ILO instruments in this area will be examined below.

The Occupational Safety and Health Convention (No. 155) was adopted in 1981.[61] This Convention provides for the formulation and implementation of national policies on occupational safety, health and the working environment (Article 4(1)). In order to achieve this goal, actions must be undertaken both by the government (Part III) and by the enterprises (Part IV). Convention No. 155 is complemented by the 1981 Occupational Safety and Health Recommendation (No. 164) which further elaborates on the actions that may be undertaken to address these issues.

In 1985, the ILO adopted the Occupational Health Services Convention (No. 161)[62] which provides for the establishment of enterprise-level occupational health services which are entrusted with preventive functions and are responsible for advising all interested parties on maintaining a safe and healthy working environment (Article 5). More recently, in 2006 the Promotional Framework for Occupational Safety and Health Convention (No. 187) was adopted.[63] The purpose of this Convention was to promote a preventative safety and health culture and progressively achieve a safe and healthy working environment (Preamble). Under Convention No. 187 ratifying States must develop, in consultation with the most representative organisations of employers and workers, a national policy, national system and national programme on occupational health and safety (Article 2(1)).

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58 See: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/SignaturesRatifications_en.pdf, 23.4.2012; as at 23.4.2012, 45 European Social Charter (revised) or have accepted the rights (or certain of the rights) guaranteed by the Protocol by ratifying the European Social Charter (revised). States have either signed the 1988 Additional Protocol or have signed the

59 Parliamentary Assembly Resolution 1793/2011, Promoting active ageing: capitalising on older people's working potential, 28.1.2011 (9th sitting).

60 See the information on the ILO website on occupational safety and health available at: http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/occupational-safety-and-health/lang--en/index.htm, 23.4.2012.

61 Occupational Safety and Health Convention (No. 155), ILC 67th session (1981).

62 Occupational Health Services Convention (No. 161), ILC 71st session (1985).

63 Promotional Framework for Occupational Safety and Health Convention (No. 187), ILC 95th session (2006).

Apart from these instruments focusing on the fundamental principles of occupational safety and health, the ILO has adopted Conventions to address health and safety problems in particular branches of economic activity (e.g. Hygiene (Commerce and Offices) Convention (No. 120), 1964; Occupational Safety and Health (Dock Work) Convention (No. 152), 1979; Safety and Health in Mines Convention (No. 176), 1995, as well as Conventions to address specific risks (e.g., Radiation Protection Convention (No. 115), 1960; Occupational Cancer Convention (No. 139), 1974).

In addition, the ILO adopts Codes of Practice which set out practical guidelines for public authorities, employers, workers, enterprises and other bodies. Even though they are not legally binding, Codes of Practice provide guidance on safety and health at work in certain economic sectors (e.g. construction, opencast mines), on protecting workers against certain hazards (e.g. radiation, lasers) and on certain safety and health measures (e.g. occupational safety and health management systems; ethical guidelines for workers' health surveillance).[64]

The **World Health Organisation (WHO)** has also been active in the protection of workers' occupational health since its creation in 1948. The WHO Constitution empowers the organisation to work towards the improvement of working conditions.[65] In 2007, the World Health Assembly endorsed the WHO Global Plan of Action on Workers' Health (2008 – 2018)[66] which follows the WHO Global Strategy on Occupational Health for All, adopted by the World Health Assembly in 1996. The WHO in close collaboration with the ILO aims at creating a supportive policy environment and strengthening and improving partnerships at country level between ministries of health, labour and social security.

Within the **Council of Europe** legal framework the European Social Charter (Revised) provides that all workers have the right to safe and healthy working conditions (Part I(3)) while the Additional Protocol to the European Social Charter establishes workers' right to contribute to the protection of health and safety in their working environment (Article 3(1)(b)).

In sum, international instruments, mostly adopted by the ILO and WHO, have extensively addressed the right to health and safety at work providing for sound legal standards in this field.

[64] See: http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/occupational-safety-and-health/lang--en/index.htm, 23.4.2012.

[65] Constitution of the World Health Organisation available at: http://www.who.int/governance/eb/who_constitution_en.pdf, 23.4.2012.

[66] Workers' health: global plan of action, WHA 60th session (2007).

3. FUNDAMENTAL WORKERS' RIGHTS IN EU LAW

KEY FINDINGS

- Freedom of association and the right to collective bargaining are recognised as fundamental rights in the EU but EU competence to regulate them is not entirely clear.
- To fight against age discrimination, the EU legislator and the Court of Justice have set more stringent requirements than the international standards. Moreover, they fight age discrimination for the elderly and the youth alike.
- The EU has also developed a comprehensive and advanced regulatory framework in the area of occupational health and safety.

3.1. Freedom of association and the effective recognition of the right to collective bargaining

The freedom of association and the right to collective bargaining were initially recognised by the Community Charter of the Fundamental Social Rights of Workers of 1989 ('1989 Community Charter'), adopted as a non-legally binding declaration by all Member States. It provided that 'Employers and workers of the European Community shall have the right of association, in order to constitute professional organisations or trade unions of their choice for the defence of their economic and social interests. (…) Employers or employers' organisations, on the one hand, and workers' organisations, on the other, shall have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice'.

At present, Article 151 of the **Treaty on the Functioning of the European Union (TFEU)** sets out the EU social policy objectives stating that both the EU institutions and the Member States should have in mind the fundamental social rights established under the 1996 European Social Charter[67] and the 1989 Community Charter in this field.

The freedoms of assembly and of association are guaranteed under Article 12 of the **Charter of Fundamental Rights of the EU** ('Charter of Fundamental Rights') which notes that 'Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests'. The right to collective bargaining and collective action is found in Article 28 of the Charter of Fundamental Rights according to which 'Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action'. Article 28 deals with the process of collective bargaining, the actors involved in this process, its potential outcomes and the 'appropriate levels' of bargaining.

[67] Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163. See section 2.1.

Since the adoption of the Lisbon Treaty, the Charter of Fundamental Rights has the same legal status as the Treaties (Article 6 TEU). Consequently, the acknowledgement of freedom of association and the right to collective bargaining as fundamental rights within the EU is established.[68]

An issue of particular interest is whether the EU has the competence to act concerning the freedom of association. Article 153(1) and (2) TFEU provide that the EU can adopt measures and/or legislative instruments in certain fields of social policy in order to achieve the EU objectives in this area. However, Article 153(5) TFEU states, *inter alia*, that the right of association is not included in the fields where the EU can act.

Article 154(1) TFEU entrusts the Commission with the task of promoting consultation of management and labour at Union level and of taking the necessary measures to facilitate their dialogue.[69] Should management and labour so desire, their dialogue at Union level may lead to contractual relations, including agreements (Article 155(1) TFEU). These agreements shall be implemented either by Council Decisions or in accordance with the procedures and practices specific to management and labour and the Member States (Article 155(2) TFEU). As a consequence, it has been argued that even if the EU could not adopt legislation regulating the freedom of association under Article 153 TFEU, the Commission could still take initiatives in this field which could then lead to EU level agreements between management and labour under Articles 154 and 155 TFEU.[70]

In addition to the above provisions, Article 156 TFEU suggests that the Commission is entitled to encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields, including the right of association and collective bargaining between employers and workers.

As far as the right to collective bargaining is concerned, in line with Article 153(1) and (2) TFEU, the representation and collective defence of the interests of workers and employers fall within EU competence. As already discussed, Articles 153 and 154 TFEU envisage a collective bargaining process at the EU level. Nonetheless, the EU has no competence concerning the right to strike and the right to impose lock-outs (Article 153(5) TFEU) despite the fact that they are intrinsically linked to the right to collective bargaining.[71] At the same time, the Charter of Fundamental Rights explicitly recognises in Article 28 the right of workers to take collective action to defend their interests, including strike action. This formulation can be read as acknowledging the right to strike: if collective action includes strike action and the former is qualified as a right, then the latter should also be acknowledged as a right too,[72] thus creating a discrepancy between the level of protection afforded to the right to strike under the Treaty and the Charter.

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[68] For more information about the developments from the 1989 Community Charter to the Charter of Fundamental Rights of the EU see: http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/communitycharterofthefundamentalsocialrightsofworkers.htm.

[69] Note that workers' right to information and consultation within the undertakings (guaranteed under Article 27 of the Charter of Fundamental Rights) is also protected under secondary EU legislation, including Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 122, 16.5.2009, p. 28 – 44 and Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 082 , 22.3.2001, p. 16 – 20.

[70] Brian Bercusson, European Labour Law and the EU Charter of Fundamental Rights, Nomos (2006), p. 159.

[71] Thomas Blanke, Outlook – Chances of European harmonisation or coordination of collective wage formation in Collective Bargaining and Wages in Comparative Perspective, Kluwer Law International, 2005, p. 165. Note that the passage refers to the similar provisions of the Constitutional Treaty.

[72] Right to strike, Eurofound, available at: http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/RIGHTTOSTRIKE.htm, 23.4.2012.

In conclusion, it would seem that even if the EU does not have the competence to regulate the right to strike by way of minimum standards through Directives, collective action is not excluded from the scope of EU law, as also indicated by related CJEU rulings.[73]

Collective bargaining and collective agreements are important within the EU legal framework in view of the various functions they perform. First, social partners assume a quasi-legislative function when engaging in collective bargaining at the EU level in the form of social dialogue. These collective agreements may be given legal effect in the form of directives.[74] However, more recently the agreements on harassment and violence at work[75] and on inclusive labour markets[76] were not given such effect.

Second, collective agreements may facilitate the implementation and application of Union law in two ways: collective agreements may be allocated a role in the transposition of EU law into the national law of the Member States[77] or they may be allocated a role in the flexibilisation of EU law, allowing for its adaptation to the specific national context of industrial relations and employment practices in each Member State.[78]

Finally, collective bargaining and collective agreements are considered as reflecting fundamental social objectives and values which should be protected against competing values.[79] For example, in the *Albany* case, the **Court** noted that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers and that collective negotiations between management and labour for the conclusion of collective agreements, in view of the social objectives of such agreements, should be regarded as falling outside the scope of Article 101(1) TFEU which prohibits cartels and other agreements that could disrupt free competition in the EU internal market.[80]

However, the Charter of Fundamental Rights does not confer absolute protection on collective bargaining and collective agreements.[81] In this regard the Court of Justice of the European Union (CJEU) has held that the right to collective action can constitute a restriction on the right of establishment; however, while this restriction may, in principle, be justified by an overriding reason of public interest such as the protection of workers, the CJEU stated that this restriction must be suitable to achieve the legitimate objective pursued and should not go beyond what is necessary to achieve that objective.[82] Likewise, the CJEU has also held that the right to strike is recognised under EU law. However, it may

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[73] For example, Case C- 438/05 *Viking*, [2007] ECR I – 779 and Case C – 341/05 *Laval*, [2007] ECR I – 11767. This statement is made in the Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final, 21.3.2012, p. 11.

[74] Brian Bercusson (ed) European Labour Law and the EU Charter of Fundamental Rights, Nomos (2006) p. 307.

[75] Framework Agreement on Harassment and Violence at Work, 16.7.2007, available at: http://www.ueapme.com/docs/joint_position/2007_Framework_Agreement_Harassment_and_Violence_at_Work.pdf.

[76] Framework Agreement on Inclusive Labour Market, available at: http://www.etuc.org/IMG/pdf_20100325155413125.pdf, 23.4.2012.

[77] See Article 11 of Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 23.3.2002, p. 29 – 34.

[78] See Article 5 of Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 23.3.2002, p. 29 – 34; Article 18 of Directive 2003/88/EC concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9 – 19; Clause 4(3) of Directive 96/34/EC on the framework agreement on parental leave OJ L 145, 19 June 1996, p. 4 – 9.

[79] Brian Bercusson (ed) European Labour Law and the EU Charter of Fundamental Rights, Nomos (2006), p. 307 – 308; see also C – 67/96 Albany [1999] ECR – 5751, para. 55 – 60; concerning the freedom of strike and its relationship to the free movement of goods see Article 2 of Council Regulation 2678/98 on the functioning of the internal market in relationship to the free movement of goods among the Member States.

[80] C-67/96 *Albany* [1999] ECR I – 5751, para. 59 – 60.

[81] Articles 28 and 52 of the Charter of Fundamental Rights.

[82] C- 438/05 *Viking*, [2007] ECR I – 779, para. 47.

still constitute a restriction on the freedom to provide services and therefore would be protected only to the extent it pursued a legitimate aim and was justified by overriding reasons of public interest.[83]

According to Professor Monti, the Court rulings 'revived an old split that had never been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level'.[84]

In March 2012, the Commission **proposed the adoption of a Regulation** on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services.[85] The proposed Regulation aims to clarify the rules applicable with respect to the exercise of the fundamental right to take collective action as well as the need to reconcile in practice such right with freedom to provide services and of establishment in cross-border situations ('Monti II Regulation').[86] In particular, Article 2 of the proposed Regulation reads 'The exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms'. The Proposal has not been well received among stakeholders and decision-makers.[87]

In sum, the EU legal framework guarantees the freedom of association and the right to collective bargaining as fundamental rights of the EU in line with the standards at international level. However, EU law does not explicitly address discrimination against workers participating in trade unions. This is instead well covered under international law. The negotiations for the adoption of the proposed Monti II Regulation might shed more light on the EU competence to regulate the practical implementation and functioning at EU and national level of these two rights.

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[83] C – 341/05 *Laval*, [2007] ECR I – 11767, para. 95.

[84] A New Strategy for the Single Market, At the Service of Europe's Economy and Society', Report to the President of the European Commission by Mario Monti, 9.5.2010, available at: http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf, 23.4.2012, p. 68.

[85] Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final, 21.3.2012.

[86] Ibid, p. 10.

[87] ' The Commission package on the posting of workers adopted on 21.03.2012 does not strike the right balance between protecting workers and facilitating cross-border service provision', ETUC Declaration on the Commission proposals for a Monti II Regulation and Enforcement Directive of the Posting of Workers Directive, 19.04.2012, available at: http://www.etuc.org/a/9917; 'The legislative proposals on the posting of workers were given a mixed reception by the employment and social affairs ministers at their informal meeting, on 24-25 April in Horsens, Denmark. The ministers reacted fairly positively to the draft directive that clarifies the 1996 rules, but most member states questioned the relevance of a new regulation to reconcile the right to take collective action with economic freedoms (so-called 'Monti II')', Petitjean S., *Mixed reaction in Council to Monti II regulation*, 25.04.2012, available at: http://www.europolitics.info/social/mixed-reaction-in-council-to-monti-ii-regulation-art332617-25.html; 'In my view, there is nothing of merit in the Draft Monti II Regulation, the contents of which reflect a failure to understand the serious implications of the Viking and Laval decisions, and a failure also to address the changing nature of human rights law insofar as it affects the right to strike', Ewing K.D., *The Draft Monti II Regulation: An Inadequate response to Viking and Laval*, available at: http://www.ier.org.uk/sites/ier.org.uk/files/The%20Draft%20Monti%2011%20Regulatioin%20by%20Keith%20Ewing%20March%202012.pdf.

3.2. Age antidiscrimination

The EU is facing unprecedented demographic changes which require that strategic action be undertaken in order to increase the participation of older people in the work force.[88] The European Parliament, as early as the 1980s, adopted Resolutions on ageing with a number of **policy documents** on the same topic being issued by the **European Commission** in the early to mid – 1990s. However, it was not until the late 1990s that ageing and the shrinking of the EU population acquired a more prominent role on the agenda of the EU institutions.[89]

In 1994, Directive 94/33/EC on the protection of young people at work was adopted, with the purpose of ensuring that young people are protected against economic exploitation and against any work likely to harm their safety and health or development or to jeopardise their education.[90]

The first serious attempt to tackle population ageing was the 1999 Commission Communication *Towards a Europe for All Ages*;[91] in this Communication the Commission noted that 'the magnitude of the demographic changes […] will force the European Union to rethink and change outmoded practices and institutions'. Further strategic documents followed such as the Commission Communication *Increasing the employment of older workers and delaying the exit from the labour market*[92] (March 2004), which outlined key conditions for promoting the employment of older workers, including flexible forms of work organisation. In 2005, the Commission issued the Green Paper *Confronting demographic change: a new solidarity between generations*, which updates the Commission's role in addressing demographic change. The Commission Communication on *The demographic future of Europe – from Challenge to Opportunity*[93] (October 2006) provided a framework for EU and Member State policies, including policies aimed at promoting employment in Europe through more jobs and longer working lives of better quality.[94]

More recently the Commission adopted the Communication *An Agenda for new skills and jobs: A European contribution towards full employment* which for the first time discusses on equal terms the problems faced by both young and older workers[95] (November 2010). The Communication notes that young workers are amongst those hardest hit by the recession while highlighting the need to strengthen the EU Common Principles for Flexicurity in the post-crisis context.[96]

The need to address age discrimination is recognised both in primary and secondary EU legislation and aims equally at the protection of younger and older workers. Article 10 **TFEU** provides that 'in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, *age* or sexual orientation' (emphasis added). In addition, Article 19 TFEU establishes an EU competence to regulate in the field of antidiscrimination providing that

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88 Commission Communication The demographic future of Europe – from challenge to opportunity COM(2006) 571 final.

89 Malcolm Sargeant, The Law on Age Discrimination in the EU, Kluwer Law International, 2008, p. 15.

90 Council Directive 94/33/EC on the protection of young people at work (OJ L 216, 20.8.1994, p. 12).

91 Commission Communication Towards a Europe for All Ages – Promoting Prosperity and Intergeneration Solidarity, COM(1999) 221 final, 21.5.1999, p. 6.

92 Commission Communication Increasing the employment of older workers and delaying the exit from the labour market, COM(2004) 146 final, 3.3.2004.

93 Commission Communication on The demographic future of Europe – from Challenge to Opportunity, COM(2006) 571 final, 12.102006.

94 Ibid, p. 8 – 10.

95 Communication An Agenda for new skills and jobs: A European contribution towards full employment, COM(2010) 682 final, 23.11.2010, p. 2.

96 Ibid, p. 4.

'the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, *age* or sexual orientation' (emphasis added). The Charter of the Fundamental Rights also provides in its Article 21(1) that 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, *age* or sexual orientation shall be prohibited' (emphasis added).

Before the adoption of the TFEU, it was a matter of debate whether a general principle of non-discrimination was recognised in the EU legal order.[97] The CJEU in *Mangold* stated that the principle of non-discrimination on grounds of age must be regarded as a general principle of EU law.[98] However, this ruling has not been unconditionally accepted by scholars and was even contradicted by other CJEU rulings.[99] Nonetheless, since the adoption of the Lisbon Treaty, the Charter of Fundamental Rights is given binding effect equal to the Treaties and, as a consequence, non-discrimination may be considered as a fundamental right under EU law (Article 6 TEU).

In 2000, on the basis of Article 13 TEC (now Article 19 TFEU), the EU adopted the **Framework Directive 2000/78/EC for equal treatment in employment and occupation**.[100] This Directive prohibits discrimination on the grounds of religion or belief; disability; age or sexual orientation. The recitals accompanying the Directive acknowledge the significance of addressing age discrimination in employment and note the harmful effects it may have both on equality rights and important social objectives, such as high level of employment or social protection. Recitals 8 and 25 refer to the EU Employment Guidelines which emphasise the support that must be provided to older workers in order to increase their participation in the work force. In addition, they discuss that unjustified discrimination based upon stereotypes and prejudice is in violation of the fundamental rights of dignity and equality.[101]

The Framework Directive is applicable not only against those above a particular age. Therefore, it should be applied in a way that victims of age discrimination, regardless of their age, are able to assert their rights.[102] Moreover, the Directive is concerned not only with ensuring that all individuals in similar positions are treated in an identical manner. On the contrary, Recital 26 reveals that the Directive aims at establishing substantive equality, combating age-based disadvantages and upholding of basic rights even if this entails the use of differential treatment.

The Framework Directive applies in the field of employment in the public and private sectors concerning: access to employment and vocational training; employment and working conditions; and dismissals and pay (Article 3).[103]

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97 Nicky ten Bokum et al, Age Discrimination Law in Europe, Kluwer Law International 2009, p. xxx.

98 C-144/04 *Werner Mangold*, [2005] ECR-9981, para. 75

99 Nicky ten Bokum et al, p. xl – xl11; Case C-411/05 *Palacios de la Villa* (2007) ECR I-8531 where the Court assessed the legal issue exclusively on the legal basis provided in Directive 2000/78/EC without referring to the general principle of non-discrimination; Case 427-06 *Bartsch* (2008) I-7245, para. 24., where the Court distinguished the case from *Mangold* saying that the general provision in question was not intended to transpose EU legislation, and therefore the EU prohibition of discriminating on the ground of age is not applicable.

100 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L303, 2.12.2000, p. 16 – 22.

101 Age discrimination and European Law, DG for Employment, Social affairs and Equal Opportunities, April 2005, available at: http://ec.europa.eu/justice/discrimination/document/index_en.htm.

102 Ibid.

103 One optional exception is established concerning Member States' ability to establish that the Directive will not apply to the armed forces (Article 3(4)).

It further provides that both direct and indirect discrimination on any of the grounds referred to in Article 1 are prohibited.[104]

Nonetheless, the prohibition of age discrimination in the Directive is not absolute: age discrimination may be justified in three cases if it is proved that: a) it is objectively necessary to b) achieve a necessary aim, and c) it is applied in a proportionate manner.[105] The three cases are:

- When a person is subject to what would otherwise be considered as indirect discrimination on the grounds of age but the application of the provision, practice or criterion in question is justified as objectively necessary and proportionate (Article 2(2)(b));
- When being of a particular age is a genuine and determining occupational requirement (Article 4);
- When a person is subject to what would otherwise be considered direct discrimination but the Member State has foreseen that differential treatment based on age shall not constitute discrimination if it is objectively and reasonably justified by a legitimate aim pursued by national law (Article 6(1)). The provision indicates what could be considered differential treatment (Article 6(1)(a) – (c)) as well as the aims that may be considered as legitimate, and thus, as justifying the discrimination (Article 6(1)). This justification is applicable only when the ground for discrimination is age.

The introduction of the third justification aims at distinguishing between circumstances where the use of age (or age-linked characteristics) is a legitimate proxy (i.e., employment policy, labour market and vocational training objectives) and when it is not.[106] Indeed, discrimination may also be established on characteristics which are closely linked to age such as seniority, maturity and experience. These are age-like characteristics that, in most cases, only those who have spent a number of years in an activity have, i.e., they can be acquired only by those of a certain minimum age.[107]

Pertaining to the burden of proof, Article 10 of Directive 2000/78/EC notes that Member States must take the necessary measures so that in all proceedings, with the exception of criminal ones, when the plaintiffs establish facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. This provision articulates a principle established by the CJEU regarding cases of sex discrimination. It is considered an extremely valuable tool since in discrimination cases most of the evidence needed to prove discriminatory treatment rests with the perpetrator. Nonetheless, this was a new development in the procedural rules of several Member States.[108]

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[104] Direct discrimination occurs 'where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1' (Article 2(2)(a)). Indirect discrimination occurs where 'an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons' (Article 2(2)(b)).

[105] Age discrimination and European Law, DG for Employment, Social affairs and Equal Opportunities, Unit D.3, April 2005, p. 31.

[106] Age discrimination and European Law, DG for Employment, Social affairs and Equal Opportunities, Unit D.3, April 2005, p. 14.

[107] A study published by the Commission in 2011 on 'Age and Employment', available at: http://ec.europa.eu/justice/discrimination/files/age_and_employment_en.pdf, concluded that the exceptions to the principle of age equality are widespread and not always interpreted coherently in the Member States.

[108] The same principle concerning the burden of proof is also adopted in the Racial Equality Directive, also adopted in 2000; in this regard, see 'The Racial Equality Directive: Applications and Challenges', FRA, 2012, available at: http://fra.europa.eu/fraWebsite/attachments/FRA-RED-synthesis-report_EN.pdf, 23.4.2012, p. 13.

Age discrimination cases have regularly been brought before the **CJEU** and the resulting rulings have clarified the possible justifications. For example, the Court in case C-88/08 ruled that Directive 2000/78 must be interpreted as precluding national legislation which excludes periods of employment completed before the age of 18 from being taken into account for the purpose of determining the incremental step at which contractual public servants of a Member State are graded. This legislation was put in place in order not to treat general education less favourably than vocational education and to promote the integration of young apprentices into the labour market. However, even if this differential treatment could be considered as objectively and reasonably justifiable for the attainment of the above aims, the legislation was still not considered as an appropriate and necessary means to reach those objectives.[109]

Additionally, the CJEU in Joined Cases C-250/09 and C-268/09[110] held that national legislation, under which university professors are compulsorily retired when they reach the age of 68 and may continue to work beyond the age of 65 only by means of fixed-term one-year contracts renewable at most twice, may be justified under Article 6(1) if that legislation pursues, by appropriate and necessary means, a legitimate aim linked *inter alia* to employment and labour market policy, such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations. In this case, the CJEU held that the retirement age for university professors was higher than the state pension age in the Member State and the age that other workers retired and that the use of fixed-term contracts above the age of 65 balanced the needs of universities and the needs of professors.

The above analysis reveals that the EU legislator has not only taken into account the developments at the international level in the fight against age discrimination but has actually adopted far more stringent requirements in order to protect this right. Moreover, the EU clearly included age discrimination against young workers in the focus of its policy and the CJEU has already provided significant guidance about the practical enforcement of this fundamental right.

3.3. Occupational health and safety

About 168,000 EU citizens die from work-related accidents and diseases each year and over 7 million are injured in accidents.[111] Work-related accidents and health problems have significant economic and social impacts; therefore health and safety at work has become one of the most advanced social policies of the European Union. This central role has been reassured with the adoption of the EU 2020 Strategy,[112] which seeks to better address health and safety at work in order to increase Europe's competitiveness.

In particular, the **2007-2012 European Strategy for Health and Safety at Work**,[113] which follows from the first Community strategy on health and safety at work 2002-2006, contributes to improving occupational health and safety by outlining actions to be taken by

[109] The legislation has been considered contradictory and in no direct relationship with the aim, see Case C-88/08 *Hütter*, (2009) ECR I – 5325, paras. 43, 48 – 51.

[110] Joint Cases C-250/09 and C-268/09 *Vasil Ivanov Georgiev* (2010).

[111] Hämäläinen P, Saarela KL, Takala J, 'Global trend according to estimated number of occupational accidents and fatal work-related diseases at region and country level'. Journal of Safety Research 40 (2009) 125–139. Elsevier B.V. See also European Parliament Resolution of 15 December 2011 on the mid-term review of the European strategy 2007-2012 on health and safety at work (2011/2147(INI).

[112] Communication from the Commission: Europe 2020- A Strategy for smart, sustainable and inclusive growth, COM(2010)2020 final, 3.3.2010.

[113] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work, COM(2007) 62 final, 21.2.2007.

various stakeholders, at both EU and national levels. In December 2011, the European Parliament adopted a resolution on the mid-term review of the European strategy 2007-2012 on health and safety at work.[114]

Among various issues, the Parliament considered that the economic crisis should not be an excuse to undermine the application of the health and safety standards (point 12) and that SMEs should be helped to set up their prevention policies (point 62). It also stressed the important role of labour inspectorates to ensure that health and safety standards are respected, encouraging Member States to increase staffing levels and resources for the inspectorates (point 51); called for more awareness raising, exchange of good practice and the preparation of guidelines for a better enforcement of the right to health and safety at work (points 45 and 46); and called on Member States to bring more searching scrutiny to bear on the failure to report accidents at work (point 53).

On 28 June 2012, during a conference organised by the Danish Presidency on the 2007-2012 EU strategy on health at work, Commissioner László Andor presented the preliminary results of the on-going evaluation of the current Strategy and declared that these results as well as the outcomes of the upcoming public consultations will "help design a future EU strategy on health and safety at work" for the 2013-2020 period.[115]

Moreover, the European Commission, in close cooperation with the European Agency for Health and Safety at Work (EU OSHA) and the tripartite Advisory Committee on Health and Safety at Work, has elaborated non-binding guidance documents with the aim of helping companies, in particular small and medium sized enterprises, implement the numerous requirements of European directives on occupational health and safety.[116]

In order to improve the level of protection of workers' safety and health, the EU has developed a sound legislative framework. International law on health and safety at work, and the ILO measures in particular, had a major impact on the legal framework of the EU Member States. As highlighted by the Commission 'the ILO standards form the background to a number of policies, laws and collective agreements in the Member States […]. The Member States have already ratified a large number of ILO conventions relating, in particular, to core labour standards, […]'.[117]

The first Directives[118] were adopted in the 1970s on the basis of general internal market harmonisation provisions set out in Articles 100 and 100a of the Treaty Establishing the European Community. These Directives focused on measures for market harmonisation and only slightly touched upon occupational health and safety related issues.

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[114] European Parliament Resolution of 15 December 2011 on the mid-term review of the European strategy 2007-2012 on health and safety at work (2011/2147(INI)), available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0589&language=EN&ring=A7-2011-0409.

[115] 'EU Strategy on Health and Safety at Work – Where We Stand and Future Priorities', speech by Commissioner Andor, Conference on Occupational Safety & Health at Work, Copenhagen, 28 June 2012, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/506&format=HTML&aged=0&language=EN&guiLanguage=en.

[116] See at the EU OSHA website on the European Guidelines http://osha.europa.eu/en/legislation/guidelines/guidelines-intro, 23.4.2012.

[117] See Communication, *Promoting decent work for all - The EU contribution to the implementation of the decent work agenda in the world*, 24.5.2006, COM(2006) 249, p. 4, available at: http://ec.europa.eu/europeaid/what/social-protection/documents/2com_2006_249_en.pdf.

[118] Council Directive 77/576/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the provision of safety signs at places of work, OJ L 229, 7.9.1977, p. 12–21; Council Directive 78/610/EEC on the approximation of the laws, regulations and administrative provisions of the Member States on the protection of the health of workers exposed to vinyl chloride monomer, OJ L 197, 22.7.1978, p. 12–18.

The adoption of the Single European Act in 1987 constituted a major step forward as it introduced the following provision on social policy to the Treaty: 'improvements, especially in the working environment, as regards the health and safety of workers.' The Treaty of Amsterdam further strengthened the EU's legislative competence as it introduced the 'Employment' title and incorporated the rules of the 1992 Agreement on Social Policy into the EU Treaty.[119] The legal foundation for adopting legislation on health and safety at work is now set out in Article 153 of the Treaty of the Functioning of the European Union.

The framework legislation setting the basic rules for the protection of workers' health and safety at work was adopted in 1989, in form of **Directive 89/331/EEC (Framework Directive)**.[120] By introducing minimum health and safety requirements, the Framework Directive aims to eliminate risk factors for occupational diseases and accidents.

The Framework Directive sets obligations for employers in order to ensure the safety and health of workers in every aspect related to work (Article 4), including the duty of preventing occupational risks and providing information and training to workers, as well as organisation and means (Article 6(1)). The Directive also introduces the key elements and principles of risk assessment that employers need to carry out in order to evaluate work related risks (Article 6(3)). In addition, the Framework Directive provides that workers are also responsible to take care of their own safety and health at work in accordance with the training and instructions given to them (Article 13).

A 2004 Commission Communication evaluating this Framework Directive[121] concludes that the Framework Directive has positively influenced national standards for occupational health and safety across Europe.[122]

On the basis of the Framework Directive, the European Union has subsequently adopted a series of **individual Directives** focusing on specific aspects of health and safety at work. These individual Directives define ways to assess specific health and safety related risks, and often set limit values for certain substances and agents. More specific and/or stringent provisions set out in these individual Directives prevail over the more generic provisions of the Framework Directive. The individual Directives cover, *inter alia*, the following areas:

- Work places: e.g. Directive 1999/92/EC on risks from explosive atmospheres, Directive 89/654/EEC on workplace requirements;
- Work equipment: e.g. Directive 2009/104/EC on the use of work equipment, Directive 92/58/EEC on safety and health signs;
- Personal protective equipment: e.g. Directive 89/656/EEC on the use of personal protective equipment;

[119] The Social Agreement aimed at providing a larger role to social partners in the Community legislative processes as well as extending the EC's legislative competences to new areas and introducing qualified majority voting. The provisions of the Social Agreement were attached to the Treaty as an Annex. The Amsterdam Treaty incorporated the provisions of the Social Agreement into the 'Social Chapter' of the Treaty. For more information about this Agreement please see http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/agreementonsocialpolicy.htm.

[120] Council Directive 89/391/EEC 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.

[121] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the practical implementation of the provisions of the Health and Safety at Work Directives 89/391 (Framework), 89/654 (Workplaces), 89/655 (Work Equipment), 89/656 (Personal Protective Equipment), 90/269 (Manual Handling of Loads) and 90/270 (Display Screen Equipment), COM(2004) 62 final, 5.2.2004.

[122] Moreover, the case-law of the CJEU has often dealt with health and safety issues. Among the most important judgments are Case C-127/05, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, (2007) ECR I-4619 on the duty of employers to ensure the health and safety of workers.

- Specific hazards (including biological, physical and chemical hazards): e.g. Directive 2000/54/EC on biological agents at work, Directive 98/24/EC on risks related to chemical agents at work, Directive 2003/10/EC on noise;
- Work with visual display units: e.g. Directive 90/270/EEC on display screen equipment;
- Handling of heavy loads involving risk of back injury: e.g. Directive 90/269/EEC on manual handling of loads;
- Temporary and mobile work sites: e.g. Directive 92/57/EEC - temporary or mobile construction sites;
- Specific sectors and workplaces: e.g. Directive 92/104/EEC - mineral-extracting industries, Directive 93/103/EC - work on board fishing vessels;
- Specific groups of workers: e.g. Directive 92/85/EEC - pregnant workers and Directive 94/33/EC on the protection of young people at work.[123]

In addition, legislation adopted with the objective of establishing the internal market, on the legal basis of Article 114 TFEU, may also set rules that concern the health and safety of workers. These Directives ('New Approach Directives') are rather technical and set essential requirements on the basis of which standard setting bodies (CEN,[124] CENLEC[125] and ETSI[126]) elaborate harmonised technical standards. 'New Approach Directives' with occupational health and safety aspects include Directive 2010/35/EU on transportable pressure equipment and Directive 2006/42/EC on machinery.[127]

Legislation other than the above may also contribute to the aim of improving health and safety at work. This last category covers both Directives (e.g. Directive 91/414/EEC - plant protection products, Directive 2000/78/EC - equal treatment) and Regulations (e.g. Regulation (EC) No 1907/2006 on Registration, Evaluation, Authorisation and Restriction of

[123] Directive 1999/92/EC on minimum requirements for improving the safety and health protection of workers potentially at risk from explosive atmospheres, OJ L 134, 7.6.2000, p. 36–36; Council Directive 89/654/EEC concerning the minimum safety and health requirements for the workplace, OJ L 393, 30 December 1989, p. 1–12; Directive 2009/104/EC concerning the minimum safety and health requirements for the use of work equipment by workers at work, OJ L 260, 3.10.2009, p. 5–19; Council Directive 92/58/EEC on the minimum requirements for the provision of safety and/or health signs at work, OJ L 245, 26.8.1992, p. 23–42; Council Directive 89/656/EEC on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace, OJ L 393, 30.12.1989, p. 18–28; Directive 2000/54/EC on the protection of workers from risks related to exposure to biological agents at work, OJ L 262, 17.10.2000, p. 21–45; Council Directive 98/24/EC on the protection of the health and safety of workers from the risks related to chemical agents at work, OJ L 131, 5.5.1998, p. 11–23; Directive 2003/10/EC on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents, OJ L 42, 15.2.2003, p. 38–44; Council Directive 90/270/EEC on the minimum safety and health requirements for work with display screen equipment, OJ L 171, 4.7.1990, p. 30–30; Council Directive 90/269/EEC on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers, OJ L 156, 21.6.1990, p. 9–13; Council Directive on the implementation of minimum safety and health requirements at temporary or mobile construction sites, OJ L 245, 26.8.1992, p. 6–22; Council Directive 92/104/EEC on the minimum requirements for improving the safety and health protection of workers in surface and underground mineral-extracting industries, OJ L 404, 31.12.1992, p. 10–25; Council Directive 93/103/EC concerning the minimum safety and health requirements for work on board fishing vessels, OJ L 307, 13.12.1993, p. 1–17; Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348, 28.11.1992, p. 1–7; Council Directive 94/33/EC on the protection of young people at work, OJ L 216, 20.8.1994, p. 12.

[124] European Committee for Standardisation.

[125] European Committee for Electrotechnical Standardisation.

[126] Telecommunications Standards Institute.

[127] Directive 2010/35/EU on transportable pressure equipment and repealing Council Directives 76/767/EEC, 84/525/EEC, 84/526/EEC, 84/527/EEC and 1999/36/EC, OJ L 165, 30.6.2010, p. 1–18; Directive 2006/42/EC on machinery, and amending Directive 95/16/EC, OJ L 157, 9.6.2006, p. 24–86.

Chemical Substances (REACH), Regulation (EC) No 1272/2008 on the Classification, Labelling and Packaging of substances and mixtures (CLP)).[128]

While a thorough comparison of the international and EU standards on health and safety at work is not possible within the scope of this study, it can be concluded that the EU has developed a comprehensive and advanced regulatory framework in the area of occupational health and safety. The European Parliament has significantly contributed to the development of EU legislation on health and safety at work. It has several times called on the European Commission to improve existing legislation, by amending e.g. Directive 92/85/EEC on pregnant workers and Directive 2000/54/EC on biological agents at work.[129] The European Parliament has also rejected the Commission's proposals at a first reading within the ordinary legislative procedure on the basis that they did not provide a sufficient level of protection to workers against occupational health and safety risks.[130]

Moreover, given the emergence of new technologies (including nanomaterials, electromagnetic emitting devices and ionising radiation) the European Parliament has called on the European Commission to assess the potential risks arising from the use of new technologies and to take legislative actions to ensure that new technologies are covered by existing legislation related to health and safety at work.[131] Finally, the European Parliament also aims to raise the awareness of the general public and of policy makers on new emerging occupational health and safety challenges, such as musculoskeletal disorders, by preparing studies[132] and encouraging the work of interests groups (e.g. the European Parliament Interest Group of Rheumatic Disorders). These areas are not regulated comprehensively by international law instruments and the EU therefore has the potential to fill in these gaps.

In conclusion, the EU has developed a comprehensive and advanced policy and legal framework for the protection of the right to health and safety at work.

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[128] Council Directive 91/414/EEC concerning the placing of plant protection products on the market*, OJ L 230,* 19.8.1991, p. 1–32*;* Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22*;* Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ L 396, 30.12.2006, p. 1–849; Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006, OJ L 353, 31.12.2008, p. 1–1355.

[129] European Parliament legislation resolution of 20.10.2010 on the proposal for a directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, 2008/0193 (COD), European Parliament Resolution of 6.7.2006 on protecting European healthcare workers from blood-borne infections due to needle stick injuries (PA_TA (2006)0305).

[130] European Parliament Draft Legislative Resolution on the proposal for Directive of the European Parliament and of the Council on amending Directive 2002/15/EC on the organisation of the working time of persons performing mobile road transport activities 2008/0195(COD).

[131] European Parliament resolution of 15.12.2011 on the mid-term review of the European strategy 2007-2012 on health and safety at work (2011/2147(INI), European Parliament Resolution of 24.4.2009 on the regulatory aspects of nanomaterial (2008/2208(INI)), European Parliament Resolution of 2 April 2009 on health concerns associated with electromagnetic field (2008/2211(INI).

[132] European Parliament study on 'Occupational health and safety risks for the most vulnerable workers' see at: http://www.europarl.europa.eu/document/activities/cont/201108/20110829ATT25418/20110829ATT25418EN.pdf.

4. NATIONAL EXPERIENCES ON THE ENFORCEMENT OF A SELECTION OF FUNDAMENTAL WORKERS' RIGHTS

This section summarises the enforcement situation for the selected rights in each of the seven EU Member States under review. For each country, it explains briefly the legal framework and the impact of EU/international law thereon. It also analyses the effectiveness of the enforcement mechanisms for the three fundamental workers' rights and provides suggestions to improve the situation.

The complete national reports are annexed to the study. They are structured by fundamental right in order to allow for specific analysis of the enforcement situation and for clear comparison of the national reports. They present the relevant legal framework at the Member State level, review the specific enforcement systems available, and analyse in detail the functioning of these systems, highlighting both problems and best practices.

4.1. The Greek (EL) case

The **freedom of association** in order to form trade unions and the **right to collective bargaining** are explicitly protected under the Greek Constitution. Apart from the Constitution, they are also regulated under numerous laws, the main one being Law 1876/1990 'Free collective bargaining and other provisions'.

Workers' right to associate is enforced by the criminal courts while the main mechanisms for enforcement of the right to collective bargaining are reconciliation, mediation and arbitration. Reconciliation is available for the resolution of all worker-related disputes regardless of whether they arise within the context of the negotiations for the conclusion of a collective labour agreement. Mediation may be considered as an extension of the collective bargaining process with the assistance of an independent, neutral third party; the mediator issues an award which, if accepted by both workers' trade unions and employers' federations, leads to the conclusion of a collective agreement. Arbitration plays a supplementary role in the collective bargaining process as it can be used when a solution is not found through reconciliation or mediation.

These mechanisms have undergone significant changes since the signature of the first Memorandum by Greece with the EU and the International Monetary Fund in 2010. Under the previous structure, workers' trade unions could unilaterally resort to arbitration if certain conditions were met. As of 2012, recourse to arbitration is possible only if both parties agree. This means that if employers' federations refuse to negotiate collectively, workers cannot resort to arbitration unilaterally.

Furthermore, since 2010, mediators and arbitrators are explicitly obliged by the legislation to take account of the competitiveness of the company and the general economic conditions: as a consequence wage increases will be rarely decided on, even if such increases were permitted by the legislation. Moreover, arbitrators may only rule on the issue of the basic (minimum) wage and not on issues regarding the rest of the working conditions (e.g., benefits, financial or not). Finally, the introduction of a general competence for associations of persons (i.e., not only trade unions) to negotiate and conclude enterprise collective agreements, especially in small and medium enterprises, further weakens workers' negotiating power and makes them more vulnerable to employers' demands.

Although international law has had a significantly positive influence on the protection of the freedom of association and the right to collective bargaining in Greece, the main difficulties identified regarding the enforcement of these rights relate to the changes introduced since

2010. Perhaps, among its other suggestions for structural reforms in Greece, the EU could also include proposals which would ensure that workers' right to collective bargaining is, in practice, effectively exercised. For example, the EU could suggest that the relevant legislation is amended to allow a party to unilaterally appeal to arbitration if the other party refuses, in bad faith, to negotiate collectively.

Age antidiscrimination was introduced into the Greek legal order for the first time with Law 3304/2005 which transposes Directive 2000/78/EC. Claims for violations of the principle of age antidiscrimination may be brought both before the civil and the criminal courts. The Greek Labour Inspectorate (SEPE) is also entrusted with the task of supervising whether the principle of age antidiscrimination is violated; SEPE may order violators to comply with the legislation within a reasonable timeframe, impose administrative sanctions or instigate criminal proceedings. Furthermore, the Greek Ombudsman may intervene in cases of age antidiscrimination when the public authorities are involved. However, it cannot impose sanctions or annul illegal actions of the public administration.

The first important difficulty in the enforcement of age antidiscrimination in Greece is that the Greek legislation itself often provides for differential treatment on the basis of age, giving contradictory signals to citizens. For example, the Second Memorandum of Economic and Financial Policies Law and Law 4046/2012 introduced direct discrimination against younger workers providing that the minimum wage level as determined by the National General Collective Agreement would be lowered by 32% for workers below 25 years old and by 22% for those above 25 years old. Further, there is a lack of awareness among potential victims of the equality legislation and the complaint procedures available to them, resulting in frequent failure to recognise and reluctance to report such discrimination. Finally, there are also difficulties in the operation of the enforcement mechanisms: with regards to the non-judicial ones, and especially SEPE, limited resources are available and as a consequence the number of inspections made is not sufficient. Moreover, the potential cost and extreme length of judicial proceedings is having a significantly deterrent effect on victims. As a consequence, few positive experiences concerning the enforcement of age antidiscrimination have been identified. These include the introduction of measures aimed at affording increased protection to older workers in certain cases and the adoption of a reversed burden of proof before judicial and administrative authorities, as per the requirements of Directive 2000/78/EC.

Financial reinforcement of the mechanisms established for the protection of the right to age antidiscrimination, especially SEPE, an increase of awareness raising activities, efforts to ensure the timely adjudication of claims before the Civil Courts and a careful evaluation of the justifications for draft legislation to introduce differentiated treatment on the ground of age would be significant steps to enforce this right further.

The right to health and safety at work is regulated by numerous laws, most of which have been adopted to transpose EU and international legal instruments in the Greek legal order. Enforcement of the right to health and safety at work is entrusted with SEPE as well as the civil and criminal courts while a limited role is reserved for workers' committees on health and safety at work.

The main difficulties pertaining to the enforcement of the right to health and safety at work include SEPE's lack of resources to inspect smaller enterprises; SEPE inspections are now focused on larger enterprises which, however, usually comply with the legislation. Also, the Centres for the Prevention of Occupational Hazard and the Occupational Health and Safety Inspection Departments are not equipped with laboratories for measuring chemical – physical and biological agents. Moreover, SEPE usually inspects work-places after accidents have occurred instead of acting pre-emptively.

Additionally, when accidents occur in the course of employment, employers are held liable for the material damages of the workers insured with the Social Insurance Organisation (IKA) only where the accident is attributable to an intention on the part of the employer.

Positive experiences concerning the enforcement of the right to health and safety at work include the development by SEPE of specialised checklists in order to ensure consistent and effective enforcement of the health and safety at work legislation and its regular participation in information campaigns as well as the high compensations for moral damages usually awarded by courts.

The right to health and safety at work would be better protected if SEPE were afforded increased financial resources, updated its infrastructure, obtained laboratories, was equipped with more legal experts for the imposition of fines and the initiation of legal proceedings, and coordinated its activities with those of other inspecting bodies (such as IKA, which monitors the implementation of insurance legislation, and the Body Against Financial Crime, which monitors the implementation of tax legislation). Finally, in cases of repeated accidents due to violations of the health and safety at work legislation, SEPE should have the power to impose heavier fines or the employer should be obliged to pay increased insurance contributions to IKA.

4.2. The French (FR) case

In France, **freedom of association** is provided by Article 34 of the 1958 Constitution. It includes the right to create or join a trade union and to strike. The right to **collective bargaining** is not enshrined as such in the Constitution but is guaranteed within the right for workers to participate in the determination of their working conditions. All social laws are codified in the French Labour Code. In 2001, the UN's Committee on Economic, Social and Cultural Rights urged France to ensure the right of smaller and newer unions to participate in collective bargaining. The law of 20 August 2008 on social democracy reformed the rules for determining whether trade unions are 'representative', i.e. empowered to negotiate collective agreements that apply to an economic sector. The law of 15 October 2010 enabled workers in small companies (fewer than 11 workers) to participate in union elections. Since the enactment of the law on the modernisation of social dialogue of 31 January 2007, a code of conduct provides for the presentation of social laws or bills to representative unions before they are enacted by the French Parliament, strengthening social dialogue. In the public sector, two laws have recently been adopted regarding the right to strike in the area of public transportation, providing for obligatory bargaining before notifying a strike.

Trade unions can bring legal actions before labour courts and civil courts to enforce agreements negotiated between employers and trade unions. Employees can also bring actions for compensation and for criminal sanctions against the employers who breach the obligation to negotiate. Workers have also other means to enforce their freedom of association and right of collective bargain which include the right to strike, boycotts, blockades, petitions and refusal of overtime. In addition, a National Commission for Collective Bargaining has been created to advise the Labour Minister on topics including collective bargaining and working relationships.

Court proceedings are too lengthy to ensure effective enforcement of these rights, and some agreements are not enforced. On the other hand, the reforms led to improvements in the representativeness of trade unions (now elected by workers, even in small companies with less than 11 employees, instead of being selected by the government) and to the increase of the number of collective agreements signed in companies. Moreover, thanks to the code of conduct trade unions are consulted on upcoming legislation and by setting up

mandatory collective bargaining, dialogue between public transportation employers and trade unions has been significantly improved and has prevented conflicts.

Recommendations to step up the enforcement of this right would include enforcing agreements and adopting measures to speed up judicial proceedings.

The national legislation on the **prohibition of age discrimination** was influenced by Directive 2000/78/EC, transposed partly by law 2001-1066 of 16 November 2001 relating to antidiscrimination in general, and partly by Law No 2008-496 of 27 May 2008 on adaptation to EU antidiscrimination law. The prohibition of age discrimination is included in the Labour Code and covers all areas of work including recruitment and promotion. Recently, a Decree of 28 August 2006 has provided the possibility for employers to offer unemployed workers over 57 years old a fixed-term contract (18 months). In addition, workers over 50 years of age are allowed 3 years of unemployment insurance instead of the 2 years provided to other workers. Moreover, companies of more than 50 employees are now obliged to prepare a safeguard work plan (*plan de sauvegarde de l'emploi*) focusing on senior workers when at least 10 workers need to be made redundant (Decree No. 2009-560 of 20 Mai 2009).

Although French legislation protects workers against age discrimination, enforcement remains poor. Enforcement powers lie with the courts, the staff delegate (*délégué du personnel*), the union representatives (*délégués syndical*) and the Ombudsman. The staff delegate and the union representative have the right to bring an action to court on behalf of a worker discriminated against based on age or to inform the labour inspectorate; the Ombudsman can refer cases to the prosecutor and present observations to courts.

The main difficulty for the enforcement of age antidiscrimination is the lack of awareness by workers. Only a few cases have been brought to court and the number of claims sent to the Ombudsman has not significantly increased over the years. Legislation itself makes some distinctions on the basis of age that could be considered discriminatory. Even when this type of legislation aims at positive action to support workers of a certain age, the results can be contradictory. However, recent judicial cases have been widely covered by the media and represent steps towards better enforcement of the right, clarifying its scope and encouraging other workers to bring their cases to court.

The main measure to step up the enforcement of this right is to increase the awareness of equality measures by workers and employers. In particular, measures to encourage employers to consider the added value of the professional experience of older workers will support the enforcement of this right. Furthermore, decision-makers should ensure that legislation which introduces (positive) discriminatory practices for a specific age category of workers is proportionate. They should also step up efforts to communicate to workers in all age groups the necessity of such measures. Finally, speedier trials will enable better judicial enforcement of this right.

The **right to health and safety at work** is closely regulated by French law. Laws on health and safety have evolved to transpose the EU acquis and have integrated rulings of the Court of Cassation (*Cour de Cassation*) which extended the liability of employers. ILO conventions also have a direct impact as they are often referenced in court judgments. The right of health and safety at work is regulated in the Labour Code and in the Social Security Code.

Different actors have the responsibility to enforce the right to health and safety at work: workers, employers, union representatives, the Committee for health and safety at work, inspectors, the National Health Insurance Commission and the courts. Together with inspectors, the Committee for health and safety and the union representative play a major role in the enforcement of workers' right to health and safety, monitoring the enforcement

of health and safety standards, alerting the employer to potential risks, issuing recommendations and reporting to the authorities.

Problems for the enforcement of this right include the still low number of inspectors and the non-binding nature of the measures of the Committee. Positive aspects are the setting of the obligation for employers to ensure health and safety at work which stems from case-law, the effectiveness of the inspectors' actions - when they act - and a new facilitated procedure to submit and process the declaration of accidents and professional diseases.

The main recommendation to reinforce the protection of this right would be to further increase the number of labour inspections.

4.3. The Hungarian (HU) case

Freedom of association is enshrined in the new Basic Law and in the new Act on Association of Hungary. The general rules set out in these two pieces of legislation are applicable to trade unions. However, no specific legislation regulates the activities of the trade unions. The **right of collective bargaining** is also newly included in the Basic Law. The main enforcement mechanisms in Hungary for these rights are the judiciary as well as alternative dispute resolution mechanisms (ADR) such as consultation, mediation and arbitration promoted by the Labour Mediation and Arbitration Service (*Munkaügyi Közvetítői és Döntőbírói Szolgálat*, MKDSZ), a state-supported independent organisation. The Equal Treatment Authority can also hear complaints related to exercising membership and participation rights.

The new Labour Code, which entered into force in July 2012, enhances the regulatory role of collective agreements. It enlarges significantly the role and influence of social partners in labour market regulation, simultaneously increasing their responsibility and reducing the regulatory functions of the state. However, the Code also cuts back on the enforcement of related rights by, for example, reducing the protection previously available to trade union representatives for carrying out their functions in enterprises, eliminating the right of veto against unlawful measures by the employer negatively affecting workers, and reducing the monitoring of working conditions.

Collective bargaining remains highly decentralised in Hungary. The new potential for works agreements (concluded by 'cooperative' works councils at company level) to substitute for collective agreements, under specific conditions, may also undermine the effectiveness of collective bargaining. Even though MKDSZ services are typically successful, they are not used often. Strike regulations are inadequate and highly controversial, which may help to account for the low number of strikes in Hungary. Moreover, the narrowing scope of national level tripartite social dialogue also presents a serious challenge for Hungarian trade unions.

Recommendations to improve the enforcement of these rights include: adoption of specific rules for trade unions to ensure legitimacy and legal certainty, clarification of the right to strike (e.g. a legislative definition of 'essential services'), reinvigoration of national tripartite dialogue especially for the adoption of new laws, further promotion of alternative dispute resolution (as it enjoys a low level of utilisation), and strengthening of sectorial level bargaining (through Sectorial Dialogue Committees - ÁPBs).

The comprehensive Hungarian Antidiscrimination Code (Act CXXV of 2003) applies the same rules for all **discrimination** grounds; thus, age is a protected characteristic. Its aim of increasing the enforcement of antidiscrimination rights is slowly being realised. **Age** especially is becoming a central reference in discrimination cases, with EU law being the most important driver of this reform.

The Equal Treatment Authority and the courts are the main enforcement mechanisms for this right. The Authority receives the largest number of age-related complaints in relation to the exclusion of persons over 50 from the labour market.

The main problems in the enforcement of this right include the low level of law-awareness, the difficulty to prove discrimination based on age and to adopt positive measures, and the low utilisation of class actions. The labour law provisions designed to enhance employment security for those approaching pensionable age, but which reduce security for those who have already reached that age, cause legal uncertainty. It is difficult to assess the discriminatory impact of these measures. However, positive experiences include a continuously increasing level of awareness, the growth of client-centred services and out-of-court settlements in the Authority's practice, and a targeted measure supporting the entry of young workers in the labour market.

Recommendations to step up the enforcement of this right include building on the positive experiences, such as awareness-raising activities, and the further promotion of out-of-court settlements before the Equal Treatment Authority.

Hungarian **occupational health and safety legislation** is well developed and essentially in line with European standards. The Directorate for Occupational Safety and Health and Labour Affairs of the National Labour Office (NMH) is the main enforcement agency. However, the latest changes to the new Labour Code (e.g. concerning reforms to employers' liability) and the recent reorganisation of the inspectorate have led to some reductions in overall standards.

In practice, compliance and enforcement deficits can be detected, mostly due to low levels of awareness and resources for health and safety from employers (especially SMEs), the limited number of inspectors and their resources, and the lack of an overarching national policy and evaluation mechanism. The positive experiences include policies on free information services, new guidelines for inspections, new streamlined methods for fining instructions, the warning system for SMEs by inspectors, and the ongoing work of the tripartite Labour Safety Committee.

More awareness raising is crucial for further enforcement of this right. Other recommendations include: strengthening of the role of workers' health and safety representatives, providing for such representatives in small enterprises with fewer than 50 employees, and the active use of tripartite dialogue and state support for the activities of the Labour Safety Committee. Furthermore, the introduction of real insurance-related incentives in occupational safety and health and the adoption of the long-planned separate occupational accidents and diseases insurance branch (a *bonus-malus* system) would enhance the enforcement of occupational health and safety rights.

4.4. The Italian (IT) case

Freedom of association and the right to collective bargaining in Italy follow a voluntary model. However, these rights are recognised by ILO Conventions and EU law applicable in Italy and by the Constitution (Articles 18, 39, 40), the Civil Code (Articles from 2067 to 2081) and special laws (e.g. the Workers' Statute - Law n. 300/1970, D. Lgs. 29/1993, Law 146/1990). Negotiations for collective agreements in the private sector mainly take place at two levels: national level covering all employees and company level.

Freedom of association and the right to collective bargaining are well protected by a number of mechanisms. The most important worker representation bodies at company level are the RSU (*'Rappresentanza Sindacale Unitaria'*) elected by all employees and the RSA (*'Rappresentanza Sindacale Aziendale'*) elected by workers affiliated to a trade union in companies with more than 15 employees.

Specific laws and collective agreements may also provide for joint committees of workers and employers to address specific issues. For example, a January 2009 agreement signed by the government, employers' associations and two major trade unions provides Conciliation and Arbitration Boards for the interpretation and application of collective agreements.

Article 28 of the Workers' Statute (Law No. 300/1970) provides that, when an employer indulges in anti-union behaviour, trade unions can demand an immediately enforceable judicial order requiring such behaviour to cease. In addition, the Provincial Labour Directorate can issue administrative fines against employers for breaches of information and consultation rights. In the field of fundamental services or jobs, an independent Guarantee Commission (*'Commissione di Garanzia'*) monitors strike calls in order to prevent conflicts and to secure agreements in advance whereby essential services are maintained.

All these instruments represent positive developments. The entry into force of the Charter of Fundamental Rights of the European Union is also a positive development, as judges can now refer to it in the reasoning of their decisions reinforcing the protection of a number of workers' rights.

However, the diminished role of trade unions poses a major challenge to the enforcement of these rights. This is due partly to problems of representativeness (workers in small and medium enterprises are often not represented by trade unions and not covered by collective agreements), and partly because of recent disagreements among the main trade union confederations in Italy. Moreover, joint committees are not always functioning properly; as a result effective consultation of workers in enterprises is rare. Finally, judicial procedures related to the protection of these rights are lengthy.

Potential steps that could reinforce the protection of the rights of freedom of association and collective bargaining in Italy include: extended coverage of workers by collective agreements in all enterprises, the possibility of trade union actions even in small and medium sized enterprises, and a modification in the constitution of joint committees such as the Conciliation and Arbitration Boards (by labour practitioners, not negotiators).

European Union legislation introduced the concept of **age antidiscrimination** into the Italian legal framework with Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation transposed by D. Lgs. 216/2003 on equal employment opportunities. D. Lgs. 276/2003 on reform of the labour market and Law 108/1990 on individual dismissals make distinctions on the basis of age. Italian legislation includes some positive measures, but also some that put workers in a specific age group in more disadvantageous positions without clear justification. The 2003 law introduced particular contracts (*'contratti di svantaggio'*) for categories such as young people aged 18 to 29 and disadvantaged workers, and the 1990 law provides that workers who reach the age of 60 and are entitled to old age pension can be made redundant.

For workers in the private sector there are no bodies aiming at preventing age discrimination. While collective contracts may empower extra-judicial bodies to monitor the respect of labour rights, their remit does not explicitly cover antidiscrimination. In the public sector, a 'Central Guarantee Committee' has a monitoring and advisory role in the field of equal opportunities but has no sanctioning powers.

The main enforcement mechanism for age discrimination is the judiciary. However, Italian jurisprudence is inconsistent on the discriminatory nature of legal provisions which distinguish workers on the basis of age. Moreover, some rules such as the 'entry contract' (*'contratto di inserimento'*) for people aged 18 to 29, which allows collective agreements to place the worker in inferior contractual conditions than generally recognised for the same

duties, seem apparently in conflict with the European Court of Justice's decision in *Mangold* and have not yet been tested. Age discrimination can also be difficult to prove in court. Finally, the main challenge for the enforcement of this right seems to be low awareness of the issue.

The setting up of the Central Guarantee Committee and the introduction by D. Lgs. 216/2003 of a special rapid court procedure (2 or 3 months) against discrimination, including the possibility for a judicial order against the violator, are positive examples.

Important steps to reinforce the protection of this right would include an awareness-raising campaign and the clarification of antidiscrimination rules, especially in the recruitment process.

Concerning **health and safety at work**, the TUSL – Single Act on Safety at Work 2008 is quite a comprehensive piece of legislation and both the Civil and Criminal Codes provide sanctions for breaches of this right. Moreover, the EU acquis and a number of ILO Conventions reinforced the legal framework for the protection of this right.

Enforcement mechanisms aim at prevention or redress (civil, administrative and criminal provisions). Responsibilities are shared among employers, workers and their representatives, the Permanent Advisory Commission on Health and Safety at Work, and the inspectors of the Labour and Health Ministries and their local branches. One of the main preventive measures available to the employer is the adoption of a specific company regulation (*'modello di organizzazione e gestione'*) for prevention in the field of health and safety at work, and controls. When an accident leads to injury or death of a worker, victims may seek compensation at courts. Trade unions and associations of victims' relatives can intervene in the process. In some cases, trade unions have qualified as parties with their own right to compensation.

Undeclared work poses major challenges with respect to prevention. Due to limited resources, inspectors only focus on major cases that draw media attention. Prevention has also been hindered by the adoption of a new Decree n. 5 (9 February 2012) on the simplification of laws and procedures, which reduced controls over companies, as well as by the financial crisis which has limited the ability of small and medium sized enterprises to invest in occupational health and safety and training. Moreover, the number of inspectors is inadequate to effectively cover all of Italy and compensation proceedings for damages due to the violation of health and safety rights are very costly and lengthy.

Positive aspects regarding the enforcement of this right include the sound and well-organised legal framework and the '*modello di organizzazione e gestione'* for prevention in the field of health and safety. The setting up of the Permanent Advisory Commission on Health and Safety at Work, the allocation of funds, and training initiatives provided by public authorities were also particularly useful. The 2011 statistics of INAIL (National Institute against Accidents at Work) show a decline in workplace accidents.

Measures such as financial support by public institutions for training courses in small enterprises, information campaigns addressed to employers and employees including the spreading of good practices, an increase in the numbers and resources of inspectors, and the shift of the burden of proof to the employer when an employee denounces a failure to respect health and safety standards in a situation of undeclared work, could further enhance enforcement of this fundamental workers' right.

While this report was being drafted, a labour market reform has been adopted: Law n. 92 of 28 June 2012 '*Disposizioni in materia di riforma del mercato del lavoro in una prospettiva di crescita*' (Rules on labour market reform in a growth perspective).

A new work entry contract for young people, '*apprendistato*' (apprenticeship), and a new monitoring system for the effects of the reform by the government and social partners have been introduced.

4.5. The Dutch (NL) case

The Dutch Constitution includes the **freedom of association**, the **right to collective action** and the right not to be discriminated against as fundamental rights. International law plays an important role in the Dutch legal system, in particular regarding freedom of association and the right to collective bargaining. International conventions such as the European Convention on Human Rights (ECHR) and the European Social Charter (ESC) are directly applicable in the Netherlands. The right to strike was recognised in the Netherlands through case law based on these conventions.

The Law on Collective Agreements (*Wet op de collectieve arbeidsovereenkomst/Law CAO*), adopted in 1927, regulates what a Collective Agreement (CAO) is, who is bound by it and under what timeframe. CAOs are civil agreements between social partners relating to working conditions, to which the government is not a party. The Law on Declaring Provisions of Collective Agreements Binding and Void of 1937 (*Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten/Law AVV*) stipulates that the Minister of Social Affairs and Employment, at the request of either an involved employer or employee, can declare a CAO to be generally binding for an entire industry.

Certain issues cannot be the subject of collective bargaining (e.g., equal probation period for employee and employer; minimum wage; prohibition to terminate the employment contract during sickness lasting less than 2 years; and equal treatment on the basis of gender). Trade unions may involve the Works Councils in CAO negotiations. When employees and employers fail to reach agreement on a CAO, they can decide to seek mediation from a third party. Mediation can also take place in negotiations between civil servants and the government regarding a CAO. Permanent (statutory) dispute settlement mechanisms are absent in the Netherlands.

The enforcement of collective agreements is mainly the responsibility of the parties involved. The government facilitates their enforcement by providing the possibility to establish control bodies for generally binding CAOs, by carrying out investigations (based on Article 10 AVV) on the application of generally binding agreements, and by overseeing the collaboration and exchange of information between the SWZ Inspectorate and the social partners. Workers can also go to court regarding violations of this right. Strikes are relatively rare in the Netherlands (21 in 2010).

The major challenge to the enforcement of the right to collective bargaining relates to increased legal uncertainty about its scope due to changing circumstances: the identification of the roles and responsibilities of the different parties involved in 'atypical' employment relationships (such as interim workers), the coverage of these workers by collective agreements and the consequences of the *Laval* case for the collective bargaining system. In general, however, the consulted stakeholders consider that existing enforcement mechanisms are effective. Steps for further improvement could include a more flexible approach on the conditions under which the Inspectorate of the Ministry of Social Affairs and Employment (*Inspectie van het Ministerie van Sociale Zaken en Werkgelegenheid*) (SZW Inspectorate) can proceed to investigations and the clarification of the applicable rules, including the relationship between competition law and collective agreements, precluding the setting of minimum prices for subcontracted work, and timely adoption of EU provisions regarding the right to take collective action in the context of the freedom of establishment and the freedom to provide services.

The main national provision on **discrimination** is Article 1 of the Constitution. This article forbids discrimination on the basis of religion, beliefs, political affiliation, race, gender or on any other ground. It does not explicitly refer to age. Pursuant to Article 1, the General Law on Equal Treatment (AWGB) was adopted in 1994. Discrimination on the grounds of age within an employment relationship is prohibited by the Law on Equal Treatment of Age in Employment (*Wet gelijke behandeling op grond van leeftijd bij de arbeid*) (WGBL) of 17 December 2003. This law (in combination with a law on disability) transposes Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. Employees who believe their rights under the WGBL have been violated may go to court, request a decision from the Equal Treatment Commission (CGB), appeal to the National Ombudsman, ask for the advice or mediation of an antidiscrimination bureau (ADBs), or alert the SZW Inspectorate.

Difficulties in the enforcement of the right to age antidiscrimination include the fact that the SZW Inspectorate's competences are limited to identifying age discrimination in job vacancy advertisements; judgment whether there is an actual case of discrimination is reserved to the courts or the CGB. Another obstacle to the implementation of age antidiscrimination legislation is the reluctance of workers to report discrimination in order not to endanger their labour relationship. Finally, the increasing unemployment rates for workers over the age of 55 also raise concerns of extended age discrimination in the labour market.

Positive experiences include several projects to inform organisations about the Equal Treatment Act on age, the issuing of decisions by the CGB to clarify the correct application of this right, and the development of checklists for employers to ensure their vacancies are not age-discriminatory. An evaluation by the CGB concluded that the Dutch legal framework contributes to preventing and combating age discrimination and may increase employment participation, while another study revealed that CGB petitioners consider that the treatment of their petition by the CGB is a positive experience. The level of respect for this right in the Netherlands is relatively high. Nonetheless, future measures could focus on facilitating the reporting of cases by providing information and raising awareness.

Employees are entitled to a **safe and healthy workplace**. The Law on Working Conditions of 18 March 1999 (*Arbeidsomstandighedenwet or Arbowet*) is a framework law with the general rules and guidelines on working conditions. The responsibility for a safe and healthy workplace primarily rests with the employer. Employers and employees (or their representatives) can establish a 'work catalogue' (*Arbo-catalogus)* at the sectorial or company level in which they agree on how to ensure the standards of the Law on Working Conditions. After approval by the SZW Inspectorate, the catalogues form the basis for monitoring and enforcement. The Inspectorate also ensures through thorough checks that standards are applied. At the enterprise level, Works Councils (*Ondernemingsraad*) or worker's representatives (for enterprises between 10 and 50 employees) also monitor the enforcement of the right to health and safety at work. For companies with fewer than 10 employees, employers shall consult the concerned employees (Article 12 (3)).

Among the preventive measures for the enforcement of the right to health and safety at work, catalogues are recognised as effective. They are available for more than half of the working population. However, only 12% of employers are said to be familiar with them. Other problems underlined by stakeholders include the lack of health and safety representatives and the limited capacity of the SZW Inspectorate. The possibility to stop working in case of imminent danger, the right to lodge a secret complaint with the Inspectorate, and free legal assistance provided by trade unions are all positive aspects for the enforcement of this right.

Making employers and workers aware of the catalogues and strengthening their implementation practice as well as providing for a workers' representative for health and safety in companies would further reinforce protection of this right.

4.6. The Swedish (SE) case

Freedom of association and the right to collective bargaining have been recognised in Sweden by collective agreements since the beginning of the 20th century. The 1938 *Saltsjöbaden* Agreement, which is still in force, established a right to collective bargaining. The Co-Determination in the Workplace Act remains the central piece of legislation regarding workers' rights; it lays down the right to collective bargaining and to get information from employers at the workplace. Other legislation protects related rights such as the activities of trade union representatives and workers' representatives in company boards.

The Swedish system is based on consensus, negotiations among social partners, and a high degree of unionisation. Around 90 percent of employees in Sweden are protected by collective agreements and over 70 percent are unionised. The impact of EU law on the right of freedom of association and collective bargaining in Sweden is particularly evident in the legislative amendments (*Lex Laval*) adopted in the aftermath of the *Laval* case of the Court of Justice on the right of EU workers in Sweden to enjoy the same level of protection of their right to collective bargaining as their Swedish colleagues. The Court of Justice held that unions had overstepped their right to 'blockade' (i.e. to undertake a labour action which aims to prevent the counterpart from utilising its facilities). This case resulted in lively debates in Sweden where many wish to continue to deal with labour market issues through negotiations among the social partners, and are resistant to rules coming from case law or legislation, especially at the EU level.

The 1974 Judicial Procedure in Labour Disputes Act sets a special procedure for settling work-related disputes in the Labour Court (AD), to which only trade unionists have access. The Labour Court is competent to hear collective dispute cases and can award damages for the violation of freedom of association. If the plaintiff employee is not a trade union member nor represented by a union, the complaint must be lodged before the district court.

Disputes arising when the social partners seek to conclude a collective agreement should first be resolved through negotiation. Collaboration agreements, i.e. agreements on bargaining procedures, can also be signed. The Co-Determination in the Workplace Act obliges both parties to participate in the negotiation process. The Swedish National Mediation Office is responsible for mediating collective labour disputes. Mediation may be either voluntary or compulsory (if there is a risk of industrial action or if such an action has already been initiated). Arbitration of collective disputes is also possible under certain circumstances. Arbitrators' rulings cannot be appealed.

The freedom of association and right to collective bargaining are highly developed in the Swedish system and there is a high level of participation in trade unions. As a consequence, disputes do not arise frequently and violations occur mostly in small enterprises, in most cases due to ignorance of the law. It is also positive that the Labour Court applies a reversed burden of proof and that trade unions have the right to represent their members who claim their rights have been violated. However, the aftermath of *Laval* left legal uncertainty about freedom of association and the right to collective bargaining in Sweden as trade unions lodged claims at the ILO, which should issue a decision in autumn 2012. The Swedish government also decided in June 2011 to appoint a commission to review *Lex Laval.* Moreover, the increase of new types of employment relations (such as temporary

work, interim work, posted work and economically dependent self-employed work), where it is not clear who the counterparts from the employers' side are, leaves doubts about the application of the rules on freedom of association and collective agreements on these workers. Overall, even though the enforcement of the freedom of association and the right to collective bargaining is sufficient in Sweden, some rules should be clarified, including the interplay between international and EU law in the aftermath of *Laval* and the rules applicable to new forms of employment.

The Swedish Constitution contains the framework for antidiscriminatory provisions in the Instrument of Government (*Regeringsformen*), which is one of the four fundamental laws forming the Constitution. The Discrimination Act, transposing Directives 2000/78/EC and 2000/43/EC, is so far the only legal instrument which explicitly prohibits discrimination and harassment on the ground of age. **Age antidiscrimination** legislation is aimed at protecting both older and younger workers even though, in practice, it is perceived as mostly related to older workers. Legal disputes on age discrimination may be brought to the Labour Court in the same way as other labour law disputes. Furthermore, the Equality Ombudsman, a government agency that seeks to combat discrimination and promotes equality, can register and investigate complaints free-of-cost and, in some circumstances, bring cases to the Labour Court. However, it cannot impose penalties or grant compensation itself, or change court rulings or the decisions of other agencies. Finally, complaints may be filed with any of the Anti-Discrimination Bureaus, a network of NGOs specialised in discrimination issues that upon request or complaint can initiate a cost free investigation of the matter, and/or directly go to court representing the plaintiff.

Positive experiences with regard to age antidiscrimination include the explicit introduction of such a right due to EU law, the Ombudsman's competence to bring cases on age discrimination before the Labour Court if trade unions fail to do so, the introduction of a provision in the Employment Protection Act which favours older employees when laying off and re-hiring as well as recent case-law condemning certain, frequently followed, age discriminatory practices.

Problems in the enforcement of this right include the difficulty to prove when differentiated treatment on the ground of age can be justified and the detrimental effect of measures supporting older workers on younger workers. In addition, victims have limited time to file complaints and take their case to the court.

It would be useful to strengthen the role of the courts in the enforcement of age discrimination by amending the relevant procedural rules to extend deadlines and increasing the level of damages awarded as currently they are quite low. Finally, enhanced protection of younger workers would also constitute a positive step for the enforcement of this right.

The statutory foundation of the **right to health and safety at work** is laid down in the Work Environment Act (AML). The AML was amended to better incorporate the vast EU acquis into the national legal order.

The right to health and safety at work is enforced by a number of actors, including the employers themselves and workers. Moreover, safety officers (*skyddsombud*), who are union affiliated employees selected by the employer, and safety boards, established in bigger business with over fifty employees, are competent for issues on health and safety at work. The Work Environment Authority is the administrative authority competent for the enforcement of the right related to health and safety at work. The Authority specifies the requirements to be met by issuing 'Provisions and General Recommendations' in its own statute book. In addition it supervises, through inspections, employers' compliance with the Work Environment Act and the provisions issued by the authority itself.

If the employer does not comply with the inspectors' recommendations, the Work Environment Authority can issue an injunction or prohibition as well as a fine. Contingent fines are decided upon by an administrative court against legal persons. Courts of law may also impose penalties on natural persons, including fines or, for serious work environment crimes, imprisonment.

Positive experiences on the enforcement of this right include social partners' regular consultations on strategic issues and the activities of the Work Environment Authority, which has adopted a holistic approach aimed at improving all aspects of the work environment.

Difficulties in the enforcement of the right to health and safety at work include the number of inspections carried out, which is considered insufficient when compared to the actual needs, and the lack of coordination between the activities of the Work Environment Authority and those of other inspection authorities which results in double or no inspections. An increase of the authority's resources and better coordination with other bodies would be considered positive steps to increase its efficiency and impact.

4.7. The British (UK) case

A general **freedom to associate** in the United Kingdom belongs to all workers with the exception of the police and the armed forces. This right is enforced in reliance on Article 11 of the European Convention on Human Rights (ECHR), which has been incorporated into UK law by the 1998 Human Rights Act, as well as through a combination of statutory employment rights contained in the 1992 Trade Union and Labour Relations Consolidation Act (TULRCA), and the law of unfair dismissal, which protects a worker from detrimental treatment on the grounds of his/her trade union membership. The TULRCA was brought in line with Article 11 ECHR following the decision by the European Court of Human Rights in *Wilson and Palmer v United Kingdom* (2002). An action for a breach of the rights contained in the TULRCA can be brought before an employment tribunal which has the power to (a) make an order declaring the rights of the parties; (b) to issue a compensation order; and (c) to make a recommendation.

There is no right as such to **collective bargaining** in the UK and collective bargaining has traditionally operated outside a legal framework. The 1999 Employment Relations Act introduced a statutory recognition procedure for trade unions by employers. This procedure is overseen by the Central Arbitration Committee (CAC), a permanent independent body with statutory powers that decides, by checking criteria and/or organising a ballot, if a trade union can be recognised to bargain with the employer. This means that collective bargaining can now occur either on a voluntary basis, as agreed between employers and trade unions with no legal enforcement mechanisms attached, or under the statutory recognition procedure which forces employers to recognise a trade union for the purposes of collective bargaining, provided the trade union commands enough support amongst the workforce.

Overall, the enforcement of the right to freedom of association and collective bargaining works well in the UK. The enforcement of freedom of association is not an issue. The voluntary collective procedure seems more successful than the statutory recognition one,

especially because it leads to a more conducive atmosphere between trade unions and employers. However, the statutory recognition procedure has been well received and has helped trade unions in securing recognition and raising the overall coverage of collective bargaining.

The main difficulty seems to lie in the declining influence of trade unions as a whole (as a result of low membership figures) and in the fact that the statutory recognition procedure is

granted as an individual rather than a collective right meaning that trade unions cannot initiate the recognition procedure. The restrictive criteria for invoking the recognition procedure (e.g. the threshold for support amongst the bargaining unit) limit the number of cases initiated. Moreover, industrial action is subject to strict balloting and notification requirements. As a result, the number of strikes in the United Kingdom is far below the European average and industrial action is not an effective tool to force employers to recognise trade unions or to encourage collective bargaining.

It would be desirable if trade unions, rather than their members, could directly bring claims to defend these two rights. It would also bring more workers under the statutory recognition procedure if the 40% threshold for a successful ballot and the exemption for small employers (employing fewer than 21 workers) were to be removed.

The concept of **age discrimination** was introduced in the UK through a European Directive. The 2010 Equality Act is now the main legislative framework. The Act prohibits discrimination based on a person's age group or apparent age. Exceptions continue to operate such as different national minimum wage rates depending on age. The compulsory retirement age in the UK was debated by the Court of Justice of the European Union (case C-388/07) and was later abolished.

Jurisdiction under the Act for antidiscrimination claims in an employment context lies with the employment tribunal. Claimants can bring actions on the basis of direct or indirect discrimination or discrimination by association. If an employment tribunal finds in favour of a claimant, it has the power under the 2010 Equality Act to (a) make an order declaring the rights of the parties; (b) require the employer to pay compensation; and (c) make a recommendation. There is little evidence in the case law of the power to make recommendations being used effectively. The right to age antidiscrimination is also protected by the Equality and Human Rights Commission which promotes awareness raising and can launch investigation and bring cases to courts.

A major initial difficulty in the enforcement of age antidiscrimination is the lack of certainty as to the meaning of the provisions relating to age antidiscrimination and the extent of the exceptions applicable as well as a lack of necessary regulations to enforce the provisions of the Equality Act. This is coupled with a lack of awareness amongst potential claimants of the existence of the right. However, the abolition of the default retirement age stands out as a major positive experience in the enforcement of the right to age antidiscrimination.

Positive steps to enforce this right further would be the introduction of regulations to accompany the Equality Act, including limits on the exemptions to equal treatment (as for minimum wages for young people), guidance on how to interpret the requirement of proportionality in deciding a claim, and awareness raising activities.

The main protection of the right to **health and safety at work** can be found in the 1974 Health and Safety at Work Act which imposes criminal liability on employers who breach its provisions. The Act has been complemented by specific regulations. The European Union has also been instrumental in pushing for higher standards of health and safety at work through a number of Directives which have been implemented in the UK.

Overall, the health and safety at work regime in the UK is working well. Jurisdiction for breaches of health and safety laws lies with the courts. A breach of duties under the 1974 Health and Safety at Work Act is considered under criminal law. Civil liability only arises under the Regulations implementing the European Directives. More significant fines were eventually introduced (2008 Health and Safety Offences Act) for use in extreme cases of accidents, usually those leading to fatalities.

Health and safety at work is also monitored by the Health and Safety Executive (HSE), an independent regulator which oversees compliance with health and safety legislation through inspectors. Within the workplace, an employer has a duty to consult designated health and safety representatives.

Criticisms have been levelled at the relatively low numbers of health and safety inspections. The increased use in recent years of statutory enforcement powers goes some way to rectifying this problem by making inspections more effective (rather than more frequent). These enforcement powers are generally regarded as successful and their use has risen over the last three years. Moreover, HSE has adopted a comprehensive approach to good health and safety which includes clear guidance and targeted policies at companies in order to make up for a lack of inspections.

Suggestions for improvement include provision of more resources to ensure more inspections, targeting enforcement action at occupational diseases and injuries and giving greater support to the health and safety representatives in the workplace. Finally, establishing a good health and safety regime overall should include clearer guidance for employers in order to facilitate compliance.

5. THE ENFORCEMENT OF A SELECTION OF FUNDAMENTAL WORKERS' RIGHTS IN THE EUROPEAN UNION

On the basis of the findings of the seven national reports summarised in the previous section and annexed to the study, common trends in measures affecting these rights can be identified.

5.1. Enforcement mechanisms

KEY FINDINGS

- In the selected countries, the judicial system is the main mechanism for enforcing the selected fundamental workers' rights.
- Alternative Dispute Resolution (ADR) of collective disputes, such as arbitration, conciliation and mediation, is increasingly used.
- Ombudsmen and equal treatment authorities provide both preventive and repressive measures, strengthening in particular the enforcement of the right to age antidiscrimination.
- All actors concerned with health and safety standards at work (employees, employers and public authorities) have responsibilities for monitoring the enforcement of associated rights.
- Supra national bodies, like the Court of Justice of the European Union or the ILO Committees, also play an important role in key cases for enforcement of the selected fundamental workers' rights.

The national reports identify the range of mechanisms available in the targeted countries for the enforcement of fundamental workers' rights defined as: 'any measure that is legally binding and/or confers some sort of (negotiating/implementing/control) power that can be activated to make sure the fundamental workers' right is respected in practice' and any possible correlated measure that could have a significant impact on the enforcement of fundamental workers' rights (measures that enable/facilitate the pursuit of enforcement measures or difficulties that discourage the pursuit of enforcement measures).

From the findings of the national reports, certain typologies of enforcement mechanisms can be distinguished.

The **judicial system** is considered the main enforcement mechanism for the three fundamental workers' rights under review in the seven countries examined. In several cases, disputes related to the selected fundamental workers' rights are dealt with by judicial authorities specifically competent for these matters, i.e. labour sections (FR, HU, IT, SE, UK). Some countries provide for tribunals that also include representatives of employers and employees (FR, UK). Administrative and criminal courts might also be competent, e.g., for employment disputes in the public sector or violation of health and safety rules. In addition, civil courts may be used to ensure compensation for damages.

In some countries, specific judicial procedures for labour law disputes exist. These include the possibility for trade unions to directly intervene in cases to support workers or even to be party to the proceedings in order to represent general workers' interests (EL, FR, IT). Other specific judicial procedures include the possibility for workers to represent themselves without a lawyer (UK), the possibility of speedy judicial procedures to ensure a

rapid solution to the infringements of workers' rights (IT) or facilitation of a shift in the burden of proof to the employer (as provided for by EU law in all Member States for discrimination cases and in Sweden for collective disputes). Moreover, *ad hoc* interim orders against employers to cease infringing behaviours exist, for example, in France and Italy with countries such as Hungary ensuring potential class actions for collective rights. In some Member States, in order to enforce the selected workers' rights, parties are obliged to attempt to reach a settlement of their dispute before a professional conciliator/mediator as a pre-condition for bringing claims in court (EL, FR) or judicial conciliation is made available to the parties before commencement of the proceedings (EL, IT).

Alternative Dispute Resolution (ADR) is also available to workers as an enforcement mechanism for their fundamental rights. **Conciliation/mediation procedures** are generally allowed for collective disputes. Moreover, some countries (such as EL, HU and SE) provide *ad hoc* alternative dispute resolution services. The solution reached through these alternative dispute resolution mechanisms is transformed into a collective agreement in Greece. **Arbitration** can also be used as an alternative dispute resolution mechanism for collective (EL, SE) or individual disputes (IT). Arbitrators issue an award which is binding on the parties. Sometimes the award represents a binding collective agreement (EL, HU).

Moreover, a number of **bodies and committees** have been set up by law or agreements between workers and employers to deal with workers' rights, mostly focusing on freedom of association and the right to collective bargaining both at national and enterprise level (FR, HU, IT, NL, UK). Some of them are tripartite bodies (national authorities, employers' representatives and workers' representatives). In France, a National Commission for Collective Bargaining has been set up as a monitoring and consultative body at national level. In Hungary, a national level tripartite consultative forum is being established (replacing the abolished National Council for the Reconciliation of Interests). In the United Kingdom, a Central Arbitration Committee appointed by the government, which comprises experts in industrial relations, is in charge of the recognition procedure for trade unions in order to participate in the collective bargaining process. In Italy, the National Council of Economy and Labour is also in charge of a certification procedure for trade union representation for collective bargaining and ARAN (Agency for Collective Bargaining in the Public Administration, *Agenzia per la Rappresentanza Negoziale delle Pubbliche Amministrazioni*) is the specialised agency of the government in charge of its representation in collective bargaining for the public sector. Furthermore, an independent body, the Guarantee Commission, monitors strike actions in the field of essential services in Italy. At enterprise level, these bodies and committees are numerous: e.g. the European Work Councils in line with Directive 2009/38/EC and the Italian Conciliation and Arbitration Board set up by a collective agreement.

Ombudsmen also play an active role in the enforcement of workers' rights and especially in the protection against age discrimination (EL, FR, NL, SE) although their competencies are broader and their activities do not focus exclusively on the workplace. Their actions may be limited in principle to the public sector (such as in EL). Ombudsmen are attributed different tasks in the seven selected countries. These range from receiving complaints to launching investigations, presenting recommendations to resolve cases or support claimants in court actions, alerting prosecutors to take appropriate actions or bringing actions directly to court.

Ad hoc **equal treatment commissions, equality bodies** or **antidiscrimination networks** also support the right to age antidiscrimination (EL, FR, HU, NL, SE, UK) by trying to reconcile parties and issuing authoritative reports. In Hungary, the Equal Treatment Authority can issue orders to ensure equal treatment and can issue fines against employers. In the United Kingdom, the Equality and Human Rights Commission can launch

official inquiries and formal investigations and take a limited number of cases to courts on behalf of individuals to clarify the state of the law. In Italy, the Central Guarantee Committee has a monitoring and advisory role in the field of antidiscrimination (and of health and safety at work) which is limited to the public sector. The workers' representative at enterprise level also has a role in the fight against age discrimination (FR) asking employers to remedy a breach and, if no settlement is found, bringing a case to court on behalf of the discriminated worker.

In all the reviewed Member States, **labour inspectorates** are specific bodies of the state responsible for ensuring respect for worker's rights, especially equal treatment and the right to health and safety at work. In all countries, inspectors can carry out a wide range of enforcement activities: contribute to awareness of health and safety standards, elaborate guidelines/checklists for the respect of these standards in the enterprises (EL), check health and safety models/catalogues jointly agreed by employers and employees (such as in IT and NL), act as conciliators, issue warnings, impose fines, order the temporary suspension of activities, or withdraw employers' licenses.

In particular, well established legislation in the seven Member States, stemming from the application of both international (ILO Conventions) and EU standards, provides for a number of other specific enforcement mechanisms aimed at preventing breaches of the right to health and safety at work. In all analysed countries both employers and employees have obligations to ensure that health and safety standards are respected at work. According to various criteria, including in particular the size of the enterprise, in all selected Member States a **physician, a workers' representative** or an ***ad hoc* committee** have a role in ensuring respect for health and safety standards and act as intermediaries in the relevant discussions between employees and employers. These bodies have some specific powers for the enforcement of such right which range from issuing reports to monitoring health and safety standards, alerting the labour inspectorates and ordering the suspension of work in cases involving imminent risks to workers' safety.

Moreover, in some cases **other bodies have been set up at national level** to enforce this right. In Hungary, the Labour Safety Committee is the discussion forum for health and safety issues at national level where the government, employers and employees are represented; it has recently been given some rights of decision in the field of health and safety standards. In Italy, the Permanent Advisory Commission on Health and Safety at Work is also a tripartite body in charge of the interpretation of the legal framework and the monitoring of the implementation of the European Directives on the issue.

Finally, for health and safety at work, **social security institutions** also play a role in the award of invalidity benefits in case of accidents at work due to breaches of health and safety standards. The functioning of these institutions and the rules for awarding benefits are quite complex and specific to the social security system of each Member State, thus their detailed analysis falls outside the scope of the present study. However, they are briefly mentioned when relevant to ensure a comprehensive analysis of all important aspects of the enforcement of the selected fundamental workers' rights.

At international level, the **ILO Committee** on Freedom of Association and the ILO Committee on the Application of Standards also receive claims to check the respect of national laws with the relevant ILO Conventions (see the complaints of trade unions in EL, HU and SE in section 5.2). At European Level, the **Court of Justice** of the European Union has clarified the extent of the selected fundamental workers' rights under EU law on a number of occasions. In particular, cases on freedom of association and the right to collective bargaining (*Laval*) and on age discrimination (*Mangold*) have been closely followed by trade unions and practitioners in the Member States as references for the enforcement of these rights in their countries.

5.2. The impact of international and European law on national enforcement of the selected fundamental workers' rights

KEY FINDINGS

- International law, and especially the ILO Conventions, have had a positive impact on enforcement of freedom of association and the right to collective bargaining in the selected Member States, while EU law had less of an influence.
- EU law introduced the principle of age antidiscrimination in the national legal systems and plays a major role in its enforcement, while international law has been less significant.
- The vast ILO acquit on the right of health and safety at work is reflected in the national legislation of the seven Member States, and EU legislation on health and safety at work has also contributed greatly to the creation of an appropriate legal framework for the enforcement of the related right.

The national reports look specifically at the impact of international and EU law on the legislative framework and enforcement mechanisms available in each country for the selected fundamental workers' rights. In general, international and EU law both had a positive impact on the enforcement of the selected fundamental workers' rights. However, the respective influence of international and EU law on the three examined workers' rights varies to a great extent.

According to the national reports, **international law** had a particular impact on freedom of association and the right to collective bargaining (EL, FR, IT, NL, UK). In the United Kingdom and in the Netherlands, for example, freedom of association and the right of collective bargaining have been recognised in the national systems through the European Convention of Human Rights and the European Social Charter. Moreover, the UK Trade Union and Labour Relations Consolidation Act (TULRCA) was amended following a decision of the European Court of Human Rights in *Wilson and Palmer v United Kingdom* (2002)[133] which examined Article 11 ECHR on right to freedom of association including the right to form and to join trade unions. In France, in 2001 the UN Committee on Economic, Social and Cultural Rights issued recommendations on the representativeness of trade unions which led to the 2008 reform of the collective bargaining system. Further, the French Supreme Court (Cour de Cassation) often refers to the ILO Conventions to justify its decisions.

In particular, **ILO Conventions** have had a significant role in the enforcement of freedom of association and the right of collective bargaining. In Greece, Hungary and Sweden, trade unions have relied directly on the provisions of the Conventions to protect the rights they considered undermined by the recent reforms of their respective labour markets. In Greece, the respect of ILO Convention No. 87 'Freedom of Association and Protection of the Right to Organise', Convention No. 98 'Right to Organise and Collective Bargaining' and Convention No. 154 'Collective Bargaining' is being assessed by the competent ILO Committees on Freedom of Association and on the Application of Standards. For Convention No. 154 on Freedom of Association, it was found by both the Greek Supreme Court and the competent Committee that the overall Greek system of arbitration for collective disputes respects freedom of association and the right of collective bargaining as enshrined in the ILO Conventions. However, the decision of the ILO Committee on the Application of Standards on other measures of the Greek reform is still pending.

[133] *Wilson and Palmer v United Kingdom* [2002] ECHR 552.

In November 2011, the ILO provided negative comments about the new Labour Code of Hungary concerning measures which affected not only freedom of association and the right to collective bargaining but also antidiscrimination and the right to health and safety at work. These comments have led to some changes, although mostly limited to the rights of trade unions. In 2003, the ILO held that the Swedish government had breached the ILO Conventions on collective bargaining and the right to organise by adopting legislation which increased the retirement age from 65 to 67 years and forbade collective agreements which included an obligation to retire before the age of 67. Moreover, in Sweden, the *Laval*[134] judgment of the Court of Justice of the EU led to amendments (*Lex Laval*)[135] to existing acts on freedom of association and the right to collective bargaining. Swedish trade unions submitted a complaint to the ILO Committee on Freedom of Association (case no. 2171/GB.286/11) considering these changes in breach of the fundamental ILO Conventions No. 87 and No. 98. A decision is expected by autumn 2012.

The vast ILO acquis on the right of health and safety is also reflected in the national legislation of the seven Member States. In Italy, the Single Act on Safety at Work has been amended to include reference to the relevant ILO Conventions (as well as to the relevant EU legislation).

On the other hand, international law has been less significant in the enforcement of the right to age antidiscrimination. Hungary is a possible exception in that judges have recently lodged appeals to the European Court of Human Rights against the new Hungarian legislation on the mandatory retirement age (from 70 years to 62, the retirement age for other categories of workers).[136]

As regards age antidiscrimination, **EU law** stands out for having had a major impact on the enforcement of this right compared to both international and national legislation (EL, FR, IT, NL, SE, UK). The national reports underline that the legal and enforcement structures for this right stem from Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. This Directive explicitly introduced age among the grounds of prohibited discrimination and provided for reversed burden of proof for related cases in national law. Moreover, national practitioners and the judiciary look closely at the indications of the EU, and in particular of the Court of Justice, to interpret the rules on the justifications of age discrimination (EL, FR, HU, IT, SE, UK).

EU legislation on health and safety at work has also contributed greatly to the setting of an appropriate legal framework for the enforcement of this right (EL, FR, HU, IT, SE, UK). Although national rules may already have existed in this field, EU requirements drove them to higher standards. The legal framework for health and safety at work, which is the result of international, EU and national rules, provides a sound and advanced protection of this right in the seven analysed countries.

Finally, compared to age antidiscrimination and the right to health and safety at work, EU law on freedom of association and the right to collective bargaining seems to have had less impact on the national systems of the seven Member States.

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[134] Laval-domen, Arbetsdomstolen AD dom nr 89/09, Mål nr A 268/04 (see also Case C-341/05 *Laval* [2007], ECR Page I-11767).

[135] The changes mean that industrial action by a trade union against a foreign employer in order to enforce a collective bargaining agreement may only be taken under certain circumstances. For example, the conditions of employment demanded by the trade union must be equivalent to the conditions of a central collective bargaining agreement applied in Sweden for corresponding employees. See, Berterud, M., 'Sweden – Amendments to the Foreign Posting Employee Act (1999:678) and the Employment (Co-Determination in the Workplace) Act (1976:580)', Mondaq, 14 September 2010, available at: http://www.mondaq.com/article.asp?articleid=108240.

[136] Rayner, J., *Hungarian government forces 200 judges to retire*, Law Society Gazette, 19 January 2012, available at: http://www.lawgazette.co.uk/news/hungarian-government-forces-200-judges-retire.

However, the introduction of the Charter of the European Union as a binding instrument by the Lisbon Treaty had a positive impact on national legislation such as in Italy and in France. Article 12 on freedom of assembly and association, Article 28 on the right of collective bargaining and action, including strike actions, and Article 54 prohibiting the abuse of rights reinforced the respect of these rights by being increasingly referred to by national judges in their decisions (FR, IT). Moreover, the case-law of the Court of Justice of the EU (the *Laval* case in particular) had quite an impact in some countries (such as NL and SE). Swedish trade unions argue that EU law infringes their rights under ILO Conventions and have lodged complaints at the competent ILO Committee, thus testing the respective influence of EU and international rules on freedom of association and the right to collective bargaining. This situation has led to legal uncertainty about the interpretation of freedom of association and the right to collective bargaining and it will be worth studying carefully the upcoming ILO decision (expected in autumn 2012) to analyse the interaction of international and EU law and the consequences for the enforcement of workers' rights, not only in Sweden, but all over Europe.

5.3. Common problems in national enforcement of the selected fundamental workers' rights

KEY FINDINGS

- For freedom of association and the right to collective bargaining, the main difficulties lie in the limits to representativeness of trade unions and the coverage of workers by collective agreements. Moreover, the diminished role of tripartite bodies and trade unions in social dialogue and the uncertainty of the exact scope of this right in the aftermath of the *Laval* case negatively affect the overall enforcement of this right. Unclear rules and cumbersome procedures also undermine the exercise of the right to strike.
- For age antidiscrimination, the main problem lies in the widespread lack of awareness of this right. Moreover, legal uncertainty on the rules allowing for justified age discrimination and the contradictory indications provided by recent national legislation (mostly concerning older workers and pensions) and national jurisprudence weaken its enforcement.
- The right to health and safety at work seems to be better enforced in the selected countries than the other two fundamental workers' rights. Difficulties such as limited resources of labour inspectorates and high costs for compliance with health and safety standards for employers are exacerbated by the economic crisis.
- The lengthy and costly judicial proceedings represent a major obstacle for the enforcement of the three fundamental workers' rights.

The national reports assess the effectiveness of the mechanisms available in the targeted countries to make sure the selected fundamental workers' rights are respected in practice. Difficulties in the enforcement of these rights were then highlighted and discussed with stakeholders during interviews.[137]

The identification of common problems in the enforcement of fundamental workers' rights is a necessary first step toward drawing sound recommendations for future actions to ensure workers' rights in Europe are respected. A review of the difficulties highlighted in the national reports revealed a number of commonalities, analysed here by right.

[137] Lists of the stakeholders consulted by country are included in Annex I of the respective national reports attached to this study.

Numerous difficulties were highlighted for the enforcement of **freedom of association and the right to collective bargaining** in the seven selected countries.

One issue regards the **representativeness of trade unions and the recognition procedures** as conditions for the effective exercise of the right to collective bargaining. The problem seems to lie mainly in the strict criteria which do not allow small parties to be represented: in a number of cases, high thresholds are established to recognise the power of a trade union to bargain with the employers. In Hungary, for example, trade unions representing less than 10% of the workers in a company cannot enjoy this right, while in the UK smaller trade unions can but only if affiliated to bigger ones. This situation has been criticised as leaving a small, but still important, part of the employees without the right to collective bargaining. In the UK, the recognition procedure set up by law to identify the trade unions competent to negotiate with employers, although welcomed overall, has also been criticised as slightly unbalanced in favour of employers who seem to be in the position of 'choosing' the trade union with whom to bargain.

Another problem regards the **coverage of workers by collective agreements**. In the Netherlands and in Sweden, it has been underlined that new forms of employment arrangements (temporary work, interim work, posting, etc.) create uncertainty about who the parties to the collective bargaining process are and about the coverage of these workers by existing collective agreements. Moreover, small enterprises are often outside the entire system of collective bargaining (for example, in the UK, the recognition procedure applies only for enterprises with more than 21 workers) and their workers are not covered by collective agreements (FR, IT).

While it seems clear that the procedures and rules in place for bigger enterprises might not be suitable for a smaller entity, no alternative methods were provided to ensure the respect of freedom of association and the right to collective bargaining of workers in smaller businesses. This is a shared concern for stakeholders as small and medium enterprises (SMEs) account for the majority of businesses in Europe.[138]

Difficulties are also encountered in the activities and composition of **bodies and committees** established by law or collective agreements for the enforcement of freedom of association and the right to collective bargaining. In general, the **role of tripartite dialogue** (HU, IT) **and of trade unions** (IT, UK) seems to be diminished. In the Netherlands the debate about the possibility of including the government in a tripartite dialogue on labour relations has been on-going but has not led to any substantive decision yet. In Italy and Hungary, in recent years the importance of tripartite dialogue at national level has been significantly diminished in favour of a more centralised decision-making process: it seems that governments are increasingly adopting decisions affecting the labour market without proper consultation with the social partners. In these two countries, it was also underlined that the dialogue between employers and employees at enterprise level in *ad hoc* bodies or committees is often not respected by employers and no effective means exist to ensure that employers use and participate in these fora. The Hungarian and Greek reports also stress the risk of delegating the right to dialogue with the employers to associations of workers (such as European Works Councils) and not to independent trade unions which are considered better equipped to enforce workers' rights. The concern is that these associations might be more likely to follow employers' positions as compared to trade unions. In Italy, trade unions in recent years found themselves often opposed to each other with a detrimental effect on the capacity to bargain, especially at national level.

[138] 'The European Union's 23 million small and medium-sized enterprises (SMEs) constitute 99 % of the EU's businesses', Eures The Mobility Portal, http://ec.europa.eu/eures/main.jsp?lang=en&catId=9674&myCatId=9674&parentId=20&acro=news&function=newsOnPortal.

For the **alternative resolution of collective disputes** between employers and employees, other challenges have emerged. In Greece, the new rules of the austerity measures have been criticised for weakening the role of arbitration and mediation processes: arbitrators can now only decide on wages, trade unions can no longer unilaterally make recourse to arbitration and mediators and arbitrators need to take into account the economic situation when taking decisions which could lead to less favourable treatment of workers. In Hungary, the possibilities provided by arbitration, conciliation and mediation services are not yet fully exploited by workers. In Italy, it has been suggested that the Conciliation and Arbitration Boards set up by a collective agreement would work better if they were constituted by experts and not by workers' and employers' representatives.

Other problems highlighted include the fact that freedom of association and the right to collective bargaining are considered as individual rights, notwithstanding their intrinsic collective dimension. This impedes trade unions' abilities to bring a claim against their violation (UK). Diminishing the strong protection of trade union representatives in Hungary, the recent labour legislation reform has withdrawn the right of veto of trade unions against a breach of their rights by employers (which formerly allowed them to stay the execution of an employer's behaviour until the decision of a judge). In the Netherlands, case-law established that a collective agreement that requires employers to pay certain minimum rates to independent contractors is not allowed under EU competition law and employers bound by their offer during public procurement procedures can no longer negotiate prices and working conditions with their suppliers. Finally, the *Laval* case left a general legal uncertainty in all Member States regarding the exact scope of freedom of association and the right of collective bargaining in the EU. The expected adjudication by the ILO of the complaints brought by Swedish trade unions will not necessarily fully clarify the situation.

Finally, a number of difficulties were highlighted as regards the **right to strike**. Strike and other forms of industrial action (such as boycotts, refusal of working overtime and blockades, i.e. actions to prevent the counterpart from utilising its facilities) can be used as enforcement mechanisms by workers to ensure their fundamental rights. In the UK, the procedures to undertake strike actions are cumbersome and, if not followed correctly, can leave them vulnerable to considerable claims for damages. This makes it difficult to use strike action to force an employer to agree to a collective agreement. In Hungary, the legal uncertainty surrounding the right to strike, especially in the so called 'essential services', leaves workers with doubts about their rights and therefore leads to hesitation in their exercise.

For **age antidiscrimination**, the rules driven by EU law are at a relatively early stage for assessment of their enforcement but some conclusions can be drawn from the national reports. Some national reports have noted that rules on seniority and pensions contributions could be indirectly discriminatory on the basis of age.

Problems with the **burden of proof** were highlighted in a number of reports (HU, IT, NL, UK). This is particularly interesting as the EU provisions establish a reversed burden of proof: as mentioned in section 5.2, 'when the plaintiffs establish facts from which it may be presumed that there has been direct or indirect discrimination, the respondent must prove there has been no breach of the principle of equal treatment'.[139] National reports highlighted that even if this principle is favourable to victims of age discrimination, establishing facts from which discrimination on the basis of age could be presumed is still very difficult, especially when discrimination occurs during the recruitment process.

[139] Article 10 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L303, 2.12.2000, p. 16 – 22.

This difficulty may explain the very low number of court cases reported (FR, HU, IT, NL) although courts are the main enforcement mechanism available for age antidiscrimination. The length and costs of the judicial procedures also act as deterrents for victims of age discrimination (see the end of this section). The **lack of specific bodies to monitor and enforce this right for workers** in the private sector has also been highlighted as a problem in Italy.

However, the major obstacle in the enforcement of this right seems to be the **uncertainty about the exact content of EU provisions on age antidiscrimination** which are often not clear to national practitioners. Indeed, as mentioned under section 3.2, according to Directive 2000/78/EC some exceptions are allowed and distinctions based on age can be justified. While the Court of Justice of the EU and the European Commission have given some indications, these are not exhaustive and national jurisprudence is sometimes contradictory.

For example, in the United Kingdom, the rules providing for compulsory retirement age which allowed employers to dismiss workers older than sixty-five were brought before the Court of Justice in a preliminary ruling case (C-388/07).[140] The CJEU stated that those rules could in principle be justified and left to the referring court the decision on the existence of such justification considering the circumstances of the case. The UK Employment Appeal Tribunal considered the objectives of redundancy schemes (rewarding loyalty and favouring older workers) as legitimate but stressed the need for examining the justification of the terms and conditions of the schemes: these rules were abolished in 2011 by new employment equality rules.

In Greece, civil servants and public sector employees with open-ended private contracts, who will be 55 years old on 31 December 2013 and will have completed 35 years of pensionable service, will be required to leave their posts, receiving only 60% of their basic pay and no social or other benefits. The European Commission affirmed[141] that this legislation seems necessary and proportionate considering the current economic situation as the measures follow objective criteria and are aimed at ensuring that the civil servants concerned receive full pension upon their retirement. In Italy, the Supreme Court overruled a decision of the Court of Appeal of Florence in 2011 finding that criteria for collective dismissals based on proximity to retirement are not discriminatory. However, in Sweden, in 2011, the Labour Court held that a collective agreement, by which in cases of redundancies employees who were closer to the retirement age would be the first laid off, was violating the Discrimination Act. Moreover, an agreement of Scandinavian Airlines with the local union to lay off a number of personnel taking into account the fact that older workers were a few years away from pension, was also condemned the same year, stirring a significant public debate. Similarly, in France, the Courts held that the prohibition of older ski instructors to teach during low season in order to leave more job opportunities for younger instructors was discriminatory.

Meanwhile, in Hungary, new rules reducing the retirement age for judges from 70 years old to 62 have been appealed at the European Court of Human Rights. The Hungarian labour code also provides for the possibility to dismiss older employees who qualify for a pension without justification. Hungarian jurisprudence seems to have accepted these measures as lawful. Also in Hungary, a company that was cutting its staff due to the economic crisis decided to dismiss an older worker to protect younger ones providing income for their

[140] Case C-388/07, *Age Concern England*, ECR [2009] I-1569.

[141] Response of 9 December 2011 to a question for written answer by MEP Nikolas Chountis (GUE/NGL), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+P-2011-011751+0+DOC+XML+V0//EN.

family. In this case the spotlight of media and public debate was intense: the court found the measure justified.

Moreover, **some of the latest measures adopted to cope with the ageing population and the crisis** (see below) also distinguish on the basis of age and stakeholders consider that these rules **give contradictory indications on what age discrimination is and what amounts to a justified distinction on the basis of age.** Some of these measures have not yet undergone judicial scrutiny to check if the differentiated treatment is indeed justified. In Greece, the minimum wage as determined by the National General Collective Agreement would be reduced by 22% for workers above 25 years old and 32% for workers below 25 years old. In the UK as well, different minimum wages rates and different level of redundancy payments apply depending on age. Some positive measures to help groups of workers who are disadvantaged because of their age (older or younger) also make stakeholders wonder about their legitimacy and usefulness. In Italy, for example, it is possible to sign special contracts to help young workers from 18 to 20 years old to enter the labour market (‘*contratto di inserimento*’) by placing them in a lower category (for seniority, pay, etc.) than the appropriate one established by the relevant collective agreements considering their tasks. In France, measures providing workers older than 50 with longer access to unemployment benefits (three years instead of two) seem to have the counter effect of easing their dismissal and making their re-entry in the job market more difficult.

Knowledge of age antidiscrimination has increased since the transposition of Directive 2000/78/EC and this might in part explain the increase of age discrimination cases, especially at the work place and against older people (EL, HU, NL). However, another fundamental problem identified in almost all the analysed countries remains the general **low awareness** of equality legislation concerning age. Differentiated treatment on this ground is often not considered as discrimination and the acceptance of age discriminatory measures is widespread, notwithstanding some efforts to increase knowledge on the issue (such as in the NL).

Finally, the work of **labour inspectors** is seen as effective for the enforcement of the **right to health and safety at work**. Most problems therefore do not relate to the lack of mechanisms but to their **functioning**. The first challenge highlighted by national experts lies with the low number of inspectors as compared to the number of companies present in their countries (EL, FR, HU, SE, UK). This often leads to ex post controls which are not systematic: they are led by complaints from trade unions and employees or by accidents, especially when they are under the spotlight of the media. This problem is exacerbated by the general low level of resources of inspectorates who often lack the necessary instruments to carry out their activities and focus mostly on repressive measures instead of preventive ones such as information and awareness raising activities (EL, IT, NL, SE). Furthermore, the low level and lack of systematic, coherent imposition of sanctions by labour inspectors means that such sanctions are not dissuasive and do not effectively encourage employers to pay significant attention to health and safety standards (HU and UK). In Sweden and Greece, the lack of coordination of the activities of labour inspectorates with the ones of other bodies (such as the Swedish Chemical Agency or IKA, the Greek body for monitoring the application of the compulsory insurance legislation) undermines the effectiveness of inspections as it results in double inspections in some cases and none in others.

The **withdrawal of trade unions’ specific power to monitor** working conditions and the lack of workers’ representatives for health and safety in small enterprises have been highlighted in Hungary as further difficulties in the enforcement of this right. In Italy, the fact that many small and even medium companies operate in the so called **shadow**

economy also represents a serious concern for the enforcement of the right of health and safety at work because, as these work relationships are not formally declared to the authorities, rules and checks are not applied.

A number of national experts also highlighted the difficulties of workers due to administrative burdens and strict rules of **recognition of invalidity** in cases of accidents at work (FR, HU, IT). The lack of specific separate insurance schemes for accidents at work could contribute to the problems for enforcement of this right (HU).

As regards **the role of employers** in the enforcement of the health and safety standards at work, the low awareness of the applicable rules has been highlighted (NL) as well as the fact that, due to the economic crisis, employers increasingly consider compliance with health and safety standards as an unnecessary cost and are less and less law abiding (HU). The lack of public funding or incentives to bear these costs is also a problem (HU, IT). Furthermore, the limitation by law of employers' liability to events under their control, while jurisprudence was moving towards more objective responsibility, has also been highlighted in Hungary as a negative development.

Finally, a major obstacle stressed repeatedly in the national reports and which concerns all the three fundamental workers' rights analysed regards the judicial proceedings (especially in EL, FR, HU, IT). While this enforcement mechanism, as mentioned above, remains the most important one to ensure fundamental workers' rights are respected, access to courts remains difficult for many workers. This has been recognised by the stakeholders as the reason for the low number of cases on the three rights. The difficulties lie in the **extremely long duration of proceedings** which in practice impedes an effective enforcement of workers' rights and prolongs legal uncertainty on their exercise for years. Moreover, proceedings are **costly**. Especially in times of crisis, this expense deters the use of this enforcement mechanism by workers. In some cases, as the UK, for certain claims it is possible for workers to represent themselves in court but difficulties due to the technical nature of the judicial rules might transform this favourable measure into a disadvantage for the worker. In Sweden, only workers affiliated to trade unions, which assume the costs of defence, can access the Labour Courts while others need to address themselves to the district courts. In other cases, free legal aid or special low fees for labour law trials have been withdrawn (such as in Italy) and only indigent people still have access to that aid.

5.4. Positive experiences in national enforcement of the selected fundamental workers' rights

KEY FINDINGS

- For freedom of association and the right to collective bargaining, recognition procedures ensure legal certainty and contribute to enhancing the representativeness of trade unions. Moreover, alternative dispute resolution, such as arbitration, mediation and conciliation, helps provide workers with more rapid and effective protection.
- For age discrimination, the reversed burden of proof is crucial for facilitating enforcement. Ombudsmen, equal treatment authorities and antidiscrimination networks may offer other effective tools including awareness raising activities, guidance on the application rules, free-of-cost support in judicial disputes and facilitation of out-of-court settlements.
- For health and safety at work, responsibilities are attributed to all actors involved (employers, employees, their representatives and the *ad hoc* committees in bigger companies and labour inspectorates). This spreads control of the standards and increases the level of enforcement. Labour inspections seem the most effective enforcement mechanism and new policy approaches embracing all aspects of the enforcement of this right, including prevention, represent a step forward in its protection.
- Measures to facilitate access to courts such as legal aid, special rapid judicial procedures and the possibility to obtain interim measures for the protection of workers' rights are also the key to ensure this main enforcement mechanism is effective for all three rights.

Besides the faulty aspects in enforcement mechanisms mentioned above, stakeholders identified also some positive experiences. These aspects need to be highlighted and built upon to strengthen the enforcement of the selected fundamental workers' rights in all Member States.

As regards **freedom of association and the right of collective bargaining**, the **recognition procedures** provided in some countries for attributing bargaining power to trade unions were considered overall as positive instruments because they ensure legal certainty and contribute to enhancing representativeness of trade unions (FR, IT, UK). For example, in the UK, the recognition procedure has increased the overall coverage of collective agreements. Other measures have also ensured a greater representativeness of trade unions and increased coverage by collective agreements: i.e., in France, workers in establishments with fewer than 11 employees can also vote in trade union elections and the number of collective agreements has accordingly increased.

A number of mechanisms have also been helpful in **enhancing the role of tripartite bodies and of trade unions** ensuring their consultation and the effectiveness of their right to collective bargaining. In France, a code of conduct for the Government and the Parliament ensures that social partners are involved in labour market decisions by providing that all acts must be presented to them before they are enacted and the National Commission for Collective Bargaining includes even representatives from the Supreme Court. In Hungary, the tripartite national dialogue is being restored with the creation of a new body. As regards **bodies and committees** set up by law or collective agreements for the enforcement of freedom of association and the right to collective bargaining, a positive development in the Netherlands are the control bodies established by the parties to a

collective agreement to provide information and monitor compliance throughout the sector, including the power to impose fines. In Italy, the Italian Guarantee Authority for strikes has been successful in regulating the politically sensitive right to strike and, in France, the obligation to enter into collective bargaining with the employer before sending a notice to strike in the sector of public transportation, recently introduced by Law No. 2007-1224 of 21 August 2007, has significantly improved dialogue between public transportation employers and trade unions and prevented conflicts.

Alternative dispute resolution mechanisms such as conciliation, mediation and arbitration were recognised by experts and stakeholders as the most suitable and appreciated enforcement mechanisms for the resolution of collective disputes in all Member States analysed. Such systems are easily accessible, and their procedures less lengthy, cumbersome and costly compared to the judiciary.

Finally, some specific measures for **court proceedings** have also enhanced the enforcement of freedom of association and the right to collective bargaining. These include the reversed burden of proof, facilitated procedures for *ad hoc* interim measures to reintegrate the worker in his post in cases of unjustified dismissal due to trade union activities or for interim orders to cease anti-union behaviour infringing the freedom of association, as well as high compensation levels for workers whose fundamental rights have been infringed and the possibility for trade unions to represent workers (thus in effect providing free legal aid in FR, IT, SE, UK).

Regarding **age antidiscrimination**, the explicit recognition of this right by EU law is considered the first major positive step for the respect of this right in all analysed countries. Indeed, **EU law** enlarged the scope of application of general national equality rules where they did not yet provide specifically judicial protection against discrimination based on age. Moreover, the **reversed burden of proof** introduced by EU law has been recognised in all the analysed countries as a key procedural rule to facilitate enforcement of this right, notwithstanding the difficulties for victims to bring actions to courts.

In all countries where bodies (**Ombudsmen or Equal Treatment Authorities**) have been established to ensure, among other tasks, protection against age discrimination, experts and stakeholders have underlined that **all their activities** constitute very positive developments for the enforcement of this right. In particular, the following measures were noted as particularly effective: information and awareness raising activities (all countries), investigative powers (EL, UK, IT, FR, HU, NL, SE), notification to prosecutors or support for workers' claims (FR), initiation of judicial proceedings (SE, UK), and imposition of fines (HU). In Hungary, the importance of the independence of the Equal Treatment Authority, its free-of-cost and rapid procedures and the out-of-court settlements that it can facilitate were all stressed as crucial. Moreover, in France, it was underlined that when these bodies support cases or provide advice, judges almost always follow their opinion. The importance of these opinions and guidance towards all actors involved (workers, employers and judges) is significant since the exact scope of this 'new' right is not always clear. In the Netherlands, measures such as the publication of examples of discriminatory vacancy advertisements (and immediate direct contact with the employers to explain why such advertisement is discriminatory), the development of check lists for employers to ensure their recruitment procedure is not discriminatory and the publication of Equal Treatment Commission opinions which clarify when differentiated treatment on the basis of age is acceptable have been highlighted as useful in the enforcement of the right to age antidiscrimination. In the UK as well, codes of practice and explanatory notes of the Equality and Human Rights Commission are recognised as positive steps.

As regards the judiciary enforcement mechanism, special rapid procedures providing for a maximum of three months for issuing remedies in age discrimination cases both in first instance and appeal trials as well as the possibility to ask for an interim measure stopping the discriminatory conduct are recognised in Italy as successful enforcement mechanisms. In France, in addition to employees or candidates, trade unions have standing to bring a legal action on their behalf.

Finally, some of the **measures adopted by the national legislators to protect either young or old workers** represent positive steps, although most of them focus on older workers. In Greece, new rules for older workers provide that when employees over fifty-five years old are made redundant they can become self-insured and their former employers have to pay part of their insurance contributions. In Hungary, in order to facilitate the labour market integration of young workers, employers may have a right to a specific allowance. In Sweden, the Employment Protection Act includes a provision called 'the law of the aged' which gives priority to older employees when re-hiring. In France, Decree of 28 August 2006 obliges companies of more than 50 employees to prepare a safeguard work plan focusing on senior workers when at least 10 workers need to be made redundant (*plan de sauvegarde de l'emploi*).

In all the analysed countries, the **high standards** introduced thanks to international and EU legislation are considered the major positive aspect in the enforcement of the **right to health and safety at work**. In particular, the obligations imposed upon all the actors involved (employers, employees, their representatives and the *ad hoc* committees in bigger businesses) to ensure a healthy and safe work environment have led to widespread controls of compliance with the standards thus increasing the level of protection. A number of specific measures have been highlighted in the national reports as effective instruments for the protection of this right. These include mechanisms for prevention and repression of violations of the right to health and safety at work.

As regards **prevention**, multi annual national labour safety programmes developed by the State (HU) and company documents (inventories, models, catalogues, charters, etc.) agreed by both employers and employees which indicate the health and safety rules to be respected adapted to the needs of each company (IT, NL) proved to be effective preventive instruments. In Greece and Hungary, specialised checklists developed by the labour inspectorates to ensure consistent and effective enforcement of the health and safety legislation were also highlighted as positive developments. In general, new policy approaches by the labour inspectorates which focus on raising awareness on health and safety standards, including guidance on the applicable standards and information campaigns, were underlined as crucial for the enforcement of this right (HU, EL, SE, UK). Moreover, the allocation of specific funds to companies, especially small and medium sized ones, for the financing of training activities and preventive measures on health and safety at work exist in both Hungary and Italy. Although funding is limited, this has been highlighted as positive step for the enforcement of this right. Finally, in Hungary and Italy, tripartite dialogue extends to preventive and information measures for health and safety at work.

As regards **repressive measures**, labour inspections on the spot are considered effective in all countries under review with recourse to labour inspectorate procedures not as lengthy and costly as recourse to the courts. In particular, the increased use of some inspectors' powers, such as the issuing of warnings and prohibition notices (termination of activity for imminent risks), is considered to have reinforced the protection of this right (HU and UK). The possibility to suspend the operation of a company where there is an imminent risk for the health and safety of workers (also by the workers themselves or their representatives) is key to making this right effective (EL, FR, NL).

Moreover, the high level of sanctions (monetary or imprisonment) (EL, HU, IT, UK) along with the possibility of confidential submission of complaints and free legal assistance at court (HU, NL) contribute to better protection of the right to health and safety at work. In France, facilitated procedures for declarations to social security authorities of accidents at work due to violation of health and safety standards, including the rule providing for approval of recognition of professional diseases if the competent authorities do not reply within a specific deadline, has also helped workers to ensure that, once their right is violated, they are not left without protection. Still in France, another positive measure should be mentioned: the '*obligation des résultats*' (obligation of results) for employers. This rule extends the responsibility of employers to ensure not only that they have done everything they can to respect health and safety at work but also that the standards in their company are effective in practice, therefore pushing them to higher compliance degrees with health and safety rules.

Finally, in some Member States, statistics show a general decrease of accidents at work which could suggest a better enforcement of the right to health and safety at work. However, attention should be paid to situations relating to undeclared work which do not appear in those statistics (HU, IT).

5.5. Common trends in the effect of recent national measures to combat the crisis on the enforcement of the selected fundamental workers' rights

KEY FINDINGS

- In some Member States, recent national measures to cope with the economic crisis and to address the challenges of more globalised labour markets have weakened the enforcement of freedom of association and the right to collective bargaining.
- In some Member States, recent measures to cope with the economic crisis and to address the challenges of more globalised labour markets and of the ageing population give contradictory indications on the enforcement of the right to age-antidiscrimination.
- In some Member States, austerity measures coupled with the economic crisis that has hit many employers may undermine the enforcement of the right to health and safety at work.

National reports pay particular attention to recent measures undertaken by governments to cope with the economic crisis, including measures aimed at enhancing the flexibility of national labour markets to address the challenges of globalised markets and of the ageing population. From a **fundamental workers' rights perspective**, the following remarks can be made.

Concerning the **enforcement of freedom of association and the right of collective bargaining**, in Sweden and in the Netherlands, the debate on new or possible measures to strike a balance between the right to take collective action on one hand and the freedom of establishment and the freedom to provide services on the other is lively. In Greece, austerity measures affecting, amongst others, these fundamental rights were clearly adopted under pressure from EU and international institutions to cope with the significant economic and financial crisis. The most important changes introduced concern the functioning of the mediation and arbitration system for collective disputes. The level of protection previously afforded to workers' right to freedom of association and collective bargaining was reduced by the elimination of trade unions' right to recourse to arbitration unilaterally under certain circumstances, the competence of the arbitrator to rule only on

the issue of the basic wage, the obligation of mediators and arbitrators to consider the general economic situation, and the development of competitiveness and of production activity reduce.

In Hungary, the labour market reform introduced mostly with the new Labour Code is, according the government, due to the necessity to modernise the Hungarian labour market and increase its flexibility and competitiveness. The new Labour Code introduces some positive measures,[142] but cuts back on the enforcement of certain trade unions' rights in that it diminishes the protection of trade union representatives and eliminates the right to veto unlawful measures directly affecting the employees (the measure, once objected to, could not be executed until the final and binding decision of the court). In both cases, modifications to existing rules have been extensive and weakened the enforcement of freedom of association and the right to collective bargaining compared to before. It therefore seems that a step backward in the respect of workers' rights has been taken in those instances.

In Italy and Hungary, the national reports underlined the tendency of governments to take decisions on new (austerity) measures centrally, thus reducing the role of social partners in the dialogue on the measures to be adopted. Further, in Italy the reform of the labour market was being discussed at the Parliament at the time of the preparation of this study. The same finding was made concerning the role of trade unions in collective bargaining in Hungary and Greece where the possibility of new types of agreements signed by employers and associations of workers undermine the role of trade unions and their activities for the enforcement of workers' right to freedom of association and collective bargaining.

In countries where a comprehensive reform of national legislation regulating the labour market had not recently taken place, measures dealing with older workers and pension systems were nonetheless adopted and stirred public debate and experts' discussions, especially on the enforcement of the **right to age-antidiscrimination**. As highlighted above in section 5.3, some of the recent measures adopted to cope with the ageing population and the crisis give contradictory indications as to what age discrimination is and what amounts to justified distinction on the basis of age. Some of these measures have not yet undergone judicial scrutiny to assess if that distinction is indeed justified and therefore leave uncertainty about the exact content of workers' rights and their enforcement. Furthermore, jurisprudence at national level is trying to clarify the exact scope of the concept of age discrimination, looking also at the case law of the Court of Justice, but is also providing contradictory indications.

Moreover, the attention with respect to age antidiscrimination seems to focus mostly on older workers. Only a few recent measures take into account the situation of young people to whom the equality rules also apply and whose situation is also worsened by the crisis. Public authorities face the problem of trying to enforce the right to age antidiscrimination for more vulnerable groups (either older or younger workers) without at the same time disadvantaging other age groups and ensuring that the measures are not counterproductive (as the French example of longer access to unemployment benefits for older workers unfortunately shows).

Finally, recent austerity measures in the seven countries also had a mostly negative impact on the enforcement of the **right to health and safety**. Comprehensive or *ad hoc* austerity measures especially in Hungary, Italy and the United Kingdom seem to threaten the enforcement of the right to health and safety at work. Stakeholders underlined that the adoption of high-level health and safety at work standards and investments in training for both employers and employees might entail heavy costs for the employers who are

[142] E.g. it protects older employees before retirement.

increasingly not able to afford them (HU, IT). This might lead to a weakening of the enforcement of this fundamental workers' right and could end up reversing the general trend of diminished accidents at work. The limited public resources due to the economic crisis to support companies, especially small and medium level ones, will not be able to counter this risk. Moreover, possible cuts in the number of inspectors and the reduction of controls and resources of the labour inspectorates, although compensated by holistic approaches focusing more on prevention, might also hinder the enforcement of this right (IT, SE, UK). In Hungary, the new Labour Code has taken away part of trade unions' power to monitor compliance with health and safety rules by the employers. The new Labour Code has also limited the responsibility of employers to events under their control, despite the fact that courts had extended this responsibility in their case law.

6. RECOMMENDATIONS FOR THE ENFORCEMENT OF THE SELECTED FUNDAMENTAL WORKERS' RIGHTS

The previous sections have analysed the level of enforcement of the selected fundamental workers' rights in the seven Member States. In light of the findings of the national reports, and taking into account the suggestions provided by national stakeholders consulted for the study, a number of recommendations can be made to reinforce the protection of the selected fundamental workers' rights. The recommendations included here focus exclusively on measures of more general nature, which could be applied across Europe for stepping up the efforts for the enforcement of the selected fundamental workers' rights.[143] Measures which would be useful only in a specific national context are included in the national reports.

Under the principle of sincere cooperation (Article 4(3) of the Treaty on European Union), Member States are responsible for implementing and enforcing EU law and any rights derived there from within their territories. In the field of workers' rights, the EU supports and complements the activities of Member States which thus remain the main competent actors to legislate and enforce these rights (Article 153 TFEU). In this context, many of the recommendations below are addressed primarily at decision makers and actors involved at national and local level on labour market policies.

Nonetheless, the support of the EU institutions and in particular of the European Parliament for undertaking the proposed actions and monitoring the enforcement level of these rights is crucial for the protection of workers in Europe. This is true especially in times of economic crisis when the risk of weakening the selected fundamental workers' rights is heightened. Several of the recommendations below therefore recognise the potential of the European semester process for reinforcing the protection of these rights.[144]

6.1. Recommendations for the enforcement of freedom of association and the right to collective bargaining

Recommendation 1:

Recent and upcoming national measures adopted to cope with the current economic crisis and the challenges of globalised labour markets need to be strictly monitored by European and national institutions to ensure that they do not represent a step backward in the enforcement of freedom of association and the right of collective bargaining. **In the context of the European Semester, the European Parliament should pay special attention to this aspect in the discussions on the Annual Growth Survey and could call upon the Commission and Council to monitor carefully such measures when assessing the National Reform Programmes.**

[143] Some of the recommendations put forward in the next section, such as recommendation n. 3 and 4, are in line with the ones presented in a previous study of the European Parliament (19/2007 – EMPL Committee, Authors: Consortium LABOUR ASOCIADOS SLL, Association pour le Développement de l'Université Européenne du Travail, *The impact of new forms of labour on industrial relations and the evolution of labour law in the European Union*, European Parliament, June 2008) and others, such as recommendation n. 10, 12 and 13, are in line with the European Parliament Resolution of 15 December 2011 on the mid-term review of the European strategy 2007-2012 on health and safety at work (2011/2147(INI), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0409+0+DOC+XML+V0//EN (see corresponding points n. 11 and 51, 63, 53).

[144] European Commission, Memo/11/14 of 12 January 2011, European semester: a new architecture for the new EU Economic governance – Q&A, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/14.

Recommendation 2:

The adoption of measures to cope with the current economic crisis and the challenges of globalised labour markets at national level and their implementation at the workplace should be debated with social partners. The role of tripartite dialogue and of trade unions should not be disregarded by national governments and employers at national, sectorial and company level. **In the context of the European Semester, the European Parliament could call upon the Commission and the Member States to provide for sections in the National Reform Programmes on how social dialogue has been respected in the adoption of measures that affect the fundamental rights of workers.**

Recommendation 3:

The possibility to be represented and to be covered by collective agreements should be allowed for all workers even if they are affiliated to a smaller group, if they work in small companies or if they are working under 'atypical' contractual forms such as temporary or interim work. European and national legislators should explore the possibilities to provide for appropriate rules to ensure all workers are covered and to clarify the applicable rules with employers and employees. **The European Parliament could consider calling upon the Commission to present a Communication identifying the obstacles and exploring the relevance of possible solutions such as guidelines on the implementation of the relevant EU acquis, e.g. Directive 97/81 on part time work or Directive 2008/104 on temporary agency work, and exchange of best practices at national level.**

Recommendation 4:

The *Laval* case of the Court of Justice of the European Union supported the freedom of companies to provide services in other Member States as opposed to the right of EU workers in Sweden to enjoy the same level of protection of their right to collective bargaining as their Swedish colleagues. This case left doubts about the exercise of freedom of association and the right to collective bargaining under EU law. Swedish trade unions have appealed the *Lex Laval,* the law adopted in Sweden as a follow-up to the judgment, to the ILO. To allow workers to exercise their rights without hesitation and to ensure international standards in this area are respected in Europe, **the European Parliament should monitor the up-coming ILO decision and take it into account in the negotiations of the draft EU Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services**.

Recommendation 5:

Access to alternative dispute resolution (ADR) systems for collective conflicts should be facilitated and the provision of arbitration, mediation and conciliation services should be encouraged and supported by both the European institutions and the national governments as such systems have proven effective for the protection of freedom of association and the right of collective bargaining. **The European Parliament could call upon the Commission to further promote the use of ADR systems for the enforcement of collective workers' rights in its initiatives on justice for growth.**

6.2. Recommendations for the enforcement of the right to age antidiscrimination

Recommendation 6:

Awareness-raising activities by all actors involved in labour market policies and clarification by the European Commission of the practical application of the age antidiscrimination rules stemming from EU law, especially on the possible exceptions to equal treatment, are the most important steps for the enforcement of this right. **The European Parliament could consider calling upon the Commission to present a Communication clarifying the EU acquis on age-antidiscrimination in light of the jurisprudence of the Court of Justice and providing guidelines for identifying the valid exceptions to equality on the basis of age.**

Recommendation 7:

Recent and upcoming national measures adopted to cope with the crisis, the challenges of globalised labour markets and of the ageing population, focusing mostly on pension issues and older workers, need to be strictly monitored by the European and national institutions to ensure that they do not represent a step backward in the enforcement of age antidiscrimination. **In the context of the European Semester, the European Parliament could call upon the Commission and the Member States to provide for sections in the National Reform Programmes on how EU antidiscrimination law, including age antidiscrimination, has been respected.**

Recommendation 8:

Positive measures which focus mostly on older workers should be monitored by European and national institutions to ensure that they support this vulnerable group of workers without disadvantaging others. In particular, more measures should be adopted by national governments to ensure the protection of younger workers against age discrimination. **The European Parliament could contribute to drawing attention to the situation of young workers, i.e., by adopting an own-initiative Resolution on their specific working conditions calling upon Member States to ensure they are not disadvantaged in comparison to workers in other age groups.**

Recommendation 9:

Ombudsmen, equal treatment authorities and antidiscrimination networks present in some Member States provide an effective enforcement mechanism for the right to age antidiscrimination as they are easily accessible and advantageous to workers. Increased access to financial support provided by the EU and national institutions and an extension of their powers and activities, both for preventive and repressive measures, by national governments should be secured to promote a high level enforcement of this right. **The European Parliament could consider calling upon the Commission to explore the possibility of enlarging the powers and activities of these bodies under the EU anti-discrimination competences (Article 19 TFEU) and ensure the stepping up of financing efforts in this field in the negotiations of the European Social Fund 2014-2020.**

6.3. Recommendations for the enforcement of the right to health and safety at work

Recommendation 10:

Possible cuts in the already limited resources for staff and equipment could undermine the effectiveness of labour inspectorates. Recent and upcoming national measures to cope with the economic crisis need to be strictly monitored by European and national institutions to ensure they do not undermine the enforcement of this right. **For this purpose, the Parliament could call upon the Commission to have the Senior Labour Inspectorate Committee study implementation problems related to decreasing national staff and financial resources and report to Member States on any conclusions concerning possible solutions.**

Recommendation 11:

Incentives such as insurance-related ones or financial aid by the EU and national governments to support the application of health and safety standards should be provided to ensure that higher costs for training and equipment do not hinder the enforcement of this right by employers hit by the economic crisis. **The European Parliament could ensure the stepping up of financing efforts in this field in the negotiations of the European Social Fund 2014-2020 and consider the adoption of a Recommendation encouraging Member States to set up economic incentives to support the implementation of health and safety standards.**

Recommendation 12:

Holistic policies which include preventive measures, such as awareness raising on health and safety standards and clear guidance for employers in order to facilitate compliance (i.e. through checklists or catalogues), should be supported both by the EU and national institutions for the effective enforcement of the right to health and safety**. The European Parliament could support these efforts by calling upon the Commission and the national health and safety authorities to disseminate the guidance documents developed by the Commission and the Advisory Committee on Health and Safety at Work by organising workshops or *ad hoc* events at EU and national level.**

Recommendation 13:

European and national legislators should explore the possibilities to provide for facilitated procedures for declarations of accidents at work due to violation of health and safety standards to ensure that workers are not left without protection if this right is violated. **The European Parliament could call upon Member States to bring more searching scrutiny to bear on any failures to report accidents at work and could request the Commission to consider whether a proposal for EU legislation in this area could be put forward.**

6.4. General recommendations for the enforcement of the selected fundamental workers' rights

Recommendation 14:

There is a crucial need to increase the accessibility and effectiveness of the main enforcement mechanism for the selected fundamental workers' rights: the judicial system. Labour law proceedings should be more user friendly by providing:

- Increased possibilities for legal aid or reduced costs for vulnerable groups of workers;
- Easier access to the award of *ad hoc* interim measures protecting workers' rights while trials are pending as well as direct access to courts by trade unions to represent collective workers' rights;
- Application of the reversed burden of proof beyond discrimination cases (such as in cases of denunciations of violations of the right to health and safety at work by non-declared workers);
- Reasonable procedural deadlines ensuring speedy trials and avoiding the prolongation of legal uncertainty on workers' rights due to the pending of the cases; and
- Adequate levels of damages and compensations and the issuing of dissuasive sanctions.

The **European institutions and especially the European Parliament, as the representative of the Union's citizens, could support Member States in their efforts to introduce such measures improving the enforcement of all fundamental workers' rights**.

REFERENCES

ILO

- C29 - Forced Labour Convention, 1930
- C81 – Labour Inspection Convention, 1947
- C87 - Freedom of Association and Protection of the Right to Organise Convention, 1948
- C98 - Right to Organise and Collective Bargaining Convention, 1949
- C100 - Equal Remuneration Convention, 1951
- C105 - Abolition of Forced Labour Convention, 1957
- C111 - Discrimination (Employment and Occupation) Convention, 1958
- C115 - Radiation Protection Convention, 1960
- C135 – Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking Convention, 1971
- C138 - Minimum Age Convention, 1973
- C139 - Occupational Cancer Convention, 1974
- C152 - Occupational Safety and Health (Dock Work) Convention, 1979
- C154 – Promotion of Collective Bargaining Convention, 1981
- C155 - Occupational Safety and Health Convention, 1981
- C161 - Occupational Health Services Convention, 1985
- C167 - Safety and Health in Construction Convention, 1988
- C176 - Safety and Health in Mines Convention, 1995
- C182 - Worst Forms of Child Labour Convention, 1999
- C184 - Safety and Health in Agriculture Convention, 2001
- C187 - Promotional Framework for Occupational Safety and Health Convention, 2006
- P155 - Protocol of 2002 to the Occupational Safety and Health Convention, 1981
- ILO Constitution, 1919
- ILO Older Workers Recommendation No. 162, 1980
- ILO Declaration on Fundamental Principles and Rights at Work, 1998
- Committee on Freedom of Association, Case No. 2261, Report No. 332 (Greece): *Complaint against the Government of Greece presented by the Federation of Industries of Northern Greece (FING)* (2003) (available at: http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=1302&chapter=3&query=Greece%40ref&highlight=&querytype=bool&context=0).

- Committee on Freedom of Association, Case No. 2171, Report No. 286 *(Sweden): Report in which the Committee requests to be kept informed of developments* (2003) (available at: http://www.ilo.org/public/english/standards/relm/gb/docs/gb286/pdf/gb-11-p2.pdf see pp.291-299).
- Observation (CEACR) – adopted 2011, Right to Organise and Collective Bargaining Convention, 1949 (No.98) – Greece, (available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:226751420411005::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2698934,102658,Greece,2011).

UN

- 2002 Report of the Second World Assembly on Ageing
- 2002 The Madrid International Plan of Action on Ageing
- 1998 UN Enable, Disability and Employment,
- 1991 United Nations Principles for Older Persons
- 1966 UN international covenant on civil and political rights
- 1966 UN international covenant on economic, social and cultural rights
- 1983 Vienna International Plan of Action on Ageing
- 1966 International Covenant on Civil and Political Rights
- 1948 UN Universal Declaration of Human Rights

Council of Europe

- The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights (ECHR), 1950
- European Social Charter, 1961 (revised in 1996)
- Resolution No. 1793 – Promoting active ageing – capitalising on older people's working potential, 2011
- Recommendation No. 1796 – The situation of elderly persons in Europe, 2007
- Case *Carriès c/ France,* 20 July 2007 (application No 74628/01)
- Case *Gobry c/ France*, 6 July 2004 (application No 71367/01)
- Case *Selmouni c/ France*, 28 July 1999 (application No 25803/94)
- Case *Wilson and Palmer v United Kingdom*, 2 July 2002 (application Nos 30668/96, 30671/96 and 30678/96)

European Union Law

- Treaty on the Functioning of the European Union (TFEU), OJ C 187, 9.5.2008
- Charter of Fundamental Rights of the European Union, OJ C 83, 30.3.2010
- Council Decision 2010/707/EU of 21 October 2010 on guidelines for the employment policies of the Member States, OJ L 308, 24.11.2010, p. 46-51

- Directive 2009/104/EC of 16 September 2009 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 260, 3.10.2009, p. 5-19
- Directive 2009/38/EC of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 122, 16.5.2009, p. 28-44
- Directive 2008/104/EC of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, p. 9-14
- Directive 2008/94/EC of 22 October 2008 on the protection of employees in the event of the insolvency of their employer, OJ L 283, 28.10.2008, p. 36-42
- Regulation 1907/2006/EC of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), OJ L 396, 30.12.2006, p. 1-849
- Directive 2006/42/EC of 17 May 2006 on machinery, OJ L 157, 9.6.2006, p. 24-86
- Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9-19
- Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation, OJ L 80, 23.3.2002, p. 29-34
- Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16-20
- Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16-22
- Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22-26
- Directive 99/92/EC of 16 December 1999 on minimum requirements for improving the safety and health protection of workers potentially at risk from explosive atmospheres (15th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 23, 28.1.2000, p. 57-64
- Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, p. 43-48
- Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, p. 16-21
- Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work, OJ L 14, 20.1.1998, p. 9-14
- Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 14, 20.1.1998, p. 6–8

- Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145, 19.6.1996, p. 4-9
- Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 254, 30.9.1994, p. 64-72
- Directive 94/33/EC of 22 June 1994 on the protection of young people at work, OJ L 216, 20.8.1994, p. 12-20
- Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 348, 28.11.1992, p. 1-7
- Directive 92/58/EECs of 24 June 1992 on the minimum requirements for the provision of safety and/or health signs at work (ninth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 245, 26.8.1992, p. 23-42
- Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites, OJ L 245, 26.8.1992, p. 6-22
- Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 288, 18.10.1991, p. 32-35
- Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed- duration employment relationship or a temporary employment relationship, OJ L 206, 29.7.1991, p. 19-21
- Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 156, 21.6.1990, p. 14-18
- Directive 90/269/EEC of 29 May 1990 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 156, 21.6.1990, p. 9-13
- Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 393, 30.12.1989, p. 18-28
- Directive 89/655/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 393, 30.12.1989, p. 0013 - 0017
- Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 393, 30.12.1989, p. 1-12

- 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
- Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ L 225, 12.8.1986, p. 40-42
- Directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work, OJ L 263, 24.9.1983, p. 25-32
- Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 039, 14.2.1976, p. 40-42
- Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 045, 19.2.1975, p. 19-20

European Commission Documents

- 'EU Strategy on Health and Safety at Work – Where We Stand and Future Priorities', speech by Commissioner Andor, Conference on Occupational Safety & Health at Work, Copenhagen, 28.06.2012, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/506&format=HTML&aged=0&language=EN&guiLanguage=en
- European Commission, Memo/11/14 of 12 January 2011, European semester: a new architecture for the new EU Economic governance – Q&A, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/14
- 'Age and Employment', European Commission, DG Justice, 2011, available at: http://ec.europa.eu/justice/discrimination/files/age_and_employment_en.pdf
- Mid-term review of the European strategy 2007-2012 on health and safety at work, Commission Staff Working Paper, SEC(2011) 547 final, 27.4.2011, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011SC0547:EN:NOT
- Communication, *Reaffirming the free movement of workers: rights and major developments*, 13.07.2010, Brussels, COM(2010) 373, available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=847
- Communication, *An Agenda for new skills and jobs: A European contribution towards full employment*, 23.11.2010, COM(2010) 682, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0682:FIN:EN:HTML
- Communication, *Work Programme 2010*, 31.3.2010, Brussels, COM(2010) 135 final, available at: http://ec.europa.eu/atwork/programmes/docs/cwp2010_en.pdf
- Communication, *Renewed social agenda: Opportunities, access and solidarity in 21st century Europe*, 2.7.2008, COM (2008) 412, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0412:FIN:EN:PDF
- Commission Staff Working Document, *Report on the EU contribution to the promotion of decent work in the world*, 2.7.2008, SEC (2008) 21840, available at: http://ec.europa.eu/europeaid/what/social-protection/documents/6sec_21841.pdf

- Communication, *Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work*, 21.2.2007, COM(2007) 62, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0062:FIN:EN:PDF
- Green Paper, *Modernising labour law to meet the challenges of the 21st century*, 22.11.2006, COM(2006) 708, available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0708en01.pdf
- Communication, *Promoting decent work for all - The EU contribution to the implementation of the decent work agenda in the world*, 24.5.2006, COM(2006) 249, available at: http://ec.europa.eu/europeaid/what/social-protection/documents/2com_2006_249_en.pdf
- Communication, *The demographic future of Europe – from challenge to opportunity*, 12.10.2006, COM(2006) 571 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0571:FIN:EN:PDF
- Communication, *Green Paper "Confronting demographic change: a new solidarity between the generations"*, 16.3.2005, COM(2005) 94 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0094:FIN:EN:PDF
- Communication, *Increasing the employment of older workers and delaying the exit from the labour market*, 3.3.2004, COM(2004) 146 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0146:FIN:EN:PDF
- Communication, *Adapting to change in work and society: a new Community strategy on health and safety at work 2002–2006*, COM(2002) 118 final, 11.3.2002, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0118:FIN:EN:PDF
- Communication, *Promoting core labour standards and improving social governance in the context of globalisation*, 18.7.2001, COM(2001) 416, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0416:FIN:EN:HTML
- Communication, *Towards a Europe for All Ages – Promoting Prosperity and Intergenerational Solidarity*, 21.5.1999, COM(1999) 221, available at: http://ec.europa.eu/employment_social/social_situation/docs/com221_en.pdf
- *Guidance on risk assessment at work (Directive 89/391/EEC),* Directorate-General V Employment, industrial relations and social affairs, Luxemburg, 1996, available at: http://osha.europa.eu/en/topics/riskassessment/guidance.pdf

European Parliament Studies

- 06/2011 - EMPL Committee, Authors: W. Eichhorst, M. J. Kendzia, B. Vandeweghe *Cross-border collective bargaining and transnational social dialogue*, available at: http://www.europarl.europa.eu/document/activities/cont/201107/20110711ATT23834/20110711ATT23834EN.pdf
- 01/2011 - EMPL Committee, Authors: C. Crepaldi, C. Castegnaro and S. Naaf with contribution of D. Mesini) *The Role of Minimum Income for Social Inclusion in the EU 2007-2010*, available at: http://www.europarl.europa.eu/document/activities/cont/201106/20110620ATT21867/20110620ATT21867EN.pdf

- 12/2010 - EMPL Committee, Authors: W. Eichhorst, M. Dolls, P. Marx, A. Peichl, S. Ederer, T. Leoni, M. Marterbauer, L. Tockner, G. Basso, M. Gerard, I.Vanhoren, *The Role of the Social Protection as Economic Stabiliser: Lessons from the Current Crisis*, available at: http://www.europarl.europa.eu/document/activities/cont/201106/20110620ATT21867/20110620ATT21867EN.pdf
- 10/2010 – EMPL Committee, Authors: Sylvest J., Gros Pedersen K., Kidmose Rytz B., Damsbo M., *Implementation of the Directives on Health and Safety at Work as a Cost Factor*, European Parliament, October 2010, available at: http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24264/20110718ATT24264EN.pdf
- 06/2010 - EMPL Committee, Authors: C. Crepaldi, D. Barbieri, P. Boccagni, S. Naaf, F. Pesce with the collaboration of D. Gottardi, S. Bertulessi and F. Ravelli, *EU Cooperation in the field of Social Inclusion*, available at: http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24280/20110718ATT24280EN.pdf
- 05/2010 - EMPL Committee, Author: J. Malmberg, *The impact of the ECJ judgements on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action*, available at: http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24274/20110718ATT24274EN.pdf
- 10/2008 – EMPL Committee, Authors: Houtman I., Douwes M., de Jong T. et al., *New forms of physical and psychosocial health risks at work, European Parliament*, October 2008, available at: http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24294/20110718ATT24294EN.pdf
- 19/2007 – EMPL Committee, Authors: Consortium LABOUR ASOCIADOS SLL, Association pour le Développement de l'Université Européenne du Travail, *The impact of new forms of labour on industrial relations and the evolution of labour law in the European Union*, European Parliament, June 2008, available at: http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24292/20110718ATT24292EN.pdf

European Parliament Resolutions

- European Parliament Resolution of 15 December 2011 on the mid-term review of the European strategy 2007-2012 on health and safety at work (2011/2147(INI), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0409+0+DOC+XML+V0//EN
- European Parliament Resolution of 13 September 2011 on the situation of women approaching retirement age, (2011/2091(INI)), available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0360
- European Parliament Resolution of 12 May 2011 on the proposed ILO convention supplemented by a recommendation on domestic workers, available at: http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2011/05-12/0237/P7_TA-PROV(2011)0237_EN.pdf

- European Parliament Resolution of 6 July 2010 on promoting youth access to the labour market, strengthening trainee, internship and apprenticeship status, (2009/2221(INI)), available at: http://www.europarl.europa.eu/RegistreWeb/search/resultDetail.htm?language=EN&reference=P7_TA(2010)0262&lg=EN&fragDocu=FULL
- European Parliament Resolution of 20 October 2010 on the proposal for a directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, 2008/0193(COD), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0373+0+DOC+XML+V0//EN
- European Parliament Report of 6 October 2010 on the demographic challenge and solidarity between generations, P7_A(2010)0268 FULL, available at: http://www.europarl.europa.eu/RegistreWeb/search/resultDetail.htm?language=EN&reference=P7_A(2010)0268&lg=EN&fragDocu=FULL
- European Parliament Resolution of 24 April 2009 on the regulatory aspects of nanomaterial (2008/2208(INI)), available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0328&language=EN
- European Parliament Resolution of 2 April 2009 on health concerns associated with electromagnetic field (2008/2211(INI), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0216+0+DOC+XML+V0//EN
- European Parliament Resolution of 15 January 2008 on the Community strategy 2007-2012 on health and safety at work available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/sec/com_sec(2011)0547_/com_sec(2011)0547_en.pdf
- European Parliament Resolution of 6 July 2006 on protecting European healthcare workers from blood-borne infections due to needle stick injuries (PA_TA (2006)0305), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0305+0+DOC+XML+V0//EN
- European Parliament Resolution on the proposal for Directive of the European Parliament and of the Council on amending Directive 2002/15/EC on the organisation of the working time of persons performing mobile road transport activities 2008/0195(COD), available at: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2010-0137&language=EN

Case-law of the Court of Justice of the European Union

- Case C-43/75, *Defrenne* [1976] ECR 455
- *Case* C 170/84 *Bilka-Kaufhaus v Weber von Hartz,* [1986] ECR I-1607
- Case C-270/97, *Deutsche Post AG v Elisabeth Sievers* [2000] ECR I-929
- Case C-271/97, *Brunhilde Schrage* [2000] ECR I-929

- Case C-193/99, *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* (reference for a preliminary ruling) [2001] ECR Page I-04881
- Case C-398/01 (joined cases C-397/01 to C-403/01), *Bernhard Pfeiffer* [2004] ECR I-08835
- Case C-144/04, *Werner Mangold v Rüdiger Helm* (reference for a preliminary ruling), [2005] ECR I- 09981
- Case C-127/05, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [2007] ECR I-04619
- Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767
- Case C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA,* [2007] ECR I-08531
- Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779
- Case C-303/06 *S.Coleman v Attridge Law and Steve Law,* [2008] ECR I- 05603
- Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxemburg* [2008] ECR I-04323
- Case C-346/06, *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-01989
- Case C-427/06, *Birgit Bartsch v Bosch und Siemens Hausgeräte* (BSH) Altersfürsorge GmbH (reference for a preliminary ruling), [2008] ECR I-07245
- Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG* (reference for a preliminary ruling), [2010] ECR I-00365
- Case C-388/07, Age Concern England, ECR [2009] I-1569
- Case C-88/08, *David Hütter v Technische Universität Graz* (reference for a preliminary ruling), [2009] ECR I-05325
- Case C-229/08, *Colin Wolf v Stadt Frankfurt am Main* (reference for a preliminary ruling), [2010] ECR I-00001
- Case C-341/08, *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* (reference for a preliminary ruling), [2010] ECR I-00047
- Case C-499/08 *Andersen*, (2010) OJ C 346, 18.12.2010, p. 7–7
- Case C-45/09 *Rosenbladt*, (2010) OJ C 346, 18.12.2010, p. 9–9
- Joined cases C-250/09 and C-268/09 *Georgiev*, (2010) OJ C 13, 15.1.2011, p. 12–13
- Case C-447/09 *Prigge* [2011] ECR I-(not yet published 06.08.2012)

Reports

- Eurostat, *Impact of the economic crisis on unemployment - Statistics Explained*, 2.4.2012 available at: http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Impact_of_the_economic_crisis_on_unemployment.

- Eurostat, *Population structure and ageing* October, 2011, available at: http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Population_structure_and_ageing.
- Annual Report: Employment and Social Developments in Europe 2011, European Commission, available at: http://ec.europa.eu/social/main.jsp?catId=113&langId=en&pubId=6176&type=2&furtherPubs=yes.
- Study on the economic and social effects associated with the phenomenon of posting of workers in the EU, March 2011 by IDEA Consult and ECORYS Netherlands, available at: http://ec.europa.eu/social/main.jsp?catId=471&langId=en
- Thematic Report 2010 'Protection, Involvement and Adaptation European Labour Law in Time of Crisis, Restructuring and Transition', European Network of Legal Experts in the field of Labour Law, available at: http://www.labourlawnetwork.eu/publications/prm/73/size__1/index.html
- European implications of the Laval case judgment – preliminary analysis and proposed strategy for the EFBWW, available at: http://www.efbww.org/pdfs/European%20implications%20of%20the%20Laval%20Case%20judgment%20080709.pdf.
- Report on joint work of the European social partners on the ECJ rulings in the Viking, Laval, Ruffert and Luxembourg cases (19 March 2010), available at: http://www.etuc.org/IMG/pdf_Joint_report_ECJ_rulings_FINAL_logos_19.03.10.pdf.
- Eurostat, *Health and safety at work in EurPriope* (1999-2007) – A statistical portrait, 2010, available at: http://epp.eurostat.ec.europa.eu.
- Pan-European opinion poll on occupational safety and health – June 2009 – EU27', available at: http://osha.europa.eu//en/safety-health-in-figures/eu-poll-slides-2009/Package_EU27.pdf.

Books and Articles

- Klug F. and Wildbore H., *Equality, Dignity and Discrimination under Human Rights Law; selected cases*, Centre for the Study of Human Rights, LSE, available at: http://www2.lse.ac.uk/humanRights/articlesAndTranscripts/Human_rights_equality_and_discrimination.pdf.
- Petitjean S., *Mixed reaction in Council to Monti II regulation*, 25.04.2012, available at: http://www.europolitics.info/social/mixed-reaction-in-council-to-monti-ii-regulation-art332617-25.html
- Rodriguez Piñero M. and Ferrer B., *International protection of collective bargaining – A difficult task in Labour Law: Its role, trends and potential*, 23.4.2012, available at: http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@actrav/documents/publication/wcms_111442.pdf.
- ETUC Declaration on the Commission proposals for a Monti II Regulation and Enforcement Directive of the Posting of Workers Directive, 19.04.2012, available at: http://www.etuc.org/a/9917
- Ewing K.D., *The Draft Monti II Regulation: An Inadequate response to Viking and Laval*, available at: http://www.ier.org.uk/sites/ier.org.uk/files/The%20Draft%20Monti%2011%20Regulatioin%20by%20Keith%20Ewing%20March%202012.pdf.

- Tackling Ageism and Discrimination, An Equinet Perspective in the context of the European Year for Active Ageing and Solidarity between Generations 2012, available at: http://www.equineteurope.org/age_perspective_english.pdf
- Rayner, J., Hungarian government forces 200 judges to retire, Law Society Gazette, 19 January 2012, available at: http://www.lawgazette.co.uk/news/hungarian-government-forces-200-judges-retire.
- The Free Child Project, 'Youth and the Economy', 2011, available at: http://www.freechild.org/ythecon.htm.
- Craig P. and De Burca G., *EU Law-Text, Cases and Materials*, 5th edition, Oxford University Press, 2011
- Bruun N., Jacobs A. and Schmidt M., *ILO Convention No. 94 in the aftermath of the Rüffert case,* European Review of Labour and Research, 2010 available at: http://trs.sagepub.com/content/16/4/473.full.pdf+html.
- Ertel M. et al, *European social dialogue on psychological risks at work: benefits and challenges*, European journal of industrial relations, 2010, v. 16, No. 2, June, p. [169]-183.
- Berterud, M., 'Sweden – Amendments to the Foreign Posting Employee Act (1999:678) and the Employment (Co-Determination in the Workplace) Act (1976:580)', Mondaq, 14 September 2010, available at: http://www.mondaq.com/article.asp?articleid=108240.
- Watson P., *EU Social and Employment Law: Policy and Practice in an Enlarged Europe*, Oxford University Press, 2009.
- ten Bokum N. et al (ed), *Age Discrimination Law in Europe*, Kluwer Law International, 2009.
- Kromer D., *Coming of Age: the justification test in age discrimination*, European Law Reporter 2009, No. 9, p. 301-307.
- Sargeant M. (ed), *The Law on Age Discrimination in the EU*, Kluwer Law International, 2008.
- Blanpain R., *European Labour Law*, Kluwer International Law, 2008.
- Whittall M., *Unions fear ECJ ruling in Laval case could lead to social dumping,* 25 February 2008 available at: http://www.eurofound.europa.eu/eiro/2008/01/articles/eu0801019i.htm.
- Hämäläinen R.-M., *The Europeanization of occupational health services: study of the impact of EU policies*, (2008).
- Alli B. O., *Fundamental principles of occupational health and safety*, ILO 2008.
- Ghosheh N., *Age discrimination and older workers: Theory and legislation in comparative context*, ILO Conditions of Work and Employment Series, No. 20, 2008.
- Brunk T., *Debate over implications of Laval case for labour market relations*, 23 July 2007 available at: http://www.eurofound.europa.eu/eiro/2007/06/articles/se0706029i.htm.
- Euro Info Centre, *EU Employment Law*, London Chamber of Commerce and Industry, December 2006.

- Vogel L., Paoli P., *New scope for the Community health and safety at work strategy: 2007-2012*, European Trade Union Institute for Research, Education, Health and Safety (ETUI-REHS), Health and Safety Department (HESA) 2006.
- Bercusson B. (ed), *European Labour Law and the EU Charter of Fundamental Rights*, Nomos, 2006.
- Danwitz T., Article 52–54. In Tettinger P. and Stern K. (eds) *Kolner Gemeinschaftskommentar zur Europaischen Grundrechte-Charta*. Munich: Beck, 2006.
- Daubler W., *Die Implementation von ILO-Ubereinkommen-Erfahrungen und Uberlegungen in Deutschland*. In: Bauer J-B et al. (eds) Festschrift ARGE 25 Jahre Arbeitsgemeinschaft Arbeitsrecht im Deutschen Anwaltsverein, Bonn, 2006.
- Alston P. (ed), *Labour Rights as Human Rights*, Oxford University Press, 2005.
- Blanpain R. (ed), *Collective Bargaining and Wages in Comparative Perspective*, Kluwer Law International, 2005.
- Blanke T., *Outlook – Chances of European harmonization or coordination of collective wage formation in Collective Bargaining and Wages in Comparative Perspective*, Kluwer Law International, 2005, p. 165.
- AGE's analysis of the state of transposition of the Employment Directive at December 2005 – AGE -The European Older People's Platform, available at: http://www.imsersomayores.csic.es/documentos/documentos/age-analysistransposition-01.pdf.
- Report of the high level group on the future of social policy in an enlarged European union, dg for employment and social affairs, 2004, available at: http://www.pedz.uni-mannheim.de/daten/edz-fd/gds/hlg_social_elarg_en.pdf.
- Barrett B., *Health and safety at work: whose responsibility?*, The Journal of Business Law 2003, March, p. 145-159.
- Birk R., *Munchener Handbuch zum Arbeitsrecht* (2nd edition (Aufl)), Munich: Beck, 2000.
- Besselink L., *Entrapped by the maximum standard. On fundamental rights, pluralism, and subsidiarity in the European Union*, Common Market Law Review 35(3), 1998.

Framework Agreements of Social Partners

- ETUC, UNICE, UEAPME, CEEP, Framework agreement on work-related stress, 8 October 2004

European Agency for Safety and Health at Work

- Buffet M-A., Priha E., *Workforce diversity and risk assessment: ensuring everyone is covered,* European Agency for Safety and Health at Work, Working Environment Information, Belgium, 2009
- Eeckelaert L., Hogh A. et al, *Preventing risks to young workers: policy, programmes and workplace practices,* European Agency for Safety and Health at Work, Working Environment Information 7, Luxembourg, 2009
- European Agency for Safety and Health at Work, *Promoting health and safety in European Small and Medium-sized Enterprises (SMEs)*, Luxembourg, 2005

- Goudswaard A., André J-C., Ekstedt E. et al., *New forms of contractual relationships and the implications for occupational health and safety*, European Agency for Safety and Health at Work, Luxembourg, 2002

Websites

- Employment and Social Affairs Committee, European Parliament, available at: http://www.europarl.europa.eu/committees/en/EMPL/home.html
- Eures - The Job Mobility Portal, available at: http://ec.europa.eu/eures/main.jsp?lang=en&catId=9674&myCatId=9674&parentId=20&acro=news&function=newsOnPortal.
- European Health and Safety Legislation, European Agency for Health and Safety at Work, available at: http://osha.europa.eu/en/legislation.
- European Labour Law Network, available at: http://www.labourlawnetwork.eu/.
- European Social Charter, Council of Europe, available at: http://www.coe.int/T/DGHL/Monitoring/SocialCharter/.
- European Trade Union Confederation, available at: http://www.etuc.org/.
- European Trade Union Institute, available at: http://www.etui.org/.
- Rights At Work, European Commission, available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=82.
- Social Affairs, European Economic and Social Committee, available at: http://www.eesc.europa.eu/?i=portal.en.social-affairs.

ANNEXES

The following national reports have been prepared by individual experts for Milieu Ltd, under contract to the European Parliament.

Please note that the findings of these reports are based on literature review and consultations with national stakeholders (a list is included in Annex I of each report). If the source of information was an interviewee, this has been indicated in a footnote.

ANNEX 1:
NATIONAL REPORT FOR GREECE

CONTENTS

LIST OF ABBREVIATIONS

CCP	Code of Civil Procedure
GSEE	Greek General Confederation of Labour
IKA	Social Insurance Organisation
ILO	International Labour Organisation
IMF	International Monetary Fund
OMED	Organisation for Mediation and Arbitration
SDOE	Body against Financial Crime
SEPE	Hellenic Labour Inspectorate

Please note that the findings of this report are based on literature review and consultations with national stakeholders (a list is included in Annex I of this report). If the source of information was an interviewee, this has been indicated in a footnote.

1. INTRODUCTION TO THE LEGAL FRAMEWORK AND ENFORCEMENT TRADITION IN GREECE

As with other **legal systems of continental Europe**, the sources of law which underpin the Greek legal order are very specific. The highest form of binding law is the **Constitution**. The fundamental principles of labour law are contained therein and guide the policy choices of the legislator and the executive power. Under Article 26 of the Constitution, the legislative power is vested in the Parliament and the President of the Republic.

Labour and employment relations are mainly regulated by **Laws** voted by the Parliament or by **Regulatory Administrative Acts** (Presidential Decrees, Ministerial Decrees or acts adopted by other organs of the government/administration) which are issued either for the execution of laws or on the basis of a special authorisation, if they have a legislative content. Moreover, custom (a long and uniform application of a certain practice to a broad number of circumstances), including business custom, constitutes a source of law in the Greek legal order (Article 1 of the Civil Code). Custom is applicable where there is no agreement between the parties or when it can contribute to the interpretation of agreements.

Labour law in Greece presents a peculiarity when compared with other areas of law: a large number of domestic labour rules are laid down directly by trade unions, with the approval of the State and in accordance with the laws. These constitute the so-called ***droit d'origine professionnelle*** which comprises collective agreements, arbitration decisions, and work regulations. These instruments are of a collegial nature as they are formed through collective procedures and have a collective effect on groups of workers.

Further, according to Article 28 of the Constitution, generally acknowledged rules of **international law** and international conventions that have been ratified and entered into force constitute an integral part of domestic Greek law and take precedence over any provision of law that contradicts them.[1] This means that the ILO Conventions signed and ratified by the Greek State take precedence over any other domestic legislation when they contain rules of substantive law and not mere guidelines to the national legislator.

1.1. National legislation on freedom of association and the right to collective bargaining, age antidiscrimination and the right to health and safety at work

The **freedom of association** in order to form trade unions and **the right to collective bargaining** are explicitly protected under the Greek Constitution. Before the adoption of the 1975 Constitution, the **freedom to form trade unions** was protected under the general freedom of association (Article 12 of the Constitution). Today, Article 23(1) provides that the State shall adopt due measures to safeguard specifically the freedom of association to form trade unions and the unhindered exercise of related rights. The freedom of association may be regarded both as an individual and as a collective right. As an individual right, the freedom of association has both a positive and a negative aspect. The 'positive' freedom of association enables workers and employers to establish trade unions, in compliance with the relevant laws; the right to form trade unions may not be dependent upon the State's authorisation (Article 12 of the Constitution). The 'negative' freedom of association refers to the right of individuals to refuse to associate with others in collective

[1] 'Legal Order, Greece', European Judicial Network on Civil and Commercial Matters available at: http://ec.europa.eu/civiljustice/legal_order/legal_order_gre_en.htm.

organisations/trade unions. As a collective right, the freedom of association under Article 23 of the Constitution allows for the independence of trade unions and for the protection of their right to defend their rights.

The Greek Constitution also protects workers' **right to strike**. Article 23(2) notes that strike constitutes a right to be exercised by lawfully established trade unions in order to protect and promote the financial and the general labour interests of working people. However, the right to strike is prohibited for certain professions (judicial functionaries and those serving at security corps) and is subject to limitations for others (public servants or employees of enterprises of public nature). Therefore, it seems that the right to strike is an individual workers' right which, however, is exercised by the trade unions. The practical consequence of this provision is that strikes may be decided and called only by trade unions.[2]

The **right to collective bargaining** is also explicitly protected under the Constitution; Article 22 provides that 'General working conditions shall be determined by law, supplemented by collective labour agreements contracted through free negotiations and, in case of the failure of such, by rules determined by arbitration'.

Apart from the Constitution, the freedom of association and the right to collective bargaining are regulated under numerous other laws. For example, **Law 1264/1982 'on the democratisation of the labour movement and the fortification of collective freedom of workers'**, as amended, protects the right of workers in the private sector as well as those working under a private law relationship in the public sector to form trade unions. In particular, Article 14 notes that the State must implement the necessary measures for the unhindered exercise of the right to establish and operate trade unions. In addition, employers must not interfere with workers' right to exercise their trade union rights (Article 14(2)) while the termination of the employment relationship due to legitimate trade union action is prohibited (Article 14(4)).

The same law also regulates the right to strike; according to Article 19(1), strike is a workers' right exercised by the trade unions: a) to preserve and promote workers' financial, employment, collective and insurance interests and b) to manifest workers' solidarity towards workers employed in the same multinational cooperation, as long as the outcome of the strike of the latter has a direct impact on the financial or employment interests of the former. Therefore, it can be concluded that a strike may be initiated for a broad range of issues and not only for those which can be regulated through collective agreements. Strikes shall be considered as lawful if the conditions laid in the legislation are met.[3]

With regard to the employers' obligations in cases of strike, Law 1264/1982 prohibits the hiring of new workers who do not participate in the strike ('*απεργοσπάστες*') as well as lock-outs and injunctions against strikes before the judicial authorities (Article 22(1), (2) and (3)). In order to counterbalance the inability to bring injunctions to challenge the exercise of the right to strike, the law provides that the competent judicial authorities may take the necessary measures so that the hearing in the judicial proceedings takes place within five days after the submission of the relevant documentation to the court (Article 22(4)).

Trade union rights of public servants are protected in **Law 3528/2007 'Code of Public Servants and Employees of Legal Persons of Public Law'** (Article 46).

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[2] Koukiadis, I., *Labour Law – Epitome* ('*Εργατικό Δίκαιο – Επιτομή*') (Sakkoulas, 2011), p. 311.

[3] The relevant requirements are laid in Article 20(1), Article 19(1) third indent and Article 21(1) of Law 1264/1982; especially for civil servants and employees working the public sector under a private law contract see also Article 20(2) of Law 1264/1982 and Article 3 of Law 2224/1994 'Regulation of matters pertaining to employment, trade union rights, health and safety at work and organisation of the Ministry of Labour and the legal persons supervised thereby'. On these issues see also Andriopoulos, S., 'Collective Labour Law' available at: http://www.greeklawdigest.gr/topics/employment/item/115-collective-labour-law (22 May 2012).

With regards to the right to collective bargaining, **Law 1876/1990 'Free collective bargaining and other provisions'**, as amended, regulates the right of workers to engage in collective bargaining to determine issues such as social insurance, work conditions, the exercise of trade union rights, etc. (Article 2). The law recognises four types of collective agreements: the National General Collective Agreement; the sectorial collective agreements; the occupational collective agreements (crafts) and the enterprise (or company level or firm) collective agreements. The right of public servants to engage in collective bargaining concerning their working conditions is regulated by **Law 2738/1999 'Collective Labour Agreements in the Public Sector'**.

In addition, Greece has ratified **International Labour Organisation (ILO) Conventions** No. 87 on Freedom of Association and Protection of the Right to Organise (with Legislative Decree 4204/1961), No. 98 on the Right to Organise and Collective Bargaining (with Legislative Decree 4205/1961) and No. 154 on Collective Bargaining (with Law 2403/1996) which, as noted above, prevail over any contrary provisions of domestic laws. Thus, it can be concluded that international law has had a significant impact on the freedom of association and the right to collective bargaining at the domestic level as early as 1961.

Age antidiscrimination is not specifically referred to in the Constitution. However, Article 4(1) provides that all Greeks are equal before the law and that Greek men and women have equal rights and equal obligations. Within the context of the work environment, Article 22(1) notes that 'all workers, irrespective of sex or *other distinctions*, shall be entitled to equal pay for work of equal value' (emphasis added). Moreover, Article 5(1) of the Constitution reads 'all persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages' which means that violations of the principle of age antidiscrimination may also be found as incompatible with citizens' right to the free development of their personality.[4]

Age antidiscrimination was for the first time introduced into the Greek legal order through the transposition of Directive 2000/78/EC. **Law 3304/2005** aims at addressing both direct and indirect discrimination (Articles 3 and 7) and provides protection also against harassment (Article 2(2)) and instructions to discriminate (Article 2(3)). It creates a novel system for the protection of injured persons and provides for expanded administrative and criminal penalties (Articles 16 and 17). Further, the law emphasises the actions of specific public bodies (e.g., Greek Ombudsman, Service for Equal Treatment, the Hellenic Labour Inspectorate (SEPE)) for the promotion of equal treatment as well as provides for the adoption of strategies to promote social dialogue.

Note that the Greek legislation itself has introduced differentiated treatment on the ground of age which has been considered as legitimate in a number of cases. For example, under **Law 4024/2011** civil servants and public sector employees with indefinite private law contracts who will be 55 years of age on 31 December 2013 and will have completed 35 years of pensionable service will be required to leave their posts after 24 and 12 months respectively. Those affected will receive only 60% of their basic pay and will not be entitled to social or other benefits. The European Commission said that this legislation seems necessary and proportionate under the current economic environment as the measures employ neutral and objective criteria and are aimed at ensuring that the civil servants

[4] The Greek Council of State ('Συμβούλιο της Επικρατείας') in its judgment 2454/2010 held that the requirement that only candidates who are below 35 years old may participate in a competition to fill a vacant bailiff position is in violation of Article 5(1) (protection of citizens' right to freely develop their personality) and Article 25(1) (principle of proportionality) of the Constitution.

concerned receive full pension upon their retirement.[5] Furthermore, the Second Memorandum of Economic and Financial Policies and Law 4046/2012 introduced direct discrimination against younger workers providing that the minimum wage level as determined by the National General Collective Agreement would be lowered by 22% for workers above 25 years old and 32% for workers below 25 years old (Annex V(1) paragraph 29 of Law 4046/2012).

Concerning **health and safety at work,** the Greek Constitution does not contain a provision regulating this right *per se*. The right to health is protected under various provisions (such as Article 5(5) on the protection of everyone's health and genetic identity and Article 21(3) on the obligation of the State to adopt health measures for the protection of youth, old age, disability and for the relief of the needy). On the other hand, the Constitution provides that work constitutes a right which enjoys the protection of the State (Article 22(1)). It could thus be argued that since the Constitution provides for the protection of both health and the right to work, the adoption of measures to protect the health of workers in their work environment is constitutionally imperative.[6]

At the same time, health and safety at work is regulated by numerous laws, both general and more specific catering to the needs of particular categories of workers. EU law has had a significant impact in this field as most laws on health and safety at work have been adopted in response to measures set at the EU level. Law 1568/1985 'Workers Health and Safety', Presidential Decree 17/1996 'Measures to improve the health and safety of workers at work to comply with Directives 89/391/EEC and 91/383/EEC', Presidential Decree 159/1999 'Measures to improve the health and safety or workers, etc. (amendment to Presidential Decree 17/1996)' constitute fundamental laws for the protection of health and safety at work. In 2010, the **Code of Laws on Workers' Health and Safety** (Law 3850/2010) was adopted containing the basic provisions aimed at the protection of health and safety at work.

European employment law had a significant impact on Greek law, especially concerning the right to age antidiscrimination and the right to health and safety at work as presented above. National laws regularly refer to EU measures in their text and even titles. Furthermore, judges in Greece take into account the decisions of the Court of Justice of the EU (CJEU) when applying the relevant domestic legislation.

1.2. Overview of the enforcement tradition in Greece

This section provides an overview of the different judicial and non-judicial mechanisms that are in place to enforce in Greece freedom of association, the right to collective bargaining, age antidiscrimination, and the right to health and safety at work.

Greece has not opted for the establishment of courts examining specifically labour/employment disputes. **Individual employment disputes** are examined in the **civil courts** according to a special procedure for labour disputes (Articles 663 – 676 of the Code of Civil Procedure, (CCP)). Only disputes arising out of a private law relationship (even if the employer is a public entity) are subject to this procedure; in the case of public servants, the **administrative courts** have the competence to adjudicate the relevant disputes.

[5] Response of the Commission on 9 December 2011 to a question for written answer by MEP Nikolas Chountis (GUE/NGL), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+P-2011-011751+0+DOC+XML+V0//EN.

[6] Dimitropoulou, E., and Mpampatsikou, F., 'Legislative frame for health and safety in work' (2007), available at: http://www.vima-asklipiou.gr/volumes/2007/VOLUME%2004_07/VA_REV_3_06_04_07.pdf.

Concerning civil law disputes, at the first level, the magistrate's courts and the single-magistrate courts of first instance are competent to adjudicate employment disputes depending on the amount of the dispute (Article 666 CCP). The court must try to reconcile the parties during the hearing, but failure to do so does not render the whole procedure invalid (Article 667 CCP). At the second level, competence to adjudicate employment disputes belongs to the courts of appeals while the Supreme Court ('Άρειος Πάγος') has such competence at the highest level (Articles 674 and 675A CCP).

According to the CCP, the right to legal action is granted to the employee, the employer and its successors and the recognised employees' trade unions and employers' federations. In particular, these trade unions and federations are entitled to exercise the rights of their members in cases of violation of collective labour agreements or instruments of the same value (i.e. Arbitration and Ministerial decisions), provided that the member on behalf of whom they exercise this right does not object (669(1) CCP). Trade unions and federations may also intervene in favour of one of the parties or if the case focuses on the interpretation or implementation of a collective agreement (Article 669(2) and (3) CCP).

As of 2 April 2012, court judgments on employment disputes are rendered in public 60 days after the hearing (Article 643(1) CCP; Article 15(7) Law 4055/2012). In 2009, the courts of first instance issued 6129 judgments on employment disputes (5607 in 2008 and 7061 in 2007) and the courts of appeal, 1256 judgments (2459 in 2008 and 2563 in 2007).[7]

The **criminal courts** may also have competence in case the employment/labour legislation is violated if there is a specific provision to this end.[8] Felonies, with few exceptions, are judged by 'mixed' courts of first instance with their judgments being appealed before the mixed courts of appeal. Misdemeanour courts are competent for adjudicating misdemeanours at first instance with courts of appeal having such competence at second instance. Final decisions of the court of appeal may also be challenged for errors in law before the Supreme Court ('Άρειος Πάγος'). Magistrate's courts are competent for adjudicating minor offences.[9]

The CCP prohibits Arbitration in the case of individual employment disputes (Articles 867 and 663 CCP) whereas, as will be analysed below, Arbitration is allowed in the case of *collective labour disputes*. However, before the parties decide to bring the case before the courts, there is an opportunity for **SEPE** to intervene in an attempt to reconcile the worker and the employer. SEPE is entrusted, amongst others, with the tasks of supervising and monitoring the implementation of the employment legislation as well as the reconciliation and the resolution of employment disputes (Article 2(1) Law 3996/2011). In addition, SEPE oversees the implementation of the principle of equal treatment regardless of racial or ethnic origin, religion or belief, disability, age, or sexual orientation as well as the Greek legislation on the workers' health and safety at work (Article 2(2) Law 3996/2011, Article 19(3) Law 3304/2005).

SEPE tries to reconcile the parties to a dispute after a complaint is submitted. Then, SEPE convenes a three-party meeting between the inspector, the employer and the employee, during which the issue under dispute is discussed. This reconciliation process may last up to 20 days and is ended with the drafting of a report which is signed by the parties and the

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7 Hellenic Statistical Authority, data available at: http://www.statistics.gr/portal/page/portal/ESYE/PAGEthemes?p_param=A0602&r_param=SJU18&y_param=2009_00&mytabs=0 and http://www.statistics.gr/portal/page/portal/ESYE/PAGEthemes?p_param=A0602&r_param=SJU15&y_param=2009_00&mytabs=0. Note that there is no data available for 2010 or 2011.

8 For example, see Article 23(1) and (2) of Law 1264/1982 referring to violations of the freedom of association.

9 For a more detailed discussion of the criminal courts' jurisdiction in English see 'The Greek Judicial System' available at: http://www.unidroit.info/mm/TheGreekJudicialSystem.pdf.

conciliator and which is binding upon the parties. If employment legislation is violated, SEPE can grant a reasonable period within which the employer must comply with the legislation, impose administrative sanctions or institute legal proceedings for the imposition of criminal penalties. If there is an immediate danger to the health and safety of workers, SEPE can suspend the operations of the enterprise (Article 23 Law 3996/2011).

According to Law 3094/2003, the **Ombudsman** is the designated authority to protect citizens' rights against maladministration and any illegalities. As the authority itself states 'the Greek Ombudsman investigates individual administrative actions or omissions or material actions taken by government departments or public services that infringe upon the personal rights or violate the legal interests of individual or legal entities. Before submitting a complaint to the Greek Ombudsman, the complainant should first come into contact with the public service involved with his or her case. Only if the problem is not resolved by the service concerned should a complaint be submitted to the Ombudsman.'[10]

One of the responsibilities of the Ombudsman is to promote equal treatment and fight discrimination in the public sector based on race or ethnicity, religious or other conviction, disability, age or sexual orientation (Article 3(2) Law 3094/2003). However, note that the Greek Ombudsman mainly has the authority to intervene in cases involving public bodies; only under exceptional circumstances (i.e., where a child's rights are violated or where there is unequal treatment of men and women in matters of employment) can it examine the behaviour of private individuals. As a mediator, the Greek Ombudsman makes recommendations and proposals to the public administration. It cannot impose sanctions or annul illegal actions by the public administration.

For the fight against discrimination based on race or ethnicity, religious or other conviction, disability, age, or sexual orientation, Law 3304/2005 also established the **Service for Equal Treatment** which examines claims for violation of the principle of equal treatment, tries to help the parties reach out-of-court settlements, and submits to the Committee of Equal Treatment a report in the case of failure to reconcile the parties (Article 23 Law 3304/2005). In the field of employment and occupation however, according to Article 19(2) and (3) of Law 3304/2005, SEPE is designated as the competent authority to intervene where the principle of equal treatment is violated by natural and legal persons in the private sector; the Committee of Equal Treatment has only a supplementary role and, in practice, is not involved at all.[11]

Additionally, according to the Code of Laws on Workers' Health and Safety at Work (Law 3850/2010), workers in enterprises which employ more than 50 employees have the right to form **Health and Safety Committees** which, amongst others, monitor the working conditions and in cases of imminent danger may call the employer to take the necessary action. In companies that have between 20 and 50 employees the same right is granted to the **representative on health and safety issues** (Article 4(1) and (2) and Article 5(1)).

The resolution of collective labour disputes is mainly entrusted to non-judicial mechanisms, namely **Reconciliation**, **Mediation** and **Arbitration**. These mechanisms have undergone dramatic changes in the last two years because of the financial crisis and will be analysed in detail under section 3.1. Under Reconciliation and Mediation the third party aims at facilitating the two parties to reach an agreement of their own while in Arbitration the Arbitrator will in the end issue his/her award.

[10] 'What is the Greek Ombudsman? Role and mission', the Greek Ombudsman website, available at: http://www.synigoros.gr/?i=stp.en.what.

[11] Conclusion based on consultations with the stakeholders.

2. FREEDOM OF ASSOCIATION AND THE RIGHT TO COLLECTIVE BARGAINING

2.1. Description of the enforcement mechanisms for freedom of association and the right to collective bargaining

The main enforcement mechanism for the **workers' right to associate** in order to form trade unions is the **criminal courts**. Article 23(1) of Law 1264/1982 notes that employers who interfere with their workers' right to form or participate in trade unions shall be punished by the misdemeanour court with imprisonment up to five years[12] or a fine up to 5,000,000 drachmae. If the worker is fired or transferred to another place of work because of his participation in a trade union, the employer is subject to punishment by imprisonment up to five years or a fine up to 1,000,000 drachmae (Article 23(2) Law 1264/1982).[13]

As already noted, the mechanisms for the enforcement of workers' **right to collective bargaining** have undergone significant changes since the signature of the first Memorandum by Greece with the EU and the International Monetary Fund (IMF) in 2010. This study will first briefly refer to the characteristics of the workers' organisation and then analyse the functioning of Reconciliation, Mediation and Arbitration before and after 2010.

Characteristics of workers' organisation

The labour movement is organised in three tiers: on the **primary level** 'local unions' are organised on a local basis by at least 20 employees (Article 78 of the Civil Code) and can negotiate collective agreements if an enterprise employs more than 50 persons (Article 6(1)(b) Law 1876/1990). Note that the measures adopted since 2010 have brought significant changes for workers' bodies which may conclude collective agreements on the primary level. On the **secondary level**, collective agreements may be concluded by the federations, which consist of local unions and are organised by enterprise, sector or occupation. On the **third level**, there is only one labour union for employees in the private sector, the Greek General Confederation of Labour (GSEE), which may negotiate and sign collective agreements.[14] According to OECD Statistics, trade union density (ratio of wage and salary earners that are trade union members, divided by the total number of wage and salary earners) in Greece is relatively low (24.0% in 2008) and slightly decreasing over time (26.8% in 1999).[15]

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[12] According to Article 53 of the Criminal Code, in the case of misdemeanours the penalty of imprisonment is from 10 days to five years, unless otherwise specified. According to Article 52, in the case of felonies the imprisonment may be from 5 years to 20 years or life imprisonment, unless otherwise specified. According to Article 57, the monetary penalties in the case of misdemeanours cannot be less €150 or more than €15,000.

[13] The legislation has not been updated after the introduction of the Euro. 5,000,000 drachmas amounts to approximately €15,000 and 1,000,000 drachmas amounts to approximately €3000.

[14] Patra, E., 'Social dialogue and collective bargaining in times of crisis: The case of Greece', ILO working paper No. 38, February 2012, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_174961.pdf, p. 9. The agreement signed on the third level is called 'National General Collective Agreement', sets the minimum working conditions (including the level of the basic wage) and applies to all workers across the country.

[15] 'Trade Union Density', OECD StatExtracts available at: http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN.

Pre – crisis

As already discussed, **Reconciliation** is one of the mechanisms for the resolution of labour disputes. According to Article 13 of Law 1876/1990, even if disputes arising from an employment relationship are not the subject of a collective labour agreement, trade unions or employers may request the intervention of a Conciliator. The Conciliator tries to align the views of the parties in order to end the dispute. If the dispute arises during negotiations for the conclusion of a collective labour agreement and the reconciliation process results in an agreement, then the collective labour agreement is concluded.

If negotiations for the conclusion of a collective labour agreement reach an impasse, the parties can resort to the **Organisation for Mediation and Arbitration (OMED)** for resolution of their dispute.

Mediation may be considered an extension of the collective bargaining process with the assistance of an independent, neutral third party. If the parties do not reach agreement within 20 days from the commencement of the Mediation process, the Mediator submits his own proposal; if the parties do not accept this proposal within 5 days it is considered rejected (Article 15(6) Law 1876/1990). If the proposal is accepted, a collective labour agreement is concluded.

Arbitration plays a supplementary role in the collective bargaining process. Before 2010, a collective dispute could be referred to Arbitration: a) with the mutual consent of the negotiating parties at any stage of the collective bargaining process; b) unilaterally, on the initiative of one of the parties, if the other party had refused mediation; c) unilaterally, on the initiative of workers' trade unions if they had accepted the Mediator's proposal and the employers' federations had rejected it; d) if the dispute related to an agreement at the enterprise level, by the party that had accepted the Mediator's proposal if the other party had rejected it (Article 16 Law 1876/1990). The first goal of the Arbitrator is to facilitate the agreement of the two parties through an open exchange of arguments; therefore, the Arbitrator initially acts as a Mediator in order to assist the parties to reach consensus. If these efforts fail, then he issues his award.[16] Note that when a dispute is referred to Arbitration, the right to strike is suspended for ten days from the day of the appeal (Article 16(8) Law 1876/1990).

The Arbitration system in Greece was often characterised as 'compulsory' since it allowed workers' trade unions to unilaterally resort to this mechanism. As a consequence, in 2003, the Federation of Industries of Northern Greece **appealed Law 1876/1990 on 'Free collective bargaining and other provisions' before the ILO Committee on the Freedom of Association** claiming that the imposition of a compulsory arbitration procedure violated ILO Convention No. 154 on Collective Bargaining. The Committee held that imposing a compulsory procedure if the parties do not reach an agreement raises problems in relation to the application of Convention No. 98 on the right to organise and collectively bargain. However, the Committee further noted that Law 1876/1990 allowed for the creation of more appropriate mechanisms for the resolution of collective disputes and that it was adopted by an unanimous Parliament with the support of the national employers' and workers' organisations represented in OMED. The Committee suggested that consultations with the most representative organisations be initiated to ensure that compulsory arbitration is available only in the case of essential services (i.e., services essential for the life, personal safety or health of the whole or part of the population).[17]

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[16] Ibid, p. 8.

[17] See paragraphs 665, 666 and 667 of Case No. 2261, Report No. 332 (Greece) Complaint against the Government of Greece presented by the Federation of Industries of Northern Greece (FING) available at: http://www.ilo.org/ilolex/cgi-

On the same issue, the Supreme Court ('Άρειος Πάγος') held in judgment 25/2004 that the **Arbitration system** established under Law 1876/1990 is **compatible with the Greek Constitution, Article 6 of ILO Convention No. 154, and the European Convention on Human Rights**. In particular, concerning the law's compatibility with the ILO Convention No. 154 on Collective Bargaining, the court stated that the compulsory arbitration system is not prohibited under Article 6 of the Convention which merely states that the operation of industrial relations systems with the voluntary participation of the parties to the collective bargaining process is not precluded. Further, the court noted that Articles 6, 5(1), 4 and 8 of the ILO Convention No. 154 only provide guidelines to the national legislator, they do not amount to rules of substantive law creating rights and obligations for workers and, consequently, do not obtain regulatory effect by virtue of the Constitution. Therefore, the Greek legislation, and especially Article 16(1) of Law 1876/1990 was in compliance with the Convention regarding the peaceful settlement of collective disputes.

Post – crisis

The most significant changes due to the 2010 financial crisis relevant for this report include those made to the procedure and the scope of application of Mediation and Arbitration, the strengthening of the mechanisms for Reconciliation, and the prohibition of wage increases beyond those agreed in the National General Collective Agreement.[18]

The 'Memorandum of Economic and Financial Policies' of 3 May 2010 signed by the Greek Government, the EU and the IMF to boost competitiveness, notes that 'following consultation with social partners and within the frame of EU law, the government will reform the legal framework for wage bargaining in the private sector, including by eliminating asymmetry in arbitration'.[19] In response to this recommendation, Law 3845/2010 'Measures for the application of the support mechanism for the Greek economy by euro area Member States and the IMF' provided that the **procedure of appeal to OMED would be changed.**

Under the 'Updated Memorandum of Understanding on specific economic policy conditionality' of 6 August 2010, the Greek Government was once again asked to 'adopt and implement legislation to reform the wage bargaining system in the private sector, which should provide for a reduction in pay rates for overtime work and enhanced flexibility in the management of working time'.[20] In order to comply with this requirement, Law 3871/2010 'Fiscal Management and Responsibility' was adopted providing that **any Arbitration decisions issued after the adoption of this law would not be valid if they provided for wage increases** in 2010 and the first semester of 2011 (Article 51(1)). Moreover, the Law provided that any Arbitration decision adopted after Law 3845/2010 came into force could be appealed before a three-member arbitration board if it

lex/pdconv.pl?host=status01&textbase=iloeng&document=1302&chapter=3&query=Greece%40ref&highlight=&querytype=bool&context=0.

18 Kyriakoulas, P., 'Labour Relations after the Memorandum: Overview of the Changes in Labour Law 2010 – 2012' *('Οι εργασιακές σχέσεις μετά το Μνημόνιο: Πανόραμα της Μεταρρύθμισης της Εργατικής Νομοθεσίας 2010 – 2012'*), March 2012, National Institute of Labour and Human Resources, available at: http://www.eiead.gr/publications/docs/EIEAD_arthra_kai_meletes_2-2012.pdf, p. 14.

19 Greece – Memorandum of Economic and Financial Policies, 3 May 2010 available at: http://www.minfin.gr/content-api/f/binaryChannel/minfin/datastore/f9/31/25/f9312567ab01c79257c1385021f830e06ed91b97/application/pdf/Greece%2BLOI%2BMEFP%2BTMU-2.pdf, p. 11.

20 Updated Memorandum of Understanding on specific economic policy conditionality, 6 August 2010, available at: http://www.minfin.gr/content-api/f/binaryChannel/minfin/datastore/d8/4e/34/d84e340dfc9bb18ddb836375c1612696d0210d31/application/pdf/Revised+MoU+FINAL.pdf, p. 34.

provided for wage increases. Such appeals could be brought within 15 days from the day Law 3871/2010 came into force.

Law 3899/2010 completely **reformed the Mediation and Arbitration process** amending fundamental Articles of Law 1876/1990 and in particular replacing Articles 14, 15, 16 and 17. The main changes to the procedure are:

- The new Article 15 afforded employers the right to unilaterally make recourse to Arbitration after the Mediator had made a proposal. This meant that if the Mediator's proposal for the conclusion of the collective agreement was not accepted by the workers, employers could also unilaterally resort to Arbitration whereas under the previous regime unilateral appeal to Arbitration was specifically reserved to the workers' trade unions if they had accepted the Mediators' proposal which was rejected by the employers (Article 15). Note however that, as will be elaborated below, unilateral appeal to Arbitration has been eliminated altogether with Law 4046/2012 and the Act of Cabinet 6 of 28 February 2012, issued on authorisation of Law 4046/2012 and, therefore, this provision is not in force at the time of writing this report.
- The Arbitration decision may determine only the basic wage whereas under the previous regime it could regulate in general payment and working conditions. Now, non-basic wage issues (i.e., other benefits, financial or not) can be only a matter of collective bargaining, i.e., disputes over these issues cannot be resolved through any other dispute resolution procedure.
- Mediators and Arbitrators need to consider the general economic situation, the development of competitiveness and the production activity the collective dispute refers to.
- Disputes on the validity of Arbitration decisions fall under the competence of the one-member court of first instance. The relevant action may be brought by the parties to the collective dispute and the court's decision binds all of them. The hearing will be within 45 days from the submission of the application. Appeals to the decision of the court of first instance shall be made within 15 days of the decision and the hearing for the appeal will be within 30 days of its submission.
- Introduction of three-member Arbitration (versus the one-person Arbitration under the previous regime) in the cases of unilateral recourse to arbitration if one of the parties so requests.
- The workers' right of strike is suspended for 10 days also where the employer unilaterally appealed to arbitration (previously, this was the case only when workers unilaterally opted for Arbitration). Note however that, as will be elaborated below, unilateral appeal to Arbitration has been eliminated altogether with Law 4046/2012 and the Act of Cabinet 6 of 28 February 2012, issued on authorisation of Law 4046/2012.

Further, Law 3899/2010 introduced a **new type of collective agreement, the 'special enterprise collective agreement'** which can be negotiated even by employers employing fewer than 50 workers and the respective enterprise union, or if such a union does not exist, with the respective sectorial labour union or federation.[21] Special enterprise collective agreements could provide for working conditions inferior to those of the sectorial agreements but not below those provided in the National General Collective Agreement (Article 13).

[21] Patra, E., see footnote 14, p. 18.

Finally, the Second Memorandum of Economic and Financial Policies of February 2012 which Law 4046/2012 incorporated into the national legal order, and the Act of Cabinet 6 of 28 February 2012, issued on authorisation of Law 4046/2012, provide that **unilateral recourse to arbitration is eliminated**; only if both parties agree (i.e., both the workers' trade unions and the employers' federations) may they resort to Arbitration. The provision that workers' right of strike is suspended when a dispute is referred to Arbitration is preserved (Article 3(1) Act of Cabinet 6 of 28 February 2012). In addition, these instruments make changes in the duration of the collective agreements, freeze the 'maturity' provided by law or collective agreements and prohibit automatic periodic wage increases until unemployment falls below 10% (Annex V(1), Article 29, Law 4046/2012).

On the primary level, Law 4046/2012 provides that enterprise agreements may be concluded even by 'associations of persons' (i.e., not trade unions), which are formed by at least three fifths of an enterprise's workers, regardless of the total number of employees in the enterprise.

Note that GSEE **appealed before the ILO Committee on the Application of Standards** the newly adopted measures (Communications dated 29 July 2010, 28 July and 18 November 2011) claiming that they violate Greece's obligations under various ILO Conventions, including ILO Conventions No. 98, No. 87 and No. 154.[22] In its 2011 Report, the ILO Committee on the Application of Standards noted the exceptional circumstances which Greece has had to face over the last few years and stated, amongst others, that the possibility to have recourse to compulsory arbitration as set out in Law 3899/2010[23] would appear not to infringe the provisions of the Convention. Further, it mentioned that the restrictions placed on the Arbitrator in relation to the maximum increase of the basic wage can be determined by the Government in the absence of a common agreement among the parties concerned as an exceptional measure in the current circumstances of extreme austerity, if they do not exceed a reasonable period.[24]

In summary, the most importance changes in the functioning of Mediation and Arbitration in Greece within the last two years are: i) the elimination of the workers' trade unions' right to unilateral resort to Arbitration; ii) the obligation of Mediators and Arbitrators to consider the general economic situation, the development of competitiveness and of the production activity; and iii) the competence of Arbitrators to rule only on the issue of the basic wage.

Moreover, associations of persons (i.e., not only trade unions) can now negotiate and conclude collective agreements at the enterprise level. **Overall, the enforcement of the worker's right to collective bargaining seems weakened by the measures to cope with the financial crisis.**

In 2010, OMED had 133 Mediation cases. Mediators issued proposals in 80 cases. In total 62 collective labour agreements were signed: 28 collective labour agreements were signed after the submission of the Mediator's proposal while 34 were signed without such a submission. In 2011, OMED had only 41 cases of Mediation with Mediators issuing

[22] Institute of Labour, GSEE – ADEDY, 'Greek Economy and Employment, Annual Report 2011' ('*Η ελληνική οικονομία και η απασχόληση, Ετήσια Έκθεση 2011*') available at: http://www.inegsee.gr/sitefiles/studies/EKTHESH_13.pdf, p. 302 – 306.

[23] Which, as discussed above, extended the right to unilaterally appeal to arbitration to employers' federations and provided that only the basic wage (and not issues concerning the rest of the working conditions) can be determined through this process.

[24] 'Observation (CEACR) – adopted 2011, Right to Organise and Collective Bargaining Convention, 1949 (No.98) – Greece', available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:226751420411005::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2698934,102658,Greece,2011.

proposals in 21 cases. In total, 8 collective labour agreements were signed: 2 after the submission of the Mediator's proposal and 6 without one.[25]

Concerning Arbitration, in 2010 OMED had 61 cases; 57 Arbitration decisions were issued while 4 collective labour agreements were signed during the Arbitration process. In 2011, after the introduction of Law 3199/2010, OMED had 29 cases of Arbitration; 22 Arbitration decisions were issued while 2 collective labour agreements were signed during the process.[26]

2.2. Practical enforcement situation for the freedom of association and the right to collective bargaining in national law

2.2.1. Major difficulties in the enforcement of the freedom of association and the right to collective bargaining

The laws adopted in the aftermath of the 2010 financial crisis have significantly changed the functioning of the mechanisms through which workers could enforce their right to collective bargaining. Under the current structure, the **workers' right to, under certain circumstances, unilaterally resort to Arbitration has been eliminated; now, only if both parties consent may they make recourse to Arbitration.** This means that even if one of the party refuses, in bad faith, to negotiate collectively, the other party cannot resort to Arbitration unilaterally, which may render the protection of the right ineffective. Further, such a limitation does not seem to arise out of Article 23 of the Constitution which clearly provides for the possibility to use the services of Arbitrators in case of an impasse in negotiations. It is thus argued that the goal of this new mechanism is to weaken the collective bargaining process and the role of collective agreements so that the conclusion of individual employment contracts prevails.

Further, it is argued that since **Mediators and Arbitrators** need to take account of the competitiveness of the company and the general economic circumstances, they **would rarely decide on wage increases**, even if such increases were permitted by the legislation. Furthermore, Arbitrators may decide only on the issue of the basic wage; this means that if there is a failure in the collective bargaining process and an inconclusive mediation process for issues concerning the rest of the working conditions (e.g., benefits, financial or not), there is no other dispute resolution mechanism available.

Finally, the fact that associations of persons (i.e., not only trade unions) may negotiate and conclude collective agreements on the primary level, in small and medium enterprises regardless the number of employees, further weakens workers' negotiating power and makes them more vulnerable to employers' demands.

Overall, even though it seems that workers' right to collective bargaining is weakened by the measures adopted in the last two years to cope with the financial crisis, it is still early to reach clear conclusions on how these changes will affect collective labour law in Greece.

[25] 'OMED Annual Report 2011' ('*ΟΜΕΔ, Ετήσια Έκθεση του έργου έτους 2011*') (March 2012), available at: http://www.omed.gr/el/files/Report_2011_3.pdf, p. 77.

[26] Ibid.

2.2.2. Positive experiences on the enforcement of the freedom of association and the right to collective bargaining

International law has had a significantly positive influence on the domestic legal framework for the protection of the freedom of association and the right to collective bargaining as Greek workers could rely on these provisions, appealing to the ILO, to protect the rights that they considered infringed by the recent legislative developments. At this point, no further positive experiences have been identified.

2.3. Conclusions on the effectiveness of the enforcement of the freedom of association and the right to collective bargaining in Greece

The main enforcement mechanism for workers' right to associate in order to form trade unions is the criminal courts. Concerning the right to collective bargaining, the parties may resort to Reconciliation, Mediation and Arbitration. These mechanisms have undergone significant changes in the last two years as a result of the measures Greece had to adopt because of the financial crisis. The main challenges under the current system include the fact that the parties may resort to Arbitration only if they mutually consent, the requirement that Mediators and Arbitrators take into account the competitiveness of the enterprise and the general economic conditions when rendering their proposals/awards and the fact that Arbitrators may only rule on the issue of the basic wage and not on the rest of the working conditions (e.g., benefits, financial or not). Although international law has had a significantly positive influence on Greek law for the protection of the freedom of association and the right to collective bargaining, overall, after 2010 workers' right to collective bargaining seems to be weakened in an attempt to raise competitiveness.

The relevant legislation could be amended providing that in case one of the parties refuses, in bad faith, to negotiate collectively, the other could resort unilaterally to arbitration; possibly, the EU could put forward a relevant proposal among the initiatives that it undertakes for structural reforms in Greece.

3. AGE ANTIDISCRIMINATION

3.1. Description of the enforcement mechanisms for age antidiscrimination

Law 3304/2005 provides for the imposition of both administrative and criminal penalties in cases of workplace discrimination on the grounds of age. Pertaining to the **criminal** penalties, according to Article 16, anyone who violates this law in the provision of goods or services shall be punished with imprisonment of six months to three years and a monetary penalty of €1000 to €5000. As far as **administrative penalties** are concerned, Article 17 of Law 3304/2005 refers to Article 16 of Law 2639/1998 which is, however, now declared void and is replaced by the provisions of Law 3996/2011 on the SEPE.

As discussed in section 2.2 above, **SEPE** is entrusted with supervising the implementation of the principle of equal treatment regardless of age. If SEPE considers that the relevant legislation is violated, it can order the violator to comply with the legislation within a reasonable timeframe, impose administrative sanctions or institute criminal proceedings (Article 23 Law 3996/2011). With regards to administrative sanctions, SEPE can impose fines ranging from €500 to €50,000. Within 60 days from the communication to the employer of the decision imposing a fine an appeal may be brought before the administrative courts of first instance (Article 24 paragraphs (1)(A) and (6) Law 3996/2011).

Moreover, employees may appeal to the **civil courts** in cases of age discrimination. Article 14(1) of Law 3304/2005 notes that the injured party needs to prove before the competent judicial (or administrative) authorities the facts from which direct or indirect discrimination can be presumed, in which case the opposing party must prove that in the actual circumstances the principle of equal treatment was not violated.

As already mentioned in section 2.2 above, the Greek **Ombudsman** may intervene in cases of age antidiscrimination when the public authorities are involved. As a mediator, the Greek Ombudsman makes recommendations and proposals to the public administration. It does not impose sanctions or annul illegal actions by the public administration. In 2011, 25% of the complaints the Greek Ombudsman received alleging violation of the principle of non-discrimination were referring to discrimination on the ground of age.[27] The principal objective of the Greek Ombudsman is to promote non-discrimination and influence the way the public sector exercises its authority as well as to increase public awareness of the relevant issues. The successful intervention of the Ombudsman in a significant number of cases in 2011, including cases on age antidiscrimination, is encouraging since it familiarises public authorities with the right to age antidiscrimination and their obligations.[28]

[27] 'Greek Ombudsman - Annual Report 2011' ('*Συνήγορος του Πολίτη – Ετήσια Έκθεση 2011*') available at: http://www.synigoros.gr/resources/docs/plhres-keimeno.pdf, p. 17.

[28] Ibid, p. 107.

3.2. Practical enforcement situation of age antidiscrimination in national law

3.2.1. Major difficulties in the enforcement of age antidiscrimination

The first important difficulty in the enforcement of age antidiscrimination in Greece is that **Greek legislation itself often distinguishes on the basis of age**, giving contradictory signals to the citizens.[29]

Further, there is a **lack of awareness** of equality legislation and complaint procedures among potential victims so that they do not regularly seek the enforcement of their right to equal treatment. Often, there is **failure to recognise** and **reluctance to report** such discrimination.

Finally, there are difficulties also in the operation of the enforcement mechanisms: with regards to the **non-judicial ones**, and especially SEPE, they have limited resources and as a consequence the number of inspections is not sufficient;[30] concerning **judicial enforcement mechanisms**, the potential cost and length of judicial proceedings has a significant deterrent effect on victims.[31]

3.2.2. Positive experiences on the enforcement of age antidiscrimination

EU law has had a decisive influence on the protection against discrimination on the grounds of age in Greece. The relative legislative framework was put in place to ensure compliance with EU Directive 2000/78/EC.

Moreover, Greek legislation has sometimes also introduced measures aimed at affording increased **protection to older workers** (e.g., Article 66 of Law 3199/2011 provides that when employees over 55 years of age are made redundant, they can become self-insured and their former employer has to pay part of their insurance contributions).

3.3. Conclusions on the effectiveness of the enforcement of age antidiscrimination in Greece

In Greece, EU law has had a decisive impact on protection against age discrimination as the relevant national framework was adopted to transpose Directive 2000/78/EC. Various mechanisms exist to help workers assert their right to age antidiscrimination, including the civil courts, the criminal courts, SEPE and the Greek Ombudsman.

Major difficulties in the effective protection of the right to age antidiscrimination include the lack of information and awareness and the inability of some of the enforcement bodies, such as SEPE and the civil courts, to ensure effective and timely compliance with the legislation. An additional difficulty arises from the fact that the Greek legislation itself gives contradictory signals as it often introduces differentiated treatment on the basis of age. On the other hand, in certain cases measures to protect older workers have also been adopted.

[29] E.g. Law 4024/2011 provides that civil servants and public sector employees with indefinite private law contracts who will be 55 years of age on 31 December 2013 and have completed 35 years of pensionable service are required to leave their posts receiving only 60% of their basic pay and will receive their full pension upon retirement. Please see section 2.1 for more detailed discussion of this issue.

[30] Conclusion based on the interviews with stakeholders.

[31] Conclusion based on the interviews with stakeholders. Please note that there is no statistical information per type of claim in Greece.

In order to improve the protection of the right to age antidiscrimination it is essential that the State, with the firm support of the EU, promotes awareness raising activities, increases the financial resources available to enforcement bodies (especially SEPE) and makes the necessary changes in procedures before judicial authorities to ensure respect for the right to a speedy trial.

4. THE RIGHT TO HEALTH AND SAFETY AT WORK

4.1. Description of the enforcement mechanisms for the right to health and safety at work

According to Article 71 of the Code of Laws on Workers' Health and Safety at Work (Law 3850/2010) any employer, manufacturer, importer or supplier who violates the provisions of the legislation on workers' health and safety, regardless of the provisions of the Criminal Code, shall be subject to the following sanctions with a decision of the competent **Head of Centre for the Prevention of Occupational Hazard** (the Centres for the Prevention of Occupational Hazard constitute regional directorates of SEPE) or the **Special SEPE Inspector**: a) for each violation a fine ranging from €500 to €50,000; b) temporary suspension of the relevant production process or part(s) or the whole business for up to six days.

The Minister of Labour and Social Security, after the reasoned recommendation of the competent labour inspector, may impose the aforementioned temporary suspension for a period longer than six days or even permanently suspend the operations of the relevant production process.

In order to impose these sanctions, the following are taken into account:

- The severity, immediacy and extent of the risk; and,
- The seriousness of the offences, any repeated failure to comply with previous recommendations, similar offences in the past and the degree of fault.

Prior to the imposition of these administrative sanctions, a reasonable period of up to 30 days may be granted to the employer to comply with the relevant requirements.

Violation of the provisions for the protection of workers' health and safety by the employers is **punished by the criminal courts** with imprisonment of at least 6 months or with a monetary penalty of at least €900. Any producer or manufacturer, importer or supplier who intentionally violates the health and safety legislation is punished with imprisonment or a monetary penalty of at least €293, or both.[32] If the violation occurs out of negligence, the perpetrators are punished with imprisonment of up to a year or a monetary penalty (Article 72(1) and (2)). If the trial is suspended, the court explicitly determines the new hearing within 21 days.

As discussed in section 2.2 above, **SEPE** is also responsible for monitoring the implementation of the legislation on health and safety at work. Apart from the sanctions mentioned in section 4.1., if the right to health and safety at work is violated SEPE can also **impose a temporary suspension of the operations of the enterprise** if it considers that there is an immediate danger to the safety and health of the workers (Article 23 Law 3996/2011). In 2010, the technical and health services of SEPE made 25,259 inspections and re-inspections, and imposed sanctions in 3219 cases (839 referrals to criminal proceedings; 1358 suspensions of operations; 1023 fines amounting to €2,405,900).[33] In 2011, the technical and health services of SEPE made 28,150 inspections and re-inspections, and imposed sanctions in 2171 cases (775 referrals to criminal proceedings, 806 suspensions of operations, 590 fines amounting to €1,704,111).[34]

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[32] Please note that in Greece, there is no statistical information on court judgments per category of offence.

[33] SEPE Annual Report 2010' ('*Έκθεση Πεπραγμένων Σ.ΕΠ.Ε 'Ετους 2010*'), available at: http://www.ypakp.gr/uploads/docs/4437.pdf, p. 120 – 126.

[34] 'SEPE Annual Report 2011' ('*Έκθεση Πεπραγμένων Σ.ΕΠ.Ε 'Ετους 2011*'), available at: http://www.ypakp.gr/uploads/docs/5188.pdf, p. 110 – 116.

Claims for the violation of the health and safety at work legislation may also be brought before the competent **civil courts**. In the case of employment accidents, workers who are insured with the Social Insurance Organisation (IKA) are compensated by the Organisation (Article 34(1) Compulsory Law 1846/1951); only if the accident at work may be attributed to the employer's intention, he will be personally liable for the worker's material damages (Article 34(2) Compulsory Law 1846/1951). In both cases (i.e., regardless of whether the employment accident is attributed to the employer's intention or negligence), the worker may seek compensation for his moral damages from the civil courts (according Article 932 of the Civil Code). If the employee is not insured with IKA, Law 551/1915 provides that the employer is liable for the employee's material damages.

4.2. Practical enforcement situation of the right to health and safety at work in national law

4.2.1. Major difficulties in the enforcement of the right to health and safety at work

One of the main enforcement mechanisms for the right to health and safety at work is **SEPE**. However, SEPE is considerably understaffed and focuses its inspections on larger companies (which usually comply with the legislation). Further, the Centres for the Prevention of Occupational Hazard and the Occupational Health and Safety Inspection Departments are not equipped with laboratories for measuring chemical – physical and biological agents. Moreover, SEPE usually inspects work-places after accidents have occurred instead of acting pre-emptively.

Additionally, in case of employment accidents, note that **employers** shall not be held personally **liable** for the material damages of the employees unless the accident can be attributed to their intention. However, employers are obliged to inform SEPE, the IKA and the police in the case an accident has occurred at work (Article 43(2) Law 3850/2010). In this case, an inspection by SEPE may follow in which case, if it is deemed that the relevant health and safety legislation was violated, SEPE will impose sanctions.

Compliance with the **health and safety at work legislation often requires significant investments by employers**; therefore, it is possible that due to the economic crisis employers may decide to cut down on such costs, thus not complying with the relevant legislation. It is noteworthy that already in 2009, at the beginning of the financial crisis in Greece, 42% of the population (as compared to the EU average at 21%) believed that due to the economic crisis the health and safety conditions at work might deteriorate a great deal and 38% (EU average at 40%) that they might deteriorate to some extent; only 12% expressed the view that the health and safety conditions at work would not really deteriorate (EU average at 23%) and 7% that they would not deteriorate at all (EU average at 6%).[35] Thus, it can be concluded that even in 2009, when the economic crisis had significantly smaller impact on Greece than it has today, citizens were afraid that the conditions of health and safety at their workplace could deteriorate to a significant larger extent than other Europeans.[36]

[35] 'Pan-European opinion poll on occupational safety and health – June 2009 – Greece', available at: http://osha.europa.eu/en/safety-health-in-figures/eu-poll-slides-2009/Package_Greece.pdf , p. 18.

[36] Ibid, p. 20.

4.2.2. Positive experiences on the enforcement of the right to health and safety at work

EU and international law have contributed significantly in setting high standards for health and safety at work in Greece.

As noted above, workers may claim moral damages from their employers in the case of a labour accident which is due to violations of the health and safety legislation at work. Courts usually award very **high compensation** for moral damages.[37]

Further, SEPE has developed specialised **checklists** in order to ensure consistent and effective enforcement of the health and safety at work legislation. SEPE also regularly participates in information **campaigns** such as the 'Risk assessment in the use of dangerous substances'. In that case, SEPE published four leaflets providing information and occupational advice related to occupational risks and preventive measures in different sectors; these leaflets were published in five languages (Greek, English, Albanian, Romanian and Russian).

4.3. Conclusions on the effectiveness of the enforcement of the right to health and safety at work in Greece

Overall, Greece seems to have an adequate legal framework to protect the right to health and safety at work also due to EU and international standards even though citizens fear that working conditions might deteriorate due to the economic crisis. There are various mechanisms to ensure that this right is respected (civil courts, criminal courts, SEPE, Workers' Committee on Health and Safety at Work). The compensation provided for moral damages in the case of accidents at work seems satisfactory and SEPE's specialised checklists for inspections and its regular participation in information campaigns constitute positive developments.

However, SEPE does not have the necessary resources to inspect a sufficient number of enterprises and employers are not held personally liable for the material damages for accidents at work unless the accident can be attributed to the employer's intent.SEPE would need to increase its personnel, update its infrastructure, be equipped with laboratories, be supported by more legal experts in the imposition of fines and initiation of criminal proceedings as well as coordinate its activities with those of other inspecting bodies (for example, the Social Security Organisation (IKA) which monitors the implementation of insurance legislation, and the Body Against Financial Crime (SDOE) which monitors the implementation of tax legislation). The creation of an Integrated Information System between these Bodies would relieve SEPE inspectors from administrative burdens to a great extent. Finally, in case of repeated labour accidents due to violation of the legislation on health and safety, SEPE should have the power to impose heavier fines or the employer should be obliged to pay increased insurance contributions to IKA.

[37] Conclusion based on the interviews with stakeholders.

ANNEXES

Annex I: List of stakeholders contacted for the report

Trade Unions

- Institute of Labour – Greek General Confederation of Labour: freedom of association and the right collective bargaining; age antidiscrimination; health and safety at work.
- Hellenic Labour Inspectorate – Directorate for Planning and Coordination of Occupational Safety and Health Inspection: health and safety at work.
- Hellenic Labour Inspectorate – Directorate for Planning and Coordination of Social Inspection.

Workers Association / NGOs

- 50 plus Hellas: age antidiscrimination.

Authorities

- Organisation for Mediation and Arbitration: right to collective bargaining.

Practitioners

- Professor Konstantinos Papadimitriou, Associate Professor of Labour Law, University of Athens Law School: freedom of association and the right collective bargaining; age antidiscrimination; health and safety at work.
- Professor Konstantinos Mpakopoulos, Lecturer of Labour Law, University of Athens Law School: freedom of association and the right collective bargaining; age antidiscrimination; health and safety at work.

Annex II: Information sources (legislation, case-law, literature reviewed and statistics)

National Law

- Greek Constitution (Government Gazette A' 147/2001).
- Civil Code, Presidential Decree 456/2984 (Government Gazette A' 164/1984).
- Law 4046/2012 'Second Memorandum, PSI, Reduction of Minimum wages - Pensions/ Lawyers/ Medicines / Privatisations' (Government Gazette A' 28/2012)
- Law 4024/2011 'Pensions in the public sector, single payroll, workers' reserve list, occupational (crafts) agreements' (Government Gazette A' 226/2011).
- Law 3996/2011 'Hellenic Labour Inspectorate, Issues of Employment, Insurance, EKAS, OAED etc.' (Government Gazette A' 170/2011).
- Law 3899/2010 'Urgent Fiscal – Tax, Labour-Wage Measures' (Government Gazette A' 212/2010).
- Law 3871/2010 'Fiscal Management and Responsibility' (Government Gazette A' 141/2010)
- Law 3850/2010, Code of Laws on Workers' Health and Safety (Government Gazette A' 84/2010).
- Law 3845/2010 'Measures for the application of the support mechanism for the Greek economy by euro area Member States and the IMF' (Government Gazette A' 65/2010).

- Law 3094/2003 'Greek Ombudsman and other provisions' (Government Gazette A' 10/2003).
- Law 3528/2007 'Code of Public Servants and Employees of Legal Persons of Public Law' (Government Gazette A' 26/2007).
- Law 3304/2005 'Implementation of the Principle of Equal Treatment regardless of racial or national origin, religion or belief, disability, age or sexual orientation' (Government Gazette A' 16/2005).
- Law 2738/1999 'Collective Labour Agreements in the Public Sector' (Government Gazette A' 180/1999).
- Presidential Decree 159/1999 'Measures to improve the health and safety or workers, etc. (amendment to Presidential Decree 17/1996)' (Government Gazette A' 157/1999).
- Presidential Decree 17/1996 'Measures to improve the health and safety of workers at work to comply with Directives 89/391/EEC and 91/383/EEC', (Government Gazette A' 11/1996).
- Law 2403/1996 Ratifying ILO Convention 154 (Government Gazette A' 99/1996).
- Law 2224/1994 'Regulation of matters pertaining to employment, trade union rights, health and safety at work and organisation of the Ministry of Labour and the legal persons supervised thereby' (Government Gazette A' 112/1994).
- Law 1876/1990 'Free collective bargaining and other provisions' (Government Gazette A' 27/1990).
- Law 1568/1985 'Workers Health and Safety' (Government Gazette A' 177/1985).
- Law 1264/1982 'On the democratization of the labour movement and the fortification of collective freedom of workers' (Government Gazette A' 79/1982).
- Legislative Decree 4204/1961 Ratifying ILO Convention 87 (Government Gazette A' 174/1961).
- Legislative Decree 4205/1961 Ratifying ILO Convention 98 (Government Gazette A' 174/1961).
- Compulsory Law 1846/1951 'Establishment of the Social Insurance Organisation' (Government Gazette A' 179/1951).
- Law 551/1915 'Employment Accidents - Compensation' (Royal Decree 24.7/25.8 1920).

National Case-Law

- Greek Council of State ('Συμβούλιο της Επικρατείας') in its judgment 2454/2010.
- Supreme Court ('Άρειος Πάγος') judgment 25/2004

Literature

- Andriopoulos, S., 'Collective Labour Law' available at: http://www.greeklawdigest.gr/topics/employment/item/115-collective-labour-law (22 May 2012).
- Kyriakoulas, P., 'Labour Relations after the Memorandum: Overview of the Changes in Labour Law 2010 – 2012' ('*Οι εργασιακές σχέσεις μετά το Μνημόνιο: Πανόραμα της Μεταρρύθμισης της Εργατικής Νομοθεσίας 2010 – 2012*'), March 2012, National Institute of Labour and Human Resources, available at: http://www.eiead.gr/publications/docs/EIEAD_arthra_kai_meletes_2-2012.pdf.
- Patra, E., 'Social dialogue and collective bargaining in times of crisis: The case of Greece', ILO working paper No. 38, February 2012, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_174961.pdf

- Koukiadis, I., *Labour Law – Epitome* (‘*Εργατικό Δίκαιο – Επιτομή*’) (Sakkoulas, 2011)
- Institute of Labour, GSEE – ADEDY, ‘Greek Economy and Employment, Annual Report 2011’ (‘*Η ελληνική οικονομία και η απασχόληση, Ετήσια Έκθεση 2011’*) available at: http://www.inegsee.gr/sitefiles/studies/EKTHESH_13.pdf
- ‘Pan-European opinion poll on occupational safety and health – June 2009 – Greece’, available at: http://osha.europa.eu/en/safety-health-in-figures/eu-poll-slides-2009/Package_Greece.pdf.
- Dimitropoulou, E., and Mpampatsikou, F., ‘Legislative frame health and safety in work’ (2007), available at: http://www.vima-asklipiou.gr/volumes/2007/VOLUME%2004_07/VA_REV_3_06_04_07.pdf.
- ‘The Greek Judicial System’ available at: http://www.unidroit.info/mm/TheGreekJudicialSystem.pdf.
- ‘Legal Order, Greece’, European Judicial Network on Civil and Commercial Matters available at: http://ec.europa.eu/civiljustice/legal_order/legal_order_gre_en.htm.

Statistics

- ‘Greek Ombudsman - Annual Report 2011’ (‘*Συνήγορος του Πολίτη – Ετήσια Έκθεση 2011*’) available at: http://www.synigoros.gr/resources/docs/plhres-keimeno.pdf.
- ‘OMED, Annual Report 2011’ (‘*ΟΜΕΔ, Ετήσια Έκθεση του έργου έτους 2011*’) (March 2012) available at: http://www.omed.gr/el/files/Report_2011_3.pdf.
- ‘SEPE Annual Report 2011’ (‘*Έκθεση Πεπραγμένων Σ.ΕΠ.Ε Έτους 2011*’), available at: http://www.ypakp.gr/uploads/docs/5188.pdf.
- ‘SEPE Annual Report 2010’ (‘*Έκθεση Πεπραγμένων Σ.ΕΠ.Ε Έτους 2010’*), available at: http://www.ypakp.gr/uploads/docs/4437.pdf.
- ‘Trade Union Density’, OECD StatExtracts available at: http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN.

ANNEX 2:
NATIONAL REPORT FOR FRANCE

CONTENTS

LIST OF ABBREVIATIONS

CA	Collective agreement
CFDT	Confédération Française Démocratique du Travail
CGPME	Confédération Générale des Petites et Moyennes Entreprises
CGT	Confédération Générale du Travail
FO	Force Ouvrière
ILO	International Labour Organisation
MEDEF	Movement of the French Enterprises
UPA	Union Professionnelle Artisanale
DIRECCTE	Directions Régionales de l'Entreprise, de la Concurrence, de la Consommation, du Travail et de l'Emploi

Please note that the findings of this report are based on literature review and consultations with national stakeholders (a list is included in Annex I of this report). If the source of information was an interviewee, this has been indicated in a footnote.

1. INTRODUCTION TO THE LEGAL FRAMEWORK AND ENFORCEMENT TRADITION IN FRANCE

The Constitution of 4 October 1958 with the Preamble to the Constitution of 27 October 1946, the Declaration of the Rights of Man and of the Citizen of 26 August 1789 and the fundamental principles recognised by the laws of the Republic, to which the Preamble refers, are the highest sources of French law. They are followed by laws, decrees and regulations. General principles of law, custom and case law are also sources of law.

International and European treaties ratified by France take precedence over French laws and regulations. By virtue of the primacy of European law, regulations and directives do so as well. International commitments supersede domestic law by virtue of Article 55 of the Constitution (*hierarchie des normes*), but do not prevail over constitutional norms. Under Article 54 of the Constitution, the Constitutional Council (*Conseil Constitutionnel*) may nullify clauses in French laws ratifying international commitments that contradict the Constitution.[1]

In principle, French courts decide cases purely by applying legislation. However when legislation is incomplete, contradictory or lacking, courts may have no alternative but to use a normative power and the power of legislative interpretation (Article 4 of the Civil Code). As a result, sometimes jurisprudence has shaped the frameworks of labour law. ILO Conventions ratified by France have a significant influence on this jurisprudence. The Court of Cassation often quotes from and refers to these conventions in its judgments.[2]

1.1. National legislation on freedom of association and the right to collective bargaining, age antidiscrimination and the right to health and safety at work

The 1958 **Constitution** guarantees **freedom of association** including the right to create and join a trade union and to strike (Recitals 6 to 8 of the Preamble to the 1946 Constitution). Article 34 of the 1958 Constitution provides fundamental principles of labour law. The right to **collective bargaining** is linked to the right for workers to participate in the determination of their working conditions (Recital 8(6) of the Preamble to the 1946 Constitution).

Article 28 of the Charter of Fundamental Rights of the European Union protects the right of collective bargaining. Both employers and employees have the right to engage in the collective bargaining process and must bargain in good faith. This has influenced French law as previously only employers had an obligation to negotiate in good faith. The doctrine and jurisprudence now tend to apply this obligation to both employers and employee unions.[3] The Court of Cassation (*Cour de Cassation*) has also often used **ILO Convention** No. 87 concerning Freedom of Association and Protection of the Right to Organise in its decisions.

The labour laws governing freedom of association focus on collective bargaining and workplace representation. They are codified in the **Labour Code**. The 1982 '**Auroux laws**'[4] require employers to negotiate with representative unions all specific working

[1] Burdeau, G., *Droit constitutionnel*, 24th ed, LGDJ/Montchrestien, 2000.

[2] For example Cass. Soc., 29 March 2006, No 04-46499.

[3] Article L. 2262-4 of the Labour Code. See also: http://www.cgt.fr/Negocier-chaque-annee-une.html.

[4] Named after Jean Auroux, a French Minister of Labour: loi No 82-689 relative aux libertés des travailleurs dans l'entreprise, loi No 82-915 relative au développement des institutions représentatives du personnel, loi No 82-957 relative à la négociation collective et au règlement des conflits du travail, loi No 82-1097 relative aux comités d'hygiène, de sécurité et des conditions de travail.

conditions including wages and working time, although they do not require that an agreement actually be reached. However, employees and trade unions have various means of applying pressure on employers to conclude an agreement (e.g. strikes, boycotts, petitions, etc. – see section 3.1).

In 1966, the government granted national-level 'representative' rights to five trade union confederations (CGT, CGT-FO, CFTC, CFDT and CGC), empowering them to sign national, sectorial, and company-level collective agreements.[5] In 1982, the presumption of representativeness was further extended to any union affiliated with one of the five confederations.[6] In 2001, the **UN's Committee on Economic, Social and Cultural Rights** urged France to ensure that the criteria used to determine whether to recognise representative status of a union that is not affiliated with one of the five confederations 'do not impede the right of [smaller and newer] unions to participate freely' in collective bargaining.[7]

Law No. 2008-789 of 20 August 2008 dramatically changed the scope of representativeness by allowing employers and workers' representatives to negotiate collective agreements even if there is no representative union in the area covered by the agreement. However, at the national and inter-sectorial level, the new rules will be fully applicable from the next round of elections which will take place in 2013.[8] Major trade unions will no longer be presumed as representative and workers will vote for their representatives. Trade unions will be considered representative if they respect the fundamental principles of Article L. 2121-1 of the French Labour Code,[9] if they have existed for more than 2 years and have received at least 10% of the votes in the first round of voting for the company's staff representative bodies (works council, single staff delegation, or staff delegation).[10] This threshold is reduced to 8% for unions seeking representativeness at the branch level in an undertaking or at the sectorial and national level.[11] However, during the transitional period, if a small union affiliated to a confederation decides to leave it, it will lose its **representativeness** even if it won 10% of

the votes, and will then have to wait for the next election.[12] A supplementary **law enacted on 15 October 2010**[13] allows very small companies (fewer than 11 employees) to vote in national trade union elections every 4 years in order to determine unions' representativeness.[14]

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5 Simon, P., 'France: Freedom of Association and Labour Law', ODIHR, April 2007, available at: http://legislationline.org/topics/country/30/topic/1/subtopic/17 (last accessed 15 June 2012).

6 Ibid.

7 Four criteria are specified by statute: 'membership levels, independence, amount of dues, and experience of the union. Courts also consider the criteri[on] of 'influence' when judging representativeness'. Ibid. (brackets in original), citing Cass. Soc., 3 December 2002, No. 01-60.729.

8 Dupays, A., and Girodroux, C. (eds), *Lamy social, Droit du travail, Charges sociales*, Lamy, Wolters Kluwer, 2012, §3758.

9 Respect of republican values (Cass. Soc., 8 July 2009, No 08-60.599), independence (Cass. Soc., 22 July 1981, No 81.60.695), financial transparency, significant audience and influence (Cass. Soc., 29 September 2011, No 10-26.2011) and significant membership (Cass. Soc., 25 June 1987, No 86-60.522).

10 Grangé, J., France, *Employment and labour law – Jurisdictional comparisons*, 4th ed., 2012, Siân Keall, Travers Smith LLP, p. 117-118.

11 Article 2 de la loi No 2008-789 du 20 août 2008 portant rénovation de la démocratie sociale et réforme du temps de travail et Circulaire DGT No 20 relative à la loi portant rénovation de la démocratie sociale et du temps de travail (Fiche No 8).

12 Cass. Soc., 18 May 2011, No 10-60.069 and No 10-21.705. From the next elections in 2013 onwards, representativeness is not dependent on the affiliation with a 'representative' trade union but only on the factors mentioned above.

13 Loi du 15 octobre 2010 No 2010-1215 complétant les dispositions relatives à la démocratie sociale issues de la loi No 2008-789 du 20 août 2008.

14 Article L. 2122-9 of the Labour Code.

According to Article L. 2261-24 of the Labour Code, the Ministry of Labour can order that national or sectorial **collective agreements be made generally applicable**. The employers' organisations, the workers' organisations, or the Ministry of Labour itself can initiate this procedure, after a reasoned opinion from a Committee consisting of an equal number of representatives on both sides – employers and employees (Article L. 2261-19). According to Article L. 2261-15, when the order of the Ministry is published, all companies must apply the collective agreement. Any employee falling within the scope of the generally applicable collective agreement may claim his rights under it even if his employer is not a member of one the signatories' organisations.

Directive 2009/38/EC on the establishment of a **European Works Council** was transposed on 21 October 2011 by an ordinance. Consequently, Articles 2341-1 ssq of the Labour Code were recently amended.

In the private sector, the **right to strike** is enshrined in the Labour Code (Articles L. 2511-11 and L. 1132-2). In the public sector, two recently enacted laws provide a framework for the right to strike in the area of public transportation.[15] Law No. 2007-1224 of 21 August 2007 obliges trade unions in the sector of public transportation to enter into collective bargaining with the employer before issuing a notice to strike.

Finally, Law No. 2007-130 of 31 January 2007 on modernisation of social dialogue (*Loi Larcher*) established a **code of conduct** for the government and the parliament, according to which every social law or bill is presented to the trade unions before being enacted by the parliament, in order to reduce conflicts between them and the government.

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation influenced national legislation on the right to **age antidiscrimination**. Law No. 2001-1066 of 16 November 2001 relating to antidiscrimination transposed part of this Directive covering age discrimination. **Law No. 2008-496 of 27 May 2008** on adaptation to EU antidiscrimination law transposed further antidiscrimination provisions, amending **Articles L. 1132-1 ssq of the Labour Code**. The right to age non-discrimination covers all areas of work including recruitment and promotion. Article L. 1132-1 provides that no one can be subject to discrimination at work based on his age. Article L. 5331-2 forbids the publication of vacancies that include an age limit. Article L. 1237-4(2) forbids the use of a clause (*clause couperet*) allowing termination of a work contract based on the worker's age.

These laws regulate both direct and indirect discrimination. The definition of indirect discrimination is set out in Article 1 paragraph 2 of Law No. 2008-496 of 27 May 2008. According to a landmark case of the Court of Cassation, 'there is indirect discrimination based on age only when a provision, a criterion or a practice, which seem at first neutral, could trigger a specific disadvantage/burden for individuals of a certain age compared to others, unless this provision, criterion or practice is objectively justified by a legitimate objective and the measures taken to reach this goal are appropriate and necessary'.[16] The ***Kücükdeveci* judgment** of the CJEU confirming the general principle of non-discrimination on the ground of age also influenced a later judgment of the Court of Cassation which ruled that justifications to difference of treatment in employment and occupation must be thoroughly checked.[17]

[15] Loi No 2007-1224 du 21 août 2007 sur le dialogue social et la continuité du service public dans les transports terrestres réguliers de voyageurs and Loi 2012-375 du 19 mars 2012 relative à l'organisation du service et à l'information des passagers dans les entreprises de transport aérien de passagers.

[16] Cass. Soc., 30 April 2009, No 07-43.945. See also Cass. Soc., 19 October 2010, No 08-45254.

[17] Judgment of the Court of Justice of the European Union of 19 January 2010 in case C-555/07, *Seda Kücükdeveci/Swedex GmbH & Co*., ECR 2010 Page I-00365; Cass. Soc., 11 May 2010, No 08-43 681 and 08 45 307.

A Decree of 28 August 2006 allowed employers to offer unemployed workers over 57 years old a fixed-term contract (18 months).[18] In addition, workers over 50 years of age are allowed 3 years of unemployment insurance instead of the 2 years provided to other workers. Companies of more than 50 employees are now obliged to prepare a safeguard work plan focusing on **senior workers** when at least 10 workers need to be made redundant (*plan de sauvegarde de l'emploi*).[19]

The **Labour Code and the Social Security Code** include rules on **health and safety rights** of workers.[20] Case law of the Court of Cassation has played a major role in establishing new rules with respect to the employers' obligation to provide safety for workers. In particular, jurisprudence has established the obligation for the employer to take all necessary and appropriate measures to provide safety and to protect physical and mental health (*obligation de sécurité de résultat*).[21] Moreover, employers must inform workers preventively of any health related risk they might be exposed to. This new obligation is now defined by Article 4121-1 of the Labour Code and is often applied by courts.[22] Article 4121-3-1 of the Labour Code also includes the notion of work related stress (*pénibilité au travail*) and the obligation of the employer to inform workers about repetitive or difficult tasks and stressful jobs and about the measures in place to reduce this stress.

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 influenced French labour law. It was transposed by Law No. 91-1414 of 31 December 1991.[23] As a result of transposing EU law, a section on the 'general principles of prevention' (*principes généraux de prévention*) was included in the section on health and safety at work of the Labour Code. ILO Convention No. 81 on Labour Inspection played a major role in the development of labour inspectors' competences. This convention was enacted by Law No. 50-927 of 10 August 1950.

In 2010, a **new Decree regulating the submission of declaration of accidents and professional diseases** entered into force.[24] This simplified the procedure for qualifying an injury or disease as work-related. A disease will be considered work-related based not only on tables but also on an individual assessment by a doctor. In the absence of decision from the Primary Health Insurance Fund (*Caisse Primaire d'Assurance Maladie*) within 3 months of the notification, the injury or disease will be recognised as work-related.

1.2. Overview of the enforcement tradition in France

This section provides an overview of the mechanisms that enforce freedom of association, the right to collective bargaining, age antidiscrimination, and the right to health and safety at work in France. It discusses the competent court, and describes other institutions that are responsible for the enforcement of one or more workers' rights or are active in dispute settlement or conflict resolution.

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[18] Décret No 2006-1070 du 28 août 2006 aménageant les dispositions relatives au contrat à durée determinée afin de favoriser le retour à l'emploi des salariés âgés.

[19] Décret No 2009-560 du 20 mai 2009 relatif au contenu et à la validation des accords et des plans d'action en faveur de l'emploi des salariés âgés.

[20] Part IV of the Labour Code on Health and Safety and Book four of first part of the Social Security Code.

[21] Cass. Soc., 28 February 2002, No 00-1005.

[22] Cass. Civ., 2ème, 9 July 2009, No 08-16934.

[23] Loi no 91-1414 du 31 décembre 1991 modifiant le code du travail et le code de la santé publique en vue de favoriser la prévention des risques professionnels et portant transposition de directives européennes relatives à la santé et à la sécurité du travail.

[24] Décret No 2009-938 du 29 juillet 2009 relatif à la procédure d'instruction des déclarations d'accidents du travail et maladies professionnelles.

In France, **administrative** courts (*Tribunal Administratif*) settle disputes at first instance between individuals and public authorities and between civil servants and the administration as their employers. The decisions can be appealed before the Administrative Courts of Appeal. The Council of State (*Conseil d'État*) hears cases at last instance. The Council is also competent at first instance for challenges to decrees or regulations, and acts as the supreme administrative court and the government adviser. Its decisions are an authoritative source of law.

Civil courts like the Instance (*Tribunal d'Instance*) or Grande Instance Courts (*Tribunal de Grande Instance*) are competent for collective disputes.[25] Trade unions can bring actions before these courts. Claims that exceed €10,000 are brought before the Grande Instance Courts. The decisions of civil courts can be appealed before the Courts of Appeal and at last instance before the Court of Cassation. The latter is responsible for ensuring that lower courts comply with the law. Its judgments represent a main source of law.

Within the civil court system, the Labour Tribunal (*Conseil des Prud'hommes*) and the **Social Security Tribunal** (*Tribunal aux Affaires de Sécurité Sociale*) are competent to enforce the three chosen fundamental workers' rights by allocating compensation or imposing sanctions when necessary. The **Labour Tribunal** is competent for individual disputes. However, in some cases the Labour Court is competent by subject and the individual or collective nature of the dispute is irrelevant: for example, the Labour Tribunal is always competent in cases concerning discrimination,[26] the violation of collective agreements,[27] redundancy,[28] or harassment.[29] The Labour Tribunal has jurisdiction over claims between employers and workers in the private sector. Civil servants can bring their cases before the Tribunal only when they are hired under conditions ruled by civil law. The Labour Tribunal is composed of two representatives of employers and two representatives of employees. If no majority is reached, the case will be reviewed by a professional judge. Before reaching the Tribunal, the parties have to present themselves before the **Office of Conciliation** where they will be heard by two counsellors. If a settlement is reached, even if partial, it binds both parties legally.

Whether or not a decision can be appealed depends on the amount in dispute. This serves to control the number of appeals. The Court of Appeal hears appeals concerning more than €4,000,[30] reviewing both the analysis of the facts and the application of the law.[31] Regardless of whether or not the amount in dispute meets the threshold, the Court of Cassation may review a decision of the Labour Tribunal or the Court of Appeal regarding the correct application of the law only.[32]

Criminal courts are competent in some cases of violation of collective interest of employees, of discrimination on the basis of age and of accidents at work (homicide or injury by recklessness) (see respective sections below). The **Constitutional Council** (*Conseil Constitutionnel*) also plays an important role in interpreting laws. The Council may raise constitutional questions (*questions prioritaire de constitutionalité*) in the area of labour law.

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25 *Prud'hommes, Répertoire de procedure civile*, Dalloz, December 2011. §194.
26 Articles L. 1134-2 and L. 1411-2 of the Labour Code.
27 Articles L. 2262-9 and L. 2262-10 of the Labour Code.
28 Article L. 1235-7 of the Labour Code.
29 Article L. 1154-2 of the Labour Code.
30 Article D. 1462-3 of the Labour Code; Décret No 2008-244 du 7 mars 2008 relatif au code du travail.
31 Guinchard, S., *Droit et pratique de la procédure civile, Droits interne et de l'Union européenne*, 7th ed., Dalloz action, 2012-2013, §121.31 s.
32 Op. cit., § 553.21 s; Cour de Cassation, The Role of the Court, http://www.courdecassation.fr/about_the_court_9256.html, (last accessed 15 June 2012).

Since 2011, in cases of discrimination, the victim can also bring a case to the **French Ombudsman** (also referred to as *défenseur des droits*).[33] The Ombudsman acts as a mediator but can also investigate cases. In discrimination cases, he can inform the General Attorney's Office and support the claimant in his legal action.[34] However, the decisions of the Ombudsman cannot be appealed.

In order to provide a safe working environment and to prevent any safety and health risk, in every company of more than 50 employers, a **Committee for health and safety at work** is created. It is composed of the employer, employees' representatives elected for 2 years, and a doctor who has a consultative role. The committee or the staff delegate in smaller companies, in his role as union representative, can launch studies in the company, the results of which are communicated to the employer, who decides whether to take measures.

In companies of more than 50 employees, the employees elect a **union representative** (*délégué syndical*) from amongst themselves. A **staff delegate** (*délégué du personnel*) is elected in companies of at least 11 workers. In these companies, the staff delegate also performs the union representative role. The staff delegate ensures that the rights of workers are respected, while the union representative can negotiate with the employers to expand these rights.[35]

The Ministry of Work and Health employs **labour inspectors** who work in the Regional Department of Enterprise, Competition, Consumer Affairs, Labour and Employment (*Directions Régionales de l'Entreprise, de la Concurrence, de la Consommation, du Travail et de l'Emploi*-DIRECCTE). They monitor the application of legislation on issues including health and safety at work, the functioning of representative institutions within companies, and the validity of redundancies or dismissals.

[33] Lois No. 2011-333 and 2011-334 du 29 Mars 2011.

[34] See Le Défenseur des droits, http://defenseurdesdroits.fr/ (last accessed 15 June 2012).

[35] See 'Délégués du personnel, délégués syndicaux, comité d'entreprise: quelles différences?', Editions Tissot, November 2010, available at: http://www.editions-tissot.com/campagnes/ds/1110/pdf/Differences_IRP.pdf (last accessed 15 June 2012).

2. FREEDOM OF ASSOCIATION AND THE RIGHT TO COLLECTIVE BARGAINING

2.1. Description of the enforcement mechanisms for freedom of association and the right to collective bargaining

Under Articles L. 2241-6 and R. 2241-9 of the Labour Code, **the employer must negotiate** with the most representative trade unions within the company at least every three years regarding certain issues such as wages and working time. Otherwise, employers and trade unions are free to negotiate (e.g. training, leave).[36] Refusal by the employer to negotiate constitutes a criminal offence of interference (*délit d'entrave*),[37] punishable by up to one year's imprisonment and/or a fine up to €3,750. Up to two years' imprisonment and/or a fine of up to €7,500 apply for repeated offences.[38] However, an obligation to negotiate is not an obligation to conclude. If the negotiation fails, a report of disagreement must be prepared and transmitted to the Regional Department of Enterprise, Competition, Consumer Affairs, Labour and Employment (*Directions Régionales de l'Entreprise, de la Concurrence, de la Consommation, du Travail et de l'Emploi*-DIRECCTE), under Article L. 2242-4 of the Labour Code. This report records all the suggestions from both sides, as they stood at the end of the negotiations, and the measures that the employers wants to apply unilaterally. It serves as evidence that the negotiations took place and as a record of the exchanges.[39]

Workers also have various means of applying pressure on the employers to conclude an agreement.[40] The right to **strike**, protected by the Preamble of the French Constitution, is one of them. A collective agreement may never limit the right to strike and the law may only require a notice period before going on strike.[41] Strikes remain a common mode of collective action. However, other forms such as refusal of overtime and petitions to the employers have made more progress.[42] There are also more individual labour disputes and in more and more establishments both collective actions by employees and individual conflicts occur.[43] Wages and working time are the most controversial issues in negotiations and are often the cause of strikes.[44] Blockades (labour actions aiming to prevent the employer from utilising its facilities) and boycotts are not regulated as such in French law.[45]

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[36] For more information about the collective negotiation within the companies, see Ministère du travail, de l'emploi et de la santé, 'La négociation collective en entreprise, 6 January 2009, available at: http://travail-emploi.gouv.fr/informations-pratiques,89/fiches-pratiques,91/convention-collective,110/la-negociation-collective-dans-l,1008.html (last accessed 15 June 2012).

[37] Article L. 2328-1 of the Labour Code.

[38] Article L. 2146-1 and L. 2146-2 of the Labour Code.

[39] *Memento Social*, ed. Francis Lefebvre, 2012, §52025.

[40] See Ministère du travail, de l'emploi et de la santé, 'Les conflits collectifs du travail', 27 April 2009, available at: http://travail-emploi.gouv.fr/etudes-recherche-statistiques-de,76/statistiques,78/relations-professionnelles,85/conflits-collectifs,243/les-conflits-collectifs-du-travail,2300.html (last accessed 15 June 2012).

[41] Cass. Soc., 7 June 1995, No 93-46.448; *Memento Social*, ed. Francis Lefebvre, 2012, §10890.

[42] Around 15% of the companies of at least 10 employees opened collective negotiations and this reaches 80% in the companies that count workers' representatives. The number of companies that experienced a strike remains stable at 2%. The number of non-worked days for participation in a strike amounted to 128 days in 2007.

[43] See Ministère du travail, de l'emploi et de la santé, 'Des conflits du travail plus nombreux et plus diversifiés', February 2007, available at: http://travail-emploi.gouv.fr/IMG/pdf/2007.02-08.1.pdf (last accessed 15 June 2012).

[44] Ibid.

[45] See Ministère du travail, de l'emploi et de la santé, 'Les conflits collectifs du travail', 27 April 2009, available at: http://travail-emploi.gouv.fr/etudes-recherche-statistiques-de,76/statistiques,78/relations-

However, Article 225-1 and 225-2 of the Penal Code state that any discrimination against, among others, companies which consists of a refusal to supply a good or service, or the obstruction of the normal exercise of any economic activity is punished by a maximum of 3 years of imprisonment and a fine of 45 000 euros.[46]

Both trade unions and individuals can initiate **legal action** to enforce an agreement.[47] The Labour Code sets out rules for the standing of employees' organisations. Article 2132-3 provides that professional trade unions can bring actions related to direct or indirect damages to a collective interest of the profession before any jurisdiction (civil, criminal and labour courts). Article L. 2262-9 provides that organisations under a collective agreement can bring an action on behalf of their individual members. Parties to a collective agreement can also bring legal action (Article L. 2262-12 Labour Code) to claim compensation from other parties who fail to respect their obligations under that agreement.

In 2008, a **National Commission for Collective Bargaining** was created.[48] It is composed of government representatives, national employers' organisation representatives, national workers unions' representatives and representatives of the Council of State. This commission has several roles including transmitting to the Labour Minister its observations relating to collective bargaining and its advice concerning the minimum wage, and the adoption of legal texts on collective bargaining or working relationships.

2.2. Practical enforcement situation for the freedom of association and the right to collective bargaining in national law

2.2.1. Major difficulties in the enforcement of the freedom of association and the right to collective bargaining

The enforcement of freedom of association and the right to collective bargaining relies mainly on labour courts. The main obstacle is the **length of the procedure**. Procedures before some Labour Tribunals can last up to 3 years. A 2012 judgment of the Paris Grande Instance Court required the State to compensate an employee for the excessive length of the procedure.[49]

An agreement of 12 December 2001, 'Agreement for the development of social dialogue in the craft industry' (*Accord pour le développement du dialogue social dans l'artisanat)* reached between the Craft Industry Professional Union (*Union Professionnelle Artisanale*-UPA) and the government proposed new rules for very small companies (i.e. companies with fewer than 20 workers). This **agreement has never been enforced** due to legal challenges raised by employers' unions (Movement of the French Enterprises (*Mouvement des Entreprises de France*-MEDEF) and the General Confederation of small and medium enterprises (*Confédération Générale des petites et moyennes entreprises*-CGPME). It would have allowed workers from small and medium companies in the absence of a workers' representative to benefit from the range of agreements applicable to bigger companies.

professionnelles,85/conflits-collectifs,243/les-conflits-collectifs-du-travail,2300.html (last accessed 15 June 2012).

[46] Blockades are not commonly used by trade unions which resort more often to strikes.

[47] For more information about the enforcement of collective bargaining agreements, see Ministère du travail, de l'emploi et de la santé, 'L'application d'une convention ou d'un accord collectif dans l'entreprise', 28 February 2012, available at: http://travail-emploi.gouv.fr/informations-pratiques,89/fiches-pratiques,91/convention-collective,110/l-application-d-une-convention-ou,1009.html (last accessed 15 June 2012).

[48] Article L. 2271-1 to L. 2272.2 of the Labour Code; Loi No 2008-1258 du 3 décembre 2008 en faveur des revenus du travail.

[49] TGI Paris 18 January 2012, 11/02512.

2.2.2. Positive experiences on the enforcement of the freedom of association and the right to collective bargaining

The **code of conduct** established by Law No. 2007-130 of 31 January 2007 has encouraged social dialogue between trade unions and the legislator and has helped to reduce conflicts. Trade unions have been encouraged to join discussions in areas of labour law where governmental reforms were planned.[50]

The obligation to enter into collective bargaining with the employer before **sending a notice to strike** in the sector of public transportation imposed by Law No. 2007-1224 of 21 August 2007 has led to conflict resolution without impacting public transport.[51] By setting up mandatory collective bargaining, dialogue between public transportation employers and trade unions has been significantly improved and has prevented conflicts.

Law No 2008-789 of 20 August 2008 effectively transferred the power to determine 'representativeness' of labour unions to the workers, applying a voting system rather than an agreement between the government and the five major unions as previously. This law also obliges companies to arrange with trade union representatives the reconciliation of their union activities with their work responsibilities. By enabling employees of small companies to vote in national trade union elections, **Law No 2010-1215 of 15 October 2010** effectively extended the right to collective bargaining to a class of workers who previously lacked access to it.[52] This addressed concerns raised by the UN Committee on Economic, Social and Cultural Rights.[53] Due largely to the impact of these new laws, the **number of collective agreements signed in companies increased** by 18% from 2009 to 2010.[54]

2.3. Conclusions on the effectiveness of the enforcement of the freedom of association and the right to collective bargaining in France

Trade unions can bring actions before labour courts and civil courts to enforce agreements negotiated between employers and trade unions. Employees can also bring actions for compensation and for criminal sanctions against employers who breach the obligation to negotiate. Other means to enforce the freedom of association and right of collective bargaining include the right to strike, boycotts, blockades, petitions and refusal of overtime. In addition, a National Commission for Collective Bargaining has been created to advise the Labour Minister on topics including collective bargaining and working relationships.

Court proceedings are too lengthy to ensure effective enforcement of these rights, and some agreements are not enforced. On the other hand, the reforms led to improvements in the representativeness of trade unions (now elected by workers, even in small companies with less than 11 employees, instead of being selected by the government) and to an increase in the number of collective agreements signed in companies. Moreover, thanks to the code of conduct trade, unions are consulted on upcoming legislation and by setting up

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[50] See Conseil d'Etat, 'La place des partenaires sociaux dans l'élaboration des réformes', 5 February 2010, available at: http://www.conseil-etat.fr/fr/discours-et-interventions/la-place-des-partenaires-sociaux-dans-lelaboration-des-reformes-kpv.html (last accessed 15 June 2012).

[51] See Ministère du travail, de l'emploi et de la santé, 'La loi sur le service minimum dans les transports publiée au journal officiel du 21 août', 23 August 2007, available at: http://www.travail-emploi-sante.gouv.fr/archives,1994/breves,409/la-loi-sur-le-service-minimum-dans,6107.html (last accessed 15 June 2012).

[52] Article L. 2122-9 of the Labour Code.

[53] However, according to the CFDT, participation in these elections is not encouraged, as they take place on the internet.

[54] See Vie publique, 'Bilan des négociations collectives 2010', 13 July 2011, available at: http://www.vie-publique.fr/actualite/alaune/travail-bilan-negociations-collectives-2010.html (last accessed 15 June 2012).

mandatory collective bargaining, dialogue between public transportation employers and trade unions has been significantly improved and has prevented conflicts.

Recommendations to step up the enforcement of this right would include enforcing agreements and adopting measures to speed up court proceedings.

3. AGE ANTIDISCRIMINATION

3.1. Description of the enforcement mechanisms for age antidiscrimination

If an employee or a job candidate thinks he has been the victim of discrimination based on age, he can bring a **claim before the Labour Tribunal** based on Article L. 1134-2 of the Labour Code.[55] In addition to employees or candidates, a national or departmental trade union has standing to bring a legal action on their behalf. The plaintiff needs to bring a legal claim to obtain compensation within 5 years from the discovery of the act of the discrimination.[56] The employer bears the burden of proving the decision was justified.[57] The procedure can be very long as it can be a three-step procedure: the Office of Conciliation first examines the case, which can then be referred to the Labour Tribunal. If no majority is reached, a professional judge hears the claim. On average, cases are heard more than 12 months after a claim is filed, and can take as long as 3 years.[58] Article L. 1132-4 of the Labour Code provides for the invalidity of all acts or measures violating the antidiscrimination provision (Article L. 1132-1). Sanctions can range from damages to the reintegration of the worker in the company. The amount of damages granted varies.

Criminal proceedings are also possible. Article L. 225-2 of the Penal Code provides that discrimination measures that, among others, take the form of:

- the refusal to hire, sanction or fire an individual,
- making the provision of a good or service depending on a discriminatory condition,
- making the availability of a job/internship/training offer subject to a discriminatory condition, or
- the refusal to admit an individual to the internship provided by Article L. 412-8 of the Social Security Code,

are punishable by up to three years in prison and a €45,000 fine. If the discrimination takes place in a company opened to the public (such as a shop), the sanctions can rise to a 75 000 fine and a 5 year prison sentence. If a company is found guilty of discrimination, a judge can impose a fine of up to €150,000.[59] A court may also prohibit the company from taking part in public tender offers, or publicise the decision.[60]

In addition to the Labour Tribunal, workers or candidates who think they have been the victims of age discrimination can bring an action to the **Ombudsman** (*défenseur des droits*). Once its investigation is done, the Ombudsman may present recommendations to the parties, set up mediation or conciliation or require the prosecutor to take appropriate

[55] Cass. Soc, 28 November 2007, No 07-40787.

[56] When the plaintiffs establish facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment (Article L. 1132-1 of the French Labour Code and Article 10 of Directive 2000/78/EC).

[57] Info Prud'Hommes CFDT, 'La discrimination par l'âge', 18 March 2011, available at: www.infoprudhommes.fr/node/1821 (last accessed 15 June 2012) and Touati, J.J., 'La discrimination fondée sur l'âge', *in Le Figaro*, 17 November 2008, available at: http://www.lefigaro.fr/emploi/2008/11/17/01010-20081117ARTFIG00384-la-discrimination-fondee-sur-l-age-.php (last accessed 15 June 2012).

[58] See website of the lawyers' trade union SAF (Syndicat des Avocat de France) available at: http://www.lesaf.org/index.php?option=com_flexicontent&view=items&cid=45:informations&id=400:justiciables-syndicats-avocats-conseillers-prudhommes-tous-presents-le-15-fevrier-prochain&Itemid=136 (last accessed 15 June 2012).

[59] Crocq, J.C., *Le guide des infractions*, Dalloz, Paris, 7e éditions, 2006.

[60] Code Pénal article L. 131-39.

measures. He can also present observations to civil, administrative or criminal courts and support claimants in their legal action.

The Court of Cassation has acknowledged the direct effect of Directive 2000/78/EC and overruled Court of Appeal's decisions which did not check thoroughly the justifications for age discrimination before deciding that they were allowed.[61] Awards in age discrimination cases can be significant. For instance, in the EDF case,[62] the company was first condemned by the Labour Courts to pay €3,000 damages while the Court of Appeal awarded damages for €100,000.

The Civil Tribunal (*Tribunal de Grande Instance*) of Alberville ruled in February 2012 that ski instructors had been the victims of age discrimination by their employer the *École du Ski Français*.[63] An instructor was not allowed to work during the less busy period of the ski season, in order to leave the work to younger instructors. With the support of the Ombudsman, the instructor brought a claim before the Civil Tribunal, which ruled that the clause had to be removed from the contracts. The cases received significant media attention.[64]

The **staff delegate** (*délégué du personnel*) and **union representatives** (*délégués syndical*) also play an important role in the enforcement of provisions concerning discrimination within the company. They can inform the employer of discrimination cases and may bring an action before the Labour Tribunal on behalf of the employee in cases where the employer fails to take action, in particular if he fails to investigate and take appropriate measures to resolve a case.[65] They can also inform the labour inspectorate (*inspection du travail*) of claims relating to the application of laws.

[61] Cass. Soc. 11 May 2010, No 08-45.307 and Cass. Soc. 11 mai 2010 No 08-43.681. See Cour de cassation, Rapport Annuel 2010, Discrimination professionnelle liée à l'âge, available at: http://www.courdecassation.fr/publications_cour_26/rapport_annuel_36/rapport_2010_3866/quatrieme_partie_jurisprudence_cour_3879/droit_travail_3883/galite_traitement_discrimination_harcelement_3887/discrimination_19424.html (last accessed 15 June 2012).

[62] Cour d'Appel de Paris, Pole 6 – Chambre 8 of 26 January 2012, No 09/06516. See also Infos-discriminations.fr, 'EDF condamnée pour discrimination liée à l'âge', 15 February 2011, available at: http://www.infos-discriminations.fr/2011/02/edf-condamnee-pour-discrimination-liee-a-lage/ (last accessed 15 June 2012).

[63] TGI Albertville, Civ., 21 février 2012, No 12/00048.

[64] See France 3, 'L'ESF des Arcs 1800 fait appel', 21 March 2012, available at: http://alpes.france3.fr/info/albertville-73--victoire-des-moniteurs-de-ski-71355719.html (last accessed 15 June 2012); Le Parisien, 21 February 2012, 'Discrimination à l'âge: des moniteurs de ski obtiennent gain de cause', available at: http://www.leparisien.fr/economie/emploi/discrimination-a-l-age-des-moniteurs-de-ski-obtiennent-gain-de-cause-21-02-2012-1870974.php (last accessed 15 June 2012); Le Progrès, 15 February 2011 'La centrale EDF du Bugey condamnée pour une discrimination liée à l'âge', available at: http://www.leprogres.fr/faits-divers/2011/02/15/la-centrale-edf-du-bugey-condamnee-pour-une-discrimination-liee-a-l-age (last accessed 15 June 2012); France 3, 'Discrimination liée à l'âge: EDF condamnée', 23 February 2011, available at: http://rhone-alpes.france3.fr/info/discrimination-liee-a-l-age-edf-condamnee-67505128.html (last accessed 15 June 2012).

[65] Article L. 2313-2 of the Labour Code.

3.2. Practical enforcement situation of age antidiscrimination in national law

3.2.1. Major difficulties in the enforcement of age antidiscrimination

Most workers **are not aware** of laws that protect them against age discrimination in France. Age discrimination is not generally recognised as discrimination. During the past few years, there have only been a **few cases** before the courts and the proceedings are quite long. In 2010, only 6% (692) of discrimination claims sent to the Ombudsman alleged age discrimination.[66]

Although France has enacted laws to protect the right to age antidiscrimination, **some laws have been introduced that make a distinction based on age which could be considered discriminatory.** Some laws provide older workers better unemployment conditions both in the case of collective redundancy plans and once unemployed. The safeguard work plan (*plan de sauvegarde de l'emploi*) for dismissals focuses only on senior workers.[67] Since 2009, 30,000 company plans and 88 sectorial plans have been signed. These measures could potentially be challenged by younger workers based on age discrimination.

In addition, the 3 years of unemployment insurance for older workers instead of the 2 years provided to other workers, and the possibility for employers to offer unemployed workers over 57 years old a fixed-term contract,[68] have encouraged older workers to leave their positions and companies to lay them off before reaching retirement age, and have **made it more difficult for older workers to find a job** once they are made redundant.

3.2.2. Positive experiences on the enforcement of age antidiscrimination

The transposition of **EU law** in the French system has directly contributed to recognising and enforcing the right to age antidiscrimination.

The Court of Cassation judgments of 11 May 2010 had a positive impact. Lower courts are now obliged to **thoroughly check the justifications** for age discrimination.[69] Media attention to age discrimination cases is also a positive as it may **encourage other workers to bring cases to court**.

3.3. Conclusions on the effectiveness of the enforcement of age antidiscrimination in France

Enforcement powers lie with the courts, the staff delegate, the union representatives and the Ombudsman. The staff delegate and the union representative have the right to bring an action to court on behalf of a worker discriminated against based on age or to inform the labour inspectorate; the Ombudsman can refer cases to the prosecutor and present observations to courts.

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66 Halde (Haute autorité de lutte contre les discriminations et pour l'égalité), Rapport 2010, : http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/114000234/0000.pdf (last accessed 15 June 2012).

67 For instance, Décret No 2009-560 du 20 mai 2009 relatif au contenu et à la validation des accords et des plans d'action en faveur de l'emploi des salariés âgés. In case of non-observance of this obligation, the company may be ordered to pay a fine equal to 1% of the total payroll.

68 Décret No 2006-1070 du 28 August 2006 aménageant les dispositions relatives au contrat à durée déterminée afin de favoriser le retour à l'emploi des salariés âgés.

69 See Cass. Soc., 11 May 2010, No 08 45 307.

Enforcement remains poor. The main difficulty for the enforcement of age antidiscrimination is the lack of awareness by workers. Only a few cases have been brought to court and the number of claims sent to the Ombudsman has not significantly increased over the years. Legislation itself makes some distinctions on the basis of age that could be considered discriminatory. Even when this type of legislation aims at positive action to support workers of a certain age, the results can be contradictory. However, recent cases have been widely covered by the media and represent steps towards better enforcement of the right, clarifying its scope and encouraging other workers to bring their cases to court.

The main measure to step up the enforcement of this right is to increase the awareness of equality measures by workers and employers. In particular, measures to encourage employers to consider the added value of the professional experience of older workers will support the enforcement of this right.[70] Furthermore, decision-makers should ensure that legislation which introduces (positive) discriminatory practices for a specific age category of workers is proportionate. They should also step up efforts to communicate to workers in all age groups the necessity of such measures.[71] Finally, speedier trials will enable better judicial enforcement of this right.

[70] Conclusion based on consultations with the stakeholders.
[71] Conclusion based on consultations with the stakeholders.

4. THE RIGHT TO HEALTH AND SAFETY AT WORK

4.1. Description of the enforcement mechanisms for the right to health and safety at work

Labour inspectors control the application of labour law in all its aspects (health and safety, working time, illegal work, etc.).[72] However, they are not involved in individual employment contract disputes that fall within the competence of the Labour Court.[73]

Inspectors advise employers, employees and workers' representatives about their rights and obligations.[74] Inspectorate officials have also a power of investigation that allows them to enter the companies and visit without prior notice; to conduct an investigation including interviewing the employees; to request disclosure of documents in the fight against undeclared work; and to use accredited bodies to check the premises and equipment.[75] In certain situations provided for by law, the employers must obtain permission before acting (e.g. dismissal of workers' representatives, rules of procedures, etc.).[76] The inspectors can issue observations to the employer, give him notices or request a judicial order to suspend the activity in case of serious dangers to the health and safety of workers. Their decisions can be subject to an informal appeal before the Ministry of Labour[77] or to judicial review before the Administrative Tribunal.[78]

In 2010, 2257 inspectors worked for the French Labour Inspection.[79] The labour inspection is divided into 'inspection sections' composed of one inspector, two controllers, and one administrative agent.[80] In recent years, an increase in the number of inspection agents has enabled each section to inspect a larger number of sites and workers. This development can be explained by the implementation of the Plan of Modernisation and Development of Labour inspections (*'Plan de Modernisation et de Développement de l'Inspection du*

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[72] Dupays, A., and Girodroux, C. (eds), *Lamy social, Droit du travail, Charges sociales,* Lamy, Wolters Kluwer, edition 2012, §5241.

[73] Ministère du travail, de l'emploi, de la formation professionnelle et du dialogue social, 'L'inspection du travail', available at: http://travail-emploi.gouv.fr/informations-pratiques,89/fiches-pratiques,91/litiges-et-conflits-du-travail,124/l-inspection-du-travail,1123.html (last accessed 15 June 2012).

[74] Bledniak, E., *Santé, hygiene et sécurité au travail – Prévention, responsabilité, contentieux*, 1st ed., Edition Delmas, §1309-1342.

[75] Dupays, A., and Girodroux, C. (eds), *Lamy social, Droit du travail, Charges sociales,* Lamy, Wolters Kluwer, edition 2012, §5244-5252. See also Ministère du travail, de l'emploi, de la formation professionnelle et du dialogue social, 'L'inspection du travail', available at: http://travail-emploi.gouv.fr/informations-pratiques,89/fiches-pratiques,91/litiges-et-conflits-du-travail,124/l-inspection-du-travail,1123.html (last accessed 15 June 2012).

[76] Ibid.

[77] According to Décret No 2001-532 du 20 juin 2001 relatif au régime des décisions implicites prises par les autorités administratives relevant du ministère de l'emploi et de la solidarité, the claim should be lodged within 2 months form the decision and it has no suspensive effect. If the Ministry does not make any explicit decision within 4 months from the receipt of the claim, the latter is deemed refused. See Dupays, A., and Girodroux, C. (eds), *Lamy social, Droit du travail, Charges sociales,* Lamy, Wolters Kluwer, edition 2012, §5257-5258.

[78] Dupays, A., and Girodroux, C. (eds), *Lamy social, Droit du travail, Charges sociales,* Lamy, Wolters Kluwer, edition 2012, §5256-5261.

[79] Ministère du travail, de l'emploi et de la santé, 'L'inspection du travail en France en 2009' available at: http://www.travail-emploi-sante.gouv.fr/IMG/pdf/Rapport_au_BIT_intranetW_28022011.pdf (last accessed 15 June 2012).

[80] Ministère du travail, de l'emploi et de la santé, 'L'inspection du travail en France en 2010', p. 157 and following, available at: http://travail-emploi.gouv.fr/IMG/pdf/Rapport_IT2010.pdf (last accessed 15 June 2012).

Travail'). The results of this reform have triggered different reactions in the general public. Some see it as very positive.[81] Others find it useless, or not sufficient.[82]

A **Committee for health and safety at work** must be set up in each company with at least 50 employees.[83] The committee's responsibilities are to analyse risks to health and safety and to promote prevention of those risks. It investigates work accidents and occupational diseases and reports its findings to the employer. It is consulted by the employers and the workers whenever new technology is introduced. It can ask an expert to evaluate occupational health and safety conditions. It drafts an annual report stating the general situation in the company and the measures that need to be taken in the next year. The employer will have to provide justifications to the committee if the measures have not been implemented. The committee's reports do not legally bind employers.

The **union representative** (*délégué syndical*) also plays an important role in the enforcement of legal provisions related to workers' health and safety. He can alert the employer of potential risks and in case of negligence of the employer may bring an action before the Labour Tribunal on behalf of the employee.[84] He can also inform the labour inspection (*inspection du travail*) of claims relating to the application of laws.

If an **employee is victim of a work accident or an occupational disease**, he can seek compensation from the Primary Health Insurance Fund (*Caisse Primaire d'Assurance Maladie*), upon requesting a certificate from the employer. A work doctor will examine whether the disease or accident is work related. If so, the condition will be qualified as a disability and the worker will be allocated compensation. If the doctor does not consider the issue to be work related, the employee may bring a case before the **National Health Insurance Commission** (*Commission de recours amiable de la Caisse primaire d'assurance maladie*). He may appeal the decision of the Commission before the **Social Security Tribunal** (*Tribunal des Affaires de Sécurité Sociale*) within 2 months. The decisions of the Commission and the Tribunal are legally binding. The decision of the Social Security Tribunal may be appealed before the Court of Appeal, if the value of the case is over €4,000.[85] The Court of Appeal will consider the analysis of the facts and the application of the law. If the case concerns a lesser amount, it is considered not to be significant enough to appeal on matters of fact, but may still be brought before the Court of Cassation if the application of the law is questioned.

Employers are responsible for providing a safe work environment. The Court of Cassation's jurisprudence has established the obligation for the employer to take all necessary and appropriate measures to provide safety and to protect physical and mental health (*obligation de sécurité de résultat*).[86] Failing that obligation is considered gross negligence (*faute inexcusable de l'employeur*).[87] In cases of injury or accident, the worker can bring an action for compensation to a criminal court or to a civil court within 2 years.

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81 Vie Publique, 'Inspection du travail : bilan 2008 du plan de réforme', available at: http://www.vie-publique.fr/actualite/alaune/inspection-du-travail-bilan-2008-du-plan-reforme.html (last accessed 15 June 2012) and Bessiere, J., 'L'inspection du travail, entre stabilité et évolutions', in *Semaine Sociale Lamy Suppléments*, 2001, No 1508.

82 CNT, 'Inspection du travail dans l'étau des objectifs', in *L'Humanité*, 7 July 2011, WK-RH, 'Les inspecteurs du travail ont le tournis', available at: http://www.wk-rh.fr/actualites/detail/15077/les-inspecteurs-du-travail-ont-le-tournis.html (last accessed 15 June 2012).

83 Article L. 4611-1 of the Labour Code.

84 Article L. 2313-2 of the Labour Code.

85 Article R. 142-25 of the Code of Social Security.

86 Cass. Soc., 28 February 2002, No 00-1005.

87 Cass. Soc., 11 April 2002, No 00-16535.

Article L. 452-1 of the Social Security Code foresees the possibility for workers to bring a legal action before the Social Security Tribunal to claim complementary compensation for an injury or accident due to the employer's gross negligence.[88] Finally, workers are offered a safety course by the employer.[89]

In the **event of high danger to health and safety**, workers can exercise their right of withdrawal (*droit de retrait*) as provided by Article L. 4131-1 of the Labour Code. Workers inform their employers immediately when they have reasonable cause to think there is an imminent danger to their safety and can withdraw from the dangerous situation. However if the worker has exercised his right in an illegitimate manner, the employer can retain a portion of his salary.[90] If the employer does not respect the right of withdrawal, the worker can bring a legal action before the Labour Tribunal or a criminal court (if he has suffered damages).[91]

4.2. Practical enforcement situation of the right to health and safety at work in national law

4.2.1. Major difficulties in the enforcement of the right to health and safety at work

Committees for health and safety reports do not bind the employer to follow their recommendations nor to take measures to protect workers' health and safety.

Moreover, although the number of **inspectors** has increased, some still consider it insufficient.[92]

4.2.2. Positive experiences on the enforcement of the right to health and safety at work

The **new procedure regarding qualifying injuries or diseases as work-related** constitutes a major improvement, as it is now easier for workers to receive compensation.

Jurisprudence has also established the obligation for the **employer to take all necessary and appropriate measures** to provide safety to workers and to protect their physical and mental health (*obligation de sécurité de résultat*).[93] As a result, workers benefit from better information and protection against risks in the company and can bring an action in cases of damage incurred by workers due to the failure of the employer to take all necessary measures.

Finally, when **inspectors** carry out their activities, their measures are very effective.[94]

4.3. Conclusions on the effectiveness of the enforcement of the right to health and safety at work in France

Different actors have the responsibility to enforce the right to health and safety at work: workers, employers, union representatives, the Committee for health and safety at work, inspectors, the National Health Insurance Commission and the courts. Together with inspectors, the Committee for health and safety and the union representative play a major role in the enforcement of workers' right to health and safety, monitoring the enforcement

[88] Conseil Constitutionnel, Décision No 2010-8 QPC du 18 June 2010 – Époux L.
[89] Articles R. 4141-1 ssq of the Labour Code.
[90] Cass. Soc., 11 July 1989, A 41.
[91] T. Corr. Nancy, 7 July. 1997: LPA 27 February 1998, p. 22, note Beranger.
[92] CNT, 'Inspection du travail dans l'étau des objectifs', in *L'Humanité*, 7 July 2011, WK-RH, 'Les inspecteurs du travail ont le tournis', available at: http://www.wk-rh.fr/actualites/detail/15077/les-inspecteurs-du-travail-ont-le-tournis.html (last accessed 15 June 2012).
[93] Cass. Soc., 28 February 2002, No. 00-1005.
[94] Conclusion based on consultations with the stakeholders.

of health and safety standards, alerting the employer to potential risks, issuing recommendations and reporting to the authorities.

Problems for the enforcement of this right include the still low number of inspectors and the non-binding nature of the measures of the Committee. Positive aspects are the setting of the obligation for employers to ensure health and safety at work which stems from case law, the effectiveness of the inspectors' actions - when they act - and a new facilitated procedure to submit and process the declaration of accidents and professional diseases.

The main recommendation to reinforce the protection of this right would be to further increase the number of labour inspections.

ANNEX 1: LIST OF STAKEHOLDERS CONTACTED FOR THE REPORT

Trade Unions

- Confédération Française Démocratique du Travail (CFDT) (French Democratic Confederation of Labour): Freedom of association/collective bargaining; Health and safety at work.

Authorities

- Ministry of Labour, Employment and Health: Freedom of association/collective bargaining; Age antidiscrimination.

Practitioners

- French law firm: Freedom of association/collective bargaining; Age antidiscrimination; Health and safety at work.

Annex II: Information sources (legislation, case-law, literature reviewed and statistics)

National Law

- Labour Code.
- Social Security Code.
- Law No 2012-375 of 19 March 2012 on the organisation of passenger service and information for passenger air carriers (*Loi 2012-375 du 19 mars 2012 relative à l'organisation du service et à l'information des passagers dans les entreprises de transport aérien de passagers*).
- Laws No 2011-333 and 2011-334 of 29 March 2011 relating to the defence of rights (*Lois No 2011-333 et 2011-334 du 29 mars 2011 relative au Défenseur des droits*)
- Law No 2010-1215 of 15 October 2010 supplementing the provisions relating to social democracy of Law No 2008-789 of 20 August 2008 (*Loi No 2010-1215 du 15 octobre 2010 complétant les dispositions relatives à la démocratie sociale issues de la loi No 2008-789 du 20 août 2008*).
- Decree No 2009-938 of 29 July 2009 on the procedure to guide declarations of work related accidents and illnesses (*Décret No 2009-938 du 29 juillet 2009 relatif à la procédure d'instruction des déclarations d'accidents du travail et maladies professionnelles*).
- Decree No 2009-560 of 20 May 2009 relating to action plans to promote work for older workers (*Décret No 2009-560 du 20 mai 2009 relatif au contenu et à la validation des accords et des plans d'action en faveur de l'emploi des salariés âgés*).
- Law No 2008-1258 of 3 December 2008 promoting income from work (*Loi No 2008-1258 du 3 décembre 2008 en faveur des revenus du travail*).
- Circular of the General Directorate of Labour of 13 November 2008 relating to the law governing the renewal of social democracy and working hours (*Circulaire DGT No 20 du 13 novembre 2008 relative à la loi portant rénovation de la démocratie sociale et du temps de travail (Fiche No 8)*).
- Law No 2008-789 of 20 August 2008 on the renovation of social democracy and the reform of working time (*Loi No 2008-789 du 20 août 2008 portant rénovation de la démocratie sociale et réforme du temps de travail*).

- Law No 2008-496 of 27 May 2008 containing various provisions for adapting to Community law in the field of the fight against discrimination (*Loi No 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*).
- Decree No 2008-244 of 7 March 2008 relating to the Labour Code (*Décret No 2008-244 du 7 mars 2008 relatif au code du travail*).
- Law No 2007-1224 of 21 August 2007 on the social dialogue and the continuity of service in land-based public transport (*Loi No 2007-1224 du 21 août 2007 sur le dialogue social et la continuité du service public dans les transports terrestres réguliers de voyageurs*)
- Law No 2007-130 of 31 January 2007 on the modernisation of the social dialogue (Larcher Law) (*Loi No 2007-130 du 31 janvier 2007 sur la modernisation du dialogue social (Loi Larcher)*).
- Decree No 2006-1070 of 28 August 2006 amending the provisions relating to fixed-term contracts in order to promote the return to employment of older workers (*Décret No 2006-1070 du 28 août 2006 aménageant les dispositions relatives au contrat à durée déterminée afin de favoriser le retour à l'emploi des salariés âgés*).
- Decree No 2001-532 of 20 June 2001, on the rules governing implicit decisions taken by administrative authorities under the Ministry of Employment and Solidarity (*Décret No 2001-532 du 20 juin 2001 relatif au régime des décisions implicites prises par les autorités administratives relevant du ministère de l'emploi et de la solidarité*).
- Law No 2001-1066 of 16 November 2001 relating to the fight against discrimination (*Loi No 2001-1066 du 16 novembre 2001 relative à la lutte contre les discriminations*).
- Law No 1991-1414 of 31 December 1991 amending the Labour Code and the Code of Public Health to promote the prevention of occupational hazards and for the transposition of the EU directives relating to health and safety at work (*Loi No 1991-1414 du 31 décembre 1991 modifiant le code du travail et le code de la santé publique en vue de favoriser la prévention des risques professionnels et portant transposition de directives européennes relatives à la santé et à la sécurité du travail*).
- Law No 1982-1097 of 23 December 1982 relating to comittees for health, safety, and working conditions (*Loi No 1982-1097 du 23 décembre 1982 relative aux comités d'hygiène, de sécurité et des conditions de travail*).
- Law No 1982-957 of 13 November 1982 relating to collective bargaining and the resolution of labour disputes (*Loi No 1982-957 du 13 novembre 1982 relative à la négociation collective et au règlement des conflits du travail*).
- Law No 1982-915 of 28 October 1982 relating to the development of representative institutions (*Loi No 1982-915 du 28 octobre 1982 relative au développement des institutions représentatives du personnel*).
- Law No 1982-689 of 4 August 1982 relating to the freedom of workers in the enterprise (*Loi No 1982-689 du 4 août 1982 relative aux libertés des travailleurs dans l'entreprise*)
- 1958 French Constitution.
- Law No 1950-927 of 10 August 1950 authorising the ratification of ILO Convention No. 81 (*Loi No 1950-927 of 10 août 1950 autorisant la ratification à la Convention No 81 de l'OIT*)
- Declaration of the Rights of Man and of the Citizen of 26 August 1789.

National Case-Law

- TGI Albertville, Civ., 21 February 2012, No. 12/00048.
- Cour d'Appel de Paris, Pole 6 – Chambre 8 of 26 January 2012, No 09/06516.
- TGI Paris 18 January 2012, No 11/02512.
- Cass. Soc., 29 September 2011, No 10-26.2011.
- Cass. Soc., 18 May 2011, No 10-60.069 and No 10-21.705.
- Cass. Soc. 19 October 2010, No 08-45254.
- Conseil Constitutionnel, 18 June 2010, No 2010-8.
- Cass. Soc., 11 May 2010, No 08-43 681 and 08 45 307.
- Cass. Civ., 2ème, 9 July 2009, No 08-16934.
- Cass. Soc., 8 July 2009, No 08-60.599.
- Cass. Soc., 30 April 2009, No 07-43.945.
- Cass. Soc., 28 November 2007, No 07-40787.
- Cass. Soc., 29 March 2006, No 04-46499.
- Cass. Soc., 3 December 2002, No. 01-60.729.
- Cass. Soc, 11 April 2002, No 00-16535.
- Cass. Soc., 28 February 2002, No 00-1005.
- T. Corr. Nancy, 7 July 1997: LPA 27 February 1998
- Cass. Soc., 7 June 1995, No 93-46.448.
- Cass. Soc., 25 June 1987, No 86-60.522.
- Cass. Soc., 22 July 1981, No 81.60.695.

Literature

- Bessiere, J., 'L'inspection du travail, entre stabilité et évolutions', in *Semaine Sociale Lamy Suppléments*, 2001, No 1508.
- Bledniak, E., *Santé, hygiene et sécurité au travail – Prévention, responsabilité, contentieux*, 2008, Edition Delmas.
- Burdeau, G., *Droit constitutionnel*, 24th edition, LGDJ/ Montchrestien, 2000.
- Dupays, A., and Girodroux, C. (eds), *Lamy social, Droit du travail, Charges sociales*, Lamy, Wolters Kluwer, edition 2012.
- Crocq, J.C., *Le guide des infractions*, Dalloz, Paris, 7e éditions, 2006.
- Guinchard, S., *Droit et pratique de la procédure civile, Droits interne et de l'Union européenne*, 7th edition, Dalloz action, 2012-2013.
- Grangé, J., France, *Employment and labour law – Juridictional comparisons*, 4th edition 2012, Siân Keall, Travers Smith LLP.
- *La négociation collective en 2010*, La Documentation Française, Bibliothèque des rapports publics.
- *Memento Social*, edition Francis Lefebvre, 2012.
- *Prud'hommes, Répertoire de procedure civile*, Dalloz, décembre 2011.
- Mazeaud, A., *Droit du travail*, 7th edition, Montchrestien, 2010.
- Pelissier, J., Lyon-Caen, A., Jeanmmaud, A. and Dockès, E., *Les grands arrêts du droit du travail*, 4th edition, Dalloz, 2008.

Electronic Sources

- Info Prud'Hommes CFDT, 'La discrimination par l'âge', 18 March 2011, available at: http://www.infoprudhommes.fr/node/1821.
- Conseil d'Etat, 'La place des partenaires sociaux dans l'élaboration des réformes', 5 February 2010, available at: http://www.conseil-etat.fr/fr/discours-et-interventions/la-place-des-partenaires-sociaux-dans-lelaboration-des-reformes-kpv.html.

- Cour de Cassation Annual Report 2010, Discrimination professionnelle liée à l'âge, available at: http://www.courdecassation.fr/publications_cour_26/rapport_annuel_36/rapport_2010_3866/quatrieme_partie_jurisprudence_cour_3879/droit_travail_3883/galite_traitement_discrimination_harcelement_3887/discrimination_19424.html.
- CNT, 'Inspection du travail dans l'étau des objectifs', in L'Humanité, 7 July 2011, WK-RH, 'Les inspecteurs du travail ont le tournis', available at: http://www.wk-rh.fr/actualites/detail/15077/les-inspecteurs-du-travail-ont-le-tournis.html.
- 'Délégués du personnel, délégués syndicaux, comité d'entreprise: quelles différences?', Editions Tissot, November 2010, available at: http://www.editions-tissot.com/campagnes/ds/1110/pdf/Differences_IRP.pdf.
- Infos-discriminations.fr, 'EDF condamnée pour discrimination liée à l'âge', 15 February 2011, available at: http://www.infos-discriminations.fr/2011/02/edf-condamnee-pour-discrimination-liee-a-lage/.
- France 3, 'L'ESF des Arcs 1800 fait appel', 21 March 2012, available at: http://alpes.france3.fr/info/albertville-73--victoire-des-moniteurs-de-ski-71355719.html.
- France 3, 'Discrimination liée à l'âge : EDF condamnée', 23 February, 2011, available at: http://rhone-alpes.france3.fr/info/discrimination-liee-a-l-age-edf-condamnee-67505128.html.
- Halde (Haute autorité de lutte contre les discriminations et pour l'égalité), Rapport 2010, available at: http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/114000234/0000.pdf.
- Le Parisien, 21 February 2012, 'Discrimination à l'âge : des moniteurs de ski obtiennent gain de cause', available at: http://www.leparisien.fr/economie/emploi/discrimination-a-l-age-des-moniteurs-de-ski-obtiennent-gain-de-cause-21-02-2012-1870974.php.
- Le Progrès, 1 February 2011 'La centrale EDF du Bugey condamnée pour une discrimination liée à l'âge', available at: http://www.leprogres.fr/faits-divers/2011/02/15/la-centrale-edf-du-bugey-condamnee-pour-une-discrimination-liee-a-l-age.
- Ministère du travail, de l'emploi et de la santé, 'L'application d'une convention ou d'un accord collectif dans l'entreprise', 28 February 2012, available at: http://travail-emploi.gouv.fr/informations-pratiques,89/fiches-pratiques,91/convention-collective,110/l-application-d-une-convention-ou,1009.html.
- Ministère du travail, de l'emploi, de la formation professionnelle et du dialogue social, 'L'inspection du travail', available at: http://travail-emploi.gouv.fr/informations-pratiques,89/fiches-pratiques,91/litiges-et-conflits-du-travail,124/l-inspection-du-travail,1123.html.
- Ministère du travail, de l'emploi et de la santé, 'L'inspection du travail en France en 2010', p. 157 and following, available at: http://travail-emploi.gouv.fr/IMG/pdf/Rapport_IT2010.pdf.
- Ministère du travail, de l'emploi et de la santé, 'L'inspection du travail en France en 2009' available at: http://www.travail-emploi-sante.gouv.fr/IMG/pdf/Rapport_au_BIT_intranetW_28022011.pdf.
- Ministère du travail, de l'emploi et de la santé, 'Les conflits collectifs du travail', 27 April 2009, available at: http://travail-emploi.gouv.fr/etudes-recherche-statistiques-de,76/statistiques,78/relations-professionnelles,85/conflits-collectifs,243/les-conflits-collectifs-du-travail,2300.html.

- Ministère du travail, de l'emploi et de la santé, 'La négociation collective en entreprise, 6 January 2009, available at: http://travail-emploi.gouv.fr/informations-pratiques,89/fiches-pratiques,91/convention-collective,110/la-negociation-collective-dans-l,1008.html.
- Ministère du travail, de l'emploi et de la santé, 'La loi sur le service minimum dans les transports publiée au journal officiel du 21 août', 23 August 2007, available at: http://www.travail-emploi-sante.gouv.fr/archives,1994/breves,409/la-loi-sur-le-service-minimum-dans,6107.html.
- Ministère du travail, de l'emploi et de la santé, 'Des conflits du travail plus nombreux et plus diversifiés', February 2007, available at: http://travail-emploi.gouv.fr/IMG/pdf/2007.02-08.1.pdf.
- Simon, P., 'France: Freedom of Association and Labour Law', ODIHR, April 2007, available at: http://legislationline.org/topics/country/30/topic/1/subtopic/17.
- Touati, J. J., 'La discrimination fondée sur l'âge', in Le Figaro, 17 November 2008, available at: http://www.lefigaro.fr/emploi/2008/11/17/01010-20081117ARTFIG00384-la-discrimination-fondee-sur-l-age-.php.
- Vie publique, 'Bilan des négociations collectives 2010', 13 July 2011, available at: http://www.vie-publique.fr/actualite/alaune/travail-bilan-negociations-collectives-2010.html.
- Vie Publique, 'Inspection du travail: bilan 2008 du plan de réforme', available at: http://www.vie-publique.fr/actualite/alaune/inspection-du-travail-bilan-2008-du-plan-reforme.html.

Websites

- Cour de Cassation, The Role of the Court, http://www.courdecassation.fr/about_the_court_9256.html.
- Le Défenseur des droits, http://defenseurdesdroits.fr/.
- The lawyers' trade union SAF (Syndicat des Avocat de France), available at: http://www.lesaf.org/index.php?option=com_flexicontent&view=items&cid=45:informations&id=400:justiciables-syndicats-avocats-conseillers-prudhommes-tous-presents-le-15-fevrier-prochain&Itemid=136.
- Labour Ministry at: http://travail-emploi.gouv.fr.

ANNEX 3:
NATIONAL REPORT FOR HUNGARY

CONTENTS

LIST OF ABBREVIATIONS

ABH	Decision of the Constitutional Court
ADR	Alternative Dispute Resolution
ÁPB	Sectorial Dialogue Committee
CEE	Central and Eastern European
CJEU	Court of Justice of the European Union
ETA	Act CXXV of 2003 on Equal Tratment and the Promotion
HUF	Hungarian Forint
ILO	International Labour Organisation
MKDSZ	Labour Mediation and Arbitration Service *(Munkaügyi Közvetítői és Döntőbírói Szolgálat)*
MSZOSZ	National Confederation of Hungarian Trade Unions
NGO	Non-Governmental Organisation
NGTT	National Economic and Social Council
NMH	National Labour Office (*Nemzeti Munkaügyi Hivatal*)
OÉT	National Council for the Reconciliation of Interests
OMMF	(former NMH) Hungarian Labour Inspectorate
SMEs	Small- and Medium-sized Enterprises

Please note that the findings of this report are based on literature review and consultations with national stakeholders (a list is included in Annex I of this report). If the source of information was an interviewee, this has been indicated in a footnote.

1. INTRODUCTION TO THE LEGAL FRAMEWORK AND ENFORCEMENT TRADITION IN HUNGARY

Hungary is a republic, an independent and democratic state under the rule of law. It has a statute-based civil law system based on the German-Austrian system.

An increased awareness of civil rights accompanied the 1989 political and economic transition in Hungary, and a Parliamentary Act significantly expanded on the rights enumerated in the Constitution.[1] For a long time, the Constitution was 'a compilation and regrouping of the modifications of the earlier constitution (Act XX of 1949) into a coherent structure.'[2] The new Hungarian Constitution, the **Basic Law of Hungary,** was adopted in April 2011 and entered into force on 1 January 2012. The Basic Law 'did not introduce fundamental changes affecting labour law, but some rights are worded in a shorter and less detailed way.'[3]

Hungary joined the European Union in 2004. The Basic Law provides that 'Hungary shall contribute to creating European unity, so as to achieve freedom, well-being and the security for the European people […] Hungary may exercise some of its authorities stemming from the Constitution in conjunction with the other member states through the institutions of the European Union.'[4]

Act CLXI of 2011 on the Organisation and Administration of the Courts came into force on 1 January 2012. Hungary has a unified system of jurisdiction, of four levels: local courts, county courts (*'törvényszék'*), regional courts of appeal and the Curia (former Supreme Court). A separate Constitutional Court, its members elected by the Parliament, has the power to assess the constitutionality of laws, and to hear complaints alleging violation of constitutionally protected rights.[5] The recent judicial reform did not significantly change the system for handling labour disputes. In Hungary, labour disputes at first instance are adjudicated by twenty specialised tribunals, whereas the county courts hear cases at second instance. New, unified administrative and labour courts will be set up as of 1 January 2013. The Curia's main task is to guarantee the uniformity of jurisprudence and to examine extraordinary remedies.[6]

1.1. National legislation on freedom of association and the right to collective bargaining, age antidiscrimination and the right to health and safety at work

Freedom of association is protected in the **Basic Law** (Article VIII): 'Everyone has the right to establish organisations and to join such organisations'. As of 2012, a new law regulates the right of association.[7] Legally, trade unions are treated as associations, without any detailed specific regulation.

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1 UNESCO Global Ethics Observatory, Hungary, available at: http://www.unesco.org/shs/ethics/geo/user/?action=Geo4Country&db=GEO4&id=5&lng=en.

2 Ibid.

3 Kun, A. and Kajtár, E., 'The Right To Strike And Its Possible Conflict With Other Fundamental Rights Of The People, National Report', XX World Congress of Labour and Social Security Law Santiago de Chile, September 2012, p. 3, available at: http://www.congresomundialtrabajo2012.com/wp-content/uploads/2011/01/Attila-Kun-Edit-Kajt%C3%A1r.pdf.

4 Basic Law of Hungary (25 April 2011), Article E(1)-(2), English translation available at: http://www.euractiv.com/sites/all/euractiv/files/CONSTITUTION_in_English__DRAFT.pdf.

5 The Curia of Hungary, *The Hungarian Judicial System*, available at: http://www.lb.hu/english/birsyseng.html.

6 Ibid.

7 Act CLXXV of 2011 on the right of association, a non-profit status, and operation and support of NGOs.

The right to **collective bargaining** as such is a new element in the **Basic Law**: 'Employees and employers, or their respective organisations, have, in accordance [with] the law, the right to negotiate and conclude collective agreements and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.'[8]

Hungarian labour law is regulated by **Act XXII of 1992** on the Labour Code (in force since 1 July 1992). The **new Labour Code (Act I of 2012)** entered into force on 1 July 2012. It strengthens the significance of contractual sources of labour law (such as collective agreements) and their impact on the content of employment relationships.

EU law has contributed directly to shaping the legislative framework for workers' rights in Hungary. The new Labour Code, like the former one, serves to transpose the **EU acquis on labour law in Hungary**. Furthermore, Article 5 (core interpretative provisions) of the new Code states that its provisions should be construed in harmony with the laws of Hungary and the European Union. In addition, Hungary has ratified **International Labour Organisation (ILO)** Conventions No. 87 on the Freedom of Association and Protection of the Right to Organise (Act LII of 2000), No. 98 on the Right to Organise and Collective Bargaining (Act LV of 2000), and No. 154 on Collective Bargaining (Act LXXIV of 2000). The status of international agreements in the legal hierarchy is not regulated by law. However, the new Basic Law requires national legislation to be in harmony with international laws (Article Q(2)). Hungarian trade unions filed complaints with the ILO concerning the recent labour law reforms. Following the examination of the draft Labour Code in the light of international labour standards and applicable international laws, the ILO issued a memorandum criticising the draft for insufficient promotion of collective bargaining and peaceful industrial relations, for lack of an overarching non-discrimination clause, and for expanding the possibilities for employers to avoid liability for damages relating to workplace health and safety.[9] The ILO's recommendations were taken into account to a limited extent (e.g. in the field of trade union rights, but not concerning employers' liability for damages).[10]

Like other Central European countries of former socialist practices, Hungary has a decentralised **system of collective bargaining**.[11] The main level of collective bargaining in Hungary is the workplace, since there have only been a few sectorial collective agreements. Sectorial Dialogue Committees (ÁPBs) have been established since 2002. **Act LXXIV of 2009 on Sectorial Dialogue Committees** aimed to institutionalise sectorial level social dialogue. However, this institutionalisation did not significantly increase the number of sectorial collective agreements. Collective agreements in the socialist era merely listed conditions concerning, e.g., wages, working time, and social benefits; they did not result from real bargaining. Even today, collective agreements frequently contain only explanations of statutory regulation, with some procedural rules of the company administration.

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8 Basic Law of Hungary (25 April 2011), Article XVII(2), English translation available at: http://www.euractiv.com/sites/all/euractiv/files/CONSTITUTION_in_English__DRAFT.pdf.

9 International Labour Organisation, Memorandum of Technical Comments on the Draft Labour Code of Hungary, November 2011, available at: http://www.szef.hu/lapok/845/csatolmany.

10 Following the ILO memorandum as well as negotiations with workers' associations, the Ministry of National Economy amended the text of the draft Act, which was then sent to the Parliament for adoption. The list of amendments suggested to the Parliament is available at: http://www.kormany.hu/hu/nemzetgazdasagi-miniszterium/foglalkoztataspolitikaert-elelos-allamtitkarsag/hirek/megallapodast-az-uj-munka-torvenykonyverol.

11 In practice, the coverage rate of collective agreements is relatively low, 25.5% of employees in 2009.

Under the **new Labour Code**, collective agreements can be concluded between trade unions on one side and employers, or employers' associations, on the other. A trade union may conclude a collective agreement if it represents ten per cent of the workers employed by the employer, or of the workers covered by a collective agreement concluded by the employers' interest group (Article 276(2)).[12] The trade unions defined above shall be entitled to conclude a collective agreement jointly. The new Code also allows, under specific conditions, works agreements concluded by the elected works council and the employer to contain rules on employment with the exception of salary issues (Article 268). In principle, this provision can be useful as only a very modest number of industry collective agreements (with a wider scope) have been concluded and trade union density is low.[13] However, in practice, this modification can also be risky (especially according to trade unions), because of the presumed 'loyalty' of works councils. Such works agreements are applicable only in cases where there is no other collective agreement or where there is no trade union authorised to enter into a collective agreement.

According to Article 23 of the former Labour Code, a trade union was entitled to submit an objection ('veto') to the employer because of an unlawful measure directly affecting the employees or their representative bodies, or because of an unlawful omission of a measure.[14] Most importantly, the measure objected to could not be executed until the final decision of the court. The **right of veto** is omitted from the new Labour Code, since this form of strong trade union rights is considered to be a leftover of the socialist era, and to impose an excessive burden on employers' economic freedoms.

In the new Code the **scope of the protection of trade union representatives** has also been narrowed considerably, for example becoming dependent on the number of employees in total (Article 273).[15]

The **Act on Strike (Act VII of 1989)** regulates the right to strike, but incompletely. For instance, it does not significantly regulate strikebreaking, other forms of work stoppages, liability for strikes, ballots, the collision of right to strike with other fundamental rights, or deadlines for notices. An agreement regulating the right to strike in the public sector was concluded in 1994. Some Hungarian labour lawyers regard this agreement as unconstitutional: 'Indeed, the Constitution orders that the right to strike must be regulated by an Act', however this agreement, which introduces restrictions on the right to strike, has less legal weight than an Act.[16]

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[12] Act I of 2012 on the Labour Code (adopted 13 December 2011) (hereinafter Labour Code), Article 276(2), English translation, available at: http://www.ilo.org/dyn/natlex/docs/MONOGRAPH/89886/103369/F-622727815/HUN89886.pdf.

[13] According to the OECD, trade union density in Hungary was 16.8% in 2008, compared to the EU average of 23%. OECD statistics are available at: http://stats.oecd.org/Index.aspx?DatasetCode=UN_DEN; information on the EU average is available at: http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Trade-Unions2.

[14] The scope of the measures against which the trade unions could use the veto was – in principle - relatively wide. However, a veto could not be lodged if the employee involved was entitled to file for individual legal action against the action in question. Typical examples of objected measures were the following: breach of the collective agreement, refusal of information, etc.

[15] Labour law protection can be provided to elected trade union representatives, the number of which depends on the number of workers employed during the previous calendar year at the independent fixed establishment. In line with Article 273(2), the number of elected trade union representatives ranges between one (total number of employed workers is less than 500) and five (total number of employed workers exceeds 4,000). The law affords similar protection to one additional person designated by the leadership of the local branch of the trade union represented at the employer.

[16] Kun, A. and Kajtár, E., 'The Right To Strike And Its Possible Conflict With Other Fundamental Rights Of The People', National Report, XX World Congress of Labour and Social Security Law Santiago de Chile, September 2012, p. 12, available at: http://www.congresomundialtrabajo2012.com/wp-content/uploads/2011/01/Attila-Kun-Edit-Kajt%C3%A1r.pdf; Initiative of the Democratic League of Independent Trade Unions to the Hungarian Constitutional Court, available at: http://www.szakszervezetek.hu/index.php/koezlemenyek/1588-

The most serious issue in strike law relates to strikes affecting services essential to the community (e.g. public transport). In this context, 'it is possible to exercise the right to strike only in a way that will not impede the performance of the services at a minimum level of sufficiency (Sec. 4., Subsec. 2. of the Act on Strike). […] The extent and the conditions of such a strike may be subject to legal regulation (by an Act). In absence of such a relevant Act, the extent and the conditions of such a strike must be agreed upon during the pre-strike negotiations. In December 2010 […] **amendments to the law on the right to strike** were adopted by the [Parliament]. […] As a result, striking against an employer carrying out an activity serving the basic interest of citizens is unlawful, unless the parties agree on the minimum service level and its conditions in advance or, if there is no such agreement, the level should be defined by the court (new Sec. 4., Subsec. 2. of the Act on Strike)'.[17]

The main forum for **tripartite social dialogue at national level**, the National Council for the Reconciliation of Interests (OÉT) was established in 1988. After lengthy constitutional debates about the legitimacy and competences of the OÉT, a new act was passed (**Act LXXIII of 2009**).[18] However, the government announced in May 2011 that a new act on social dialogue will abolish the OÉT and a new forum will be established (**Act XCIII of 2011**): the National Economic and Social Council (NGTT). Social partners, NGOs, churches and academics are members of this new purely consultative body. As trade unions and the ILO have urged the government of Hungary to continue engaging in tripartite dialogue outside the NGTT framework, the process of creating a new national level tripartite consultative forum began in early 2012.

Article XV of the **Basic Law** contains a **general antidiscrimination clause**. Age is not included in the list of prohibited grounds of discrimination, but the list is indicative rather than exhaustive.[19] The EU acquis relating to equal treatment and equal opportunities, including Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, is implemented by **Act CXXV of 2003 ('Equal Treatment Act', ETA**). European Union law was the most important driver of Hungarian antidiscrimination law reform. Age discrimination is expressly covered by the ETA.[20] This Act details and puts into practice the general ban on discrimination provided by the Basic Law. The ETA defines five ways of violating the principle of equal treatment: a) direct discrimination (Article 8); b) indirect discrimination (Article 9); c) harassment (Article 10(1)); d) segregation (Article 10(2)); and e) victimisation (Article 10(3)). In addition to the general exemption clauses of the ETA (Article 7, Paragraph 2.), this Act contains special exemptions for employment relationships: the principle of equal treatment is not violated in employment if the distinction is proportional, justified by the nature of the work, and based

liga-szakszervezetek-alkotmanybirosagi-bedavany; E. Berki, et al., *Kollektív jogok és érvényesülésük közszolgálatban, Összehasonlító elemzés a köztisztviselői, a szolgálati és a hivatásos katonai jogviszonyra vonatkozóan*, Zárótanulmány, Budapest, 2007.www.szmm.gov.hu/download.php?ctag=download&docID=20413.

17 Kun, A. and Kajtár, E., 'The Right To Strike And Its Possible Conflict With Other Fundamental Rights Of The People', National Report, XX World Congress of Labour and Social Security Law Santiago de Chile, September 2012, p. 12, available at: http://www.congresomundialtrabajo2012.com/wp-content/uploads/2011/01/Attila-Kun-Edit-Kajt%C3%A1r.pdf.

18 In 2005, the Constitutional Court ordered the national Parliament to adopt a law regulating the legal status of the OET. Following the decision, the Parliament adopted the Act on Social Dialogue in 2006. This act required the consent of OET for the adoption of certain labour related laws. The Constitutional Court found this provision unconstitutional arguing, that it is unconstitutional to give legislative powers to a social partner. Following this decision, the act was repealed and Act LXXIII of 2009 was adopted. See http://www.hrportal.hu/hr/alkotmanyellenes-az-oet-torveny-tobb-rendelkezese-20081014.html.

19 Basic Law, Article XIV(2).

20 In Article 8, p. o.) of the ETA 'age' is listed among 20 'protected characteristics'.

on relevant and legitimate terms and conditions (Article 22(a)). ETA also covers job seekers.[21]

The **Labour Code** provides specific rules for pensioners. In contrast with the general rule, the employer is not required to justify an ordinary dismissal if the employee qualifies as a pensioner (Article 66, Paragraph 9.), and an employee will not be entitled to severance pay, if he or she qualifies as a pensioner by the time the employment is terminated (Article 77, Paragraph 5.). According to the majority of opinions and cases,[22] the application of these provisions does not constitute impermissible age discrimination. However, it is still uncertain whether these provisions are in line with the age discrimination jurisprudence of the Court of Justice of the European Union (CJEU).[23]

In contrast to the rules on pensioners, the **Labour Code** provides for protection for employees nearing retirement. An employer may dismiss an employee only under particular conditions within the last five years before he reaches pension age (Article 66, Paragraphs 4-5). In January 2012 pension rules were altered, making it far more difficult to retire early.[24] The Parliament also reduced the mandatory age for the **retirement of judges** from 70 years to the general level from 1 January 2012.[25]

According to Article XVII(3) of the **Basic Law**, every employee has the right to working conditions that respect his or her **health, safety** and dignity. Article XX also refers to labour safety.

Article 51 of the new **Labour Code** lists the fundamental obligations of the employer, among which health and safety is central. Concerning **employers' liability for damages**, pursuant to Article 166 of the new Code, the employer must provide compensation for any loss caused to its employee in connection with his employment. The employer is exempt from liability if the damage was caused by an external unforeseen circumstance beyond its control, and if the employer was not expected to prevent that circumstance or mitigate its consequences. The employer is also relieved of liability if the damage was caused solely by the unavoidable conduct of the employee (Article 166(2)).

According to the Labour Code, **employee representatives also have a mandate concerning labour safety**: the employer must consult the works council in advance with respect to contemplated health and safety measures and draft internal regulations (Article 264, Paragraph 2., point e). The former Labour Code explicitly entitled trade unions to monitor compliance with provisions pertaining to working conditions (Article 22, Paragraph 3.). The new Code declares instead that it is the general responsibility of the Works Council to monitor the observance of the rules relating to employment (Article 262): the latter mandate is not targeted for labour safety unlike the former.

Health and safety at work is regulated in more detail by the provisions of the **Labour Safety Act (Act XCIII of 1993)** and by detailed sectorial, mainly administrative laws. Pursuant to Chapter 6 of the Labour Safety Act, workers have the right to elect a representative or representatives for occupational safety in workplaces (when at least fifty workers are employed, election of a representative is obligatory). The Act (Article 14) also

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21 In line with the provisions set out *inter alia* in Articles 1 and 21(a) of Act CXXV of 2003.

22 See e.g. FB 55. Mf.26.960/2004/3.

23 Kollonay, L. C., *The Evolution of Labour Law in the New Member States of the European Union: 1995-2005*, Country Study on Hungary No. Vt/2005/82, p. 48.

24 Act CLXVII of 2011 on the termination of early retirement pensions. Before, owing to the quite flexible former pension rules, most pensioners retired before the 'official' retirement age.

25 This has been criticised at the European level. See e.g., Hungary – infringements, MEMO/12/165, of 07/03/2012, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/165&format=HTML&aged=0&language=EN&guiLanguage=en.

provides for the mandatory design of a five-year national labour safety program, but new provisions introduced in 2012 refer instead to the development of a 'national policy on occupational safety and health'. In any case Parliament has not yet acted pursuant to that latter aim. **Decree No. 33/1998 of the Minister of Welfare** obliges employers to carry out various kinds of medical surveillance tests in the context of an employment relationship. Furthermore, a new law was adopted containing rules on the development of more stable practices in the imposition of labour safety fines (**Government Decree No. 273/2011 on the detailed rules of the level and imposition of labour safety fines**).

European legal and policy developments concerning labour safety are in essence fully implemented in Hungary. Besides 'hard' legal harmonisation of related EU directives, 'soft' EU policy instruments are also considered. For example, the European autonomous framework agreement on work-related stress (2004) was implemented within the framework of the Labour Safety Committee. This has led *inter alia* to changes to the Labour Safety Act as well as to a recommendation of the Committee to consider the prevention of work-related stress as a priority research subject in 2008, to be financed by the fund on labour safety, financed i.a. by collected occupational health and safety penalties.

Social security laws contain additional enforcement mechanisms for health and safety rules (**Health Insurance Act, Act LXXXIII of 1997**). In Hungary, there is **no specific, separate social insurance scheme against occupational accidents and diseases**. These risks are covered by the general insurance systems for sickness, invalidity and survivors. However, a planned separate insurance branch for occupational accidents and diseases (with a *bonus-malus* system) has been under consideration for a long time.[26] The Health Insurance Fund has a right of 'regress' (counterclaim) against an employer, if a sickness benefit was paid with respect to an industrial accident or an occupational disease caused by failure to comply with health and safety rules or by the intentional activity of the employer.

Finally, under the **'sound labour relations' decree** (**Decree No. 1/2012 of the Ministry for National Economy**) employers who commit fundamental breaches of law including health and safety and antidiscrimination are excluded from public aid, tenders and procurements.

1.2. Overview of the enforcement tradition in Hungary

This section provides an overview of the different mechanisms that are in place to enforce freedom of association, the right to collective bargaining, age antidiscrimination, and the right to health and safety at work in Hungary. It discusses the competent court, and describes other institutions that are responsible for the enforcement of one or more workers' rights or are active in dispute settlement or conflict resolution.

The **judicial system** plays a prominent role in Hungary for the enforcement of all three rights. In addition to hearing labour disputes, labour courts examine the decisions of – among others – social insurance organs, labour inspectors, and occupational safety organs, in accordance with the rules for hearing administrative cases. Appeals are heard by a regular court; specifically, the county court (*'törvényszék'*) hears appeals against decisions of the labour courts in its county. New unified administrative and labour courts will be set up as of 1 January 2013.

[26] The idea of introducing a separate workers' compensation insurance was already included in the Decision of the National Parliament 20/2001 (III.30.) on the National Labour Safety Programme.

In 1996, to promote the effective and speedy resolution of industrial disputes, the state and the social partners agreed to establish the **Labour Mediation and Arbitration Service** (*Munkaügyi Közvetítői és Döntőbírói Szolgálat*, MKDSZ) to 'facilitate peaceful resolution of collective interest related industrial disputes between employer(s) and employees' representatives by providing third party mediation and arbitration'.[27] The MKDSZ is a state-supported independent organisation. The new Labour Code also provides for **alternative dispute resolution mechanisms (ADR)** for collective labour disputes (Articles 291-293), such as *ad hoc* or standing reconciliation committees and arbitration.

The Equal Treatment Act mentioned under Section 2.1 also established the **Equal Treatment Authority**, an organ responsible for combating discrimination with regard to all grounds, and in all sectors (see section 3.1).

The **Directorate for Occupational Safety and Health and Labour Affairs of the National Labour Office** monitors and enforces compliance with labour safety rules. Implementation of health requirements is supervised by the State Health Service. A separate organisation (Hungarian Mining and Geological Office) controls the safety of workplaces related to mining.

[27] European Foundation for the Improvement of Living and Working Conditions, 'Social dialogue and conflict resolution in Hungary', 2004, p. 1, available at: http://www.eurofound.europa.eu/pubdocs/2004/47/en/1/ef0447en.pdf.

2. FREEDOM OF ASSOCIATION AND THE RIGHT TO COLLECTIVE BARGAINING

2.1. Description of the enforcement mechanisms for freedom of association and the right to collective bargaining

According to the new Labour Code, the employee and the employer may enforce their claims arising from employment, and trade unions or works councils may enforce their claims arising from the Labour Code or from a collective agreement or works agreement, before a **court** of law.[28] The **collective agreement may deviate from the rules** regarding the enforcement of claims for rights stemming from that collective agreement (Article 290).

In disputes which are not of a legal nature, the employer, the works council or the trade union may enter into a **consultation**. Consultation can be initiated at any time by the trade union and the works council (Article 233 of the new Labour Code). In cases of such requests the employer is obliged to cooperate, but the new Labour Code does not require the parties to reach an agreement at the end of the consultation process.

Concerning a **violation of a rule relating to information or consultation**, the employer, the works council, or the trade union may turn to a court of law within five days. In these specific cases, the court shall decide within fifteen days, in non-litigious proceedings. An appeal may be submitted against the court's decision within five days of the service thereof. The court of second instance must issue its judgment within 15 days (Article 289). However, the new Labour Code does not link a specific sanction to the breaching of information and consultation rights, whereas the former Labour Code provided for the rule of 'invalidity' to apply in most such cases.

The Code also allows for the resolution of collective disputes, i.e. disputes that do not qualify as legal disputes (since there is a conflict only of interests and not of rights) through **reconciliation and arbitration** (Articles 291-293).

Reconciliation committees can be established on an *ad hoc* basis to resolve specific conflicts, or as standing committees if required by the works agreement or the collective agreement. The employer, the works council, and trade unions may delegate equal number of members to the reconciliation committee, which is chaired by an independent person (Article 291(2)). The new Labour Code does not specify how the chair must be chosen. However, in practice this gap does not constitute a problem as in most cases members of the MKDSZ are invited to serve as chair.[29] The remit of reconciliation committees in principle is limited to ensuring constant dialogue between the parties. At the end of the dialogue, the committee is obliged to prepare a written report summarising the main findings of the discussion and its outcome. In cases, however, where the works council, the employer and the trade union previously agree in writing, the reconciliation committees may be entitled to take binding decisions at the end of the reconciliation. Decisions are taken by the reconciliation committee with a vote. In case of equal votes, the president has the right to take the final decision.

[28] Labour Code, Article 285(1).

[29] Kártyás, G., 'The case of peace pipe with the new Labour Code', available at: http://www.hrblog.hu/azujmt/2012/04/02/119/.

In addition to reconciliation, arbitration is also possible for the resolution of collective disputes. The new Labour Code distinguishes between voluntary and obligatory arbitration. Arbitration is obligatory in cases where the collective dispute concerns the cost implications of the election and functioning of works councils (Article 236(4)) and if the dispute in question concerns the use of funds devoted to well-being purposes (Article 263).

MKDSZ is an organisation that can provide trained arbitrators to the parties. Its role as mentioned under section 2.2 is to facilitate peaceful resolution of collective disputes by providing **third party mediation and arbitration**. Parties involved in a dispute are not obliged to choose a mediator or arbitrator from the register of MKDSZ. In practice, however, most do so. The agreements or awards reached through such procedures may be enforced in court.[30]

There is also a growing trend toward **in-workplace dispute resolution.** About half of all collective agreements contain regulations on internal conflict settlement and 28% establish some sort of conflict management committee.[31]

The role of the **Equal Treatment Authority** in enforcing trade union rights is limited to hearing complaints related to exercising membership and participation rights. Still, the Authority has received many complaints by trade unions that are treated very differently by the same employer.[32]

According to most of the trade unions in Hungary, the new rule on **strikes affecting services essential to the community,** described above, constitutes an obvious infringement of the right to strike. The number of strikes significantly decreased after this amendment came into force. As regards such strikes, in case of lack of a relevant act, or of lack of a pre-strike agreement between workers and employers on essential services, the labour court issues its decision, in a non-trial procedure, within five days, after hearing the parties. The same deadline applies for the appeal procedure.

2.2. Practical enforcement situation for the freedom of association and the right to collective bargaining in national law

2.2.1. Major difficulties in the enforcement of the freedom of association and the right to collective bargaining

The **new Labour Code's** changes present the most significant challenges, especially regarding rights related to trade unions (e.g., restricted protection of trade union officials, elimination of veto and monitoring rights of trade unions). Furthermore, trade unions stressed that the expansion of the role of **works agreements** may eventually undermine trade unions' bargaining rights. This measure is in line with a general international trend of extending what used to be trade union prerogatives to other bodies of workers' representation (at company level).[33] Also, critical legitimacy problems may arise in terms of the new rules concerning the **mandate of trade unions to conclude collective agreements** described under Section 2.1 above (e.g., in cases of more than one trade union, but with less than 10% of members individually).

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[30] European Foundation for the Improvement of Living and Working Conditions, 'Social dialogue and conflict resolution in Hungary', 2004, p. 18, available at: http://www.eurofound.europa.eu/pubdocs/2004/47/en/1/ef0447en.pdf.

[31] Fodor, T. G., et al., *Egy és több munkáltatóra kiterjedő hatályú kollektív szerződések összehasonlító elemzése. Országos összegző tanulmány*. Budapest, Kende Ügyvédi Iroda, 2008.

[32] See REPORT of the activity of the Equal Treatment Authority in 2010 and on application of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, EBH Budapest 2011, p. 14, Case No. 700/2010.

[33] Clauwaert, S., and Schömann, I., 'The crisis and national labour law reforms: a mapping exercise', Working Paper 2012.4., p. 13, European Trade Union Institute.

Furthermore, until now, there has been a **low utilisation level of MKDSZ**.[34]

According to trade unions, the diminishing of national level **tripartite social dialogue** damages industrial relations. The government bypasses agreements with the social partners or prepares reforms and anti-crisis' measures without meaningful consultation with them.[35]

The **lack of clear and detailed regulation of strikes** (e.g. in relation to essential services, liability for an unlawful strike) is also a problem. On many occasions the judges of the Budapest Labour Court emphasised that without a precise and detailed petition they cannot judge the merits of a case in terms of essential services.[36] In the absence of a definition of essential services, judges may face difficulties in making the determination within the strict procedural deadline of five days (in practice, sometimes they use international guidelines, for example those of the ILO).

According to trade unions, breaches of trade union rights such as the right of employees to establish or join a trade union or the right of employees not to be dismissed or discriminated for belonging to a trade union both by multinationals and small and medium enterprises (SMEs) are widespread in practice.[37]

2.2.2. Positive experiences on the enforcement of the freedom of association and the right to collective bargaining

The new Labour Code re-regulates the system of collective bargaining. It aims to **emphasise the regulatory role of collective agreements,** to make them really reflect employment relationships and not just repeat existing rules. This significantly enlarges the influence of social partners, relative to that of state regulation. Under the former Labour Code, collective agreements could only deviate from regulatory standards under certain specific circumstances.[38] The new Labour Code permits collective agreements to derogate from any of its substantive provisions except some which are explicitly listed as non-derogable (Article 277(1)-(3)).[39] However, such derogations may operate both in favour and against workers' interests, which was previously an exceptional case.

Despite the relatively low level of utilisation, when it is accepted, the **mediation offered by MKDSZ is typically successful**. In most cases the parties reach an agreement.[40] The **relatively speedy resolution** of non-litigious court procedures in collective disputes is also a positive aspect.

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[34] The latest data available on the website of the MKDSZ are from 2008. In 2008, MKDSZ provided mediation services in 5 cases, as well as mediation services during strikes. In 2008, there were 9 strikes in Hungary, of which 3 ended with an agreement between the parties. MKDSZ contributed to the conclusion of 2 agreements (see data available at: http://www.tpk.org.hu/engine.aspx?page=tpk_MKDSZ_Dokumentumok.

[35] Conclusion based on consultations with stakeholders.

[36] Asbóth, B., 'A még elégséges szolgáltatás mértékének meghatározására irányuló nem peres eljárás - Az új bírósági nem peres eljárás bevezetésének indokai és működése a Fővárosi Bíróság gyakorlatában', 16 November 2011, Jogi Fórum, available at: http://www.jogiforum.hu/publikaciok/444.

[37] Examples of cases where multinationals or SMEs have breached the rights of trade unions are provided in the ITUC 'Annual survey of violations of trade unions rights', 2012, available at: http://survey.ituc-csi.org/Hungary.html?lang=en. Conclusion also based on consultation with stakeholders.

[38] Generally only in favour of the employee.

[39] Article 277(3) states that collective agreements may not derogate from the provisions set out in Chapters XIX (general rules applicable to labour relations) and XX (works council) and in Articles 271 (on rules applicable to belonging to a trade union) and 272 (trade union's rights on concluding collective agreements).

[40] The latest data available on the website of the MKDSZ are from 2008. In 2008, MKDSZ provided mediation services in 5 cases, of which 4 mediations were successful. MKDSZ also provided mediation services during strikes. In 2008, there were 9 strikes in Hungary, out of which 3 ended up with an agreement between the parties. MKDSZ contributed to the conclusion of 2 agreements (see data available at: http://www.tpk.org.hu/engine.aspx?page=tpk_MKDSZ_Dokumentumok).

2.3. Conclusions on the effectiveness of the enforcement of the freedom of association and the right to collective bargaining in Hungary

Freedom of association is enshrined in the new Basic law and in the new Act on Association of Hungary. There are no detailed rules for trade unions. Introducing such rules might enhance unions' legitimacy and raise legal certainty. The right of collective bargaining is also enshrined in the Basic Law.

The new Labour Code made significant changes, assigning a much greater role to the regulatory role of collective agreements. The new Labour Code also allows for the resolution of collective disputes (i.e., disputes where there is a conflict of interests and not of rights) through reconciliation and arbitration.

Most challenges as regards the enforcement of the right to collective bargaining in Hungary arise precisely from the amendments brought about by the new Labour Code as it cuts back on the enforcement of the relevant rights (e.g. diminishing protection of trade unions representatives, eliminating the right of veto and monitoring). The new possibility for works agreements to replace, under specific conditions, collective agreements may also undermine collective bargaining. Further difficulties include the low utilisation of MKDSZ (even though its services are typically successful) and the lack of clear and detailed regulation of the right to strike (in particular with regards to essential services).

Recommendations to improve the enforcement of these rights include clarifying the right of strike (e.g. a legislative definition of 'essential services'), reinvigorating national tripartite dialogue especially for the adoption of new laws, further promoting alternative dispute resolution, and strengthening sectorial level bargaining.

3. AGE ANTIDISCRIMINATION

3.1. Description of the enforcement mechanisms for age antidiscrimination

The main **enforcement forums** in employment discrimination cases are the Equal Treatment Authority and the labour (or civil) court.

The Equal Treatment Authority was established by Act CXXV of 2003 on Equal Treatment and the Promotion of the Equal Opportunities **(ETA)** to investigate individual cases and to raise awareness. As of January 2012, it is an autonomous state agency instead of a central (governmental) office and can therefore act more independently. The Authority may order that practices violating the law be eliminated; prohibit the continuation of the conduct violating law; order that its decision establishing the violation be published; and impose a fine (from HUF 50,000 to HUF 6 million, approximately €180 EUR to €23,000). The judicial review of decisions of the Authority falls within the exclusive competence of the Metropolitan Court (*'Fővárosi Törvényszék'*).[41]

Courts may however oblige the employer to pay material and non-material damages, while the Authority can only impose fines.

In procedures for a violation of the principle of equal treatment, the **reversed burden of proof** applies (Article 19 of the ETA). If the plaintiff demonstrates a probability of disadvantage, and the protected characteristic, then it is for the respondent to prove that the principle of equal treatment was observed, or that the relevant legal relationship was not subject to that principle.[42]

The Hungarian **class action** rule (Article 20 of ETA) allows the public prosecutor, the Equal Treatment Authority, NGOs, and trade unions to bring a discrimination case before the courts. After the amendment of 2006, NGOs and trade unions may also launch a case before the Authority. In practice, the role of class actions is still limited.[43]

Research by the Institute of Sociology (Hungarian Academy of Sciences) for the Equal Treatment Authority (2011) revealed that according to **personal experiences**, age is the most significant factor leading to discrimination (15%). Regarding the **perception of discrimination within society**, age was the second most frequently mentioned ground (11.4%). The number of **court actions** has only slightly increased since the adoption of the ETA, while '[a]mong the nearly 1.500 complaints, the **Authority** launched proceedings in 377 cases [in 2010], out of which in 40 it established that a violation of rights had occurred. […] Similarly to previous years, the right of complainants to equal treatment was violated most in the field of employment'.[44] In 2010, age was the fourth most often referred to ground for infringements in this field. Concerning access to employment (e.g., discriminatory job advertisements), the most frequently mentioned precondition was age.

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[41] Art. 169/I-J. of Act CXL of 2004 on the general rules of administrative proceedings and services. For further discussion see Handó, T., 'Combating Harassment and Violence at Work: Hungary, in European Association of Labour Court Judges', Twelfth Annual Congress, July 2008, p. 68, available at: http://www.ealcj.org/documents/Final%20Report.pdf. The Metropolitan Court in Budapest is at the same hierarchical level as county courts ('törvényszék').

[42] See Position Paper No. 10.007/1/2006 and 384/4/2008 (III.28.) TT. of the Advisory Board (on the division of the burden of proof).

[43] In its report the Equal Treatment Authority referred to a total of 2 class actions. Report available at: http://www.egyenlobanasmod.hu/tanulmanyok/hu/kozerdeku_igenyervenyesites.pdf.

[44] 'Report of the activity of the Equal Treatment Authority in 2010 and on application of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities', EBH Budapest 2011, p. 3.

Most of the age discrimination complaints that elicited action from the Authority were made by people over the age of 50 years.[45] The most common types of complaints of age discrimination against older people are access to and termination of employment.[46]

Probably the most **intensely debated recent case** of the Authority involved a 78-year old complainant who had been working as a security guard since 2002. The complainant joined the firm at the age of 71, despite his age. However, the company terminated his contract in 2009 to reorganise its workforce because of the economic crisis, retaining primarily employees who were parents raising children. When making this decision, the company took into account the financial (social) situation of its employees and did not want to leave any of them without income. The Authority rejected the complaint, accepting the differentiation as proportional and justified by the characteristics or nature of the work. In its decision, the Authority explicitly referred to Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.[47]

The government recently announced that new programmes will be launched to support the access of **young workers** to the labour market. According to the government, in Hungary only 36% of the population between the ages of 15 and 29 is employed. The government aims to encourage young people to start their own business; it intends to allocate 7 billion HUF for the training of young entrepreneurs.[48]

3.2. Practical enforcement situation of age antidiscrimination in national law

3.2.1. Major difficulties in the enforcement of age antidiscrimination

The European Commission has raised concerns about the new rules on the mandatory retirement age of judges.[49] Many related individual applications have been lodged against Hungary at the European Court of Human Rights.[50]

Although the Constitutional Court has ruled that the provision allowing employers to terminate employment of workers who are eligible for pensions does not violate the antidiscrimination clause of the Constitution (Dec. 11/2001 (IV. 12.) ABH.), in the practice of the courts and the Authority it is still **difficult to decide whether the pensioner status can be a quasi-automatic ground for dismissal or if age-related discrimination should be subject to review**.

In general, according to the practice of the Equal Treatment Authority, discrimination based on age is very **difficult to prove.** Such discrimination can be proven most effectively by statistics (e.g. in cases of downsizings). Concerning access to employment, the fact that

[45] 'Report of the activity of the Equal Treatment Authority in 2010 and on application of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities', EBH Budapest 2011, p. 8 (emphasis added).

[46] See 'Report of the activity of the Equal Treatment Authority in 2010 and on application of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities', EBH Budapest 2011.

[47] Case No. 101/2010. For further discussion of this case, see Report of the activity of the Equal Treatment Authority in 2010 and on application of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, EBH Budapest 2011, p. 27-28.

[48] See http://www.kormany.hu/hu/nemzetgazdasagi-miniszterium/foglalkoztataspolitikaert-elelos-allamtitkarsag/hirek/a-fiatalok-vallalkozova-valasat-segito-palyazat-indul.

[49] Hungary – infringements, MEMO/12/165, 07/03/2012. http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/165&format=HTML&aged=0&language=EN&guiLanguage=en.

[50] Rayner, J., 'Hungarian government forces 200 judges to retire', Law Society Gazette, 19 January 2012, available at: http://www.lawgazette.co.uk/news/hungarian-government-forces-200-judges-retire.

usually only the applicant and the employer are present at a job interview makes it difficult to prove that age was the decisive reason the complainant was not offered the position.[51]

It is also very **difficult to implement age-related positive measures**, as the lawfulness of such measures (Article 11 of ETA) and the target group (young or older workers) are not easy to identify.

Research carried out by the Institute of Sociology (Hungarian Academy of Sciences) revealed that despite the high societal occurrence rate of discrimination **very few of the respondents actually reported their case**, or made a complaint of any kind.[52] Finally, apart from the difficulty in proving age discrimination, the **cost and length of proceedings** before the judicial authorities constitutes an additional difficulty.[53]

3.2.2. Positive experiences on the enforcement of age antidiscrimination

The introduction of ETA and the establishment of the Authority due to the drive of EU law were a major step forward in the fight against age discrimination in Hungary.

In its 2010 report, the Equal Treatment Authority welcomed the fact that, compared to previous years, 'the number of arrangements or **out-of-court settlements** between the parties approved by the Authority increased'.[54] This indicates that citizens are becoming more familiar with the activity of the Authority. The Authority's procedure is faster and free of charge, increasing the incentives to appeal to the Equal Treatment Authority rather than to the courts. The Authority stated its preference for such arrangements or settlements over the alternative of 'applying rigorous punitive sanctions'.[55]

The most important problem for **young workers** is access to the labour market.[56] The Start Programme (in Act CXXIII of 2004) launched by the government in 2005 grants allowances to employers willing to employ these young entrants. As of 2013, a new allowance scheme will be introduced in order to boost and protect the employment of certain age-categories (above 55, below 25) of workers.[57]

The study by the Institute of Sociology examined citizens' awareness **of the law on equal treatment**.[58] More than half (58.8%) of the respondents had heard about the ETA, and about one third knew about the Authority. However, stakeholders expressed the need for more awareness-raising activities in order to prevent age discrimination.

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[51] 'Report of the activity of the Equal Treatment Authority in 2010 and on application of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities', EBH Budapest 2011, p. 9.

[52] 'Extent of Gaining Knowledge of One's Rights as a Victim of Discrimination – With Special Focus on Women, Roma, People with Disabilities, and LGBT people Research Report', Budapest, 30 April 2011, Institute of Sociology, Hungarian Academy of Sciences (English summary), p. 6.

[53] Conclusion based on consultations with stakeholders.

[54] 'Report of the activity of the Equal Treatment Authority in 2010 and on application of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities', EBH Budapest 2011, p. 3.

[55] 'Report of the activity of the Equal Treatment Authority in 2010 and on application of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities', EBH Budapest 2011, p. 3.

[56] In 2011, only 36% of young people (between the age of 15-29) were employed, whereas 18.3% were reported as unemployed. See http://www.kormany.hu/hu/nemzetgazdasagi-miniszterium/foglalkoztataspolitikaert-elelos-allamtitkarsag/hirek/a-fiatalok-vallalkozova-valasat-segito-palyazat-indul.

[57] See Pleschinger G., *Nemzetgazdasági Minisztérium, Adó - és Pénzügyekért Felelős Államtitkárság*, 9 July 2012, available at: http://www.kormany.hu/hu/nemzetgazdasagi-miniszterium/ado-es-penzugyekert-felelos-allamtitkarsag/hirek/a-kormany-kedden-benyujtja-az-orszaggyulesnek-a-munkahelyvedelmi-programot.

[58] 'Extent of Gaining Knowledge of One's Rights as a Victim of Discrimination – With Special Focus on Women, Roma, People with Disabilities, and LGBT people Research Report', Budapest, 30 April 2011, Institute of Sociology, Hungarian Academy of Sciences (English summary).

3.3. Conclusions on the effectiveness of the enforcement of age antidiscrimination in Hungary

ETA, the comprehensive Hungarian antidiscrimination code (Act CXXV of 2003) applies the same rules for all the discrimination grounds (thus, age is also fully covered as a protected characteristic). EU law was the most important driver of this successful antidiscrimination law reform. The Equal Treatment Authority and the courts are the main enforcement mechanisms of this right. The bulk of the age-related complaints the Authority receives concern the exclusion of persons over 50 from the labour market.

The main problems in the enforcement of this right include the low level of law-awareness, the difficulty to prove discrimination based on age and to adopt positive measures, and the low utilisation of class actions. The specific labour law provisions designed both for pensioners and for those in the 'protected age' before pension cause legal uncertainty. It is difficult to assess the discriminatory nature of these measures. Positive experiences include a continuously improving level of awareness, the growing importance of a client-centred attitude and out-of-court settlements in the Authority's practice, and targeted labour market measures supporting entry of young workers to the labour market.

Recommendations to step up the enforcement of this right include building on the positive experiences, such as awareness-raising activities, and the further promotion of out-of-court settlements before the Equal Treatment Authority.

4. THE RIGHT TO HEALTH AND SAFETY AT WORK

4.1. Description of the enforcement mechanisms for the right to health and safety at work

A relatively large number of sanctions (inspection and administrative sanctions/fines; labour law-related liability for damages and remedial measures; social security measures, etc.) have been established for violation of the rules relating to labour safety.

Moreover, civil or criminal proceedings may also be initiated against those responsible for the violation of the legislation. However, in the jurisprudence of **labour courts**, claims directly based on the right to health and safety are very rare.

Compliance with the rules of labour safety is enforced primarily by the **Directorate for Occupational Safety and Health and Labour Affairs of the National Labour Office (NMH).** For instance, fines can be imposed up to 10 billion HUF (about €33,100). The Inspectorate also actively contributes to the preparation of regulations regarding health and safety at work. The NMH published guidelines for labour and labour safety inspections for 2012. This is a new development, intended to provide the framework for more structural, targeted and well-organised inspections. In addition, NMH is the national focal point of the European Agency for Safety at Health at Work and in this capacity cooperates with the social partners.

A conceptual change in the system of **employer's liability** for damages is reflected in the new Labour Code. The rules of the **former Labour Code** for exemption were much stricter for employers, providing that employers were liable for damages occurring in their field of operation (instead of their field of control, as in the current Labour Code). The legal practice (based on an extremely broad interpretation of 'operation') established the employer's liability for damages even in cases where the employer could not have even indirect influence on the damage caused. While maintaining the employer's objective liability, the new Code excludes compensation for reasons emerging beyond the scope of supervision and thereby limits the overly broad interpretation of the employer's liability developed in judicial practice.[59] Pursuant to Article 166 of the new Code, the employer must provide compensation for any loss caused to its employee in connection with his employment. The employer is exempt from liability if the damage was caused by an external circumstance beyond its control that it was not expected to avoid. The employer is also relieved from liability if the damage was caused solely by the unavoidable conduct of the employee. Pursuant to Article 167, no compensation is provided for damage, the emergence of which was not foreseeable for the employer.[60] No compensation is provided for the proportion of the damage caused by the employee's culpable conduct or which arose from the fact that the employee failed to meet his obligation to mitigate damages.

[59] ILO's Memorandum of Technical Comments on the Draft Labour Code of Hungary, November 2011, paragraph 29, available at: http://www.szef.hu/lapok/845/csatolmany para 29: 'ILO instruments aim at ensuring that employment injuries should be compensated with no fault imputed to either side, and compensation shall be provided without any question being raised as to whether the injury was attributable to fault on the part of the employer, the employee, or any third party.' Furthermore, 'ILO standards do not recognise such elements of *force majeure* as an acceptable ground for refusing employment injury compensation'. The ILO's Office, therefore, recommended maintaining the wording of the previous Labour Code in this respect.

[60] This 'foreseeability clause' is also heavily criticised, since it has the potential to further limit employers' liability (especially in cases of occupational diseases and commuting or work-related traffic accidents).

Although **workers** have the right to elect a **representative or representatives to represent their rights and interests related to occupational safety** and such a representative is elected at all employers with at least fifty workers (Chapter 6, Labour Safety Act), the practical role and effect of representation is problematic, especially in small and medium enterprises (SMEs) with fewer than fifty workers (where there is no mandatory requirement for organised representation). Employers with fewer than fifty employees - if a workers' representative is not elected - must directly hold a consultation with the workers in terms of occupational safety.[61]

4.2. Practical enforcement situation of the right to health and safety at work in national law

4.2.1. Major difficulties in the enforcement of the right to health and safety at work

As discussed above, collective agreements in general may deviate from the provisions of the Labour Code. This **approach of affording the social partners full regulatory power** (both in favour and against workers' interests) might, in principle, be dangerous and questionable if collective agreements deviate from statutory rules on basic rights such as the right to health and safety (Article 51). This approach also contradicts the basic principle of the Labour Safety Act which provides for the unconditional, objective liability of employers for labour safety.

The following challenges to the enforcement of the right to health and safety at work have been indicated:

- In 2009, 21,660 employers were inspected, among which 18,730 (86.5%) had committed some kind of infringement of labour safety rules. This data shows the extremely **low concern for abiding by the law** and limited capacity of employers,[62] as well as low consciousness about 'the prevention pays' attitude;
- Tendency to conceal accidents at work (mostly because of social security rules described in section 2.1) and a relatively **low number of related court cases**;
- Inappropriate and shrinking **number of inspectors** and limited resources of the inspectorate (especially taking into account recent restructurings and downsizings). The former Hungarian Labour Inspectorate (OMMF) was a separate central agency under ministerial control. Recently, it became the Directorate for Occupational Safety and Health and Labour Affairs within the National Labour Office, with considerably less staff, power and autonomy;
- **Lack of a new national policy** and an updated national 'situation report' on labour safety;
- The inspectorate reported that the **economic crisis** hit labour safety seriously, since most employers (especially in the construction industry) want to 'save' income to the detriment of labour safety;
- In the past, a large share of the collected occupational health and safety penalties was directed to a fund for projects aimed at research, dissemination of knowledge, education about labour safety, etc. From 2012, this **targeted funding is terminated**;

[61] Labour Safety Act, Article 70.

[62] Annual report of the OMMF from 2009, p. 8-9. Available at: http://www.ommf.gov.hu/index.html?akt_menu=193.

- A self-standing *'**bonus-malus'*** **social security system for occupational accidents and diseases, currently lacking**, could serve as an economic, insurance-related incentive for employers to improve occupational safety and health;
- The **national level tripartite dialogue has been diminished**, as for example when the new government instituted the new Labour Code and pensions laws without any meaningful consultation process.[63]

4.2.2. Positive experiences on the enforcement of the right to health and safety at work

Statistic on **accidents and deaths at work show a slightly improving** tendency.[64] However, according to general opinion these numbers are somewhat misleading, because of the enormous estimated number of undeclared accidents.

The NMH operates a free **Labour Safety Information Service**, designed for wider dissemination of information about labour safety, especially for SMEs. However, the staff of this service has recently been reduced. The NMH recently published new **guidelines for labour and labour safety inspections for 2012.** It intended to allow for more structured, targeted and well-organised performance of inspections. The new guidelines emphasise the informational, educational, preventive, and servicing role of the authority as opposed to its mere 'command and control' function.

Despite the recent governmental neglect of national level tripartite social dialogue in general, national reconciliation of interests related to labour safety is still in operation by the **Labour Safety Committee** (which formed part of the OÉT). This committee consists of the interested organs representing employees and employers, as well as the representatives of the government. The power of the Committee has been recently extended to the field of education matters concerning labour safety (the Committee received strong, co-decision-like rights in this field as of 1 January 2012).

As of 2011, against SMEs, in the first case of infringement the official inspection bodies must apply a **warning** only instead of imposing a fine against those SMEs found responsible for violations of health and safety legislation, which might be more sensible considering the situation of SMEs in the current economic crisis. Although the amount of collected fines is decreasing owing to this measure, it is more suitable for the specific situation of SMEs.

It is also noteworthy that a new law contains rules on streamlining **labour safety fines**.[65]

[63] Consultation with stakeholders (Hungarian trade unions) provided this information.

[64] Official Statistics, National Labour Office (NMH), 2012.

[65] Government Decree 273/2011 on the detailed rules of the level and imposition of labour safety fines. Prior to the adoption of the decree the way the Labour Inspectorate calculated the amount of labour safety fines was not set out in legislation. The decree (in particular Articles 4-7) establishes a transparent system under which the minimum labour safety fine is the same as the minimum fine (HUF 50,000, about EUR 165) referred to in Article 82(3) of Act XCIII of 1993 on Labour Safety. The maximum fine cannot exceed the amount (HUF 10,000,000, about EUR 33,000) referred to in the same article.

4.3. Conclusions on the effectiveness of the enforcement of the right to health and safety at work in Hungary

Hungarian occupational health and safety legislation is well developed and essentially in line with European developments. However, the latest changes brought some steps backwards (e.g., concerning reforms to employers' liability in the new Labour Code, the possibility of collective agreements to deviate from statutory rules on basic rights such as the right to health and safety to work as well as the recent reorganisation of the Inspectorate, now the Directorate for Occupational Safety and Health and Labour Affairs of the National Labour Office). In practice, compliance and enforcement deficits can be detected, mostly due to low levels of awareness and resources for health and safety from employers (especially SMEs), the limited number of inspectors and their resources, and the lack of an overall, up-to-date national policy and evaluation of the situation. The few positive experiences include policies on free information services, new guidelines for inspections, new streamlined methods for fining infractions, the warning system for SMEs by inspectors, and the ongoing work of the tripartite Labour Safety Committee.

More awareness-raising activities as well as strengthening the role of the workers' representative for health and safety, providing for such a representative in small enterprises with fewer than 50 employees and the active use of tripartite dialogue on this issue, would be crucial to further enforce this right (and support to the activities of the Committee). Furthermore, the introduction of real insurance-related incentives in occupational safety and health and the adoption of the long-planned separate occupational accidents and diseases insurance branch (a *bonus-malus* system) should be considered.

ANNEXES

Annex I: List of stakeholders contacted for the report

Trade Unions

- MSZOSZ (National Association of Hungarian Trade Unions): Health and safety at work; Freedom of association/collective bargaining.

Workers Association / NGOs

- MTD Consulting ('managing and training for diversity'): Age antidiscrimination.

Authorities

- Equal Treatment Authority: Age antidiscrimination.
- Directorate for Occupational Safety and Health and Labour Affairs of the National Labour Office: Health and safety at work.

Practitioners

- Budapest Labour Court (*Fővárosi Munkaügyi Bíróság*): Freedom of association/collective bargaining, Health and safety at work, Age antidiscrimination.

Annex II: Information sources (legislation, case-law, literature reviewed and statistics)

National Law

- Basic Law of Hungary (25 April 2011).
- Act I of 2012 New Labour Code.
- Act XCIII of 2011 on the National Economic and Social Council.
- Act CLXI of 2011 on the Organisation and Administration of the Courts.
- Act CLXVII of 2011 on the termination of early retirement pensions.
- Act CLXXV of 2011 on the right of association, a non-profit status, and operation and support of NGOs.
- Act LXXIII of 2009 on the National Council for the Reconciliation of Interests.
- Act LXXIV of 2009 on Sectorial Dialogue Committees.
- Act CXXIII of 2004 on Job Assistance Provided to Unemployed Entrants to the Labour Market, Unemployed Workers Over Fifty, and to Persons Seeking Employment After Caring for a Child or Nursing a Family Member, and on Employment Under Scholarship Agreement.
- Act CXL of 2004 on the general rules of administrative proceedings and services.
- Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities.
- Act LII of 2000, ratifying ILO Convention No. 87.
- Act LV of 2000, ratifying ILO Convention No. 98.

- Act LXXIV of 2000, ratifying ILO Convention No. 154.
- Act LXXXIII of 1997 Health Insurance Act.
- Act XCIII of 1993 Labour Safety Act.
- Act XXII of 1992 on the Labour Code .
- Act VII of 1989 on the Right to Strike.
- Decree 33/1998 of the Minister of Welfare.
- Government Decree 273/2011 on the detailed rules of the level and imposition of labour safety fines.
- Decree 1/2012 of the Ministry for National Economy on sound labour relation.
- Decision of the National Parliament 20/2001 (III.30.) on the National Labour Safety Programme.

National Case-Law

- EBH Case No. 101/2010.
- EBH Case No. 700/2010.
- Dec. 11/2001 (IV. 12.) ABH.
- FB 55. Mf.26.960/2004/3.

Literature

- Asbóth, B., *A még elégséges szolgáltatás mértékének meghatározására irányuló nem peres eljárás - Az új bírósági nem peres eljárás bevezetésének indokai és működése a Fővárosi Bíróság gyakorlatában*, 16 November 2011.
- Berki, E., *A sztrájkok hazai gyakorlata. Mit mutatnak a számok?,* Pécsi Munkajogi Közlemények (PMJK) 2008/2.
- Berki, E., et al., *Kollektív jogok és érvényesülésük közszolgálatban, Összehasonlító elemzés a köztisztviselői, a szolgálati és a hivatásos katonai jogviszonyra vonatkozóan*, Zárótanulmány, Budapest, 2007.
- Clauwaert, S., and Schömann, I., 'The crisis and national labour law reforms: a mapping exercise', Working Paper 2012.4., p.13, European Trade Union Institute.
- Fodor, T.G., et al., *Egy és több munkáltatóra kiterjedő hatályú kollektív szerződések összehasonlító elemzése*, Országos összegző tanulmány. Budapest, Kende Ügyvédi Iroda, 2008.
- Hajdú, J., and Csikós, S., 'National Report (Hungary) The evolving structure of Collective Bargaining in Europe 1990-2004', Research Project Co-financed by the European Commission and the University of Florence, (VS/2003/0219-SI2.359910).
- Hajdú, J., *Labour Law in Hungary*, 2011, Kluwer Law International.
- Handó, T., 'Collective agreements (National Report – Hungary)', XIVth Meeting of European Labour Court Judges 4 September 2006, Cour de Cassation, Paris.
- *Hungary: Industrial relations profile*, EIRO, 2009.
- Koltay, J., and Neumann, L., eds., *Industrial Relations In Hungary, In Focus*, 2006, Institute of Economics, Hungarian Employment Foundation (HAS).

- Kajtár, E., *Hungarian Strike Law in the Light of International and European Regulations*, Doctoral Thesis, PTE Állam- és Jogtudományi Karának Doktori Iskolája, Pécs, 2011.
- Kártyás, G., and Takács, G., *Pillory or pedestal? A normative assessement of collective agreements with extended scope*, *Pécsi Munkajogi Közlemények* IV./II., Sept. 2011.
- Kollonay, L.C., *The Evolution of Labour Law in the New Member States of the European Union: 1995-2005; Country Study on Hungary No. Vt/2005/82.*
- Kun, A., and Kajtár, E., 'The Right To Strike And Its Possible Conflict With Other Fundamental Rights Of The People', National Report, XX World Congress of Labour and Social Security Law Santiago de Chile, September 2012.
- Kun, A., *Basic introduction to the anti-discrimination legislation of Hungary*, In: Studia Iuridica Caroliensia (SIC) V. c. tanulmánykötet, Bp. 2010.
- Kun, A., *The 'dual' representation of workers at the workplace level in Hungary*, Studia Iuridica Caroliensia IV. Bp. 2009 (SIC IV.).
- Neumann, L., *Does decentralised collective bargaining have an impact on the labour market in Hungary?*, European Journal of Industrial Relations, Vol. 8, No. 1, 2002.
- Pleschinger G., *Nemzetgazdasági Minisztérium, Adó - és Pénzügyekért Felelős Államtitkárság*, 9 July 2012, available at: http://www.kormany.hu/hu/nemzetgazdasagi-miniszterium/ado-es-penzugyekert-felelos-allamtitkarsag/hirek/a-kormany-kedden-benyujtja-az-orszaggyulesnek-a-munkahelyvedelmi-programot.
- Rayner, J., 'Hungarian government forces 200 judges to retire', Law Society Gazette, 19 January 2012.
- Sargeant, M., ed., 'The Law on Age Discrimination in the EU' (Chapter 7. Hungary by Bitskey, B. and Gyulavári, T.), *Studies in Employment and Social Policy*, Kluwer, 2008.
- European Foundation for the Improvement of Living and Working Conditions, Social dialogue and conflict resolution in Hungary, 2004.
- Theses for the regulation concept of the new Labour Code, Budapest, 2009, Pécsi Munkajogi Közlemények (PMJK) II./III. 2009. Dec.
- Tóth, A., and Neumann, L., *Labour dispute settlement in four central and eastern European countries*, EIROnline, ID: TN0301101S, 02-09-2003.
- European Foundation for the Improvement of Living and Working Conditions, 'Social dialogue and conflict resolution in Hungary', 2004.
- International Labour Organization, 'Memorandum of Technical Comments on the Draft Labour Code of Hungary', November 2011.
- International Trade Union Confederation, 'Annual survey of violations of trade unions rights', 2012.
- Initiative of the Democratic League of Independent Trade Unions to the Hungarian Constitutional Court Hungary – infringements, MEMO/12/165, of 07/03/2012.

National Documents and Guidelines

- 'Extent of Gaining Knowledge of One's Rights as a Victim of Discrimination – With Special Focus on Women, Roma, People with Disabilities, and LGBT people Research Report', Budapest, April 30, 2011, Institute of Sociology, Hungarian Academy of Sciences entrusted by the Equal Treatment Authority in the scope of its project called 'TAMOP- 5.5.5/08/1 Combating Discrimination, Shaping Societal Attitude and Strengthening the Work of the Authority'
- REPORT of the activity of the Equal Treatment Authority in 2010 and on application of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, EBH Budapest 2011
- Position Paper No. 10.007/1/2006 and 384/4/2008 (III.28.) of the Advisory Board (on the division of the burden of proof), Equal Treatment Authority
- The Curia of Hungary, 'The Hungarian Judicial System', available at: http://www.lb.hu/english/birsyseng.html
- Annual report of the OMMF from 2009, available at: http://www.ommf.gov.hu/index.html?akt_menu=193

ANNEX 4:
NATIONAL REPORT FOR ITALY

CONTENTS

LIST OF ABBREVIATIONS

ASL Local Health Agency (*Azienda Sanitaria Locale*)

ARAN Agency for Collective Bargaining in the Public Administration (*Agenzia per la Rappresentanza Negoziale della Pubblica Amministrazione*)

c.a. Collective Agreements

CJEU Court of Justice of the European Union

DDL. Draft Decree Law (*Disegno di Legge*)

D. L. Decree Law (*Decreto Legge*)

D. Lgs. Legislative Decree (*Decreto Legislativo*)

EWCs European Work Councils

ILO International Labour Organisation

INAIL National Institute against Accidents at Work (*Istituto Nazionale Assicurazione contro gli Infortuni sul Lavoro*)

RSA Enterprise Trade Union Representation (*Rappresentanza Sindacale Aziendale*)

RSU Central Trade Union Representation (*Rappresentanza Sindacale Unitaria*)

TUSL Single Act on Safety at Work (*Testo Unico sulla Sicurezza sul Lavoro*)

Please note that the findings of this report are based on literature review and consultations with national stakeholders (a list is included in Annex I of this report). If the source of information was an interviewee, this has been indicated in a footnote.

1. INTRODUCTION TO THE LEGAL FRAMEWORK AND ENFORCEMENT TRADITION IN ITALY

Italy is a parliamentary democracy under a **civil law system**. The Constitution of 1948 is the basic law. To change constitutional provisions, a special procedure is required including qualified majority voting by both chambers of the Parliament within three months.[1] The Constitutional Court is empowered to nullify laws that breach the Constitution. The Parliament, composed of the Chamber of Deputies and the Senate, exercises legislative power. Legislative initiative also belongs to the National Council of Economy and Labour (*'Consiglio Nazionale dell'Economia e del Lavoro'*) and to the citizens according to a procedure established in the Constitution (Article 71) which requires at least 50,000 signatures. Executive power is held by the Government, over which the Council of State and the State Audit Court (*'Corte dei Conti'*) have an oversight and advisory role.

Enforcement is mainly based on judicial power, exercised by the Constitutional Court (judicial review of constitutionality); Supreme Court of Cassation (control of the legality of decisions); civil jurisdiction (first instance - Judge of the Peace and Tribunal; second instance - Tribunal and Court of Appeal); penal jurisdiction (first instance - Tribunal, Court of 'Assise'; second instance - Tribunal, Appeal Court of 'Assise'); and administrative jurisdiction (first instance - Regional Administrative Tribunals; second instance - Council of State). Any judge can refer a case to the Constitutional Court.

1.1. National legislation on freedom of association and the right to collective bargaining, age antidiscrimination and the right to health and safety at work

The Italian legal framework on **freedom of association and the right to collective bargaining** follows a voluntary model: legislative intervention is limited to the recognition of freedom of association, the right to collective bargaining, the right to strike, and the right of consultation and information of employees. In effect, regulation is based on collective agreements and case law.[2]

The legal framework is composed first of the **ILO Conventions** Italy has ratified,[3] and **European Law**. Within the **national legal framework**, the main laws are the Constitution which provides for freedom of association, the right to collective bargaining and the right to strike,[4] the Civil Code,[5] and special laws.[6]

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1 De Fiores, C., 'Le Revisioni Costituzionali', in Treccani.it, Enciclopedia Italiana, 29 May 2006, available at: http://www.treccani.it/scuola/maturita/materiale_didattico/costituzione_italiana/4.html (last accessed 4 June 2012).

2 See e.g., case 29/1960 (the Constitutional Court declared the rules criminalising strikes illegitimate); case 31/1969 (the Court declared strikes by public employees legitimate, with limited exceptions).

3 ILO Convention No. 154 concerning the Promotion of Collective Bargaining; ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise; ILO Convention No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively; ILO Convention No. 135 concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking. According to Article 35 of the Constitution, Italy promotes and facilitates agreements and international organisations aiming at recognising and regulating workers' rights. According to Article 80 of the Constitution, the Parliament authorises with a law the ratification of international agreements for their application in Italy.

4 Articles 18 on freedom of association, 39 on freedom of association and collective bargaining, and 40 on the right to strike.

5 Article 1(3) of the implementing rules; Articles 2067 to 2081 providing rules on collective and individual labour relations.

6 Articles 14-28 of the Workers' Statute, Law No. 300/1970; D. Lgs. No. 29/1993 on workers' representatives in public sector; Law No. 146/1990 Legal Code for strike action in essential public services, partially reformed by Act 83, 11 April 2000; D. Lgs. No. 74/2002 implementing the European Works Council Directive 94/45/EC; D.

Employees are entitled to freedom of association and to organise, to join a union and to engage in union activity. **Collective bargaining in the public sector** is conducted by trade unions, on one side, and the agency representing the public administration, ARAN (*'Agenzia per la Rappresentanza Negoziale della Pubblica Amministrazione'*), on the other. The ARAN is headed by a board appointed by the Council of Ministers. Negotiations in the **private sector** mainly take place on the national level covering all employees, and at the company level. Sectorial agreements set the general principles for the bargaining of the wage levels at company level and contain 'opening clauses' that allow divergence at the company level in certain cases, notably when company restructuring is underway. Overall collective bargaining coverage on the national level was over 80% in 2009,[7] but only 30-40% of the workforce was covered by company level agreements, with a decline in the implementation of company agreements in the years 1998 to 2006.[8]

Concerning **age discrimination**, the main **legal references** are D. Lgs. No. 216/2003 on equal employment opportunities, implementing Directive 2000/78/CE establishing a general framework for equal treatment in employment and occupation; D. Lgs. No. 276/2003 on reform of the labour market introducing contracts for disadvantaged workers (*'contratti di svantaggio'*) for categories such as young people aged 18 to 29 and disadvantaged workers (long-term unemployed aged under 32, unemployed workers aged over 45 etc.); and Law No. 108/1990 on individual dismissals. According to Article 4 of the latter, workers who reach the age of 60 and are entitled to old age pension can be made redundant. D. Lgs. No. 276/2003 introduced a work entry contract (*'contratto di inserimento'*) which permits placing workers aged between 18 and 29 years under contractual conditions that provide pay and benefits inferior to those generally recognised for their duties according to the categories fixed in collective agreements. This legislation also introduced an apprenticeship contract with a training content, for people aged between 18 and 29. The latter two laws have not yet been tested against the provisions of Directive 2000/78/EC or the European Court of Justice (CJEU)'s decision in *Mangold*.[9]

The right to **health and safety at work** is **regulated** by the Constitution,[10] the Civil Code,[11] the Criminal Code,[12] the Code of Criminal Procedure,[13] D. Lgs. No. 81/2008 known as '*Testo Unico sulla Sicurezza sul lavoro'* (TUSL – Single Act on Safety at Work), the Workers' Statute,[14] D. Lgs. No. 257/2007 implementing Directive 2004/40/EC on minimum health and safety requirements regarding the exposure of workers to risks arising from physical agents, D. Lgs. No. 257/2006 implementing Directive 2003/18/EC on the

Lgs. No. 188/2005 implementing EU Directive 2001/86/EC supplementing the Statute for a European Company with regard to the involvement of employees; D. Lgs. No. 25/2007 implementing EU Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community.

7 European Industrial Relations Observatory, 'Italy: Industrial relations profile', 2009, available at: http://www.eurofound.europa.eu/eiro/country/italy.pdf (last accessed 4 June 2012).

8 For an overview of the Italian institutional setting, statistics and strategies, see Damiani, M. and Ricci, A., 'Firm-level bargaining and contingent pay: new evidence from Italy', AIEL, XXVI National Conference, 15-16 September 2011.

9 Case C-144/04 *Mangold*, [2005] ECR I-9981.

10 Articles 1 ('Italy is a democratic Republic founded on labour'), 32 ('The Republic safeguards health as a fundamental right of the individual and as a collective interest'), 35 ('The Republic protects work in all its forms and practices'), and 41 (private economic enterprises cannot be carried out in a manner that could damage safety, freedom and human dignity).

11 Articles 2087 (employer's obligation to safeguard the health and the moral person of the employee), 2110 (employee's protection in case of pregnancy, maternity, illness, or injury), and 2114 on welfare assistance.

12 Articles 437 and 451 punishing as a crime the omission or removal of measures or devices to prevent work accidents (imprisonment to five years if the omission is intentional, up to one year if it is due to negligence), as well as Articles 589 on unintentional homicide and 590 on negligent personal injury.

13 Articles 55 entitling the Judiciary Police to take judicial notice of a crime and 321 on preventive measures.

14 Article 9 on workers' rights to oversee and regulate occupational safety and health conditions directly at the shop level.

protection of workers against risks related to exposure to asbestos at work, and administrative regulations of the INAIL (National Institute Against Accidents at Work).

EU law inspired the most recent employment legislation in Italy.[15] EU law has had a particular influence on the enforcement of the right to health and safety at work.[16] However, as indicated in a 2006-07 study for the Committee on Employment and Social Affairs of the European Parliament,[17] there seems to be **little respect** in Italy for EU law and, in particular, for EU legislation on information and consultation of employees.[18] According to that source, this is not just an issue of the quality of the procedures or structures, but of culture.[19] The draft regulation on the exercise of the right to take collective action presented by the Commission to clarify the rules applicable with respect to the exercise of the fundamental right to take collective action within the context of the freedom to provide services and the freedom of establishment ('Monti II Regulation') has recently been criticised in Italy as a contradictory text which hinders trade unions' rights.[20]

While this report was being drafted, a labour market reform has been adopted introducing measures also to cope with the crisis: Law n. 92 of 28 June 2012 '*Disposizioni in materia di riforma del mercato del lavoro in una prospettiva di crescita*' (Rules on labour market reform in a growth perspective).[21] The Government has been criticised for not having carried out the necessary consultations with social partners in preparations of this draft law.[22]

[15] E.g. D. Lgs. No. 216/2003, implementing Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

[16] See e.g., Vallebona, A., '*Breviario di Diritto del Lavoro*', Giappichelli, 2009, p. 26 and Communication from the Commission, 'Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work', COM/2007/0062 final, p. 2.

[17] Applica Sprl, 'Impact and Assessment of EU Directives in the field of "Information & consultation"', available at: www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24311/20110718ATT24311EN.pdf.

[18] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community; Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies; Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

[19] 'The European Union Employment Commissioner hailed Italy's labor-market reforms', La Gazetta del Mezzogiorno, 16 April 2012, available at: http://www.lagazzettadelmezzogiorno.it/notizia.php?IDNotizia=510964 (last accessed 4 June 2012).

[20] Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final, 21.3.2012. For commentary, see e.g. Orlandini, G*., La proposta di regolamento Monti II ed il diritto di sciopero nell'Europa post-Lisbona*, 13 April 2012, available at: http://www.europeanrights.eu/public/commenti/Monti_II_final.pdf (last accessed 4 June 2012) and CGIL, *La proposta di regolamento Monti II*, 5 February 2012, available at: http://www.cgil.it/Archivio/Giuridico/Nota_su_proposta_Monti.pdf (last accessed 4 June 2012).

[21] 'The European Union Employment Commissioner hailed Italy's labor-market reforms', La Gazzetta del Mezzogiorno, 16 April 2012, available at: http://www.lagazzettadelmezzogiorno.it/notizia.php?IDNotizia=510964 (last accessed 4 June 2012).

[22] See e.g., Tomassetti P., '*Riforma del lavoro: una sconfitta della concertazione o delle relazioni industriali?*', p. 13, available at: http://www.bollettinoadapt.it/acm-on-line/Home/documento17308.html (last accessed 4 June 2012).

The novelties of the reform include the following:

- Articles 2-5 foresee a monitoring system for the effect of the labour market reform with the participation of the most representative social partners;
- Articles 16-18 foresee a new work entry contract for young people 'apprendistato' (apprenticeship) which is intended to repeal the 'contratto di inserimento' mentioned above and which allows employers to hire young people after the expiry of this contract if the ratio '3 new employees compared to 2 existing employees' is respected (for the existing contract the ratio was 1 to 1).

1.2. Overview of the enforcement tradition in Italy

This section provides an overview of the different mechanisms that are in place to enforce freedom of association, the right to collective bargaining, age antidiscrimination, and the right to health and safety at work in Italy. It discusses the competent court, and describes other institutions that are responsible for the enforcement of one or more workers' rights or are active in dispute settlement or conflict resolution.

The protection of workers' rights in Italy is above all a task for judges. A section of the civil court system (*'sezione lavoro'*) deals exclusively with disputes on matters of labour law. In 2009, 439,001 first instance cases related to disputes on labour and social security/welfare matters were initiated, and 66,059 at second instance.[23]

Another mechanism is **alternative dispute resolution** (conciliation, arbitration and other systems specified in national collective agreements) for individual and collective labour conflicts including those concerning age discrimination and health and safety at work.

Conciliations may be judicial or non-judicial. Since Law No. 183/2010 (*'Collegato Lavoro'*), the **conciliation** procedure in employment disputes, provided by Article 410 ssq of the Civil Procedure Code, is no longer compulsory.[24] If conciliation is successful a report is drafted and signed by the panel and the parties, and a judicial decree makes it binding. In **arbitration**, according to Article 412 of the Civil Procedure Code, parties may choose neutral arbitrators to decide and settle a dispute, as long as the dispute is not already of a type designated to be handled by the court system. The process of arbitration concludes with an award (*'lodo arbitrale'*). The main difference to conciliation is that the arbitrator's settlements are binding among parties as contractual obligations without a judicial decree.

[23] Italian Statistical Yearbook 2011, Chapter 6: Justice, available at: www3.istat.it/dati/catalogo/20111216_00/PDF/cap6.pdf (last accessed 4 June 2012).

[24] Previously, parties were required to engage in a conciliation process before they could have recourse to the Labour Courts. The fact that conciliation was obligatory slowed the procedure as the 60 days foreseen to conciliate had to elapse before it was allowed to go to court. Cirioli, D., *Entra in vigore il Collegato lavoro e cambiano le regole per i licenziamenti*, 24 November 2010, available at: http://www.loccidentale.it/node/99079 (last accessed 4 June 2012).

Labour inspection bodies are also important for employees' protection. Labour inspectors are part of the Regional and Provincial Directorates of Labour which are local sections of the Ministry of Labour and Social Affairs.[25] These are responsible for the application of labour laws (also in the public sector) and for matters relating to health and safety at the workplace as well as hygiene, public health, and food hygiene, in conjunction with local health agencies (ASL). When instructed by the Ministry, they carry out investigation and research on technical issues such as for work at construction sites, galleries, and worksites where explosives are used.

Finally, in the public sector, Law No. 183/2010 establishes the **Central Guarantee Committee** (*'Comitato Unico di Garanzia'*) with a monitoring and advisory role in the field of equal opportunities, including enhancement of workers' health and antidiscrimination. However, the Committee has no sanctioning powers.

[25] See Fasani, M., Labour Inspection in Italy (International Labour Organisation, March 2011), p. 19, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_154063.pdf (last accessed 4 June 2012).

2. FREEDOM OF ASSOCIATION AND THE RIGHT TO COLLECTIVE BARGAINING

2.1. Description of the enforcement mechanisms for freedom of association and the right to collective bargaining

The most important worker representation bodies at the company level are the **RSU** ('*Rappresentanza Sindacale Unitaria*') **and the RSA** ('*Rappresentanza Sindacale Aziendale*'), which are unitary trade union delegations in public and private organisations. The RSU is elected by all company employees (whether or not affiliated to a union) and represents the workforce as well as all trade unions that operate in the company. Its main task is to negotiate binding agreements at company level. The RSA is elected by trade union members and represents only the interests of its affiliated union. The RSA can be established in companies with more than 15 employees. Law and collective agreements may also provide for **joint committees** with management on specific issues such as health and safety.[26]

A June 2011 agreement between Confindustria (the Italian industrial employers' confederation) and CGIL, CISL and UIL (the main trade unions) sets the rules for company level agreements and establishes **certification criteria** for trade union representation in national industry. The National Council of Economy and Labour (CNEL) bases certification for industry-wide bargaining on two elements: numbers of members whose dues are paid up to date, and numbers of votes cast in periodic RSU elections. Company level agreements are effective for all workers and bind the associations affiliated to the signatory confederations if they are approved by a majority of the RSU representatives. Strike clauses in company level agreements only bind the trade unions affiliated to the signatory confederations that are present at company level. Company level agreements can modify rules set by sectorial agreements, within limits established by those rules.[27]

To enforce the rights of freedom of association and collective bargaining, Article 28 of the Workers' Statute provides that, if an employer acts to hinder freedom of association and trade union activities or the right to strike, the local organs of the relevant trade unions can demand that a **court order the employer to cease the anti-union conduct**, and to redress its effects. Such an order is immediately enforceable. Failure to comply is liable to penalties under section 650 of the Penal Code.[28] D. Lgs. No. 25/2007 provides **administrative fines** (issued by the Provincial Labour Directorate) for breaches of information and consultation rights by employers. However, special conciliation committees (whose composition and functions are decided by collective agreements) may exempt employers from information and consultation obligations, where compliance may 'cause damage' to the company.[29]

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[26] Italy has not yet transposed Directive 2009/38/EC on European Works Councils.

[27] For more information on this agreement see, Morone *A., L'accordo interconfederaledel 28 giugno 2011: novita' in tema di rappresentanza sindacale e di contrattazione collettiva,* July 2011, available at: http://www.cslavoro.it/archivio/product/cct07_11ds01.pdf (last accessed 4 June 2012).

[28] I.e. up to 3 months of arrest or a fine of 206 Euros. The level of these penalties might not be effective as a deterrent for employers. However, according to D. Lgs. No. 124/04 '*Razionalizzazione delle funzioni ispettive in materia di previdenza sociale e di lavoro, a norma dell'articolo 8 della legge 14 febbraio 2003, n. 30*' (Rationalisation of social security and labour inspections), labour inspectors can enforce the order of a judge (which imposes the fine and obliges the employer to remedies the damage and/or re-establishes the health and safety standards), liaising with the public prosecutor.

[29] See Muratore, L., 'Italy: The impact of the information and consultation Directive' (European Industrial Relations Observatory), 9 March 2009, available at: http://www.eurofound.europa.eu/eiro/studies/tn0710029s/it0710029q.htm (last accessed 4 June 2012).

A January 2009 agreement signed by the government, employers' associations, and two major trade unions (CISL and UIL) provides **Conciliation and Arbitration Boards** for the interpretation and application of collective agreements (the main cause of collective disputes). Final interpretation of collective agreements is a task for **judges**,[30] except in the public sector where the unions can themselves establish an interpretation of the agreement, which is binding on the judge.

Strikes are used more frequently in Italy as compared to most EU countries as a mechanism to enforce workers' freedom of association and the right to collective bargaining.[31] However, strikes diminished by 65% between 1990 and 2009[32]. Strike calls that may affect basic public services or jobs (transportation, public health, etc.) are monitored by an independent **Guarantee Commission** (*'Commissione di Garanzia'*),[33] which can intervene to prevent conflicts, or to promote agreements in advance of strikes, to ensure essential services. It also has the power to issue penalties against the unions, consisting of exclusion from negotiations for up to two months, and the suspension for at least one month of the benefits provided by the Workers' Statute such as paid time off for trade union representatives. During strikes in sectors that have not reached an adequate agreement on this issue, the Commission has the power to impose guaranteed minimum services. In 2009, the Commission intervened in 549 cases. In 361 cases (66%) the intervention was successful, leading to the industrial action being called off in 230 cases and postponed in 131.[34] In 2008, trade unions at national and local level issued 2,195 notifications of strike action, of which 856 (39%) were called off before they were due to start.[35]

2.2. Practical enforcement situation for the freedom of association and the right to collective bargaining in national law

2.2.1. Major difficulties in the enforcement of the freedom of association and the right to collective bargaining

The role of trade unions has diminished.[36] Trade unions now struggle to enforce their international, EU and national rights. This is partly because of problems of **representativeness**: there are more trade unionists in Italy than in any other country in the EU,[37] but a high proportion are retired (49% in the three largest confederations). Therefore, the interests of union members are not always representative of the employed population. Moreover, due to legal thresholds, workers in small and medium enterprises - thus in the majority of Italian companies[38] - are often not represented by trade unions and

[30] See Article 420 ssq of the Italian Civil Procedural Code.

[31] Leonardi, S., 'Il diritto di sciopero in una prospettiva comparata', Alternative per il Socialismo – Europa, n. 17/2011, p. 3-4.

[32] Vandaele, K., 'Sustaining or Abandoning "social peace"?', working paper 2011.05, ETUI, p. 8.

[33] Not to be confused with the Central Guarantee Committee (*'Comitato Unico di Garanzia'*) which is the monitoring and advisory body in the field of equal opportunities, including enhancement of workers' health and antidiscrimination.

[34] European Industrial Relations Observatory, Developments in Industrial Action 2005-2009, 2010, available at: http://www.eurofound.europa.eu/eiro/studies/tn1004049s/tn1004049s.htm (last accessed 4 June 2012).

[35] Ibid.

[36] Stakeholders consulted for this study indicated that the role of the social partners in developing labour market governance has diminished in favour of centralised decision making by the government.

[37] More than 12 million members, with 35.1% of wage and salary workers being union members in 2010, according to OECD statistics.

[38] European Commission, MEMO/11/661, 'Small and medium sized enterprises: the situation in EU Member States 2010', 4 October 2011, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/661&format=HTML&aged=0&language=E

not covered by collective agreements. **Recent disagreements among the main trade union confederations** have weakened their effectiveness as counterparts to the employers' organisations and reduced their credibility with workers.

Joint committees of representatives of employers and employees, established in big companies, tend to be limited to resolving specific problems (e.g. training, working time, and shift arrangements) rather than examining broader issues. This situation, confirmed by the interviews, may be a consequence of the antagonistic tradition of Italian industrial relations, in contrast to the co-decision practices in other EU Member States.

Another problem is **lengthy judicial proceedings**, as many collective conflicts are dealt with by courts.[39] Moreover, the **Conciliation and Arbitration Boards** have proven to be relatively ineffective for the interpretation of collective agreements. This may be due to their being composed of representatives of the same trade unions and management groups who negotiated the agreements, and thus tending to reproduce the dynamics of the negotiation process, rather than addressing labour disputes promptly and easily.

2.2.2. Positive experiences on the enforcement of the freedom of association and the right to collective bargaining

The **Guarantee Commission** for the right to strike, the **Conciliation and Arbitration Boards** for resolving collective disputes and **Article 28 of the Worker's Statute**, a powerful tool against anti-union behaviour, represent **positive developments** for the protection of freedom of association and the right of collective bargaining.

The **entry into force of the Charter of Fundamental Rights of the European Union** is another positive development. It clearly states a number of workers' rights, the protection of which is reinforced through case law that bases judgments on the Charter's provisions.[40]

2.3. Conclusions on the effectiveness of the enforcement of the freedom of association and the right to collective bargaining in Italy

Freedom of association and the right to collective bargaining are recognised by ILO Conventions and EU law applicable in Italy and by the Constitution, the civil code, and special laws. Negotiations for collective agreements in the private sector mainly take place at two levels: national level covering all employees, and company level.

The most important worker representation bodies at company level are the RSU (*'Rappresentanza Sindacale Unitaria'*) elected by all employees and the RSA (*'Rappresentanza Sindacale Aziendale'*) elected by workers affiliated to a trade union in companies with more than 15 employees. Specific laws and collective agreements may also provide for joint committees of workers and employers to address specific issues.

N&guiLanguage=en ('SMEs in Italy represent 99,9% of the total enterprise stock and account for 71,3% of the economic added value and 81,4% of employment in the private sector').

[39] European Foundation for the Improvement of Living and Working Conditions, 'EIRO Thematic feature: Collective dispute resolution in an enlarged European Union, 2006, available at: www.eurofound.europa.eu/pubdocs/2006/42/en/3/ef0642en.pdf (last accessed 4 June 2012).

[40] The Labour Section of the Turin Court referred to the Charter in its decision of 16 July 2011 concerning a dispute between an automobile manufacturer and a union, relating to a "separated agreement" signed by the company with two other unions at one of its plants. The dispute received considerable media attention. The court ruled partially in favour of the union, agreeing that the company had violated Charter articles 54 (prohibiting the abuse of rights enumerated in the Charter), 12 (freedom of assembly and association), and 28 (right of collective bargaining).

For example, a January 2009 agreement signed by the government, employers' associations and two major trade unions provides Conciliation and Arbitration Boards for the interpretation and application of collective agreements. Article 28 of the Workers' Statute (Law No. 300/1970) provides that, when an employer indulges in anti-union behaviour, trade unions can demand an immediately enforceable judicial order requiring such behaviour to cease. The Provincial Labour Directorate can issue administrative fines for breaches of information and consultation rights by the employer. In the field of fundamental services or jobs, an independent Guarantee Commission (*'Commissione di Garanzia'*) monitors strike calls in order to prevent conflicts and to secure agreements in advance to ensure that essential services are maintained.

All these instruments represent positive developments. The entry into force of the Charter of Fundamental Rights of the European Union further reinforces the protection of these rights, as it clearly states a number of workers' rights.

A major problem in the enforcement of these rights is the diminished role of trade unions, partly because many workers in small and medium enterprises are not represented by trade unions or covered by collective agreements, and partly due to recent disagreements among the main trade union confederations. As joint committees are not yet always functioning properly, effective consultation of workers in enterprises is rare. Finally, judicial protection of these rights requires lengthy proceedings.

Potential steps that could reinforce the protection of the rights of freedom of association and collective bargaining in Italy include: extended coverage of workers by collective agreements in all enterprises, the possibility of trade union actions even in small and medium sized enterprises, and a modification in the constitution of joint committees such as the Conciliation and Arbitration Boards (by labour practitioners, not negotiators).

3. AGE ANTIDISCRIMINATION

3.1. Description of the enforcement mechanisms for age antidiscrimination

The main enforcement mechanism for age antidiscrimination is the **judiciary**.[41] Victims can bring claims to the labour sections of the civil courts. Article 4 of D. Lgs. No. 216/2003 on equal employment opportunities introduced a **special rapid procedure** (2 or 3 months) for court proceedings against discrimination, including the possibility for a judicial order against the violator (e.g. a private company but also the Public Administration) to cease the discriminatory conduct, and a second instance judgment in the following 3 months. Besides the cessation order, the employer might be obliged to re-hire an employee dismissed because of age discrimination and pay damages (lost salary and social security contributions) (Article 18 of the Workers' Statute).

However, Italian **jurisprudence** is inconsistent on the discriminatory nature of legal provisions which distinguish among workers on the basis of age. Rules on dismissal are not applied consistently. In 2006, the Court of Appeal in Florence declared collective dismissal based on proximity to retirement discriminatory,[42] but the Italian Supreme Court of Cassation has considered it non-discriminatory.[43] Similarly, the Milan Court ruled in 2011 that the provision of Article 72.11 of D.L. No. 112/2008 empowering Public Administration bodies to terminate employment when employees reach 40 years of service is not discriminatory with respect to age.[44]

Concerning rules on recruitment and seniority, the Tribunal of Milan has recognised as non-discriminatory the recruitment of a driver in the public transport service based on age, because the passing of a certain age presents a risk for that activity.[45] The Italian Supreme Court of Cassation declared as discriminatory the clauses of collective agreements that do not consider years of apprenticeship (an employment contract for people aged 18 to 29) in calculating seniority when employees' contracts are transformed into ones of unlimited duration.[46] This judgment referred to the *Hütter* decision of the CJEU, and its interpretation of Directive 2000/78/EC prohibiting national legislation excluding the taking into account of previous experience completed before reaching the age of 18 years for the determination of the remuneration of contractual agents.[47]

[41] UNAR (the National Office for the Fight against Racial Discrimination) was established in 2003 in response to Directive 2000/43/CE implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, but its activities do not address age antidiscrimination.

[42] 27 March 2006 (in D&L 2006, p. 910).

[43] Employment Section of 24.04.2007, No. 9866 and of 26.04. 2011, No. 9348.

[44] Milano Court No. 735/2011, 10 February/8 April 2011.

[45] 7 July of 2010, in D&L 2010, p. 1024.

[46] SSUU No. 20074 of 23 September 2010.

[47] Case C-88/08 *Hütter* [2009], ECR I-5325.

3.2. Practical enforcement situation of age antidiscrimination in national law

3.2.1. Major difficulties in the enforcement of age antidiscrimination

In the private sector there are no institutions aiming at preventing age discrimination. Collective labour contracts may provide extra-judicial bodies with the task of monitoring the respect of labour rights in the company. However, such bodies might not be effective as they do not have specific antidiscrimination tasks and they are often not actually appointed.

Another critical issue concerns the work entry contract for people aged 18 to 29 (*'contratto di inserimento'*), which permits collective agreements placing these workers in inferior contractual conditions than are generally recognised for their duties. This type of contract provides disadvantageous conditions for workers **based only on age**, without considering other indicators such as professional skills or social background (e.g. long term unemployment), in contrast with the CJEU's decision in *Mangold.*

Another problem is linked to **proof,** in judicial proceedings, **of age discrimination in the recruitment process**, unless job advertisements explicitly state an age limit without justifying this restriction by the nature of the particular occupational activity. According to the interviews, often this discrimination occurs because employers believe that an older worker could have less adaptability than a younger employee.

Another difficulty is that **age discrimination is less perceived**: e.g. an age limitation in recruiting procedures is not viewed as discriminatory and thus does not lead to judicial actions.

3.2.2. Positive experiences on the enforcement of age antidiscrimination

According to the interviewees, positive experiences are rare. The **special rapid procedure** for court proceedings against age discrimination including the possibility for a judicial order requiring discriminatory behaviour to cease, and the setting up in the public sector of the **Central Guarantee Committee** ('Comitato Unico di Garanzia') are considered good practices. However, the Committee has no sanctioning powers, and it will be necessary to monitor its activities to assess their effectiveness.

3.3. Conclusions on the effectiveness of the enforcement of age antidiscrimination in Italy

European Union legislation introduced the concept of age antidiscrimination into the Italian legal framework with Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation transposed by D. Lgs. 216/2003 on equal employment opportunities. D. Lgs. 276/2003 on reform of the labour market and Law 108/1990 on individual dismissals make distinctions on the basis of age. Italian legislation includes some positive measures, but also some that put workers in a specific age group in more disadvantageous positions without clear justification. The first introduced particular contracts (*'contratti di svantaggio'*) for categories such as young people aged 18 to 29 and disadvantaged workers, and the latter provides that workers who reach the age of 60 and are entitled to old age pension can be made redundant.

In the private sector there are no bodies aiming at preventing age discrimination. While collective contracts may empower extra-judicial bodies to monitor the respect of labour rights, their remit does not explicitly cover antidiscrimination. In the public sector, a Central Guarantee Committee has a monitoring and advisory role in the field of equal opportunities but no sanctioning powers. The main enforcement mechanism for age discrimination is the judiciary. However, Italian jurisprudence is inconsistent on the discriminatory nature of some legal provisions which distinguish workers on the basis of age. Moreover, some rules such as the 'entry contract' (*'contratto di inserimento'*) for people aged 18 to 29, which allows collective agreements to place the worker in inferior contractual conditions than generally recognised for the same duties, seem apparently in conflict with the European Court of Justice's decision in *Mangold* and have not yet been tested. Age discrimination can also be difficult to prove in court. Finally, the main challenge for the enforcement of this right lies in low awareness of the issue.

Positive experiences are rare but the setting up of a Central Guarantee Committee for the public sector and the introduction by D. Lgs. No. 216/2003 on equal employment opportunities of a special rapid court procedure (2 or 3 months) against discrimination, including the possibility for a judicial order against the violator, are among the good examples.

Important step to reinforce the protection of this right would include an awareness-raising campaign and the clarification of antidiscrimination rules to reach a widespread knowledge of the issue, especially in the recruitment process.

4. THE RIGHT TO HEALTH AND SAFETY AT WORK

4.1. Description of the enforcement mechanisms for the right to health and safety at work

Enforcement mechanisms aim at prevention, or redress (civil, administrative and criminal provisions). **Prevention** has become the primary focus. To this effect, the TUSL - Single Act on Safety at Work 2008 is a comprehensive piece of legislation that mainly coordinates and re-organises previous legislation dating over 60 years.

Since the entry into force of D. Lgs. No. 626/1994, the employer bears the main responsibility for enforcing safety. Depending on the size of the company, a doctor and an employee representative are also in charge of monitoring health and safety at work. Workers share responsibility, as they should follow safety rules when working. Different rules apply to different contexts depending on the safety risks and the size of the company. One of the main obligations of the employer is the adoption of a Risk Assessment Document (*'Documento di Valutazione dei rischi per i lavoratori'*) as provided by Articles 17 and 28 TUSL.[48] Moreover, the (non-compulsory) adoption of a specific company regulation (*'modello di organizzazione e gestione'*) on safety prevention and controls is a mitigating circumstance for the company in case of responsibility for accidents.[49] Article 6 TUSL set up a **Permanent Advisory Commission on Health and Safety at Work** whose main task is to interpret the legal framework and monitor the implementation of the relevant European Directives. The Commission is composed of one ministerial representative, ten regional representatives, ten trade unions' experts, and ten representatives of employers' organisations.

The TUSL provides **administrative and penal sanctions** in case of violations. The sanctions are issued **by the Labour Inspectorate and by the ASL (Azienda Sanitaria Locale**, **the local branch of the Ministry of Health)**. ASL branches oversee the observance of health rules. Local offices of the Ministry of Labour have a concurrent responsibility in fields where health and safety risks are particularly high.

If preventive measures are insufficient or fail, administrative organs tasked with oversight (i.e. Labour Inspectorate, INPS, INAIL and ASL) issue recommendations for compliance. Inspectors must issue a **warning** to the employer for the elimination of a breach, setting a deadline. Non-compliance can lead to judicial liability through **criminal claims** before the Employment Tribunal. Workers can seek **compensation** at the Labour Sections of the civil courts for injuries in the workplace that result from failure of the employer to respect a legal obligation. In such cases, victims may seek compensation in the criminal proceeding as civil claimants, thus avoiding the burden of proof they would bear if acting independently in the civil court. However, the claim cannot be doubled: victims must choose to address justice in civil courts or in criminal courts.

Article 61 TUSL provides, as an exception to general rules, that when injuries or death are related to a violation of rules on safety in working places, trade unions and associations of victims' relatives are entitled to the right to compensation of the plaintiff for moral damages. Trade unions may intervene in the process.

[48] This obligation is in line with Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work.

[49] D. Lgs. No. 231/2001 and Article 30 of D. Lgs. No. 81/2008.

In some cases,[50] trade unions have been qualified as parties in criminal procedures with a *'legitimatio ad causam'*,[51] with their own right to compensation for moral and economic damages.[52]

4.2. Practical enforcement situation of the right to health and safety at work in national law

4.2.1. Major difficulties in the enforcement of the right to health and safety at work

Major problems on prevention are connected to the **shadow economy and undeclared work**, which makes it difficult to ensure health and safety standards. **Civil and criminal suits** are, in such cases, the only routes to redress. However, proceedings are **costly and lengthy**. Labour suits had been free of cost, but recently this was conditioned on the plaintiff having income less than €31,884.48. Moreover, inspectors and prosecutors, due to limited resources, only **focus on major cases** that draw media attention.

Another reason for concern may be found in the new Decree No. 5 (9 February 2012) on simplification of laws and procedures. Its Article 14 seems to **lighten controls on companies** in all fields (with the exception of fiscal and financial checks) and therefore also on workplace health and safety. The content of the implementing regulations is yet to be determined. In general, the **number of inspectors is too low** to effectively cover all of Italy.

Finally, health and safety training and application of standards can pose **budget challenges for small enterprises, especially in times of financial crisis**. Corresponding financial support from public institutions (the state, the regions) is rare.

4.2.2. Positive experiences on the enforcement of the right to health and safety at work

The **legal framework is sound and well organised**. Some of the rules on prevention have been driven by EU law, for example, D. Lgs. No. 257/2007 implementing Directive 2004/40/EC on minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents and D. Lgs. No. 257/2006, implementing Directive 2003/18/EC on the protection of workers from risks related to exposure to asbestos at work.

Moreover, the adoption of a specific company regulation (*'modello di organizzazione e gestione'*) on safety prevention and controls is an efficient enforcement mechanism in this field. Particularly useful are the **Permanent Advisory Commission on Health and Safety at Work** and **the allocation of funds and training initiatives provided by public authorities**. These include the *'Accordi Stato-Regioni'* which entered into force on 21 January 2012 and the information sessions financed by the Ministry of Labour to increase awareness raising on health and safety standards at school for pupils aged 11-13 years old.[53]

Prevention has curtailed the number of working accidents: according to INAIL, from 2001 to 2010, accidents decreased by 24%, with a steady yearly reduction. Deaths due to working accidents declined to 980 in 2010 from over 1,500 in 2001. The latest INAIL statistics show a further reduction in workplace accidents in 2011, by 4% compared with 2010.

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[50] E.g. Criminal Court of Cassation No. 22558 of 11 June 2010.

[51] Ownership of the right on which the claim is based, Article 74 of the Criminal Procedural Code.

[52] Article 91 of the Criminal Procedural Code.

[53] See Newsletter '*Sicurezza e prevenzione*' by the Ministry of Labour, December 2009, available at: http://www.lavoro.gov.it/lavoro/sicurezzalavoro/MD/NewsLetter/ (last accessed on 5 June 2012).

4.3. Conclusions on the effectiveness of the enforcement of the right to health and safety at work in Italy

Concerning health and safety at work, the TUSL – Single Act on Safety at Work 2008 is a quite comprehensive piece of legislation and both the Civil and Criminal Codes provide sanctions for breach of this right. Moreover, the EU acquis and a number of ILO Conventions reinforced the legal framework for the protection of this right.

Enforcement mechanisms aim at prevention or redress (civil, administrative and criminal provisions). Responsibilities are shared among employers, workers and their representatives, the Permanent Advisory Commission on Health and Safety at Work, and the inspectors of the Labour and Health Ministries and their local branches. One of the main preventive measures available to the employer is the adoption of a specific company regulation (*'modello di organizzazione e gestione'*) for prevention in the field of health and safety at work, and controls. When an accident leads to injury or death of a worker, victims may seek compensation at courts. Trade unions and associations of victims' relatives can intervene in the process. In some cases, trade unions have qualified as parties with their own right to compensation.

Undeclared work poses major challenges with respect to prevention. Due to limited resources, inspectors only focus on major cases that draw media attention. Prevention has also been hindered by the adoption of a new Decree n. 5 (9 February 2012) on the simplification of laws and procedures, which reduced controls over companies, as well as by the financial crisis which has limited the ability of small and medium sized enterprises to invest in occupational health and safety and training. Moreover, the number of inspectors is inadequate to effectively cover all of Italy and compensation proceedings for damages due to the violation of health and safety rights are very costly and lengthy.

Positive aspects regarding the enforcement of this right include the sound and well-organised legal framework and the '*modello di organizzazione e gestione'* for prevention in the field of health and safety. The setting up of the Permanent Advisory Commission on Health and Safety at Work, the allocation of funds, and training initiatives provided by public authorities are also particularly useful. The 2011 statistics of INAIL (National Institute against Accidents at Work) show a decline in workplace accidents.

Measures such as financial support by public institutions for training courses in small enterprises, information campaigns addressed to employers and employees including the spreading of good practices, an increase in the numbers and resources of inspectors, and the shift of the burden of proof to the employer when an employee denounces a failure to respect health and safety standards in a situation of undeclared work, could further enhance enforcement of this fundamental workers' right.

ANNEXES

Annex I: List of stakeholders contacted for the report

Trade Unions

- CISL: Freedom of association/collective bargaining.
- CGIL: Freedom of association/collective bargaining; Health and safety at work.

Workers Association / NGOs

- Over40: Age antidiscrimination.

Authorities

- Labour Ministry: Health and safety at work.

Practitioners

- Court of Cassation: Freedom of association/collective bargaining.
- Italian Law firms: Age antidiscrimination; Health and safety at work.

Annex II: Information sources (legislation, case-law, literature reviewed and statistics)

National Law

- Constitution of the Italian Republic, 22 December 1947.
- Law No. 183/2010 establishing the Central Guarantee Committee.
- Law No. 146/1990 Legal Code for strike action in essential public services, partially reformed by Act 83, 11 April 2000.
- Law No. 108/1990 on individual dismissals.
- Law No. 300/1970 Workers' Statute.
- D. Lgs. No. 81/2008 Single Act on Safety at Work.
- D. Lgs. No. 257/2007 implementing EU Directive 2004/40/EC.
- D. Lgs. No. 25/2007 implementing EU Directive 2002/14/EC.
- D. Lgs. No. 257/2006 implementing EU Directive 2003/18/EC.
- D. Lgs. No. 188/2005 implementing EU Directive 2001/86/EC.
- D. Lgs. No. 124/2004 on the rationalisation of inspection tasks in the field of social security and employment.
- D. Lgs. No. 276/2003 on reform of the labour market.
- D. Lgs. No. 216/2003 on equal employment opportunities, implementing EU Directive 2000/78/EC.
- D. Lgs. No. 74/2002 establishing a European Works Council, implementing EU Directive 94/45/EC.

- D. Lgs. No. 231/2001 on the administrative responsibility of legal persons, societies, and associations.
- D. Lgs. No. 626/1994 regarding the improvement of safety and health of workers at work, implementing Directives 89/391/CEE, 89/654/CEE, 89/655/CEE, 89/656/CEE, 90/269/CEE, 90/270/CEE, 90/394/CEE, 90/679/CEE, 93/88/CEE, 95/63/CE, 97/42/CE, 98/24/CE, 99/38/CE, 99/92/CE, 2001/45/CE, 2003/10/CE, 2003/18/CE and 2004/40/CE.
- D. Lgs. No. 29/1993 rationalising the organisation of the public administration and revising the regulation of public employment.
- D.L. No. 5 (9 February 2012) on the simplification of laws and procedures.
- DDL No. 3249/2012 on rules on labour market reform in a growth perspective.

National Case-Law

- Employment Section No. 9348 of 26.04.2011.
- Employment Section No. 9866 of 24.04.2007.
- Firenze Court of Appeals of 27.03.2006.
- United Sections of the Court of Cassation No. 20074 of 23.09.2010.
- Criminal Court of Cassation No. 22558 of 11.06.2010.
- Constitutional Case No. 31/1969.
- Constitutional Case No. 29/1960.

Literature

- La Gazetta del Mezzogiorno, 'The European Union Employment Commissioner hailed Italy's labor-market reforms', 16 April 2012, available at: http://www.lagazzettadelmezzogiorno.it/notizia.php?IDNotizia=510964.
- Orlandini G., '*La proposta di regolamento Monti II ed il diritto di sciopero nell'Europa post-Lisbona*', 13 April 2012, available at: http://www.europeanrights.eu/public/commenti/Monti_II_final.pdf.
- CGIL, '*La proposta di regolamento Monti II*', 5 February 2012, available at: http://www.cgil.it/Archivio/Giuridico/Nota_su_proposta_Monti.pdf.
- Leonardi, S., 'Il diritto di sciopero in una prospettiva comparata', Alternative per il Socialismo – Europa, n. 17/2011.
- Vandaele, K., 'Sustaining or Abandoning "social peace"?', working paper 2011.05, ETUI.
- Damiani, M. and Ricci, A., 'Firm-level bargaining and contingent pay: new evidence from Italy', AIEL, XXVI National Conference, 15-16 September 2011.
- Morone, A., *'L'accordo interconfederaledel 28 giugno 20011: novita' in tema di rappresentanza sindacale e di contrattazione collettiva*', July 2011, available at: http://www.cslavoro.it/archivio/product/cct07_11ds01.pdf.
- Leverone, I., '*Sul licenziamenti del dirigente donna per raggioungimento dell'età pensionabile*', *Diritto & Lavoro*, 2011, p. 214.

- Cirioli, D., '*Entra in vigore il Collegato lavoro e cambiano le regole per i licenziamenti'*, 24 November 2010, available at: http://www.loccidentale.it/node/99079.
- Calafà, L., '*Selezione per autisti di autobus di linea e discriminazione in base all'età*', *Diritto & Lavoro*, 2010, p. 1024.
- Muratore, L., 'Italy: The impact of the information and consultation Directive' (European Industrial Relations Observatory), 9 March 2009, available at: http://www.eurofound.europa.eu/eiro/studies/tn0710029s/it0710029q.htm.
- Cella, G.P., and Treu, T., *Relazioni industriali e contrattazione collettiva*, Il Mulino, Bologna 2009.
- Vallebona, A., '*Breviario di Diritto del Lavoro*', Giappichelli, 2009, p. 26.
- Applica Sprl, 'Impact and Assessment of EU Directives in the field of "INFORMATION & CONSULTATION"', 2006-07 available at: www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24311/20110718ATT24311EN.pdf.
- De Fiores, C., '*Le Revisioni Costituzionali'*, in Treccani.it, *Enciclopedia Italiana*, 29 May 2006, available at: http://www.treccani.it/scuola/maturita/materiale_didattico/costituzione_italiana/4.html.
- Calafà, L., '*Licenziamenti collettivi alle Poste e discriminazioni in base all'età: la prima applicazione nazionale della sentenza Mangold*', *Diritto & Lavoro*, 2006, p. 915
- Tomassetti P., '*Riforma del lavoro: una sconfitta della concertazione o delle relazioni industriali?*', p. 13, available at: http://bollettinoadapt.it/acm-on-line/Home/documento17308.html.

International Policy Documents and Reports

- Fasani, M., Labour Inspection in Italy (International Labour Organization, March 2011), p. 19, March 2011, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_154063.pdf.
- OECD Statistics, 2010, available at: http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN.

European Policy Documents and Reports

- European Commission, MEMO/11/661, 'Small and medium sized enterprises: the situation in EU Member States 2010', 4 October 2011, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/661&format=HTML&aged=0&language=EN&guiLanguage=en.
- European Industrial Relations Observatory, Information and consultation practice across Europe, five years after the EU Directive, 2011, available at: http://www.eurofound.europa.eu/docs/eiro/tn1009029s/tn1009029s.pdf.
- European Industrial Relations Observatory, Developments in Industrial Action 2005-2009, 2010, available at: http://www.eurofound.europa.eu/eiro/studies/tn1004049s/tn1004049s.htm.
- European Industrial Relations Observatory, Italy: Industrial relations profile, 2009, available at: http://www.eurofound.europa.eu/eiro/country/italy.pdf.

- European Industrial Relations Observatory, Italy: the impact of the information and consultation Directive, 2009, available at: http://www.eurofound.europa.eu/eiro/studies/tn0710029s/it0710029q.htm.
- European Commission, Communication from the Commission, 'Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work', COM/2007/0062 final
- European Industrial Relations Observatory, Collective dispute resolution in an enlarged European Union, 2006, available at: http://www.eurofound.europa.eu/pubdocs/2006/42/en/3/ef0642en.pdf.
- European Parliament, Impact and Assessment of EU Directives in the field of "Information and Consultation" (IP/A/EMPL/FWC/2006-03/SC1), available at: http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24311/20110718ATT24311EN.pdf.
- European Foundation for the Improvement of Living and Working Conditions, EIRO Thematic feature: Collective dispute resolution in an enlarged European Union, 2006, available at: www.eurofound.europa.eu/pubdocs/2006/42/en/3/ef0642en.pdf.

National Policy Documents and Reports

- National Institute Against Accidents at Work, '*Andamento degli infortuni sul lavoro*', September 2011, available at: http://www.inail.it/repository/ContentManagement/node/N670420288/Dati%20Inail%20N%209_2011.pdf.
- Italian Statistical Yearbook 2011, Chapter 6: Justice, available at: www3.istat.it/dati/catalogo/20111216_00.

ANNEX 5:
NATIONAL REPORT FOR THE NETHERLANDS

CONTENTS

LIST OF ABBREVIATIONS

Arbowet	Law on Working Conditions (*Arbeidsomstandighedenwet*)
AWGB	General Law on Equal Treatment (*Algemene Wet Gelijke Behandeling*)
BW	Civil Code (*Burgerlijk Wetboek*)
CAO	Collective Agreement (*collectieve arbeidsovereenkomst*)
CES	Confederation Européenne des Syndicates
CGB	Equal Treatment Commission (*Commissie Gelijke Behandeling*)
ECHR	European Convention on Human Rights
ESC	European Social Charter
ETUC	European Trade Union Confederation
JAR	Labour Law Jurisprudence (*Jurisprudentie Arbeidsrecht*)
Law AVV	Law on Declaring Provisions of Collective Agreements Binding and Void (*Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten*)
Law CAO	Law on Collective Agreements (*Wet op de collectieve arbeidsovereenkomst*)
Law LV	Law on Fixing Wages (*Wet op de Loonvorming*)
NCvB	Dutch Centre for Occupational Diseases (*Nederlands Centrum voor Beroepsziekten*)
Rv	Law on Civil Action (*Wet op de Burgerlijke Rechtsvordering*)
RI&E	Inventory and Evaluation of the Risks (*Risico-inventarisatie en evaluatie*)
SER	Social and Economic Council (*Sociaal-Economische Raad*)
Sr	Criminal Code (*Wetboek van Strafrecht*)
SWZ	Social Affairs and Employment (*Sociale Zaken en Werkgelegenheid*)
WGBL	Law on Equal Treatment of Age in Employment (*Wet gelijke behandeling op grond van leeftijd bij de arbeid*)

Please note that the findings of this report are based on literature review and consultations with national stakeholders (a list is included in Annex I of this report). If the source of information was an interviewee, this has been indicated in a footnote.

1. INTRODUCTION TO THE LEGAL FRAMEWORK AND ENFORCEMENT TRADITION IN THE NETHERLANDS

The Netherlands has a codified body of law. The primary sources of law are international treaties ratified by the Netherlands and national legislation, where the Constitution is the principal instrument. National legislation is generally adopted by the Parliament adopting the Government's proposal. The Council of State also advises on the proposal before it is submitted to Parliament. The conformity of formal laws with the Constitution cannot be challenged in court.[1] Certain international and European treaties, however, have a direct effect on the Dutch legal order, and courts can review the conformity of formal laws with these treaties.

Formal laws can also include provisions authorising the adoption of regulatory acts by the government. In these cases, the government adopts a Ministerial Decree (*Algemene Maatregel van Bestuur* or AMvB). Further authorisation to a Minister is possible, in which case the latter adopts a Ministerial Regulation (*Ministeriele Regeling*). Legislation can be adopted by local authorities, in their respective competencies and jurisdiction.

Additional sources of law are general principles of law, customary law and jurisprudence. Legislation might refer to general principles or customs, and judges take these into account in their interpretations. Jurisprudence is built by case law, in particular of the Supreme Court and the Appeal Courts. For administrative law, the highest court is the Council of State.

The Netherlands transposes EU legislation by means of either a Law or a Ministerial Decree. In both cases, the Council of State advises on the proposal. Transposition can also occur by Ministerial Regulation.

1.1. National legislation on freedom of association and the right to collective bargaining, age antidiscrimination and the right to health and safety at work

The constitution recognises the **right of association** as a fundamental right, in Article 8. This right can be limited by law in the interest of public order.

International law plays an important role in the Dutch legal order, in particular its principles related to the freedom of association and to the **right to collective bargaining.** The main source of international law regarding the freedom of association is Article 11 of the **European Convention on Human Rights** (ECHR). On the basis of Articles 92 to 95 of the Dutch Constitution, this provision has direct effect and prevails over any conflicting national legislation.

The Netherlands is also a party to the **European Social Charter** (ESC) of 1961 (ratified in 1980). Article 6(4) of the ESC on the right of workers and employers to collective action, including the right to strike, is the most relevant source for this right in the Netherlands. A strike of railway (NS) staff led the Supreme Court to rule in 1986 that Article 6(4) is directly applicable, but that a strike is unlawful if it does not meet the 'rule and abuse test' (*spelregel- en misbruiktoets*).[2]

[1] Under Article 120, courts 'shall not enter into the assessment of the constitutionality of laws and treaties'. As the highest democratic power, only the Parliament (in the legislative drafting phase) can test law against the Constitution.

[2] HR 30.05.1986, NJ 1986, 688, Spoorwegstaking (NS-arrest).

The Netherlands ratified ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise Convention in 1959, and ILO Conventions No. 98 on the Right to Organise and Collective Bargaining and No. 154 on Collective Bargaining in 1993. ILO conventions have had an impact on Dutch labour law, even though earlier domestic legislation regulated the right to collective bargaining. These older laws related more to procedure than to substance.

In 1927, the Netherlands adopted the **Law on Collective Agreements** (*Wet op de collectieve arbeidsovereenkomst/Law CAO*). This regulates what a collective agreement (CAO) is, who is bound by it and under what timeframe. CAOs are civil agreements between social partners relating to working conditions, to which the government is not a party. A CAO can be established for an individual company, for part of an industry, and for the industry as a whole.

1. After a CAO is concluded, it is notified to the Department Implementation Tasks – Legislation on Labour Conditions (*Directie Uitvoeringstaken Arbeidsvoorwaardenwetgeving/UAW)* which is part of the Directorate General for Employment of the Ministry of Social Affairs and Employment.[3] The Ministry uses a sample of notified CAOs to draw a representative picture of labour conditions.[4]

The **Law on Declaring Provisions of Collective Agreements Binding and Void** of 1937 (*Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten/Law AVV)* stipulates that the Minister of Social Affairs and Employment, at the request of an involved employer or employee, can declare a CAO to be generally binding for an entire industry. This possibility has been introduced as a way to provide support to the CAO rules, and to reduce incentives for employers to gain a competitive advantage by not signing up to the CAO. The Law AVV does not alter the civil nature of the provisions of the CAO. The 1998 Decree on Registration of Collective Agreements and Requests for Declarations on being Generally Binding (*Besluit aanmelding van collectieve arbeidsovereenkomsten en het aanvragen van algemeen verbindend verklaring*) contains the procedural requirements for the notification and the request to declare a collective agreement generally binding.

Additional relevant legislation includes the Law on Salary Determination (*Wet op de Loonvorming/Law LV*) of 1970. According to its Article 4, the Ministry of Social Affairs and Employment should be notified in writing when a CAO has been agreed, modified or terminated.[5]

Article 1 of the Constitution forbids discrimination on the basis of religion, beliefs, political affiliation, race, gender or any other ground. It does not explicitly refer to age. Similarly, the 1994 **General Law on Equal Treatment** (AWGB) prohibits distinction on a number of grounds, but does not refer to age.[6] The AWGB has a specific chapter on labour. It also established the **Equal Treatment Commission** (*Commissie Gelijke Behandeling or CGB*) (see section 2.2).

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[3] SZW Ministry, 'CAO Registration', available at: http://cao.szw.nl/index.cfm?menu_item_id=16534&rubriek_id=392840&link_id=187803&hoofdmenu_item_id=16507.

[4] SZW Ministry, 'CAO Research', available at: http://cao.szw.nl/index.cfm?menu_item_id=16573&rubriek_id=392840&rubriek_item=392870&hoofdmenu_item_id=16507.

[5] SZW Ministry, 'Brochure CAO and AVV', available at: http://cao.szw.nl/index.cfm?menu_item_id=16615&hoofdmenu_item_id=16507&rubriek_id=392840&link_id=188746&doc_id_sub=6859.

[6] Article 1 in conjunction with Article 5 and 6 of the General Law on Equal Treatment, available at: http://wetten.overheid.nl/BWBR0006502/geldigheidsdatum_04-06-2012.

Discrimination on the ground of age within an employment relationship is prohibited by the **Law on Equal Treatment of Age in Employment** (*Wet gelijke behandeling op grond van leeftijd bij de arbeid, WGBL*) of 17 December 2003. This law (in combination with another law on disability) transposes Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.[7]

Article 3 WGBL prohibits making a distinction on age in relation to:

- Recruitment and selection procedures;
- Entry into, renewal and termination of an employment relationship;
- Working conditions, including payment and travel arrangements;
- Education and training during or prior to employment;
- Promotion;
- Working conditions (treatment); or
- Employment mediation.

According to Article 7(1)(a) WGBL, the prohibition of age distinction does not apply if it is based on labour market policies to promote employment in certain age categories, provided these policies are established by law. Nor does it apply if the distinction is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 7(1)(c) WGBL).

The principle of antidiscrimination is included in both civil and criminal law. The **Civil Code** (*Burgerlijk Wetboek or BW*) provides recourse against discrimination. Its main relevant provision is Article 6:162 regarding unlawful acts (*onrechtmatige daad*), according to which a person who commits an unlawful act towards another person is obliged to provide compensation.[8] In practice, this article is rarely used for work-related discrimination. Article 7:611 of Book 7 BW provides for the employers' responsibility to ensure that workplaces are free of discrimination.

The **Criminal Code** (*Wetboek van Strafrecht or Sr*) has several antidiscrimination provisions. Article 90quater defines discrimination without referring to any specific grounds.[9] Most articles that relate to discrimination (137c-137g) are not applicable to work. However, Article 429quater deals with discrimination in a profession or company. It mentions race, religion, beliefs, gender or sexual orientation. Age is not explicitly included.

The **Law on Working Conditions** of 18 March 1999 (*Arbeidsomstandighedenwet or Arbowet*) requires employers to have a policy in place to combat distinction or discrimination.[10]

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[7] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22. Other laws on disability are available at: http://wetten.overheid.nl/BWBR0014915/geldigheidsdatum_04-06-2012; see also http://www.europa-nu.nl/id/vi3ak94jozzp/notitie_over_de_implementatie_van.

[8] An unlawful act is defined as an infringement of a right; action or omission in conflict with a legal obligation or what is considered reasonable in society, except when there are grounds for justification. An unlawful act is attributed to a person when it is due to culpability, or a cause that is his responsibility according to the law or on the basis of common reasoning in society.

[9] Article 90quater defines discrimination as any form of distinction, exclusion, restriction or preference, that impairs the recognition, enjoyment or exercise on an equal footing of human and fundamental freedoms in political, economic, social or cultural areas or in other areas of social life.

[10] See Labour Foundation, 'The European framework agreement on harassment and violence at work. Final report by the Labour Foundation on the working methods used and activities undertaken by the Dutch social partners when implementing this framework agreement' (undated); Labour Foundation, 'What is a health and safety catalogue?', June 2007; SZW Ministry, 'Starting Risk Inventory and Evaluation' (undated); and 'Checklist

This requirement is included in the Law on Working Conditions on the basis of the 'Collection-Law SZW Laws 2009' (*Verzamelwet SZW-wetgeving*), referring to 'the factors that directly or indirectly distinguish, with the inclusion of sexual harassment, aggression and violence, bullying and work-pressure that create stress in the labour situation'.[11] This requires employers to include risks on discrimination in risk inventory and evaluation plans.[12]

Employees are entitled to a **safe and healthy workplace**. This right is enshrined in legislation containing rules for employers and employees regarding the health, safety and welfare of employees and independent contractors. While implementing EU directives, Dutch legislation focuses on the objectives (*wettelijke doelvoorschriften*) of preventing occupational accidents and diseases as well as avoiding over-regulation.

The **Law on Working Conditions** is a framework law. The 1997 Decree on Working Conditions (*Arbobesluit*) provides concrete rules, including conditions in the workplace and exposure to hazardous materials. The 1997 Regulations on Working Conditions (*Arboregeling*) detail the implementation of the Degree. The Law was amended in 2009 to recognise work related stress as a psychosocial condition. Employers and employees may agree on how to ensure its standards in their own sector in a **'work catalogue'** (*Arbo-catalogus*).[13]

1.2. Overview of the enforcement tradition in the Netherlands

This section provides an overview of the mechanisms for enforcing freedom of association, the right to collective bargaining, age antidiscrimination, and the right to health and safety at work in the Netherlands. It discusses the competent court, and describes other institutions responsible for the enforcement of one or more workers' rights or active in dispute settlement or conflict resolution.

The Court (*Rechtbank*) consists of various sectors, including the sub-district court (*Kantonrechter*), which is competent for, among others, labour cases.[14] The sub-district court consists of a single judge and adjudicates disputes over labour and collective agreements including cases regarding termination of an employment contract.[15] When the dispute does not concern an employment contract, the sub-district court's competence is restricted to cases involving up to €25,000.[16] Larger disputes regarding work relations, such as assignment of work or discrimination as a ground for refusing an employment contract, are submitted to the civil courts.[17]

careful handling of complaints about discrimination, Commission of Equal Treatment' (undated). Several websites discuss the prevention plan, including the website of the SZW Ministry, available at: http://www.arboportaal.nl/onderwerpen/psychosociale-belasting/discriminatie.html; an English language overview is available at: http://www.government.nl/issues/health-and-safety-at-the-workplace.

11 Article V(1) of the Collection-Law SZW- laws 2009 (of 2 July 2009), available at: http://www.st-ab.nl/1-09318ks03.htm.

12 Article 5 of the Law on Working Conditions.

13 See http://www.stvda.nl/~/media/Files/Stvda/Brochures/2000_2009/2007/Brochure_20070712.ashx.

14 In addition to the sector sub-district (*Kanton*), other sectors of the Court (*Rechtbank*) are the sector civil law, criminal law and administrative law. The Netherlands has 19 courts.

15 Information regarding the procedures at the Dutch Labour Courts is available at: http://www.arbeidsrechter.nl/procederen-ontslag-kantonrechter-procedure-verweer.

16 Article 93 Law on Legal Action (Rv).

17 Ibid.

A decision of the sub-district court can be appealed within 3 months, to the Court of Appeal (*Gerichtshof*).[18] The appellant must establish an interest in the result of the case, or the amount should be at least €1,750. If the decision of the sub-district court concerns a request for termination of an employment contract, appeal and cassation are, under normal circumstances, not possible.[19]

The Court of Appeal examines factual determinations and the application of the law. Subsequently, a cassation procedure can be initiated before the Supreme Court, which considers only whether the lower courts correctly applied the law.

Under the Law on Legal Assistance (*Wet op de Rechtsbijstand*), the government can reimburse a portion of the cost of a lawyer or mediator. Depending on income, the client will pay a contribution.[20] For an appeal, a second legal aid request needs to be submitted. Legal aid only covers the cost of a lawyer. Other costs, such as court fees, cost of extracts, and bailiff costs are not covered by state-funded legal aid. Court fees in the sub-district court vary from €39 to €298.[21] In general, the losing party bears the costs of the other party.

Dutch labour relations are relatively harmonious, with employers and employees engaged in structural dialogue.[22] There are no permanent (statutory) dispute settlement mechanisms. In case of conflicts, mediation occurs on an *ad hoc* basis.

Under the General Law on Equal Treatment (AWGB), the **Equal Treatment Commission** (CGB) was established in 1994. The CGB is an independent organisation which aims at promoting and monitoring compliance with the AWGB. Since 2004, it also monitors compliance with the Law on Equal Treatment of Age in Employment. The CGB may commence investigations on its own initiative when it believes discrimination occurs structurally within certain sectors of society. Any person claiming unequal treatment can request a decision (*oordeel*) from the CGB. Although this decision is not legally binding, it must be taken into account by courts, which must justify deviating from it. CGB's decision are followed in approximately 75% of cases.[23]

The **National Ombudsman**, established in 1981, is an independent expert body that enables individuals to file complaints about practices of administrative bodies, including violations of the principle of equal treatment.[24] Before submitting a complaint to the Ombudsman, the complainant must use the complaints procedure provided by the relevant body. The findings of the Ombudsman are not legally binding. A complaint may lead to investigations and publication of reports.[25]

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[18] There are five Courts of Appeal: The Hague, Amsterdam, Arnhem, s' Hertogenbosch and Leeuwarden.

[19] Information regarding the procedures at the Dutch Labour Courts is available at: http://www.arbeidsrechter.nl/Ontbindingsprocedure-kantonrechterformule-ontslagvergoeding.

[20] As of 2012, there is no right to subsidised legal aid if the total income per year exceeds €24,900 (for singles) or €35,200 (for couples or single parents with a minor child). See the website of the Council for Legal Aid http://www.rvr.org/nl/subhome_rz/rechtsbijstandverlener,Inkomensgrenzen.html.

[21] A fee of €298 is required in a case between legal persons; cases between natural persons (where it does not regard a financial claim) can lead to a maximum fee of €111.

[22] See de Roo, A., 'The Settlement of (Collective) Labour Disputes in the Netherlands. National Report', available at: http://ec.europa.eu/social/BlobServlet?docId=2472&langId=en.

[23] CGB, 'What is a decision', available at: http://www.cgb.nl/oordelen/wat_is_een_oordeel.

[24] The law establishing the ombudsman is available at: http://wetten.overheid.nl/BWBR0003372/geldigheidsdatum_04-06-2012.

[25] See National Ombudsman, 'Complaint against the government', available at: http://www.nationaleombudsman.nl/klacht-over-de-overheid.

In addition to a decision of the CGB, the advice or mediation of an **antidiscrimination bureau** (*Anti-discriminatiebureau*) **(ADB),** an independent organisation, can be requested. These bureaus have established a network of local offices that handle complaints, conduct research, provide training and advise organisations in antidiscrimination policy.[26]

The **Inspectorate of the Ministry of Social Affairs and Employment** (*Inspectie van het Ministerie van Sociale Zaken en Werkgelegenheid*) **(SZW)** enforces labour laws. Its main tools are inspection, investigation, and signalling. The Inspectorate carries out preventive actions and information sharing, monitoring, investigation and corrective interventions (administrative fines and criminal enforcement).[27]

The SZW Inspectorate has the competence to impose fines on **employers** for violations of the Law on Working Conditions, the Law on Working Hours, the Law on Aliens Employment Act, the Law on Minimum Wage Act and the Commodities Act (*Warenwet*). **Employees** also have obligations: if they do not comply with the Law on Working Conditions, they can be fined. The inspector prepares a 'fine report' (*boeterapport*) in case of serious offences,[28] or when a previously noted offence has not been remedied. In case of a violation of the law, the Inspectorate can also make a police report (*proces verbaal*).[29] This rarely happens in practice.

According to the Law on Works Councils of 1971,[30] **Works Councils** (*ondernemingsraad*), for enterprises with more than 50 employees, have the responsibility to avoid discrimination at the workplace and to monitor health and safety standards.[31] For enterprises with between 10 and 50 employees, the Law on Work Councils stipulates the establishment of workers' representatives.

[26] Until 2011 ADBs were the regional units of the antidiscrimination association 'Art. 1', which functioned as a national excellence centre, and were supported by funding from the Dutch government. This structure was dissolved in 2011 and government funding ceased. A list of ADBs is available at: http://www.studieinfo.nl/hulpverlening/anti_discriminatie_bureaus.html. A description of the tasks and functions of the ADBs is available at: http://www.art1.nl/artikel/461-Antidiscriminatiebureaus.

[27] More information on the functioning of the Inspectorate is available at: http://www.inspectieszw.nl/organisatie/.

[28] Serious offences arise from no monitoring of the use of personal protective equipment; employees carrying out work for which they are not qualified, no reporting to the Inspectorate when required.

[29] The SZW Ministry provides information regarding labour circumstances at http://www.arboportaal.nl/onderwerpen/arbowet--en--regelgeving/arbowet.

[30] Available at: http://wetten.overheid.nl/BWBR0002747/geldigheidsdatum_04-06-2012.

[31] FNV, 'Duties', available at: http://www.fnvbondgenoten.nl/werk_en_inkomen/dossiers/or_en_pvt/rechten_en_plichten/artikelen/Taken_van_een_or/. See also the Works Council's website http://www.or.nl/.

2. FREEDOM OF ASSOCIATION AND THE RIGHT TO COLLECTIVE BARGAINING

2.1. Description of the enforcement mechanisms for freedom of association and the right to collective bargaining

Freedom of association is a fundamental right in the Netherlands (Article 8 of the Constitution). Consequently, all employees have a fundamental right to join a trade union; if this right is violated, they can appeal to the judicial authorities.

The Law on Collective Agreements stipulates who is authorised to conclude a Collective Agreement (CAO): one or more employers, employer organisations, and one or more employee organisations.[32] The authorised employee organisations are mostly trade unions.[33] Trade union density is decreasing in the Netherlands (from 22.9% in 2000 to 19.4% in 2009).[34]

The **right to strike** is provided by Article 6(4) of the ESC on the right of workers and employers to collective action in cases of conflict of interest, including the right to strike. Strikes are relatively rare in the Netherlands. According to the Central Office for Statistics (*Centraal Bureau voor de Statistiek)* the number of days lost as a result of strikes is very low. In 2010, an average year in terms of number of strikes, there were 21 strikes in the Netherlands. As a result 59,000 labour days were lost. In approximately 40% of the cases, the strikes concerned a conflict related to a collective agreement. During the period 2001–2010, there were approximately 200 strikes.[35]

The **issues that can be the subject of CAOs** depend on whether the Civil Code allows for their regulation by private parties. The provisions of the Civil Code are either mandatory or allow for deviation by collective bargaining. Default provisions apply when the parties have not made any arrangements.[36] Mandatory provisions (*dwingend recht)* include equal probation period for employee and employer; minimum wage; prohibition to terminate the contract during sickness lasting less than 2 years; and equal treatment on the basis of gender.[37] Examples of legal provisions from which collective agreements can deviate include no payment during first two days of disability; and non-competition covenants.[38] An example of a default provision that applies where nothing has been included in agreements is the place where the employer needs to deposit wage payments.[39]

Trade unions may involve the **Works Councils** in CAO negotiations. When employees and employers fail to reach agreement on a CAO, they may seek mediation from a third party. Recently, this happened in a high profile case involving cleaning staff.[40]

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[32] The Law on Collective Agreements, available at: http://wetten.overheid.nl/BWBR0001937/geldigheidsdatum_04-06-2012.

[33] The Netherlands has several umbrella organisations that represent the interests of employers; the main 'business' organisation is VNO-NCW. The main trade unions in the Netherlands are FNV, CNV, LTO Netherlands and MHP. A full overview of trade unions is available at: http://www.b9.nl/vakbonden/nederland.htm.

[34] OECD data on trade union density is available at: http://stats.oecd.org/Index.aspx?QueryId=20167.

[35] Statistics Netherlands, 'Strikes in the postal and transport sectors in 2010', available at: http://www.cbs.nl/nl-NL/menu/themas/arbeid-sociale-zekerheid/publicaties/artikelen/archief/2011/2011-3362-wm.htm.

[36] A knowledge forum with information on CAO regulation is available at: http://www.hr-kiosk.nl/xbook/id/992.

[37] Respectively 7:652, lid 1 BW; Law on Minimum Wage; 7:670 BW; and 7:646 BW.

[38] Respectively 7:629 BW and 7:653 BW.

[39] 7:622 BW.

[40] Nu.nl, 'Mediation in cleaning dispute', 24 March 2010, available at: http://www.nu.nl/economie/2211961/bemiddeling-in-schoonmaakruzie.html.

Mediation can also take place in CAO negotiations between civil servants and the government, as for example with a difficult negotiation process regarding the police.[41] There are no permanent formal structures for such mediation; rather, the parties themselves agree on a mutually acceptable mediator.[42]

Two advisory bodies play a critical role in national labour relations: the **Social Economic Council** (*Sociaal Economische Raad, SER*)[43] and the **Organisation of Labour** (*Stichting van de Arbeid*).[44] As a forum where employees, employers and the government seek consensus on labour issues, their advice is often the basis for defining labour relations even though they do not participate in the collective bargaining process.[45]

There are several types of CAOs. A company CAO (*ondernemings-CAO*) applies to a specific company while an industry wide collective agreement (*bedrijfstak-CAO*) applies within an industry or sector.[46] If an employment contract refers to a CAO, the CAO is incorporated in the contract. Employers are bound by a CAO because they are a party to the CAO or a member of an employers' association that concluded the CAO (Article 9 Law CAO). CAOs contain provisions on wages, payment of overtime, pension, sick leave, working times, or probation, generally on terms more favourable to workers than specified in legislation. The maximum period of validity of a CAO is five years.[47]

An employee who considers that an employer does not adhere to an applicable CAO should first address the non-compliance with the employer (individually or with the support of a trade union or a legal adviser). When no solution is reached on that basis, the employee can go to **court** (sub-district court) to request compliance with the CAO (see Section 2.2.2).[48] The same procedure applies to CAOs that have been declared generally binding.[49] In certain CAOs, parties agree to submit conflicts to arbitration.[50]

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41 Government of the Netherlands, 'Ter Horst requests mediation in the police CAO dispute', 29 January 2008, available at: http://www.rijksoverheid.nl/documenten-en-publicaties/persberichten/2008/01/29/ter-horst-vraagt-bemiddeling-in-conflict-politie-cao.html.

42 Conclusion based on stakeholder consultation.

43 See http://www.ser.nl/.

44 See http://www.stvda.nl/.

45 An introduction in the Dutch labour law system is available at: http://www.bju.nl/system/uploads/17255/original/9789089741356_voorbeeldhoodstuk.pdf.pdf?1289174380. The websites for the SER and the Organisation of Labour are available at: www.ser.nl and www.stvda.nl.

46 See Government of the Netherlands, 'Labour contracts and cao', available at: http://www.rijksoverheid.nl/onderwerpen/arbeidsovereenkomst-en-cao/vraag-en-antwoord/welke-soorten-cao-s-zijn-er.html.

47 Article 18 of the Law on Collective Bargaining.

48 'Adoption of the budget of the Ministry of Social Affairs and Employment (XV) for the year 2010, No. 219', Letter from the Minister and the Secretary of Social Affairs and Employment (*Vaststelling van de begrotingsstaten van het Ministerie van Sociale Zaken en Werkgelegenheid (XV) voor het jaar 2010, nr. 219*), 7 December 2009.

49 Werk.nl, 'Labour contracts and cao', available at: https://www.werk.nl/werk_nl/werknemer/meer_weten/arbeidsrecht/arbeidsovereenkomstencao.

50 Arbeidsrechter.nl, 'Arbitration / binding advice (company law) / mediation', available at: ARBEIDSRECHTER.nl: info over arbitrage en adviezen in het arbeidsrecht | Arbeidsrechter.nl.

Although the conclusion of CAOs falls outside the sphere of public enforcement, the government plays a supporting role in enforcement through the SZW Inspectorate:

- As part of the CAO, parties can agree to 'compliance provisions' (nalevings-bepalingen). The declaration of the generally binding nature of the CAO by the government allows the parties to establish a control body to provide information and monitor compliance throughout the sector. The parties can agree on the competences of this body, which may include the power to impose fines. However, the most important checks to ensure that workers' rights are respected are carried out through inspections by the SZW Inspectorate.
- Where a collective agreement is declared generally binding, the parties can request an investigation (Article 10 of the Law AVV) if there are 'grounds for suspicion' of non-compliance and an 'intention to prosecute' – the latter through civil procedures. The SZW Inspectorate carries out the investigation and presents its findings. With this information, the party can decide to initiate court proceedings.[51]
- The Inspectorate supports the civil enforcement of collective agreements via collaboration with the social partners. Where an 'Article 10 investigation' is initiated, there is an agreement of mutual exchange of information between the partners and the Inspectorate. When the Inspectorate starts a project focussing on a particular sector, it first contacts the parties to the relevant collective agreement.

In the *ABVAKABO FNV/Unieke Kinderopvang* case,[52] the **Supreme Court** ruled that favourable labour conditions included in a CAO continue to exist after the CAO has expired, unless explicitly specified in a new CAO.[53] The Supreme Court also ruled in the *Bongers/KSB* case that when part of the work is covered by a CAO while another part is covered by an individual contract, the more favourable regime applies.[54]

2.2. Practical enforcement situation for the freedom of association and the right to collective bargaining in national law

2.2.1. Major difficulties in the enforcement of the freedom of association and the right to collective bargaining

In the Netherlands, approximately 85% of all employees are covered by a CAO.[55] There is currently a **discussion** regarding whether the **government** could play a larger role in the enforcement of CAOs. In general, however, employers and employees disfavour government intervention in the collective bargaining process.

Recently, the traditional employment relationship has shifted to a multi-party relationship (such as temporary workers under contract with an agency). In such atypical situations, **it is not evident who should be party to collective agreements.**

New types of labour relationships have emerged (such as interim workers, agency workers, self-employed workers, posted workers, migrant workers under a contract of services, informal workers, etc.).[56]

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[51] According to the SZW Ministry this happens approximately two to three times a year.

[52] ABVAKABO FNV/Unieke Kinderopvang, HR 8 april 2011, RadW 2011/499, JAR 2011/135, RAR 2011/86, available at: http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BP0580.

[53] HR 8 april 2011, RadW 2011/499, JAR 2011/135, RAR 2011/86 (ABVAKABO FNV/Unieke Kinderopvang).

[54] HR, 2 april 1993, JAR 1993/100, RvdW 1993, 89 (Bongers/KSB). See also HR 28 januari 1994, JAR 1994, 47 (Beenen/Vanduho B.V).

[55] Arbeidsrechter.nl, 'The CAO application?', available at: http://www.arbeidsrechter.nl/handeling-is-de-cao-van-toepassing.

[56] See Bouma, S., and Frouws, B., 'The use of the assignment agreement' (*Gebruik van de overeenkomst van opdracht*), Institute for Policy Research, 12 September 2011, available at:

According to the trade unions, these have developed in order to circumvent employers' obligations under the labour laws. These new arrangements can evade the coverage of CAOs.

The trade unions consider that in the last decade, employees have been replaced in several sectors (construction and building, transport) by **bogus self-employed workers**. According to the trade unions, workers are sometimes pressured into continuing on a self-employed basis instead of under an employment contract.

Competition law precludes the setting of minimum prices for contract work in CAOs. According to the Dutch Competition Authority (*Nederlandse Mededingingsautoriteit*), trade unions may not lawfully specify a minimum price for contract work in collective labour agreements, even if the aim is to combat underbidding in the sector.[57] A Dutch trade union brought this issue to court. The court ruled that a CAO provision that requires employers to pay certain minimum rates to independent contractors is not allowed under EU competition law.[58]

According to trade unions, traditional labour relations are also fragmenting due to increased use of subcontracting. For example, as a result of mandatory public procurement procedures, **services are contracted at a price that cannot ensure the proper application of CAOs** while at the same time guaranteeing proper application of working time rules. Employers are thus increasingly bound by their offer during a public procurement procedure and can no longer negotiate prices and working conditions with their suppliers.[59]

Although trade unions in the last few years have tried to raise awareness of these developments, the Ministry of Labour insists that the social partners should enforce collective agreements with the existing civil law instruments.[60]

It is still **unclear whether or not the trade unions are allowed to represent workers covered by other EU jurisdictions**. In particular, the consequences of the ***Laval* case**[61] in the Netherlands are not yet clear.

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http://www.research.nl/files/rvb/reportcenter/Rapporten/B3895/B3895GebruikVanDeOvereenkomstVanOpdrachtdef.PDF; Opinion 11/02 of the SER, 'Self-employment and working conditions' (*Zelfstandigheden en arbeidsomstandigheden*), March 2011, available at: http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2012/02/16/ser-advies-zelfstandigen-en-arbeidsomstandigheden.html; 'Opinion: A picture of the independent self-employed. An integrated overview of self-employed without employees' (*Advies Zzp'ers in beeld. Een integrale visie op zelfstandigen zonder personeel*), report to the Ministers of Social Affairs and Employment; Economic Affairs, Agriculture and Innovation; Finance; and Education, Culture, and Science, available at: http://www.raadwerkinkomen.nl/CmsData/Signaal%202010/ZZPersInBeeld.pdf. For recent developments, see http://www.fosag.nl/cms/showpage.aspx?id=1314.

57 Competition Authority, vision document 'Competition law and CAO rate provisions for the self-employed' (*Cao-tariefbepalingen voor zelfstandigen en de Mededingingswet*), December 2007, para. 7, available at: http://www.nma.nl/images/Cao-tariefbepalingen%20voor%20zelfstandigen%20en%20de%20Mededingingswet22-192405.pdf.

58 LJN: BO3551, Rechtbank 's-Gravenhage, 343076 / HA ZA 09-2395.

59 Conclusion based on stakeholder consultation.

60 For more information regarding the government's position, see e.g., Parliamentary question of Members Spekman and Van Dekken of 15 August 2011, AV/SDA/2011/13069 and answers to Parliamentary questions, provided by the SZW Ministry on 1 March 2011, AV/AR/2011/1545 (the parties themselves have a great responsibility when it comes to enforcing a collective agreement). In answering the Parliamentary question of Member Ulenbelt of 15 February 2007, AM/BR/2007/3408, the Minister of SZW stated, 'The Labour Inspectorate has no legal enforcement task regarding (generally binding declared) provisions of collective agreements. It is the CAO parties that are responsible for the control of compliance with the agreement. If it believes that in a company a generally binding collective agreement provision is not complied with, one or more parties to the agreement may, in order to start a legal action, request the Minister of Social Affairs to investigate on the basis of Article 10 of the Law on Declaring Binding and Not-Binding of Provisions of Collective Bargaining'.

61 Case C-341/05 *Laval* [2007], ECR I-11767.

This leads to uncertainty as to the scope of freedom of association and the right to collective bargaining.[62] The Explanatory Memorandum to the Viking and Laval case by the European Trade Union Confederation (ETUC) and the Confederation européenne des syndicats (CES), reflects Dutch concerns: 'The Laval judgment is ambiguous and unclear as to the question if (generally binding) collective agreements, when they are setting higher standards than the minimum standards set by law, are recognised by the ECJ as the applicable minimum standards. If not, the Laval case would turn out to have an even greater and more disastrous impact on quite a number of countries in which this is the common practice (France, Belgium, the Netherlands, etc.)'.[63]

2.2.2. Positive experiences on the enforcement of the freedom of association and the right to collective bargaining

The Ministry of Social Affairs and Employment confirmed that the use of the provision on the establishment of a **control body** is common in CAOs; more sectors are establishing monitoring bodies, which allows closer monitoring of the enforcement of workers' rights. Such mechanisms have been established in sectors such as construction, transport, cleaning, private security and confectionery.[64] Agencies providing temporary employment may also establish monitoring bodies.

2.3. Conclusions on the effectiveness of the enforcement of the freedom of association and the right to collective bargaining in the Netherlands

Freedom of association constitutes a fundamental right in the Dutch legal order. If it is violated, workers can resort to courts to seek its enforcement. The right to collective bargaining and the right to strike are also recognised, although strikes are relatively rare in the Netherlands.

Certain issues cannot be the subject of collective bargaining (e.g., equal probation period for employee and employer; minimum wage; prohibition to terminate the employment contract during sickness lasting less than 2 years; and equal treatment on the basis of gender). The negotiation process for collective agreements (CAOs) may involve the Works Councils. When employees and employers fail to agree on a CAO, they can seek mediation from a third party. Mediation can also take place in negotiations between civil servants and the government regarding a CAO. There are no permanent (statutory) dispute settlement mechanisms in the Netherlands.

The enforcement of collective agreements is mainly the responsibility of the parties. The government facilitates enforcement by providing the possibility to establish control bodies for generally binding CAOs, by carrying out investigations (based on Article 10 AVV) on the application of generally binding agreements, and by overseeing the collaboration and exchange of information between the SZW Inspectorate and the social partners. Workers can also go to court regarding violations of this right.

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[62] See e.g., Van Den Eeckhout, V., 'International Labour Law Mangled between Free Movement of Persons, Free Movement of Services, Freedom of Establishment and Nondiscrimination: Notes on Cases Viking, Laval, Rüffert and C./Luxemburg' (*Internationaal arbeidsrecht gemangeld tussen vrij verkeer van personen, vrij verkeer van diensten, vrijheid van vestiging en non-discriminatie, Enkele aantekeningen vanuit ipr-perspectief bij de uitspraken Viking, Laval, Rüffert en C./Luxemburg*), available at: http://media.leidenuniv.nl/legacy/tra-uitgebreide-vers.def.3-2-09.pdf.

[63] ETUC and CES, 'Viking and Laval cases, Explanatory Memorandum for the Executive Committee of the ETUC', 4 March 2008, p. 11, available at: http://www.etuc.org/IMG/pdf_ETUC_EXEC_Viking_Laval_-_expl_memorandum_7-3-081.pdf. In relation to this, a Dutch trade union noted that the ultimate remedy in the enforcement of the collective labour agreements can be collective action (conclusion based on stakeholder consultation).

[64] Conclusion based on stakeholder consultation.

The major challenge to the enforcement of this right relates to increased uncertainty about its scope due to changing circumstances such as the identification of the roles and responsibilities of the different parties involved in 'atypical' employment relationships (such as interim workers), the coverage of these workers by collective agreements and the consequences of the *Laval* case for the collective bargaining system. In general, however, the consulted stakeholders consider that enforcement mechanisms are effective.

Steps for further improvement could include a more flexible approach allowing for more investigations by the SZW Inspectorate and the clarification of the applicable rules, including the relationship between competition law and collective agreements, precluding the setting of minimum prices for subcontracted work, and timely adoption of EU provisions regarding the right to take collective action.

3. AGE ANTIDISCRIMINATION

3.1. Description of the enforcement mechanisms for age antidiscrimination

Cases claiming age discrimination under the Law on Equal Treatment of Age in Employment (WGBL) may be referred to **court** or to the **Equal Treatment Commission** (CGB). A court procedure is generally viewed as a last resort.[65]

Upon request, the CGB is authorised to start an investigation.[66] The parties will be questioned and given the opportunity to respond to each other's arguments. The case is reviewed by three commissioners assisted by a Registrar. The CGB can also obtain information from third parties. The CGB applies a 'reversed burden of proof'. When the applicant shows *prima facie* that discrimination has occurred, there is a presumption of discrimination. The defendant must prove that is not the case.

The investigation of the CGB can result in recommendations in its decisions. The CGB cannot impose damages or fines. According to the CGB, in approximately 75% of cases, its decision has been implemented. The applicant may still go to court. In these court cases, the burden of proof is also reversed, if the judge considers it reasonably likely that discrimination has occurred. Following this, the employer must prove it did not act contrary to the law. The court must consider the CGB's opinion in its deliberations, and can only deviate from it with a reasoned decision.

The **SZW Inspectorate** may review whether the employer is implementing policies directed against discrimination (including age), as required under Article 3 (2) of the Law on Labour Conditions, as amended in 2009 (see section 2.1). If the Inspectorate receives a complaint regarding discrimination (or after its own inquiry), it can request the employer to show which policies are in place. When the Inspectorate concludes there is a risk of discrimination, it can require the employer to implement a certain policy. If the employer fails to do so, the Inspectorate may impose an administrative fine.

The **network of antidiscrimination bureaus (ADBs)** is also competent for handling individual complaints and raising awareness. The ADBs aim at promoting a tolerant society while combating all forms of unequal treatment. To this end, they handle individual complaints, conduct research, provide education and training, and advise organisations in antidiscrimination policy.[67]

In order to improve the participation of young people (up to the age of 27) in the labour market, Article 7:668a BW was temporarily broadened to include temporary employment relationships.[68] Young people can now be hired on successive fixed-term contracts.

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[65] In 2009, the CGB addressed 40 age discrimination cases (38% of the opinions relating to employment), compared with 37 cases in 2010 (26% of employment opinions) (conclusion based on stakeholder consultation). For statistics until 2008 see GCB, 'Age', available at: http://cgb.stippacceptatie.nl/dossiers/leeftijd.

[66] CGB, 'What is a decision?', available at: http://www.cgb.nl/oordelen/wat_is_een_oordeel.

[67] See studieinfo.nl, 'Antidiscrimination bureaus', available at: http://www.studieinfo.nl/hulpverlening/anti_discriminatie_bureaus.html.

[68] Law of 30 June 2010 on a temporary extension of the option in Article 668a of Book 7 of the Civil Code to enter into fixed-term contracts in connection with the promotion of youth employment (*Wet van 30 juni 2010 tot tijdelijke verruiming van de mogelijkheid in artikel 668a van Boek 7 van het Burgerlijk Wetboek om arbeidsovereenkomsten voor bepaalde tijd aan te gaan in verband met het bevorderen van de arbeidsparticipatie van jongeren*). For discussion of the proposal, see Minister of Social Welfare and Employment, 'Notice of Change No. 32 058 – Temporary Extension of the Option in Article 668a of Book 7 of the Civil Code to enter into Fixed Term Contracts in Connection with the Promotion of Youth Employment' (*Tijdelijke verruiming van de mogelijkheid in artikel 668a van Boek 7 van het Burgerlijk Wetboek om*

The government noted this is in line with the *Mangold* case of the CJEU,[69] which interpreted Directive 2000/78/EC. Similarly, the *Rosenbladt*;[70] *Andersen*;[71] *Georgiev*;[72] and *Prigge*[73] cases also influenced Dutch labour law.[74]

3.2. Practical enforcement situation of age antidiscrimination in national law

3.2.1. Major difficulties in the enforcement of age antidiscrimination

In the Netherlands, there is a debate on public enforcement mechanisms. The Minister of Social Affairs and Employment in 2009 stated that the Labour Inspectorate's **enforcement of the prohibition of age discrimination should be limited to identifying job vacancy advertisements** that distinguish on the basis of age without proper justification.[75] The Minister stated that it is primarily for the CGB or the civil court to determine whether age discrimination takes place.

According to the CGB, the number of age discrimination cases increased between 2004 and 2006 but declined thereafter.[76] In 2011, it issued 221 decisions, 18 more than in 2010, with age discrimination cases accounting for the 25%, the single highest factor.[77] However, statistics alone might not reflect the actual problems. This is illustrated by an **increasing unemployment rate for persons older** than 55 and figures that show that in 2011 only 2% of the jobs available at the Employee Insurance Schemes were taken by persons older than 55.

arbeidsovereenkomsten voor bepaalde tijd aan te gaan in verband met het bevorderen van de arbeidsparticipatie van jongeren) (undated), available at: http://docs.minszw.nl/pdf/35/2009/35_2009_3_13560.pdf.

69 Judgment of 22 November 2005 in case C-144/04, *Mangold*, ECR 2005 p. I-9981.

70 Case C-45/09, *Rosenbladt*, [2010] (Directive 2000/78/EC does not preclude national laws permitting collective agreements that provide for automatic termination of employment upon reaching retirement age, so long as the provision has a legitimate aim relating to the labour market and the means of achieving that aim are appropriate and necessary).

71 Case C-499/08, *Andersen*, [2010] (Directive 2000/78/EC precludes national legislation that excludes workers who are eligible for old age pension from claiming a severance allowance aimed at assisting workers with more than 12 years' experience at their employer to find new employment).

72 Joined cases C-250/09 and 268/09, *Georgiev*, [2010] (Directive 2000/78/EC does not preclude legislation requiring that university professors retire by age 68 and have reduced duties from age 65, providing the legislation has a legitimate aim relating to the labour market and the means are appropriate and necessary).

73 Case C-447/09, *Prigge* [2011] (the exceptions in articles 2(5) and 6(1) of Directive 2000/78/EC, relating respectively to public security and protection of health and to measures necessary to pursue legitimate aims relating to the labour market, do not apply to permit a collective agreement that considers airline pilots as unable to perform their physical duties after age 60, when national and international law set that limit at age 65).

74 Heerma van Voss, G., and van Sloten, J., 'Chronicle of Social Law' (*Kroniek van het Sociaal Recht*), in *Netherlands Legal Reporter, Social Law* (*Nederlands Juristenblad, Sociaal Recht*), 7 October 2011, vol. 34, p. 2299-2301.

75 Letter from the SZW Minister to the Chair of the House of Representatives, AV/AV/09/28031, 9 December 2009.

76 CGB, 'Age', available at: http://www.cgb.nl/dossiers/leeftijd.

77 NOS.nl, 'Discrimination often found', 7 June 2012, available at: http://nos.nl/artikel/381029-vaker-discriminatie-geconstateerd.html.

There are **few court cases** on age discrimination. A study on victimisation commissioned by the CGB in 2010 found that people who raise the issue of unequal treatment often face negative consequences.[78] The study found that only a third of surveyed employees said they were not disadvantaged when raising the issue of unequal treatment at work while 14% feel they are discriminated against if they do so. The study also confirmed that employees feel they are in a vulnerable position and do not want to risk their employment relationship.

3.2.2. Positive experiences on the enforcement of age antidiscrimination

Several **education projects** have been set up since 2005 to raise awareness of age antidiscrimination. These include the project 'Vacancies for All Ages', where employers who publish vacancies raising concerns of age discrimination are contacted and are provided with information regarding this issue. This appears to be an effective approach. Two organisations, the Expertise Centre Age (*Expertisecentrum LEEFtijd*) and the Hotline Discrimination Amsterdam (*Meldpunt Discriminatie Amsterdam*), developed a **checklist** for recruitment advertising to ensure employers are compliant with the WGBL.

In 2005, the CGB issued a decision (2005/06) 'on age discrimination in job advertising'. The decision explains the **criteria to evaluate** when an age requirement in a job vacancy is justified and when it constitutes unacceptable age discrimination.[79] In another decision (2009/07 'on targeted recruitment and employment agencies'), the CGB clarified the criteria for justification of the recruitment and selection actions of employment agencies focusing on specific age groups.

The government also promotes compliance and prevention through education and awareness raising activities, and by discussing these subjects with the social partners.[80]

In 2009, the CGB published an evaluation of the Law on Equal Treatment of Age in Employment (2004-2008).[81] The evaluation concluded that WGBL **legislation contributes to preventing and combating age discrimination** and may increase employment participation. In addition, other legislative amendments (e.g., broadening the scope of Article 7:668a BW) have taken place to increase participation of young people (up to the age of 27) in the labour market. A study on victimisation commissioned by the CGB one year later revealed that CGB petitioners consider that the **treatment of their petition by the CGB is a positive experience**.[82]

3.3. Conclusions on the effectiveness of the enforcement of age antidiscrimination in the Netherlands

When a person believes his or her rights under the WGBL are violated, he or she may bring a case to court, request a decision from the Equal Treatment Commission (CGB), ask for

[78] Van Genugten, M., and Svensson, J., Double the Dupe? A Study of the Disadvantage Caused by Unequal Treatment of Employees (*Dubbel de Dupe? Een studie naar de benadeling van werknemers die ongelijke behandeling aan de orde stellen*), Twente University Department of Public Risks and Safety, 2010, available at: http://www.cgb.nl/publicaties/publicatie/221076/dubbel_de_dupe_een_studie_naar_de_benadeling_van_werknemers_die_gelijke_behandeling_aan_de_orde_stellen.

[79] CGB, '2005/06: Opinion on age discrimination in advertisements', 6 January 2005, available at: http://www.cgb.nl/publicaties/publicatie/221105/2005_06_advies_inzake_leeftijdsonderscheid_in_advertenties

[80] Conclusion based on stakeholder consultation.

[81] See Equal Treatment Commission, 'Evaluation of the Law on Equal Treatment of Age in Employment (2004-2008)', 2009, available at: http://www.cgb.nl/publicaties/publicatie/221591/wgbl__geen_symbool_wetgeving__evaluatie_van_de_wet_gelijke_behandeling_op_grond_van_leeftijd_bij_de_arbeid_.

[82] CGB, 'The positive and negative consequences people experience or expect as a result of raising the issue of unequal treatment', January 2010, p. 4.

the advice or mediation of an anti-discrimination bureau (ADBs), or alert the SZW Inspectorate.

Difficulties in the enforcement of the right to age antidiscrimination include the fact that the SZW Inspectorate's competences are limited to identifying age discrimination in job vacancy advertisements. The judgment of whether or not there is an actual case of discrimination is reserved to the courts or the CGB. Another obstacle to the implementation of the age antidiscrimination legislation is the reluctance of workers to report discrimination. Employees do not want to risk their employment relationship. Finally, the increasing unemployment rates of workers over the age of 55 also raise concerns of extended age discrimination in the Dutch labour market.

Positive experiences include several projects to inform organisations or businesses about the Equal Treatment Act on age, the issuing of decision by the CGB to clarify the correct application of this right, and the development of checklists for employers to ensure their vacancies are not discriminatory on the basis of age. An evaluation by the CGB concluded that the Dutch legal framework contributes to preventing and combating age discrimination and may increase employment participation, while another study revealed that CGB petitioners consider that the treatment of their petition is a positive experience.

Future measures could focus on facilitating the reporting of cases by providing information and raising awareness.

4. THE RIGHT TO HEALTH AND SAFETY AT WORK

4.1. Description of the enforcement mechanisms for the right to health and safety at work

According to Article 1 of the Law on Working Conditions, the responsibility for a safe and healthy workplace primarily rests with the **employer**. The employer has the obligation to ensure compliance with the legislative objectives (*wettelijke doelvoorschriften*). On the basis of Directive 89/391/EEC, the Law on Working Conditions stipulates that every employer must perform an inventory and evaluation of the risks (*risico-inventarisatie en evaluatie, RI&E)* employees face in performing their work.[83] The RI&E evaluates the risks associated with working in a certain industry or company. A plan of approach lists the measures taken in a specific period. Previously, the RI&E was checked by an occupational health and safety service (*ARBOdienst*). As of 1 July 2005, it is also possible to have an individual occupational health and safety expert perform the RI&E check, referred to as customisation (*maatwerkregeling*). Agreement between the employer and employees, or approval in the CAO, is required.[84] Employers who violate the Law on Working Conditions are subject to criminal penalties under the Law on Economic Offenses (Article 32(2) of the Law on Working Conditions).

Works Councils, established under the Law on the **Works Councils** (*Wet op de Ondernemingsraden, WOR*), cooperate with the employer on health and safety policy. Article 27 WOR stipulates that 'the endorsement of the Works Council shall be required for every proposed decision on the part of the entrepreneur to lay down, amend or withdraw: [...] (d) regulations relating to working conditions, sick leave or reintegration'.

Article 12(1) of the Law on Working Conditions provides that employers and employees work together on the implementation of working standards. As discussed above, employers and employees (or their representative) may lay down their agreements on how the standards in the Law on Working Conditions will be ensured in their own sector in the form of a **'work catalogue' (*arbo-catalogus*)**. The negotiations take place at the national level (per sector) and are often supported by technical institutions, such as the Netherlands Organisation for Applied Scientific Research (TNO, an independent research organisation), to provide advice for specific issues like the allowed physical load for healthcare workers or construction workers. Before finalising the catalogue, the draft is sent to the SZW Inspectorate for review. The review is limited to checking whether the catalogue describes measures for all sectors to which it applies; whether the authors of the catalogue are representative of the employers and employees to which it applies; whether the catalogue is available for employers and employees; and whether it meets the legislative objectives.[85] The catalogues that the Inspectorate reviews form the basis for its monitoring and enforcement activities.

[83] Article 5 of the Law on Working Conditions.

[84] See SZW Ministry, 'Risk inventory and evaluation', available at: http://www.arboportaal.nl/onderwerpen/arbowet--en--regelgeving/arbozorg/risico-inventarisatie---evaluatie.html. See also Oosterhout Safety Centre, 'FAQ on the new work law', available at: http://www.veiligheidscentrum.com/wettelijkkader/000000995c0c4aa63.html.

[85] See SZW Ministry, 'Work catalogues', available at: http://www.arboportaal.nl/onderwerpen/arbowet--en--regelgeving/arbowet/arbocatalogi.html.

The SZW Inspectorate is responsible for the enforcement of the Law on Working Conditions. In general, the approach used by the **Inspectorate** (in the period 2008-2011) is 'tough where it should be, soft where it can'.[86] This means that in sectors and companies where the risks are high or there is poor compliance with the law, inspections take place frequently and where necessary, serious action is taken. On the other hand, low-risk sectors and companies that comply with the law are, in principle, not inspected except in cases of serious accidents, complaints and reports. Employees have the **right to lodge a complaint** anonymously with the SZW Inspectorate. According to the 2011 annual report of the Inspectorate, '[t]he number of inspections where the Inspectorate SZW needed enforcement action increased again in 2011. In 2009, enforcement tools were used in 58% of the inspections, compared to 64% in 2011. In particular, the number of 'requests to comply' (*eisen tot naleving*) has increased. On 1 January 2011, a number of policy rules were repealed, as a result of which 'requests to comply' are used instead of warnings in sectors without a health-catalogues'.[87]

The types of measures used by the Inspectorate depend on the law violated and the severity of the violation. If no serious violations are found and the inspector is confident the violation will end without further enforcement, the inspector pursues a verbal agreement with the employer on how to remedy it. If the inspector finds a serious violation, the inspector can issue a written warning or a 'request to comply' with the law within a set time. If after a check it appears that the violation remains, the inspector can prepare a report imposing financial sanctions. If a new violation is detected within 24 months after the first penalty has become 'irrevocable', the new fine can be increased by 50%. If the same violation is noted a third time within 48 months, the inspector can prepare a police report (*proces verbaal*).[88] According to the Inspectorate, 96% of violations are ended after a warning.

For further enforcement, the reports applying financial sanctions are handed over to the Department of Fine, Penalty and Collection (*Boete, Dwangsom en Inning*) of the Inspectorate of Social Affairs.[89] A company or employee can appeal the decision to impose a fine.[90] Inspectors are authorised to order that work stop immediately in case of serious danger to the health or safety of workers.

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[86] Work Inspectorate of the Ministry of Social Welfare and Employment, Annual work inspection report 2008, Safe, healthy and legal at work (*Jaarverslag Arbeidsinspectie 2008, Veilig, gezond en legaal aan het werk*), 2008, p. 18 and 43. For more information on the 'tough / soft' approach, see SZW Ministry, 'Enforcement and sanctions', available at: http://www.inspectieszw.nl/onderwerpen/toezicht_en_handhaving/handhaving_en_sancties/.

[87] Annual Report SZW Inspectorate 2011, p. 10.

[88] See SZW Inspectorate, 'Sanctions for violations of various laws', available at: http://www.inspectieszw.nl/onderwerpen/toezicht_en_handhaving/handhaving_en_sancties/sancties_bij_overtreden_diverse_wetten/.

[89] Ibid.

[90] This can be done within six weeks of the decision by submitting an appeal to the SZW Ministry. Further appeal is possible to the courts (Administrative sector). This must be done within six weeks after the initial appeal is decided. On the basis of Article 6:16 of the General Administrative Law (*Algemene Wet Bestuursrecht*) an appeal does not suspend the decision, unless otherwise provided by law.

4.2. Practical enforcement situation of the right to health and safety at work in national law

4.2.1. Major difficulties in the enforcement of the right to health and safety at work

The SZW Inspectorate aims at stimulating social partners to find practical solutions within the existing legal framework. For more than 50% of the working population a work catalogue (*Arbo-catalogus*) is available.[91] According to the Inspectorate, however, **only 12% of employers appear to be familiar with these catalogues.**[92] It is important that social partners and the government increase the awareness of employers and employees regarding the catalogues and encourage their implementation.

Stakeholders also highlighted that **legal standards are not sufficiently precise** to achieve the desired level of protection.[93]

The **number of complaints to the Inspectorate remains very low**.[94] Other problems underlined by stakeholders include the **lack of health and safety representatives** in practice and the **limited resources of the Inspectorate**.[95]

4.2.2. Positive experiences on the enforcement of the right to health and safety at work

As discussed above, employees have the **right to lodge a complaint** with the SZW Inspectorate. Although there are few complaints, there are a significant number of inspections and suspensions.[96] However, almost all suspensions take place in the construction sector and suspension for major hazard cases is rare.[97] If there is an acute danger, **employees are allowed to stop work**.

The **Works Councils** (*ondernemingsraad*) have the right to accompany an inspector during his visit,[98] and to speak with the inspector in private.[99] At the enterprise level, Works Councils or workers' representatives (for companies between 10 and 50 employees), also monitor the enforcement of the right to health and safety at work. In small firms (fewer than 10 employees) employers should consult concerned employees.

Finally, trade unions provide **free legal assistance** to employees in order to better enable them to take action.

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91 'In 2011, the SZW Inspectorate positively tested 48 (partly) health catalogues. The majority (43) regarded additions to already approved health catalogues. Approximately 51% of working population of the Netherlands falls within the scope of a health catalogues'. 2011 Annual Report of the Inspectorate of the Ministry of Social Affairs and Employment (*Jaarverslag Inspectie Sociale Zaken en Werkgelegenheid*), p. 10.

92 Conclusion based on stakeholder consultation. For example, '36% of the meat sector knows that a specific health catalogue applies to the industry. Only 21%, however, has taken cognisance of this particular catalogue'. Work catalogue – meat, 'Work catalogues too little known', November 2011, available at: http://www.arbocatalogus-vlees.nl/Portals/pve/documenten/Nieuwsbrief%20Vlees%20november%202011.pdf.

93 Conclusion based on stakeholder consultation.

94 Conclusion based on stakeholder consultation.

95 Conclusion based on stakeholder consultation.

96 There were 1,938 suspensions in 2011 (Annual Report SZW Inspectorate 2011, p. 42). According to the SZW Inspectorate, the majority of these are applied in the construction sector and are very brief, to fix a hazardous condition at a work site. Suspension for major hazard cases is rare.

97 Preventive suspension occurred four times in 2010 and seven times in 2011; whereas there were no cases of suspension in 2010 and one in 2011 (Annual Report SZW Inspectorate 2011, p. 51).

98 Article 12 Law on Labour Conditions.

99 Conclusion based on stakeholder consultation.

4.3. Conclusions on the effectiveness of the enforcement of the right to health and safety at work in the Netherlands

The responsibility for a safe and healthy workplace primarily rests with the employer. Employers and employees (or their representatives) can establish a 'work catalogue' (*Arbo-catalogus)* at the sectorial or company level in which they specify how to achieve the standards of the Law on Working Conditions. After approval by the SZW Inspectorate, the catalogues form the basis for monitoring and enforcement. The Inspectorate also ensures the application of standards through inspections and the issuing of warnings. Employers who do not comply with the rules can be fined. At the enterprise level, Works Councils (*ondernemingsraad*), or workers' representatives (for companies between 10 and 50 employees), also monitor the enforcement of the right to health and safety at work. In small firms (fewer than 10 employees) employers should consult concerned employees.

Among the preventive measures for the enforcement of the right to health and safety at work, catalogues are recognised as effective. They are available for more than half of the working population. However, reportedly only 12% of employers are familiar with them. Other problems underlined by stakeholders include the lack of health and safety representatives and the limited capacity of the Inspectorate. The possibility to stop working in case of imminent danger, the right to lodge a secret complaint with the SZW Inspectorate, and free legal assistance provided by trade unions are all positive aspects for the enforcement of this right.

Making employers and workers aware of the catalogues and strengthening their implementation as well as providing in practice for a workers' representative for health and safety in all companies will reinforce protection of this right.

ANNEXES

Annex I: List of stakeholders contacted for the report

Trade Unions

- FNV Vakcentrale: Freedom of association/collective bargaining and health and safety.

Workers Association / NGOs

- Work and Age (*Werk en leeftijd*): Age antidiscrimination.

Authorities

- Ministry of Social Affairs and Employment (Department Employment relations, Section Social Dialogue and Employment-Migration): Freedom of association/collective bargaining; Age antidiscrimination.
- Ministry of Social Affairs and Employment (Inspectorate): Health and safety at work.

Annex II: Information sources (legislation, case-law, literature reviewed and statistics)

National Law

- Law of 30 June 2010 on a temporary extension of the option in Article 668a of Book 7 of the Civil Code to enter into fixed-term contracts in connection with the promotion of youth employment (*Wet van 30 juni 2010 tot tijdelijke verruiming van de mogelijkheid in artikel 668a van Boek 7 van het Burgerlijk Wetboek om arbeidsovereenkomsten voor bepaalde tijd aan te gaan in verband met het bevorderen van de arbeidsparticipatie van jongeren*) (30.06.2010).
- Collection-Law SZW Laws 2009 (*Verzamelwet SZW-wetgeving*) (2.07.2009).
- Equal Treatment Law on Age in Employment (*Wet gelijke behandeling op grond van leeftijd bij de arbeid, WGBL*) (17.12.2003).
- Law on Working Conditions (*Arbeidsomstandighedenwet or Arbowet*) (18.03.1999).
- Decree on Registration of Collective Agreements and Requests for Declarations on being Generally Binding (*Besluit aanmelding van collectieve arbeidsovereenkomsten en het aanvragen van algemeen verbindend verklaring*) (02.12.1998).
- Law on Declaring Binding and Non-Binding Provisions of Collective Bargaining (*Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten/Law AVV*) (2.12.1998).
- Regulations on Working Conditions *(Arboregeling)* (12.03.1997).
- Decree on Working Conditions (*Arbobesluit*) (15.01.1997).
- Law on Working Hours (*Arbeidstijdenwet*) (23.11.1995).
- Law on Aliens Employment Act (*Wet Arbeid Vreemdelingen*) (21.12.1994).
- General Law on Equal Treatment (*Algemene Wet Gelijke Behandeling, AWGB*) (02.03.1994).

- Legal Assistance Law (*Wet op de Rechtsbijstand*) (23.12.1993).
- Civil Code (*Burgerlijk Wetboek or BW*) Books 6 (engagements/*verbintenissen*) and 7 (special agreements/*bijzondere overeenkomsten*) (01.01.1992).
- Law on Works Councils (*Wet op de Ondernemingsraden, WOR*) (28.01.1971).
- Law on Salary Determination (*Wet op de Loonvorming*) (12.02.1970).
- Law on economic offences (*Wet op de Economische Delicten*) (22.06.1950).
- Law on Commodities (*Warenwet*) (28.12.1935).
- Law on Collective Agreement *(Wet op de collectieve arbeidsovereenkomst / Law CAO)* (24.12.1927).
- Criminal Code (*Wetboek van Strafrecht*) (03.03.1881).
- Law on Civil Action (Rv) (*Wetboek van Burgerlijke Rechtsvordering*) (01.10.1838).
- Dutch Constitution (24.08.1815).

National Case-Law

- ABVAKABO FNV/Unieke Kinderopvang, HR 8 april 2011, RadW 2011/499, JAR 2011/135, RAR 2011/86.
- FNV/de Staat der Nederlanden, LJN: BO3551, Rechtbank 's-Gravenhage, 343076/HA ZA 09-2395.
- Beenen/Vanduho B.V., HR 28 januari 1994, JAR 1994, 47.
- Bongers/KSB, HR, 2 april 1993, JAR 1993/100, RvdW 1993, 89.
- Spoorwegstaking (NS-arrest), HR 30.05.1986, NJ 1986, 688.

Literature

- Heerma van Voss, G., and van Sloten, J., 'Chronicle of Social Law' (*Kroniek van het Sociaal Recht*), in *Netherlands Legal Reporter, Social Law* (*Nederlands Juristenblad, Sociaal Recht*), 7 October 2011, vol. 34.
- Berkhout, D.F., 'Discrimination, Legal Effect of Legal Principles and Impact of Guidelines (Seda Kücükdeveci/ Swedex GmbH & Co KG)' (*Arbeidsrechtelijke annotaties, 2010, (9), Discriminatie, directe werking van rechtsbeginselen en doorwerking van richtlijnen*), Annotated Employment Law 2010 (9) 2, p. 70-87.
- Van Genugten, M., and Svensson, J., Double the Dupe? A Study of the Disadvantage Caused by Unequal Treatment of Employees (*Dubbel de Dupe? Een studie naar de benadeling van werknemers die ongelijke behandeling aan de orde stellen*), Twente University Department of Public Risks and Safety, 2010.
- Tijsmans, N., and van Rij, C., 'The Effects of Market Forces on Employment, Regional Public Transport' (*De effecten van marktwerking op arbeidsvoorwaarden, regionaal openbaar vervoer*), Regioplan publication No. 1845B, April 2009.
- 'ETUC and CES, Viking and Laval cases', Explanatory Memorandum for the Executive Committee of the ETUC, 4 March 2008.
- Kluwer, *Practical Guide to Labour Law* (*Praktijkgids Arbeidsrecht*), 2008.
- Van Den Eeckhout, V., 'International Labour Law Mangled between Free Movement of Persons, Free Movement of Services, Freedom of Establishment and

Nondiscrimination: Notes on Cases Viking, Laval, Rüffert and C./Luxemburg' (*Internationaal arbeidsrecht gemangeld tussen vrij verkeer van personen, vrij verkeer van diensten, vrijheid van vestiging en non-discriminatie, Enkele aantekeningen vanuit ipr-perspectief bij de uitspraken Viking, Laval, Rüffert en C./Luxemburg*), undated.

National Policy Documents and Guidelines

- Annual Report of the Inspectorate for Social Welfare and Employment (*Jaarverslag Inspectie Sociale Zaken en Werkgelegenheid*), 2011.
- Parliamentary Question to the Ministry of Social Welfare and Employment, from Members Spekman and Van Dekken, AV/SDA/2011/13069, 15 August 2011.
- Parliamentary Question to the Ministry of Social Welfare and Employment, from the Standing Committee on Social Welfare and Employment, AV/AR/2011/1545, 1 March 2011.
- House of Representatives of the Dutch Parliament (*Tweede Kamer der Staten Generaal*), Annual Session 2009-2010, No. 31 311, Letter of the State Secretary for Economic Affairs, the Minister of Social Welfare and Employment, and the State Secretaries of Social Welfare and Employment and of Finance, 2009-2010.
- Dutch Minister of Social Affairs and Employment, 'Proposal to use Enforcement Resources' (*op voorstel inzet handhavingsmiddelen*), 2009.
- Equal Treatment Commission, 'Evaluation of the Law on Equal Treatment of Age in Employment (2004-2008)', 2009.
- Ministry of Social Affairs and Employment, 'Letter from Minister Donner to the Chair of the House of Representatives regarding age discrimination' (*Brief van Minster Donner aan de Voorzitter van de Tweede Kamer der Staten Generaal betreft leeftijdsdiscriminatie*), VAV/AV/09/28031, 9 December 2009.
- Ministry of Social Welfare and Employment, Letter from the Minister and the State Secretary of Social Welfare and Employment, 'Adoption of the budget statement (XV) for the year 2010, No. 219' (*Vaststelling van de begrotingsstaten van het Ministerie van Sociale Zaken en Werkgelegenheid (XV) voor het jaar 2010, nr. 219*), 7 December 2009.
- Work Inspectorate of the Ministry of Social Welfare and Employment, Annual work inspection report 2008, 'Safe, healthy and legal at work' (*Jaarverslag Arbeidsinspectie 2008, Veilig, gezond en legaal aan het werk*), 2008.
- Competition Authority of the Netherlands Vision Document (*Visiedocument van de Nederlandse Mededingingsautoriteit*), 'CAO Tariff Agreements for Self-Employed and the Competition Law' (CAO-tariefbepalingen voor zelfstandigen en de Mededingingswet), December 2007.
- Labour Foundation, 'What is a health and safety catalogue?', June 2007.
- Parliamentary Question to the Ministry of Social Welfare and Employment, from Member Ulenbelt, AM/BR/2007/3408, 25 January 2007.
- Labour Foundation, 'The European framework agreement on harassment and violence at work. Final report by the Labour Foundation on the working methods used and activities undertaken by the Dutch social partners when implementing this framework agreement' (undated).

- Ministry of Social Affairs and Employment, 'Start with Risk Inventory and Evaluation' (Aan de slag met RI & E), Information Brochure of the Ministry of Social Affairs and Employment (undated).
- Commission of Equal Treatment, 'Checklist careful handling of complaints about discrimination' (undated).
- Minister of Social Welfare and Employment, 'Notice of Change No. 32 058 – Temporary Extension of the Option in Article 668a of Book 7 of the Civil Code to enter into Fixed Term Contracts in Connection with the Promotion of Youth Employment' (*Tijdelijke verruiming van de mogelijkheid in artikel 668a van Boek 7 van het Burgerlijk Wetboek om arbeidsovereenkomsten voor bepaalde tijd aan te gaan in verband met het bevorderen van de arbeidsparticipatie van jongeren*) (undated).

Websites

- UUUUhttp://www.arbeidsrechter.nl (Portal on labour law).
- http://www.arbocatalogus-vlees.nl (Portal on Health and Safety).
- http://www.arboportaal.nl (Portal on labour issues).
- http://www.bju.nl/juridisch/home (Boom Jurisdiction).
- http://www.cbs.nl (Statistics Netherlands).
- http://www.cgb.nl (Equal Treatment Commission).
- http://www.ec.europa.eu (European Commission).
- http://www.etuc.org (European Trade Union Confederation).
- http://www.europa-nu.nl (Dutch portal on EU).
- http://www.fnvbondgenoten.nl (FNV Bondgenoten- Trade Union).
- http://www.hr-kiosk.nl (HR Kiosk).
- http://www.inspectieszw.nl (Inspectorate SZW).
- http://www.maatwerkregeling.nl (Forum on working conditions).
- http://www.nationaleombudsman.nl (National Ombudsman).
- http://www.nu.nl (News service).
- http://www.or.nl (Work Council website).
- http://www.overheid.nl (Government).
- http://www.rijksoverheid.nl (Government of the Netherlands).
- http://www.rvr.org (Council for legal aid).
- http://www.st-ab.nl/ (Administrative Advisory Foundation).
- http://www.studieinfo.nl (Portal for information to students).
- http://www.stvda.nl (Labour Foundation).
- http://www.veiligheidscentrum.com/ (Oosterhout Safety Centre).
- http://www.wetten.nl (Portal on Dutch legislation).
- https://cao.szw.nl (collective agreement – Ministry of Social Affairs and Employment).

- https://www.rechtspraak.nl (Dutch jurisprudence).
- https://www.werk.nl (Portal on work in the Netherlands).
- www.ser.nl (Social and Economic Council of the Netherlands).
- www.stats.oecd.org (OECD).
- www.TNO.nl (Netherlands Organisation for Applied Scientific Research)

ANNEX 6:
NATIONAL REPORT FOR SWEDEN

CONTENTS

LIST OF ABBREVIATIONS

AD	Labour Court (*Arbetsdomstolen*)
ADB	Antidiscrimination Agency (*Antidiskrimineringsbyrån*)
AF	Unemployment Office (*Arbetsförmedlingen*)
AFS	Work Environment Authority's Code of Statutes
AML	Work Environment Act (*Arbetsmiljölagen*)
AMV	Public Employers' Confederation (*Arbetsmarknadsverket*)
ATL	Working Hours Act (*Arbetstidslagen*)
AV	Work Environment Authority (*Arbetsmiljöverket*)
CJEU	Court of Justice of the EU
FML	Trade Union Representatives Act (*Förtroendemannalagen*)
ILO	International Labour Organisation
LAS	Employment Protection Act (*Lagen om anställningsskydd*)
LO	Labour Organisation (*Landsorganisationen*)
LOA	Public Employment Act (*Lagen om offentlig anställning*)
MBA	Co-determination agreement (*Medbetämmandeavtal*)
MBL	Co-determination in the Workplace Act (*Medbestämmandelagen*)
PTK	Council for Negotiation and Cooperation (*Privattjänstemannakartellen*)
RF	Instrument of Government (*Regeringsformen*)
SAF	Employers' Confederation (*Sveriges Arbetsgivareförening*)
SAS	Scandinavian Airlines
SF	Act of Succession (*Successionsformen*)
SFS	Swedish Code of Statutes (*Sveriges Författningssamling*)
SL	Annual Leave Act (*Semesterlagen*)
TCO	Confederation of Professional Employees (*Tjänstemännens Centralorganisation*)
TF	Freedom of the Press Act (*Tryckfrihetsförordningen*)
UN	United Nations

Please note that the findings of this report are based on literature review and consultations with national stakeholders (a list is included in Annex I of this report). If the source of information was an interviewee, this has been indicated in a footnote.

1. INTRODUCTION TO THE LEGAL FRAMEWORK AND ENFORCEMENT TRADITION IN SWEDEN

The Swedish legal order belongs to the **Scandinavian law system** that has its historical basis in the German tradition. A comprehensive first codification was enacted in the 18th century – the Code of 1734, that can still be found in today's national Law Book (*Sveriges Rikes Lag*). Since 1925, acts and ordinances are published in the Swedish Code of Statutes (*Svensk författningssamling*).

In Sweden, the main sources of law are statutes: acts (*lagar*), which are adopted by the Parliament; ordinances (*förordningar)* adopted by the government; and regulations (*föreskrifter)* issued by administrative authorities. The most important statutes are the constitutional laws. The Swedish Constitution consists of four fundamental laws: the Instrument of Government (*Regeringsformen*), the Act of Succession (*Successionsformen*), the Freedom of the Press Act (*Tryckfrihetsförordningen*), and the Fundamental Law on Freedom of Expression (*Yttrandefrihetsgrundlagen*). The Constitution can only be amended through two consecutive decisions taken by the parliament, with new elections in between. Constitutional changes were enacted on 1 January 2011. One of the changes in the RF is Sweden's EU membership and participation in international cooperation within the framework of the United Nations (UN) and the Council of Europe, which are explicitly stated. Case law (*praxis*) and the preparatory work on proposed laws (*förarbeten*) are subsidiary sources of law which *should* be followed. Doctrines, commercial customs, and general custom are supplementary sources of law which *can* be followed.[1]

International agreements must, in principle, be incorporated into the Swedish legal order to be applicable. They can be incorporated either by reworking them into a Swedish constitutional text or by means of a separate legal act. However, some EU legislation is exempt from this principle since Sweden has transferred part of its regulatory competence to the EU. Thus, EU regulations are directly applicable in Sweden, while directives need to be transposed.[2]

Constitutional protection of labour law is scarce in Sweden. Labour relations exhibit strong self-regulatory traditions combined with statutory regulations and mediation. There is interplay between legislation and contractual agreements as statutes can be set aside case-by-case, by mutual agreement between the involved parties. Other relevant features of the Swedish system include continuity, as labour legislation and tradition have remained substantially unchanged over the years; mutual acceptance and recognition by the parties, with employer recognition of employee unionism being an integral part of the system; and collectivisation, where the collective interest of the employee community prevails over the interest of the individual employee.[3]

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1 Peczenik, A., *Legal theory and method: an introduction to jurisprudence* (*Juridikens teori och metod: en introduktion till allmän rättslära*), 1995, p. 35.

2 European Judicial Network in civil and commercial matters, 'Legal Order – Sweden', available at: http://ec.europa.eu/civiljustice/legal_order/legal_order_swe_en.htm (last accessed 12 June 2012).

3 Fahlbeck, R., 'Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Futures', Stockholm Institute for Scandinavian IS Law 1957-2009, 2009, p. 87-133, available at: http://www.scandinavianlaw.se/pdf/43-4.pdf (last accessed 12 June 2012).

1.1. National legislation on freedom of association and the right to collective bargaining, age antidiscrimination and the right to health and safety at work

The **freedom of association** is generally very strong in Sweden despite the fact that it is scarcely regulated. It is mentioned only in the Constitution which refers to the freedom to form labour organisations. Anyone can found any kind of association, regardless of its purpose and the number of participants, by stating that an association is being formed. Associations do not need to register with an authority and are not subject to supervision (unless they are recipients of funds where they need to register for taxation purposes).

The freedom of association was acknowledged in Sweden by employers in 1906, with the 'December Compromise', and in 1938 with the Saltsjöbaden Agreement. The December Compromise was the first national agreement between an employer and a union.[4] The **Saltsjöbaden Agreement (*Saltsjöbadsavtalet)*** is a basic agreement between the labour organisation LO (*Landsorganisationen*) and the Swedish Employers' Organisation, SAF. It establishes the **right to collective bargaining** as the most effective way of regulating labour relations and restricts the right to industrial action. Collective bargaining allows employers and employees to establish rules which differ from legislation, as well as to avoid the intervention of the state in labour relations. Four issues may be subject to collective negotiations: a) the operation of the cooperation body, *Arbetsmarknadnämnden* (mostly active during the 1970s), which comprises representatives of the workers' and the employers' organisations; b) the order for negotiations; c) rules regarding workers' lay-offs; and d) industrial action (such as strikes and blockades)[5] and conflicts putting society at risk. The Saltsjöbaden Agreement does not contain any provision on wages; the level of wages is regulated in collective agreements, while the individual wage is set in the employment contract signed by the employee and the employer. The Saltsjöbaden Agreement is still one of the cornerstones of collective labour practice and law in Sweden.

Due to the effects of the economic crisis there has been a tendency from the employers' side to challenge certain provisions in the Saltsjöbaden Agreement and a tendency toward the decentralisation of industrial relations.[6] In 2007, the labour organisation LO, the private clerks' council PTK (*Privattjänstemannakartellen*) and the Confederation of Swedish Enterprise (*Svenskt Näringsliv*, the successor of the former Employers' Organisation, SAF[7]) attempted to discuss the possibility of a new collective agreement, invoking the lack of flexibility on the labour market. Not all unions have adopted it, and thus it is not legally binding on SAF-LO areas such as construction and road transportation[8] and the Saltsjöbaden Agreement is still in force.

The **Employment Protection Act** (*Lagen om anställningsskydd*) enacted in 1982,[9] overrode to a large extent the rules of the Saltsjöbaden Agreement regarding workers' layoffs. Wages and job security issues are still regulated through collective bargaining. Even though legislation is compulsory, its provisions may be set aside if a collective agreement is reached on this issue.

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4 Ibid.
5 Ibid.
6 Ibid.
7 There is also an equivalent of SAF representing employees in the public sector, The Swedish Agency for Government Employers – *Arbetsgivarverket*, established in 1994, with 250 member agencies in the central government sector, as well as closely associated organisations, mostly foundations.
8 Fahlbeck, R. 'Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Futures', see note 3, above.
9 That replaced the first Employment Protection Act and became a cornerstone of the workers' protection legislation.

Some of the most important laws related to the freedom of association and the right to collective bargaining were adopted in the mid-1970s:

- **The Trade Union Representatives Act** protects trade union representatives by ensuring their job security, allowing them to exercise their trade union duties. The Act guarantees union representatives' wage and employment benefits and prohibits dismissal in cases where the representative is needed at the workplace.
- **The Co-Determination in the Workplace Act** is the most important piece of Swedish legislation concerning workers' rights. The MBL establishes the right to collective bargaining and employees' right to be informed on the situation in their workplace. Some provisions are challenged by employers' organisations, as being protective of principles some consider relatively obsolete, such 'last in – first out', according to which those employed last are afforded less protection than their colleagues who have been at the workplace longer. These principles have been criticised as making it harder for young people to establish themselves in the labour market,[10] and making the labour market less dynamic.[11] Wages, including minimum wages, are not regulated by law. However, according to the MBL, wages can be regulated in collective agreements.
- **The Judicial Procedure in Labour Disputes Act** is a special procedural law for settling work-related disputes in the Labour Court.
- **The Board Representation (Private Sector Employees) Act** establishes employees' right of representation on the board of directors.

Collective bargaining in Sweden is done without state interference and is not heavily regulated by law. As explained above, many of the existing provisions can be set aside through collective agreements; however some provisions, such as the Discrimination Act, are binding. This Swedish model has been called 'collective laissez-faire'.[12] It is up to the parties to agree on the conditions, which are binding as any other contract, after the agreement has been signed. This means that enforcement also rests on the parties. For this purpose, the employer and employee organisations have established negotiation arrangements for dispute resolution of individual cases. Disputes are first tried locally and go higher if they cannot be solved. The final instance, if the parties fail to reach an agreement, is the Labour Court. Collective agreements can be reached either locally or centrally, and they can have different coverage, e.g. a single workplace or an entire industry. Collective agreements are negotiated between employers and trade unions both in the private sector and in the public sector (although restrictions apply in the public sector in accordance with the act on public employment).

The **right to strike** is ensured in the Constitution but may be restricted by law or agreement.[13] The Co-Determination in the Workplace Act contains the 'labour stability obligation' (*fredsplikt*) according to which parties which have signed a collective agreement may not engage in activities such as strike, blockade or other industrial action.[14]

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[10] 'Beyond the crisis – About a successful Sweden in the new global economy' (*Bortom krisen – Om ett framgångsrikt Sverige i den nya globala ekonomin, Globaliseringsrådets slutrapport*), final report of the Globalisation Council, 2009.

[11] Skedinger, P., 'An excluding employment market model? The Swedish employment market's thresholds in a global perspective' (*En exkluderande arbetsmarknadsmodell? Den svenska arbetsmarknadens trösklar i ett globalt perspektiv*), Background report no. 24 of the Globalisation Council, p. 35.

[12] The term was first used in the Swedish context by journalist and politician Svante Nycander. See http://www.svante-nycander.se/arkivet/spontanordning.htm (last accessed 12 June 2012).

[13] Chapter 2, section 14 of the RF states that an association of workers and employers and an association of employers have the right to take industrial action, unless otherwise provided by law or contract.

[14] Sections 41 and 42 of the Co-Determination in the Workplace Act.

Provisions on the right to strike and its restrictions for civil servants can be found in the Public Employment Act.[15] Only if the collective agreement is terminated (e.g., if an agreement cannot be reached regarding salaries) do the parties have the right to take industrial action, such as a strike. The Labour Court has concluded in several cases that the court may not impose any restrictions on the right to take industrial action which have not been regulated in law or in agreements.[16] Trade unions which are not bound by a collective agreement with an employer always have the right to take industrial action if the action has a trade union aim.

The impact of EU law on Swedish legislation on freedom of association and collective bargaining is evident in case law, of which *Laval* is the most widely known.[17] *Laval* concerned the right of EU workers in Sweden to enjoy the same level of protection of their right to collective bargaining as their Swedish colleagues. A Latvian construction company was 'blockaded' and finally faced bankruptcy when it refused to sign a Swedish collective bargaining agreement with the local unions. The Court of Justice (CJEU) held that the unions had overstepped their right to blockade. It is often argued that EU law threatens the Swedish system of collective bargaining. The *Laval* judgment resulted in a set of legislative amendments (mainly to the Foreign Posting Employees Act and to the Co-determination in the Workplace Act) (***Lex Laval***).[18]

EU law and the International Labour Organisation (ILO) Conventions have had little impact on the design of the Swedish system of collective bargaining as they in general only set minimum rules.[19] One reason is that the initial Swedish agreements on collective bargaining preceded the adoption of the relevant ILO conventions. **However, *Laval* stirred public debate** and left uncertainty about freedom of association and the right of collective bargaining. EU law and ILO rules are being tested in appeals lodged by Swedish trade unions at the ILO with regard to *Laval*[20].

In May 2001, the Swedish parliament amended the Employment Protection Act (*lag om anställningsskydd*). The amendment entered into force on 1 September 2001 affording all employees the right, but not the obligation, to remain in employment until the age of 67.[21] The change was in line with the revision to the Swedish pensions system that was being introduced at the time to give the possibility of working longer and contributing longer to the pension system with a view to getting a higher pension. A provisional regulation covered collective agreements concluded before the change in the law came into force allowing their validity until their expiry, but no later than 31 December 2002.[22] However, new collective agreements providing for *obligatory* retirement before the age of 67 were not permitted[23]

In March 2003, the ILO held that the Swedish government had breached the ILO conventions on collective bargaining and the right to organise. The ILO concluded that the 2001 legislation increasing the retirement age from 65 to 67 years interfered with collective

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15 Section 23 of the Public Employment Act.

16 E.g. case AD 2003 nr 46 and case AD 2004 nr 96.

17 AD nr 89/09, Mål nr A 268/04 (see also Case C-341/05 *Laval* [2007], ECR I-11767). Companies that usually do not have collective bargaining agreements are typically small.

18 The changes mean that industrial action by a trade union against a foreign employer in order to enforce a collective bargaining agreement may only be taken under certain circumstances. For example, the conditions of employment demanded by the trade union must be equivalent to the conditions of a central collective bargaining agreement applied in Sweden for corresponding employees. See http://www.mondaq.com/article.asp?articleid=108240 (last accessed 12 June 2012).

19 Nyström, B., *The EU and Employment Law* (*EU och arbetsrätten*), 2002, p. 38.

20 Complaint to the ILO Committee on Freedom of Association: case no. 2171/GB.286/11.

21 See the Act on the Amendment of the Employment Protection Act.

22 Act on the Amendment of the Employment Protection Act, point 2.

23 http://www.eurofound.europa.eu/eiro/2001/03/feature/se0103186f.htm (last accessed 12 June 2012).

bargaining by preventing the conclusion of agreements including an obligation to retire before the age of 67.[24] Legally, the ILO decision implies that it is not possible for the government to retrospectively annul collective agreements.[25] In the future, the government will have very little space for legislatively regulating the issues social partners may discuss when engaging in collective bargaining. The average retirement age set out in collective agreements is indeed still 65 years.

The Swedish Constitution contains framework anti-discriminatory provisions in the Instrument of Government (*Regeringsformen*). **The Discrimination Act** (DL) is the first (and as yet only) piece of Swedish legislation which refers to **age antidiscrimination**. The DL was adopted to **transpose EU Directives** 2000/43/EC and 2000/78/EC.[26] However, Sweden was fined for late implementation of EU law. The deadline for implementation was set for 2003, with the possibility to implement provisions against age discrimination in 2006. The transposing measure entered into force in 2009, three years late. The DL provided for the establishment of the Equality Ombudsman, which supervises application of the principle of non-discrimination (including age discrimination), especially in the work environment.

The statutory foundation of the **right to health and safety at work** is laid down in the **Work Environment Act** (AML). Its main objective is to prevent sicknesses and accidents related to the working environment and to achieve good working conditions. In 2002, the AML was amended to better incorporate elements of the EU framework directive on health and safety (Directive 89/391/EEC). In 2008, the AML was once again modified to comply with Regulation EC 1907/2006 (the REACH Regulation) and Directive 2006/42/EC (the Machinery Directive) which enabled the **Work Environment Authority** to intervene in case of incorrectly marked machinery. Another novelty was that the Work Environment Act became applicable to domestic workers in private households. The amendments introduced in 2009 aimed primarily to adapt the Work Environment Act to the requirements of Directive 92/57/EEC on temporary or mobile construction sites and to ensure compliance with other legal texts, such as the Consumer Services Act.

The Work Environment Authority has the task of issuing more detailed regulations concerning working conditions. This is done by publishing in the Authority's statute book **provisions and general recommendations specifying the requirements to be met in the work environment**.[27] These provisions are drawn up in consultation with the social partners (trade unions and employers).

1.2. Overview of the enforcement tradition in Sweden

This section provides an overview of the different mechanisms that are in place to enforce freedom of association, the right to collective bargaining, age antidiscrimination, and the right to health and safety at work in Sweden. It discusses the competent court, and describes other institutions that are responsible for the enforcement of one or more workers' rights or are active in dispute settlement or conflict resolution.

[24] Case no. 2171/GB.286/11.

[25] http://www.eurofound.europa.eu/eiro/2003/05/feature/se0305102f.htm (last accessed 12 June 2012).

[26] The relevant provisions would not have come into force but for the EU legislation, especially since both workers' unions and employers' organisations had opposed the establishment of an Equality Ombudsman when its forerunner was created in 1986.

[27] Senior Labour Inspectors Committee, 'Evaluation of the Swedish Labour Inspection System in the Context of the "Common Principles of Inspection"', 2008, p. 9, available at: http://www.av.se/dokument/aktuellt/2009/SLIC_Report_Sweden.pdf (last accessed 12 June 2012).

The principles set by the Co-Determination in the Workplace Act and the long tradition of solving conflicts primarily through collective bargaining render **collective negotiations** the primary instrument for solving labour related conflicts.

The **Labour Court** in Stockholm, the only labour court in Sweden, adjudicates labour disputes. Parties can be only workers' and employers' organisations. They are obliged to negotiate with one another before the case is brought before the court. A complaint may only be lodged in the Labour Court by an employer organisation or employee organisation or by an employer who has signed a collective agreement on an individual basis. The case must relate to a dispute concerning a collective agreement pursuant to the Co-Determination in the Workplace Act, a dispute between parties who are bound by a collective agreement, or a dispute concerning a workplace where a collective agreement applies. If any of these requirements are not fulfilled, the complaint must be lodged before the district court, and can be appealed before the Labour Court, functioning as a second instance. In either case, the decisions of the Labour Court cannot be appealed.[28] Few cases reach the Labour Court, as most disputes are settled by agreements. The Labour Court dealt with the reversed burden of proof in the 1930s: the trade unions have to establish facts that make probable that an infringement has taken place. If such facts are established, the employer has to prove that the worker's rights have not been infringed.

In case of **dismissed workers**, the procedure takes place before a **general court** (i.e., a district court). The worker has to appeal to the employer within two weeks and then file a lawsuit within the following two weeks in order to retain his job if the court finds the employer breached the law.[29] Suits for damages may be brought within four weeks of dismissal. A recent trend in the labour market is that employers exploit this situation to get rid of employees they dislike hoping they will miss the first deadline and therefore miss the opportunity to keep their job, or even miss the deadline for claiming damages. Compensation for damages is usually much lower than the amount companies have to pay if workers appeal their dismissal, as in that case companies have to pay the salary from the day of the dismissal until the judgment (which usually takes more than a year), plus damages. However, according to the Employment Protection Act, an employee may only be dismissed if there is a ground for dismissal (e.g. redundancy). If a dismissed worker decides to appeal, the employment is considered ongoing, and the employer is obliged to pay a full salary until the judgment.[30] If the employer has signed a collective agreement, it may not dismiss redundant workers without negotiating with the trade union.[31]

Disputes arising during the negotiation of collective agreements may also be resolved, under certain conditions, through **mediation or arbitration** as detailed in section 3.1.

The **enforcement of age antidiscrimination** is mainly supervised by the **Equality Ombudsman**, a state authority created on 1 January 2009. The Equality Ombudsman may take a case to court or propose a settlement. Legal disputes alleging age discrimination may be brought to the **Labour Court** in the same way as other labour disputes, especially when trade unions do not wish to represent employees before the court. Court cases in this area are rare today as few workers are claiming to have been discriminated against based on age. The first case in the Labour Court on age discrimination only came in 2010.[32]

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[28] See the Judicial Procedure in Labour Disputes Act.

[29] Section 40 of the Employment Protection Act.

[30] Sections 7 and 34 of the Employment Protection Act.

[31] Section 11 of the Co-Determination in the Workplace Act.

[32] Report of the Equality Ombudsman, 'Age discrimination in the Swedish workplace' (*Åldersdiskriminering i svenskt arbetsliv - rapport*), DO, R3 2011, available at:

Other enforcement mechanisms which relate in particular to **health and safety are safety officers** (*skyddsombud*), who are union affiliated employees selected by the employer and the Work Environment Authority **inspectors** who supervise the working environment. Employers with over fifty employees are required to have a **safety board** to regularly work on health and safety at work issues. This board comprises representatives of the unions, the safety officers and representatives of the employees (who need not be union affiliated). The Labour Court has in principle no role in the enforcement of the right to health and safety at work. Such issues may arise there only in cases concerning the interpretation of a collective agreement.

http://www.do.se/Documents/Material/Rapporter/%c3%85lderdiskriminering%20i%20arbetslivet.pdf (last accessed 12 June 2012).

2. FREEDOM OF ASSOCIATION AND THE RIGHT TO COLLECTIVE BARGAINING

2.1. Description of the enforcement mechanisms for freedom of association and the right to collective bargaining

Freedom of association for individual employees and employers is protected under the Co-Determination in the Workplace Act. Those violating this right are liable to pay damages to the violated party and his organisation.[33] The **Labour Court** is competent to hear such cases, and to hear disputes which affect the relationship between the employer and employees.[34] The Co-Determination in the Workplace Act also establishes workers' **right to collective bargaining**.[35] This implies that union organisations have a statutory right to negotiate, matched by the **obligation of the opposing side to participate in the negotiation process**; failure to appear makes the party liable for damages.

In Sweden, there are three types of negotiation:

- **Co-determination negotiations** take place before the employer makes a decision entailing a substantial change in its area of activity. The employer's final decision cannot be appealed to a court and the union is not entitled to take industrial action if it disagrees with the employer's decision;
- **Dispute negotiations** take place when there is disagreement on the interpretation or application of collective agreements or legislative provisions. The parties must have the right to settle their dispute by negotiation before resorting to the courts. The parties may not take industrial action to impose their own position in the matter;
- **Agreement – linked negotiations** take place when the parties seek to conclude a collective agreement. The most important of these negotiations concern pay and general employment conditions; if the negotiations fail, industrial action is usually permitted.[36]

Collective bargaining in the private sector can take place at the national level where the Confederation of Swedish Enterprise (the main employers' association) and union confederations reach an agreement; at the industry level where parties are the competent unions and employers' industry associations; and at the local level between the company and the local union. Collective bargaining at the national level was mostly resorted to between the 1950s and the late 1980s. Collective bargaining on wages in the private sector is no longer used at the national level. Thus, the principal bargaining level for wages is now the industry level, although there is still some co-ordination at the national level, as well as considerable room for variation at the company level. However, a number of non-wage-related issues continue to be the subject of national collective bargaining. New collective agreements on non-wage-related issues continue to be signed (such as the 2006 national collective agreement on pensions for 700,000 non-manual workers in the private sector).[37]

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[33] Sections 7, 8 and 54 of the Co-Determination in the Workplace Act.

[34] Section 63 of the Co-Determination in the Workplace Act, and chapter 2, section 1 of the Judicial Procedure in Labour Disputes Act.

[35] Section 10 of the Co-Determination in the Workplace Act.

[36] Eriksson, K., 'The Swedish Rules on Negotiation and Mediation, a Brief Summary', p. 2-4, available at: http://www.mi.se/pdfs/pdfs_2010/swedish_rules_feb_%202010.pdf (last accessed 12 June 2012).

[37] European Trade Union Institute, 'Collective Bargaining', available at: http://www.worker-participation.eu/National-Industrial-Relations/Countries/Sweden/Collective-Bargaining (last accessed 12 June 2012).

A relatively new phenomenon in Sweden is the conclusion of agreements at the sectorial or industrial level on the forms of bargaining (**collaboration agreements**); such agreements contain a timetable for bargaining to ensure that a collective agreement is negotiated before the previous one expires. Negotiations for the conclusion of collective agreements are chaired by an impartial chair whose task is to assist the parties to reach an agreement. The chair may also issue proposals to resolve conflicts that arise during the negotiation. Collaboration agreements now cover the majority of the Swedish labour market,[38] and the National Mediation Office may not appoint mediators without the prior consent of the parties.[39]

In order to mediate labour disputes and to promote an efficient wage formation process, the **National Mediation Office,** a governmental agency, was established in 2000. The task of mediating labour disputes was previously undertaken by the national Conciliator's office: state mediation in industrial conflicts was been provided for by law as early as 1906. Mediation may be either voluntary or compulsory. The National Mediation Office, after the approval of the parties negotiating collective agreements, may appoint negotiation managers or mediators to participate in the bargaining process. In certain cases, e.g. if one of the parties has given notice of industrial action, mediators can be appointed even if one of the parties does not consent to mediation. Parties that have concluded collaboration agreements, e.g. agreements on bargaining procedures, are exempted from the rules concerning compulsory mediation if they have already reported the agreement and the National Mediation Office has registered it. Parties are summoned to negotiations by the Mediator; if they fail to appear, the mediator may ask the National Mediation Office to require the party to participate on penalty of a fine. Mediators also seek to persuade parties to postpone or cancel a planned industrial action; if the party refuses to comply, the mediator may ask the National Mediation Office to order the party to postpone it if it considers this would be in the interest of a satisfactory settlement. The action may be postponed only for 14 days.[40]

According to the National Mediation Office's annual report, 'the permanent mediators who deal with business at the local level had 46 cases between them, which is a new low for the 2000s. Disputes over the signing of [collective] agreements are declining in number and totalled just 12 in 2011. Only one brief strike took place, despite the fact that no less than 5700 new application agreements were reached during the year. However, the number of disputes of a different kind, involving actors other than the established unions, is increasing. In 2011, the syndicalist Central Organisation of Sweden's Workers (SAC) served notice of industrial action on 33 occasions. About half of these disputes concerned the pursuit of wage claims. Notices served by SAC seldom give rise to mediation, but are registered as cases.'[41]

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[38] Eriksson, K., 'Project for the study of conciliation, mediation and arbitration', National Report, Sweden, National Mediation Office, p. 8.

[39] Stokke, T.A., 'Mediation in Collective Interest Disputes', p. 141, available at: http://www.scandinavianlaw.se/pdf/43-5.pdf (last accessed 12 June 2012).

[40] Eriksson, K., 'The Swedish Rules on Negotiation and Mediation, - a Brief Summary', p. 7, available at: http://www.mi.se/pdfs/pdfs_2010/swedish_rules_feb_%202010.pdf (last accessed 12 June 2012).

[41] http://www.mi.se/pdfs/pdfs_2012/eng_smftn_feb2012.pdf (last accessed 12 June 2012). SAC is a 'revolutionary union' for workers created in 1910, which operates according to syndicalist principles of local autonomy, solidarity and involved members. It represents workers as well as unemployed, students and others. The organisation is in principle against collective agreements, but has in some cases signed such agreements. Since the organisation does not usually sign collective agreements, it does not have any labour-stability obligation. See https://www.sac.se (last accessed 12 June 2012).

Collective agreements in Sweden sometimes provide for the use of **arbitration** when certain kinds of legal disputes regarding the implementation and interpretation of the agreement arise. Some collective agreements provide that local disputes regarding the distribution of a centrally determined wage pool are to be settled by arbitration. Arbitrators' rulings cannot be appealed. Under the Co-Determination in the Workplace Act, mediators may require that social partners take their disputes to arbitration when there is risk of industrial action or if industrial action has commenced. The National Mediation Office may also urge social partners to make recourse to arbitration if industrial action has been initiated.[42]

2.2. Practical enforcement situation for the freedom of association and the right to collective bargaining in national law

2.2.1. Major difficulties in the enforcement of the freedom of association and the right to collective bargaining

In Sweden, the social partners usually manage to solve their disputes through negotiations, and only in extreme cases resort to alternative solutions, namely mediation and the Labour Court. Therefore there are few cases of collective disputes. Most disputes before the Labour Court concern **very small enterprises** that have scarce knowledge of the legislation and which have thus **refused to bargain** with a trade union.

The ***Laval*** judgment brought amendments to existing acts (mainly to the Foreign Posting Employees Act and to the Co-Determination in the Workplace Act) (*Lex Laval*), which are perceived as causing difficulties in the enforcement of the freedom of association and the right to collective bargaining in cross-border employment relationships.[43]

Trade unions have been very critical of the judgment and argue that the unions' right to take industrial action has been restricted for the sake of free movement in the EU.[44] Until this judgment, the social partners tried to find solutions through cooperation; now their concern is that the state will intervene through normative means. Some stakeholders consider that the current state of affairs is in breach of ILO Conventions No. 87 on Freedom of Association and Protection of the Right to Organise and No. 98 on the Right to Organise and Collective Bargaining, ILO practice and the European Convention on Human Rights. Swedish trade unions submitted a complaint to the ILO Committee on Freedom of Association (case No. 2171/GB.286/11). A decision is expected in autumn 2012. The

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[42] Eriksson, K., 'Project for the study of conciliation, mediation and arbitration', National Report, Sweden, National Mediation Office, p. 10.

[43] The changes mean that industrial action by a trade union against a foreign employer in order to enforce a collective bargaining agreement may only be taken under certain circumstances. For example, the conditions of employment demanded by the trade union must be equivalent to the conditions of a central collective bargaining agreement applied in Sweden for corresponding employees. See http://www.mondaq.com/article.asp?articleid=108240 (last accessed 12 June 2012). Note that it is not unusual for trade unions to boycott employers who refuse to sign a collective agreement, regardless of whether is a Swedish or cross-border employer – that is, trade unions will ask their members to decline to work for that particular employer. The boycott may be combined with sympathy actions, which usually aim at stopping the business activity of the employer. See Labour Asociados SLL, 'The impact of new forms of labour on industrial relations and the evolution of labour law in the European Union', 2007, European Parliament, p. 51, available at: http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24292/20110718ATT24292EN.pdf (last accessed 12 June 2012).

[44] 'Joint consultative opinion regarding the proposal with regard to the Laval case by LO and TCO', (*Gemensamt remissyttrande avseende förslag med anledning av Lavaldomen från LO och TCO*), 14 April 2009, p. 4, available at: http://www.tco.se/Templates/Page2____419.aspx?DataID=8780 (last accessed 12 June 2012); http://www.tcotidningen.se/tco-laval-dom-strider-mot-de-manskliga-rattigheterna (last accessed 12 June 2012) and http://www.tco.se/Templates/Page1____210.aspx?DataID=12568 (last accessed 12 June 2012).

Swedish government decided in June 2011 to appoint a commission to review *Lex Laval* to determine whether it would be possible to discard the changes to the law that were made after the ruling of the CJEU.[45]

In the light of the imbalances created between the economic freedoms granted to businesses and the implicit limitation of workers' fundamental rights, trade unions are **concerned about the recent Commission proposal for a 'Monti 2' Regulation** aimed at balancing employees' rights to bargaining and strike action, and employers' rights to freedom of establishment and free movement of services. They fear that the Monti 2 Regulation restricts the national right to strike and is contrary to the subsidiarity principle when regulating industrial action at European level, Swedish international commitments and possibly also to the Swedish Constitution which guarantees the right to strike. At the same time, trade unions express hope that fundamental rights will be strengthened when the EU accedes to the European Convention on Human Rights and the European Court of Human Rights can adjudicate the relevant cases.[46]

Finally, the increase of **new types of employment relations** (such as temporary work, interim work, posted work, economically dependent self-employed work) where it is **not clear** who the counterparts from the employers' side are, create obstacles to the enforcement of freedom of association and the right of collective bargaining. Cross-border employment relationships and the way they operate in practice in the labour market raise significant concerns.[47]

2.2.2. Positive experiences on the enforcement of the freedom of association and the right to collective bargaining

The Swedish model has particular features presented above that ensure a mutually beneficial situation on the labour market: the representatives of employers and employees are used to solving problems through cooperation and mutual trust. The **high level of participation in trade unions and widespread coverage of workers by collective agreements** are positive aspects for the enforcement of freedom of association and the right to collective bargaining. According to stakeholders about 70% of all employees in Sweden belong to a trade union and over 90% of Swedish employees are affected by collective agreements.[48]

Trade unions have the right to represent their members who claim that their rights have been violated. This works in practice as **free legal aid**.

Finally, the Labour Court applies a **reversed burden of proof**, i.e., trade unions have to establish facts that make probable that an infringement of workers' rights has taken place. If such facts are established, the employer has to prove the worker's rights were not infringed.

2.3. Conclusions on the effectiveness of the enforcement of the freedom of association and the right to collective bargaining in Sweden

[45] Svenska Dagbladet, 'The majority wants to unravel the Lex Laval' (*Majoritet vill riva Lex Laval*), 6 February 2011, available at: http://www.svd.se/nyheter/inrikes/majoritet-vill-riva-lex-laval_6215933.svd (last accessed 12 June 2012).

[46] TCO, 'The Parliament has to reject the proposed EU right to strike' (*Riksdagen måste avvisa föreslagen EU-strejkrätt*), 27 April 2012. Available at: http://www.tco.se/Templates/Page1____210.aspx?DataID=12639 (last accessed 12 June 2012).

[47] Conclusion based on consultations with the stakeholders.

[48] National Mediation Office Website, 'The Swedish Model', available at: http://www.mi.se/inenglish/menu_eng_sw_model.html (last accessed 12 June 2012).

The Co-Determination in the Workplace Act establishes workers' right to collective bargaining, implying an obligation for both parties to participate in the negotiation process. Disputes arising during this process should first be resolved through negotiation (agreement–linked negotiations). The responsibility to mediate labour disputes and promote an efficient wage formation process lies with the Swedish National Mediation Office. Mediation is voluntary unless there is a risk of industrial action or if such an action has been initiated, in which case it is compulsory. Arbitration of collective disputes is also possible under certain circumstances. Arbitrators' rulings cannot be appealed. Collaboration agreements, e.g., agreements on bargaining procedures, have been introduced into the Swedish legal system relatively recently. Finally, the Labour Court is also competent to hear collective dispute cases and can provide for damages for the violation of freedom of association.

The freedom of association and right to collective bargaining are highly developed in the Swedish system and there is a high level of participation in trade unions. As a consequence, disputes do not arise frequently, with violations occurring mostly in small enterprises. The Labour Court applies a reversed burden of proof and that trade unions have the right to represent their members who claim their rights have been violated, which in practice works as free legal aid.

However, the legislation adopted in the aftermath of the *Laval* case (*Lex Laval*) left legal uncertainty about the protection of the freedom of association and the right to collective bargaining in Sweden. The Swedish trade unions lodged claims at the ILO, which should issue a decision in autumn 2012, and the Swedish government decided in June 2011 to appoint a commission to review *Lex Laval*. Moreover, the increase of new types of employment relations (such as temporary work, interim work, posted work and economically dependent self-employed work), where it is not clear who the counterparts from the employers' side are, also leaves doubts concerning the application of rules on freedom of association and collective agreements to these workers.

Overall, even though the enforcement of the freedom of association and the right to collective bargaining is sufficient in Sweden, some of the relevant rules should be further clarified, including the interplay between international and EU law in the aftermath of *Laval* and the rules applicable to new forms of employment.

3. AGE ANTIDISCRIMINATION

3.1. Description of the enforcement mechanisms for age antidiscrimination

The **Discrimination Act** is so far the only legal instrument which explicitly prohibits discrimination and harassment on the ground of age. Age antidiscrimination legislation is aimed at protecting both older and younger workers even though, in practice, it is perceived as mostly related to older workers.

Legal disputes on age discrimination may be brought to the **Labour Court** in the same way as other labour law disputes. There is an **Equality Ombudsman**, which is a government agency that seeks to combat discrimination and promote equality for everyone. The agency is primarily concerned with ensuring compliance with the Discrimination Act. The Equality Ombudsman performs the tasks previously undertaken by four separate specialised anti-discrimination authorities.

The Ombudsman registers and investigates complaints.[49] In some circumstances, it can bring cases on age discrimination to the Labour Court.[50] This is the case when the trade union does not wish to represent a worker before court or when the worker is not affiliated with a union. Its services are free of cost. Court cases in this area are rare as few workers are claiming that their right to age antidiscrimination is violated. However, the Equality Ombudsman can only intervene in specific matters, including matters related to working life, and cannot impose penalties or grant compensation itself, change court rulings or change the decisions of other agencies.[51] The Ombudsman also monitors employers' compliance with the Discrimination Act and can require the adoption of active measures against discrimination.[52] Additionally, the agency undertakes awareness-raising activities and disseminates information on discrimination.[53]

Finally, complaints may be filed with any of the so-called **Anti-Discrimination Bureaus** (*Antidiskrimineringsbyrå/n*, or *ADB*s), a network of NGOs specialised in discrimination issues that can, upon request or complaint, initiate a cost free investigation of the matter or go to court representing the plaintiff. The ADBs promote equality cooperating among themselves (as each bureau is independent) and with the Equality Ombudsman.[54]

[49] Chapter 4 section 1 of the Discrimination Act. According to the Discrimination Act, it is prohibited to discriminate in the workplace against people depending on their sex, transgender identity or expression, ethnic origin, religion or other belief, disability, sexual orientation, or age. The Act is compulsory and it is not possible to agree on any exceptions to the provisions of the law.

[50] Chapter 6 section 1 of the Discrimination Act.

[51] Equality Ombudsman, 'What the Equality Ombudsman doesn't do', available at: http://www.do.se/en/About-the-Equality-Ombudsman-/What-the-Equality-Ombudsman-doesnt-do/ (last accessed 12 June 2012).

[52] Chapter 4 section 1 of the Discrimination Act.

[53] Equality Ombudsman, 'About the Equality Ombudsman', available at: http://www.do.se/en/About-the-Equality-Ombudsman-/ (last accessed 12 June 2012).

[54] See http://www.adbsverige.se/ (last accessed 12 June 2012).

3.2. Practical enforcement situation of age antidiscrimination in national law

3.2.1. Major difficulties in the enforcement of age antidiscrimination

According to stakeholders and the Equality Ombudsman,[55] age antidiscrimination in Sweden is perceived as focusing on **older people** and measures as mentioned above, focus on this age group **disregarding the situation of young workers**.

Age discrimination against young workers relates primarily to lower wages, shorter leave and poorer employment security. The 'last in – first out' principle in the Employment Protection Act often works to their disadvantage, as those workers who have been at the workplace longer enjoy stronger protection. Furthermore, many young workers do not enjoy protection under collective agreements as they often choose not to join unions or postpone their membership and are thus exempted from agreements on minimum wages, longer leave, etc.[56]

Assessing age discrimination is from a legal point of view quite complex as even the EU Directive allows for discrimination under certain circumstances. It is very **difficult to determine when differentiated treatment on the ground of age is justified or proportionate**. There are also problems with vague notions in the law, such as 'disadvantaged' or 'associated with age'.

Other problems concern the difficulty workers not affiliated to trade unions incur as they can bring claims only to the general courts and not the Labour Court. Here, the **lack of free legal assistance** (which trade unions provide to affiliated members) and **short deadlines**[57] constitute obstacles to the enforcement of rights. Moreover, the **level of damages in cases of age discrimination is very low**, even though it may be comparatively higher than in other cases, especially when punitive.[58]

3.2.2. Positive experiences on the enforcement of age antidiscrimination

The Discrimination Act transposes **EU Directives** 2000/43 and 2000/78; the Equality Ombudsman would not have been created without the implementation of EU legislation as both the workers' unions and the employers' organisations had opposed the creation of Jämo, its predecessor. The **Ombudsman may, under certain circumstances, bring cases on age discrimination before the Labour Court** if trade unions fail to do so.

In 2011, the Labour Court examined a case where parties to a collective agreement had agreed that in case of redundancies employees who were **closer to the retirement age would be the first ones to be laid off**. The affected employees asked the help of the Equality Ombudsman who in turn brought the case to the Labour Court. The court held that this **agreement violated the Discrimination Act.**[59]

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[55] See e.g. 'The Equality Ombudsman's report on age discrimination', available at: http://www.do.se/Documents/Material/Rapporter/%c3%85lderdiskriminering%20i%20arbetslivet.pdf (last accessed 12 June 2012).

[56] See e.g. http://www.tco.se/Templates/Page1____210.aspx?DataID=6280 (last accessed 12 June 2012).

[57] As mentioned earlier, the deadlines are 2 weeks. For other cases, deadlines are usually 3 weeks.

[58] Conclusion based on consultations with the stakeholders.

[59] Case AD 2011 nr 37.

The Court examined age antidiscrimination also in the SAS (Scandinavian Airlines) case.[60] SAS had an agreement with the local union about laying off a number of personnel. **Age was a significant factor in choosing who would be laid off** with SAS arguing that workers over 60 years old were already entitled to a pension. **SAS lost the case**, with the court ruling that the workers had the right to remain in the workplace until the age of 67, that they had been discriminated against because of their age and that the laying off was equal to coerced retirement. This decision affected the whole labour market as such practices were common.

The Employment Protection Act (*Anställningsskyddslagen*) includes a provision called 'the law of the aged' (*äldrelagen*) which gives **priority to older employees when re-hiring**.[61] The provisions were introduced through amendments to the Act in 1996 and 2000; when laying off workers, if two workers have been at the workplace for the same amount of time, the younger worker should be laid off first. Although this provision has a positive effect on older workers, who usually have been in the workplace longer, they have a detrimental effect on younger workers.

3.3. Conclusions on the effectiveness of the enforcement of age antidiscrimination in Sweden

Disputes on age discrimination may be brought before the Labour Court in the same way as other labour law disputes. The Equality Ombudsman, a government agency that seeks to combat discrimination and promote equality, can register and investigate complaints free of costs and, in some circumstances, bring cases to the Labour Court. However, it cannot impose penalties or grant compensation itself, change court rulings or change the decisions of other agencies. Complaints may also be filed with any of the so-called Anti-Discrimination Bureaus, a network of NGOs specialised in discrimination issues, that can upon request or complaint initiate a cost free investigation of the matter, or go to court representing the plaintiff.

Positive experiences with regard to age antidiscrimination include the explicit introduction of such a right due to EU law, the Ombudsman's competence to bring cases on age discrimination before the Labour Court if trade unions fail to do so, the introduction of a provision in the Employment Protection Act which gives priority to older employees when laying off and re-hiring as well as recent case law condemning certain common age discriminatory practices.

Difficulties in the enforcement of age antidiscrimination include the difficulty to determine when differentiated treatment on the ground of age can be justified and the detrimental effect of measures supporting older workers on younger workers. In addition, victims have limited time to file complaints and take their cases to court.

It would be useful to strengthen the role of the courts in the enforcement of age discrimination by amending procedural rules to extend deadlines and increasing the level of damages. Enhanced protection of younger workers would also constitute a positive step for the enforcement of this right.

[60] Case AD 2011 nr 37.
[61] Sections 22 and 26 of Act on Employment Protection.

4. THE RIGHT TO HEALTH AND SAFETY AT WORK

4.1. Description of the enforcement mechanisms for the right to health and safety at work

The **Work Environment Authority** is the administrative authority competent for issues relating to the working environment. Even though the Work Environment Act defines the framework of work environment regulation, the authority is tasked with issuing more detailed regulations. This is done by issuing in its own statute books 'Provisions and General recommendations specifying the requirements to be met in the work environment'.[62]

Other enforcement mechanisms for the right to health and safety at work are **safety officers** (*skyddsombud*), who are union affiliated employees selected by the employer; employers with over fifty employees must establish safety boards which regularly work on health and safety at work issues. These boards comprise representatives of the unions, the safety officers and representatives of the employees (who do not need to be union affiliated). The Labour Court has in principle no role in the enforcement of the right to health and safety. Such issues may arise only in cases concerning the interpretation of a collective agreement.

The responsibility to comply with the health and safety at work regulation lies with the **employer**. The task of the Work Environment Authority is to verify, usually through inspections, that the employer follows the Work Environment Act as well as the provisions issued by the authority itself.[63] Usually, the employer is informed in advance of the inspection, but the law also entitles the inspector to arrive unannounced. If deficiencies are detected, the Work Environment Authority inspector must draft an inspection notice, within three weeks of the visit. In this notice, the employer is called upon to inform the authority by a certain date of the way in which the work environment deficiencies will be addressed and of the way the violations have been remedied. The inspection notice is not of a binding legal nature and thus cannot be appealed.[64]

Even though the inspection notice is not binding, if the employer does not comply with its stipulations the Work Environment Authority can issue an injunction or prohibition, i.e., prohibit a certain kind of operation or order the employer to remedy the work environment deficiencies. This order can be appealed by both the employer and the safety delegate if the deficiencies are not addressed.[65] Injunctions and prohibitions are binding; therefore, the Work Environment Authority can seek the imposition of a contingent fine (*vite*) if they are not complied with.[66] Usually, an injunction or prohibition is not imposed before a new inspection verifies that the deficiencies remain.[67]

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[62] See http://www.av.se/inenglish/ (last accessed 12 June 2012).

[63] Pursuant to chapter 7 section 1 of the Work Environment Act, the Work Environment Authority is the supervisory authority for work environment related issues.

[64] AV, 'Inspection Notice', available at: http://www.av.se/inenglish/inspections/inspectionnotice.aspx (last accessed 12 June 2012).

[65] AV, 'If the deficiencies are not dealt with', available at: http://www.av.se/inenglish/inspections/ifthe.aspx (last accessed 12 June 2012).

[66] A contingent fine is not considered a criminal sanction; it is an administrative measure used to coerce the employer to comply with a prohibition or injunction. Contingency fines are issued with an amount which depends on factors such as the cost of the measures to be taken and a level which will persuade the employer to comply with the prohibition or injunction. See http://www.av.se/inenglish/inspections/contingent.aspx (last accessed 12 June 2012).

[67] AV, 'Injunction/Prohibition', available at: http://www.av.se/inenglish/inspections/injuction.aspx (last accessed 12 June 2012).

Contingent fines are usually directed against legal persons. Penalties are criminal sanctions imposed by a court and include fines or, for serious work environment crimes, imprisonment. Such penalties are addressed only to natural persons as legal persons cannot be held criminally liable in Sweden.[68] However, legal persons can be assessed fines by a court. Furthermore, employers' representatives may face criminal charges if an accident has not been reported to the Work Environment Authority in time or occurred because the company failed to have proper safety measures or instruct the workers properly.

4.2. Practical enforcement situation of the right to health and safety at work in national law

4.2.1. Major difficulties in the enforcement of the right to health and safety at work

The Work Environment Authority is the main enforcement mechanism for the enforcement of the right to health and safety at work. The Authority is currently equipped with 440 inspectors in 10 districts who carry out 35,000 inspections annually; however, it is argued that the **number of inspections performed is insufficient** when compared to the actual needs.[69]

Another difficulty arises from the fact that the Work Environment Authority does not coordinate its activities other inspection authorities, e.g., the Swedish Chemicals Agency, which results in **double inspection of the same entities**.

4.2.2. Positive experiences on the enforcement of the right to health and safety at work

The **social partners are regularly consulted** on strategic occupational safety and health matters as well as on the priorities the Work Environment Authority should have. Moreover, the social partners regularly meet to be informed and discuss the strategic activities of the authority.

The objective of the Work Environment Authority is to reduce the risks of illnesses and accidents in the workplace and to **holistically** (i.e., from a physical, mental, social and organisational view) **improve** the work environment.

4.3. Conclusions on the effectiveness of the enforcement of the right to health and safety at work in Sweden

The right to health and safety at work is enforced by a number of actors, including the employers themselves and workers. Safety officers (*skyddsombud*), who are union affiliated employees selected by the employer, and safety boards, established in companies with over fifty employees, are competent for issues on health and safety at work. The Work Environment Authority is the administrative authority competent for the enforcement of health and safety at work. The authority issues 'Provisions and General Recommendations' in its own statute book. In addition it supervises, through inspections, compliance with the Work Environment Act and with the provisions issued by the authority itself. If the employer does not comply with the inspectors' recommendations, the authority can issue an injunction or prohibition or a fine. Contingent fines are decided upon by an administrative court against legal persons. Courts may also impose penalties on natural persons including fines or, for serious work environment crimes, imprisonment.

[68] AV, 'Contingent fine/penalty', available at: http://www.av.se/inenglish/inspections/contingent.aspx (last accessed 12 June 2012).

[69] See e.g. http://www.lo.se/home/lo/home.nsf/unidview/7187F44E5FE36B58C12574940032B5FD (last accessed 12 June 2012).

Positive experiences on the enforcement of this right include social partners' regular consultations on strategic issues and the priorities and activities of the Work Environment Authority which has adopted a holistic approach aimed at improving all aspects of the work environment.

Difficulties in the enforcement of the right to health and safety at work include the number of inspections, which is considered insufficient when compared to the actual needs, and the lack of coordination between the activities of the Work Environment Authority and those of other inspection authorities which results in double inspection of the same entities. An increase of the authority's resources and better coordination with other bodies would increase its efficiency and impact.

ANNEXES

Annex I: List of stakeholders contacted for the report

Trade Unions

- TCO – The Swedish Confederation for Professional Employees: Freedom of association/collective bargaining; Health and safety at work.

Workers Association / NGOs

- The Equal Opportunities (anti-discrimination) Ombudsman: Freedom of association/collective bargaining; Age anti-discrimination.

Authorities

- Ministry of Employment, Division for Labour Law and Work Environment: Freedom of association/collective bargaining.
- The Swedish Work Environment Authority: Health and safety at work.

Practitioners

- Labour Court: Freedom of association/collective bargaining; Age antidiscrimination.

Annex II: Information sources (legislation, case-law, literature reviewed and statistics)

National Law

- Discrimination Act (*Diskrimineringslagen*), 2008.
- Act on the amendment of the 1982 Employment Protection Act (*Lag om ändring i lagen om anställningsskydd*), 2001.
- Foreign Posting Employees Act (*Lag om utstationering av arbetstagare*), 1999.
- Public Employment Act (*Lag om offentlig anställning*), 1994.
- Board Representation (Private Sector Employees) Act (*Lag om styrelserepresentation för de privatanställda*), 1987.
- Working Hours Act (*Arbetstidslagen*), 1982.
- Employment Protection Act (*Lagen om anställningsskydd*), 1982.
- Work Environment Act (*Arbetsmiljölagen*), 1977.
- Annual Leave Act (*Semesterlagen*), 1977.
- Co-determination in the Workplace Act (*Medbestämmandelagen*), 1976.
- Judicial Procedure in Labour Disputes Act (*Lag om rättegång i arbetstvister*), 1974.
- Trade Union Representatives Act (*Förtroendemannalagen*), 1974.
- Saltsjöbaden Agreement (*Saltsjöbadsavtalet*), 1938.

National Case-Law

- Case AD 2011 nr 37.
- Case AD 2009 nr 89 (Laval case).
- Case AD 2004 nr 96.
- Case AD 2003 nr 46.

Literature

- Fahlbeck, R., 'Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Futures', Stockholm Institute for Scandinavian IS Law 1957-2009, 2009, available at: http://www.scandinavianlaw.se/pdf/43-4.pdf.
- Wood, S. and Moore, S., 'Reviewing the Statutory Union Recognition (ERA 1999)', Working Paper, LSE Centre for Economic Performance, 2003.
- Nyström, B., The EU and Employment Law (*EU och arbetsrätten*), Norstedts Juridik, 2002.
- Peczenik, A., *Legal theory and method: an introduction to jurisprudence* (*Juridikens teori och metod: en introduktion till allmän rättslära*), Norstets Juridik, 1995
- Stokke, T.A., 'Mediation in Collective Interest Disputes', available at: http://www.scandinavianlaw.se/pdf/43-5.pdf.
- Skedinger, P., 'An excluding employment market model? The Swedish employment market's thresholds in a global perspective' (*En exkluderande arbetsmarknad? Den svenska arbetsmarknadens trösklar i ett globalt perspektiv*), background report No. 24 of the Globalisation Council, available at: http://www.regeringen.se/content/1/c6/11/73/80/0874c988.pdf.

Reports

- 'Age discrimination in Swedish work life – report' (Åldersdiskriminering i svenskt arbetsliv – rapport), DO R3 2011, available at: http://www.do.se/Documents/Material/Rapporter/%c3%85lderdiskriminering%20%20arbetslivet.pdf.
- Swedish National Mediation Office annual report for 2011, summary available at: http://www.mi.se/pdfs/pdfs_2012/eng_smftn_feb2012.pdf.
- Eriksson, K.,'The Swedish Rules on Negotiation and Mediation, a Brief Summary', National Mediation Office, February 2010, available at: http://www.mi.se/pdfs/pdfs_2010/swedish_rules_feb_%202010.pdf.
- Lundby-Wedin, W., et al., 'Joint consultative opinion regarding the proposal with regard to the Laval case by LO and TCO' (*Gemensamt remissyttrande avseende förslag med anledning av Lavaldomen från LO och TCO*), 14 April 2009, available at: http://www.tco.se/Templates/Page2____419.aspx?DataID=8780.
- 'Evaluation of the Swedish Labour Inspection System in the context of the "Common Principles of Inspection"', Senior Labour Inspections Committee, 2009, available at:
- http://www.av.se/dokument/aktuellt/2009/SLIC_Report_Sweden.pdf.
- 'Beyond the crisis – About a successful Sweden in the new global economy' (*Bortom Krisen – Om ett framgångsrikt Sverige i den nya globala ekonomin*), DS 2009:21 available at: http://www.regeringen.se/content/1/c6/12/68/57/e04110d0.pdf.

- 'The impact of new forms of labour on industrial relations and the evolution of labour law in the European Union', European Parliament IP/A/EMPL/ST/2007-019, available at: http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24292/20110718ATT24292EN.pdf.
- Eriksson, K., 'Project for the study of conciliation, mediation and arbitration', National Report, Sweden, National Mediation Office.

- **Electronic Sources**

- Engblom, S., et al., 'The Parliament has to reject the proposed EU right to strike' (*Riksdagen måste avvisa föreslagen EU-strejrätt*), TCO, 27 April 2012, available at: http://www.tco.se/Templates/Page1____210.aspx?DataID=12639.
- Hamskär, I. and Engblom, S., 'TCO: Does the Government put the economic interests of companies before human rights?' (*TCO: Sätter regeringen företagens ekonomiska intressen fore mänskliga rättigheter?*), TCO, 2 April 2012, available at: http://www.tco.se/Templates/Page1____210.aspx?DataID=12568.
- Larsson, E., 'The ILO rejects the Swedish government's response to *Laval*' (*ILO underkänner svenska regeringens svar om Laval*), Arbetet, 11 January 2012, available at: http://arbetet.se/2012/01/11/ilo-underkanner-svenska-regeringens-svar-om-laval/.
- Lindqvist, U., and Tilly, H., 'Do the employers and the government ignore the work environment?' (*Struntar arbetsgivarna och regeringen i arbetsmiljöarbetet?*), LO, 5 June 2011, available at: http://www.lo.se/home/lo/home.nsf/unidview/7187F44E5FE36B58C12574940032B5FD.
- Hennel, L., 'The majority wants to unravel the Lex Laval' (*Majoritet vill riva Lex Laval*), Svenska Dagbladet, 2 June 2011, available at: http://www.svd.se/nyheter/inrikes/majoritet-vill-riva-lex-laval_6215933.svd.
- Berterud, M., 'Sweden – Amendments to the Foreign Posting Employee Act (1999:678) and the Employment (Co-Determination in the Workplace) Act (1976:580)', Mondaq, 14 September 2010, available at: http://www.mondaq.com/article.asp?articleid=108240.
- Jakbo, R., 'TCO – the Laval case is contrary to human rights' (*TCO-Laval-dom strider mot de mänskliga rättigheterna*), TCO Tidningnen, 21 September 2009, available at: http://www.tcotidningen.se/tco-laval-dom-strider-mot-de-manskliga-rattigheterna.
- Hamskär, I. and Jonsson, C.M., 'The union could be better at standing up for young people' (*Facket kan bli bättre att stå upp för unga*), TCO 5 November 2007, available at: http://www.tco.se/Templates/Page1____210.aspx?DataID=6280.
- Nycander, S., 'Collective labour relations and spontaneous order' (*Kollektiva arbetsmarknadsrelationer som spontan ordning*), Ekonomisk debatt June 2004, available at: http://www.svante-nycander.se/arkivet/spontanordning.htm.
- Berg, A., 'ILO finds against government for interference in collective agreements on retirement', 22 May 2003, available at: http://www.eurofound.europa.eu/eiro/2003/05/feature/se0305102f.htm.

- Berg, A., 'Unions report Sweden to ILO for breaching Conventions', EIRO Online, 18 January 2002, available at: http://www.eurofound.europa.eu/eiro/2002/01/inbrief/se0201113n.htm.
- Berg, A. 'Government proposes compulsory right to work until 67 years of age', EIRO Online, 28 March 2001, available at: http://www.eurofound.europa.eu/eiro/2001/03/feature/se0103186f.htm.
- 'Collective bargaining', ETUI, available at: http://www.worker-participation.eu/National-Industrial-Relations/Countries/Sweden/Collective-Bargaining.
- 'The Swedish Model', National Mediation Office, available at: http://www.mi.se/inenglish/menu_eng_sw_model.html.

Websites

- Equality Ombudsman
- www.do.se.
- European Judicial Network, Legal order – Sweden
- http://ec.europa.eu/civiljustice/legal_order/legal_order_swe_en.htm.
- Central Organisation of Sweden's Workers (SAC)
- www.sac.se.
- Swedish Antidiscrimination Bureaus
- www.adbsverige.se.
- Swedish Mediation Office
- www.mi.se.
- Swedish Work Environment Authority
- www.av.se/

ANNEX 7: NATIONAL REPORT FOR THE UNITED KINGDOM

CONTENTS

LIST OF ABBREVIATIONS

CAC	Central Arbitration Committee
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
CJEU	Court of Justice of the European Union
EU	European Union
EHRC	Equality and Human Rights Commission
ERA	Employment Rights Act 1996
HSE	Health and Safety Executive
TULRCA	Trade Union and Labour Relations Consolidation Act 1992

Please note that the findings of this report are based on literature review and consultations with national stakeholders (a list is included in Annex I of this report). If the source of information was an interviewee, this has been indicated in a footnote.

1. INTRODUCTION TO THE LEGAL FRAMEWORK AND ENFORCEMENT TRADITION IN THE UNITED KINDGOM

The **United Kingdom does not have a written constitution**. British constitutional law has three main sources: legislation enacted by Parliament; case law or judicial precedent; and the law and custom of Parliament. The court's role is not only to interpret the law but also to create laws through judicial precedent where no legislative acts exist. Acts of Parliament – once passed by the House of Commons and House of Lords, and given royal assent – are implemented by the appropriate government department.[1] In addition, the devolved authorities in Northern Ireland, Wales and Scotland have limited legislative powers. Although the United Kingdom is a unitary state, separate legal systems exist in England and Wales; Northern Ireland; and Scotland.

The United Kingdom's membership of the European Union is based on the European Communities Act 1972 which, in effect, gives European legislation primary status in United Kingdom law. International treaties only become part of United Kingdom law when incorporated into the national legal system through legislation.[2]

1.1. National legislation on freedom of association and the right to collective bargaining, age antidiscrimination and the right to health and safety at work

A **freedom to associate** in the United Kingdom belongs to all workers with the exception of the police and the armed forces. Freedom of association is a right contained in all major **international human rights treaties** of which the United Kingdom is a signatory such as the Universal Declaration on Human Rights (Article 20), the International Covenant on Civil and Political Rights (Article 22) and the European Convention on Human Rights - ECHR (Article 11). Overall, Article 11 ECHR has had the greatest impact at domestic level: incorporated into United Kingdom law by the Human Rights Act 1998, it guarantees the "right to freedom of association with others, including the right to form and to join trade unions". The ECHR allows for exemptions to this right in the case of members of the police and the armed forces. The United Kingdom has also signed ILO Conventions No. 87 on Freedom of Association and Protection of the Right to Organise and No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively.

In practice, the freedom to associate in the United Kingdom is guaranteed as a positive right as against one's employer. This means that an employee can bring a civil action before an employment tribunal if he incurs disadvantages due to trade union membership. Thus, s 152 of the **Trade Union and Labour Relations Consolidation Act 1992** (TULRCA) protects against dismissal on grounds of union membership and activities; s 146 covers detriment during employment on these grounds; and s 137 protects against refusal of employment on grounds of union membership. S 146 gives workers a right not to be "subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer" for the sole or main purpose of preventing or deterring him from becoming a member of a trade union, taking part in trade union activities or using trade union services. The section also gives workers a right not to be forced to join a particular trade union. S 146 was amended to its current state following the 2002 **decision by the European Court of Human Rights** in *Wilson and Palmer v United Kingdom*.[3]

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1 For more information see http://www.parliament.uk/about/how/laws/acts/.

2 See Lord Templeman's judgment in *JH Rayner v Department of Trade and Industry* [1988] 3 All ER 257.

3 *Wilson and Palmer v United Kingdom* [2002] ECHR 552.

The Court ruled that "by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State (UK) failed in its positive obligation to secure the enjoyment of rights under art. 11 ECHR". The Court went on to explain that an essential part of freedom of association was the right for employees to instruct or permit a trade union to make representations on their behalf.

In addition to TULRCA, employees' rights are contained in the Employment Rights Act 1996 (ERA). The Act provides for individual employment rights relating *inter alia* to dismissal rights. However, all rights relating to freedom of association and collective bargaining are contained in TULRCA. TURLCA regulates freedom of association and the right of collective bargaining as individual and not collective rights.[4]

There is no right as such to collective bargaining in the United Kingdom. **Collective bargaining has traditionally operated outside a legal framework**, which led to the anomaly, still present today, that collective agreements in the United Kingdom are not legally binding. Instead, they are described as so-called "gentlemen's agreements". This was confirmed in 1969 in *Ford v AUEFW*:[5] collective agreements are not contracts because neither side (trade unions or employers) intends to create legally binding relations. Instead, the parties rely on each other's credibility to uphold the terms of the collective agreement. In relation to individual workers, collective agreements are effective as their terms are incorporated into individual employment contracts.

The voluntary nature of collective bargaining changed with the introduction of Prime Minister Thatcher's programme of economic deregulation and liberalisation, starting in 1979. The right to strike was curbed, the statutory recognition procedure which enabled trade unions to force employers into collective bargaining was abolished, and trade unions were subjected to an unprecedented amount of external regulation and supervision.

Much of this legislation remains in force although the **Employment Relations Act 1999 reintroduced a statutory recognition procedure** for trade unions by employers. This means that collective bargaining can now occur in one of two ways: either on a voluntary basis, as agreed between employers and trade unions with no legal enforcement mechanisms, or under the statutory recognition procedure which forces employers to recognise a trade union for the purposes of collective bargaining provided the union commands enough support among the workforce. Although collective bargaining is declining,[6] when it does occur it takes place at various levels: industry-wide, at national level, at company level, at plant level, or a combination of these.

The concept of **age antidiscrimination** was introduced into the United Kingdom through a European Directive. The Framework Employment Directive (2000/78/EC) required Member States to legislate against discrimination in employment on the grounds of religion or belief, disability, age or sexual orientation. In relation to age, the British government introduced the **Employment Equality (Age) Regulations 2006**, in force from 1st October 2006, to give effect to the Directive. The **Equality Act 2010**, which attempts to harmonise British discrimination laws, supplanted the Regulation. Jurisdiction for claims under the Act in an employment context lies with the employment tribunal.

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4 The House of Lords' and House of Commons' Joint Committee on Human Rights also recognised this, in its deliberations on the Employment Relations Bill in 2003-2004. See Sixth Progress Report at p. 36ssq available at: http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/102/102.pdf.

5 *Ford Motor Co Ltd v AUEFW* [1969] 1 WLR 339.

6 Labour Force Survey 2010. Information on and data of the annual Labour Force Survey can be found at http://www.esds.ac.uk/government/lfs/. An analysis of the 2010 data can be found in the annual Department for Business, Innovation and Skills, *Trade Union Membership 2010*, April 2011 available at: http://www.bis.gov.uk/assets/biscore/employment-matters/docs/t/11-p77-trade-union-membership-2010.pdf.

Article 5 of the Act prohibits discrimination based on a person's age group or apparent age. There are however major exceptions under the Act. Recital 14 of the Directive makes an exception for national retirement ages and Article 6 allows for the justification of direct age discrimination. The lawfulness of compulsory retirement ages was discussed in the United Kingdom following a decision by the Court of Justice of the European Union - **CJEU in Case C-388/07** *R (Age Concern England v. Secretary of State for BERR)*. The case challenged the default retirement age, provided for in the Employment Equality (Age) Regulations 2006, which gave employers the option to dismiss workers aged 65 or over. The CJEU allowed such discrimination as long as it could be objectively and reasonably justified by being shown to pursue a legitimate aim of social policy and was a proportionate means of achieving such an aim.[7] Upon its return to the High Court, the judges held that the government had a legitimate aim in setting a mandatory retirement age and that setting the age at 65 was a proportionate means of achieving that aim.[8] The situation has since changed. The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 repealed the default retirement age, meaning that someone can only be forced to retire when they have reached a specific age if this can be justified.[9]

Exceptions continue to operate for different national minimum wage rates depending on age (Sch. 9 para. 11 Equality Act 2010) and different levels of redundancy payments (Sch. 9 para. 10 Equality Act 2010). Finally, most age-related rules and practices in relation to pension schemes are expressly exempted from the rules on age discrimination.[10]

The main protection of the right to **health and safety at work** can be found in the Health and Safety at Work Act 1974 which imposes criminal liability on employers who breach its provisions. The Health and Safety at Work Act has been complemented **by specific regulations applicable** either to all types of employment (e.g. the Health and Safety (First Aid) Regulations 1981) or to specific hazards, industries or activities (e.g. the Control of Substances Hazardous to Health Regulations 2002).

The European Union has also been instrumental in pushing for higher standards of health and safety at work through a number of Directives which aim to ensure a higher degree of protection of workers at work through not only the implementation of preventive measures but also by placing an emphasis on the information, consultation, balanced participation and training of workers and their representatives. The **Directives have been implemented in the United Kingdom** by a number of Regulations.[11] These Regulations lay down general principles about the safety, maintenance and cleanliness of workplaces. In contrast to the domestic legislation surrounding the Health and Safety at Work Act, the regulations based on EU Directives impose civil rather than criminal liability for their breach.

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7 G. Pitt, *Employment Law*, 8th edition, Sweet and Maxwell, London, 2011.

8 G. Pitt, *Employment Law*, 8th edition, Sweet and Maxwell, London, 2011. For a critique of the case see M. Connolly, 'Forced Retirement, Age Discrimination and the *Heyday* Case' (2009) *Industrial Law Journal* 233.

9 The current coalition government committed itself to reassessing the default retirement age and published a consultation on the topic in July 2010. The majority of responses were in favour of abolishing the default retirement age. The government agreed to phase it out by October 2011. For more information and links to the relevant documents see BIS, *Default Retirement Age* available at: http://www.bis.gov.uk/policies/employment-matters/strategies/default-retirement.

10 G. Pitt, *Employment Law*, 8th edition, Sweet and Maxwell, London, 2011.

11 These are the Management of Health and Safety at Work Regulations 1999 (implementing Directive 89/391/EEC), the Workplace (Health, Safety and Welfare) Regulations 1992 (implementing Directive 89/654/EEC) and the Provision and Use of Work Equipment Regulations 1998 (implementing Directive 89/655/EEC). The Manual Handling Operations Regulations 1992, the Personal Protective Equipment at Work Regulations 2002 and the Health and Safety (Display Screen Equipment) Regulations 1992 complement this framework.

Under s 2 of the **Health and Safety at Work Act 1974**, an employer is obliged to ensure "so far as is reasonably practicable" the health, safety and welfare of all employees. This involves providing safe equipment and a safe working environment including the provision of information, training and supervision so far as necessary to ensure safety. The Act also extends this duty to cover third parties (s 3). Producers (such as designers and manufacturers) and suppliers/importers of products have a duty under s 6 to ensure that their articles or products are safe. Finally, employees themselves have a duty to take care of their own and other peoples' safety under s 7. All of these duties must be complied with "as far as is reasonably practicable." The extent to which workers are covered under the Act has been interpreted broadly by the House of Lords (now Supreme Court). In *R v Associated Octel* (1996)[12], the judges found that any activity even by independent contractors working on a site would fall under the employer's duty to provide for a safe working environment as long as the work could be considered to be part of an employer's undertaking.

1.2. Overview of the enforcement tradition in the United Kingdom

This section provides an overview of the different mechanisms that are in place to enforce freedom of association, the right to collective bargaining, age antidiscrimination, and the right to health and safety at work in the United Kingdom. It discusses the competent court, and describes other institutions that are responsible for the enforcement of one or more workers' rights or are active in dispute settlement or conflict resolution.

The main body which has jurisdiction to hear employment law claims (including claims to enforce freedom of association under ss 137 and 146 TULRCA; claims for age discrimination; and some health and safety claims related to dismissal or redundancy) is the **employment tribunal** which is composed of an employment judge as chair, and two lay members representing both sides of industry. The parties can appeal a decision to an **Employment Appeal Tribunal (EAT)** which usually has the same tripartite structure as employment tribunals. From the EAT appeals on questions of law progress to the Court of Appeal (England, Wales or Northern Ireland) or Court of Session (Scotland) and from there to the Supreme Court (which replaced the Appellate Committee of the House of Lords as the highest court in the United Kingdom in October 2009). Decisions of these courts bind lower courts.

Employment tribunals have jurisdiction over claims which relate to discrimination and the termination of an employee's contract with the exception of claims related to: personal injury, terms requiring the employer to provide living accommodation, intellectual property, breach of confidence, or restrictive covenants. The value of a claim may not exceed £25,000 (€30,800). Larger claims must be brought in a civil court; however, this is rare. Claims before an employment tribunal must be brought within three months, legal aid is not available, and there is no need for legal representation. As employment tribunals are meant to be a cheap and informal way to justice, claimants may appear in person. However, in practice, legal representation is advisable. The **number of claims** brought before tribunals has been growing every year. In 2009/2010 there were 236,100 claims, a 56% increase on the previous year.[13] Not all claims result in tribunal hearings: over two-thirds are withdrawn or settled before a hearing is scheduled.[14] Of those 236,100 claims, 5,200 related to age discrimination.[15]

[12] *R v Associated Octel* [1996] 4 All ER 846.
[13] Ministry of Justice Tribunals Service, *Employment Tribunal and EAT Statistics 2009 – 2010.*
[14] G. Pitt, *Employment Law*, 8th edition, Sweet and Maxwell, London, 2011.
[15] Ministry of Justice Tribunals Service, *Employment Tribunal and EAT Statistics 2009 – 2010.*

The average award in successful age discrimination cases was £10,931 (€13,466).[16] Decisions of an employment tribunal are binding and appeals to the EAT can be on a point of law only. In 2009-2010, the EAT dealt with 1,848 appeals.[17] Of those, the majority were either rejected or withdrawn prior to a hearing; 56 were dismissed at a preliminary hearing stage; and 403 appeals were given a full hearing. The EAT's decisions should be followed by inferior courts, but different EATs are not bound by each other's decisions.

The statutory recognition procedure for trade unions is overseen by the **Central Arbitration Committee (CAC),** a permanent independent body with statutory powers, whose members are appointed by the Secretary of State and include experts in the field of industrial relations. Decisions of the CAC on the recognition of a trade union for the purposes of collective bargaining are binding. The parties may appeal a decision of the CAC to the EAT. However, this does not happen frequently.

Jurisdiction for breaches of health and safety laws depends on whether an employer has committed a civil or criminal wrong. Civil liability only arises under the Regulations implementing European Directives. A breach of the Health and Safety at Work Act 1974 is a criminal wrong.

Civil claims in England and Wales are brought in the local county court unless the value exceeds £50,000 (€61,595) in which case the claim must be brought in the High Court (Article 5 High Court and County Courts Jurisdiction Order 1991). From the High Court, appeals may be made to the Court of Appeal and from there to the Supreme Court. In Scotland, civil claims must be brought before a Sheriff Court.[18] From there an appeal may be brought on a point of law to the Inner House of the Court of Session followed by the Supreme Court.[19]

In **criminal proceedings**, jurisdiction in England and Wales lies with the Magistrates' Court although charges of murder may be brought directly in the Crown Court. An appeal from the Magistrates' Court can progress to the Crown Court on matters of fact and law or to the Administrative Court of Queen's Bench Division of the High Court if it is solely on grounds of law. When the Crown Court acts as an appellate court, appeals from it may be brought to the High Court. When the Crown Court is a court of first instance, appeals are brought to the Criminal Division of the Court of Appeal. From the Court of Appeal and the High Court, parties may appeal to the Supreme Court. In Scotland, cases are brought in the Sheriff Court although murder claims must be brought in the High Court of Justiciary. Appeals in both cases may be brought to the High Court of Justiciary sitting as a Criminal Court of Appeal. There is no further appeal although the Scottish Criminal Cases Review Commission can order a re-examination of a case.

The Equality and Human Rights Commission (EHRC) – an independent public body established by statute in 2006 – also has a mandate to protect and promote the rights contained in the Equality Act, including age discrimination. The EHRC aims to raise awareness of rights and to help employers to develop best practices. It has the power to launch official inquiries and formal investigations into breaches of human rights. The EHRC also has the power to take a limited annual number of legal cases on behalf of individuals to clarify the state of the law.

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[16] Ministry of Justice Tribunals Service, *Employment Tribunal and EAT Statistics 2009 – 2010.* The other core rights were not listed as separate statistics.

[17] Ministry of Justice Tribunals Service, *Employment Tribunal and EAT Statistics 2009 – 2010.*

[18] There is set value for claims which may be raised in a Sheriff Court. However, claims of significant value which are usually more complex should be raised in the Outer House of the Court of Session, please see http://www.bhsscotland.org.uk/uploads/5/4/5/3/5453271/dla_guide.pdf.

[19] Special rules have been drawn up in the Sheriff Court and Outer House of the Court of Session for personal injury claims (Personal Injury Rules), *ibid*.

Health and safety at work is also monitored by the **Health and Safety Executive (HSE)**, an independent regulator who oversees compliance with health and safety legislation through inspectors. The HSE has powers to withdraw approvals, to vary licences, conditions or exemptions, to issue simple cautions, and to prosecute breaches of health and safety legislation. In particular, under the Health and Safety at Work Act 1974, the HSE has the power to issue improvement and prohibition notices to compel an employer to improve upon or to cease a dangerous activity.

Within the workplace, an employer has a duty to consult all staff about health and safety matters. If there is a recognised trade union in the workplace, then the trade union must appoint a **health and safety representative** to consult with the employer (Safety Representatives and Safety Committees Regulations 1977). In workplaces where no union is recognised or where a trade union has refused to appoint a representative, the employer can choose to consult employees directly as individuals, or through elected health and safety representatives, or a combination of the two (Health and Safety (Consultation with Employees) Regulations 1996).

2. FREEDOM OF ASSOCIATION AND THE RIGHT TO COLLECTIVE BARGAINING

2.1. Description of the enforcement mechanisms for freedom of association and the right to collective bargaining

The main enforcement mechanism to ensure **freedom of association** is the employment tribunal where claims for breaches of this freedom are initiated. If an **employment tribunal finds in favour of a claimant, it has the power to (a) make an order declaring the rights of the parties; (b) issue a compensation order; and (c) make a recommendation.** A declaratory order merely states that there has been, for example, detrimental treatment, and is of little practical relevance to claimants. Contrary to the unlimited amount of compensation that a tribunal can award in discrimination cases or for dismissal on health and safety grounds, special rules for compensation apply for unfair dismissal. In determining compensation in those cases, a tribunal will take into account the claimant's age, length of service and weekly pay to determine a basic award (maximum set by the Employment Rights Act (ERA): £12,000 (€14,878) in 2012) and will include a compensatory award (maximum £72,300 (€89,067) in 2012). Up to £25,000 (€30,800) can be awarded for wrongful dismissal or other breaches of contract. Finally, a tribunal can make a recommendation for an action which appears to be necessary and practicable for the purposes of reducing the adverse effect of the complained treatment. This means that in the case of a unfair dismissal, a tribunal may order re-employment.

Workers who bring a claim under ss 146 TULRCA (detriment in employment on grounds of trade union membership or activities) or 152 TULRCA (dismissal on those grounds) need to prove that the dismissal or detrimental treatment was related to union membership or activities. If they prove it, their claim will be considered automatically as one for unfair dismissal including compensation. No minimum length of employment is needed to bring a claim and a special regime of remedies applies for the compensation claim. Under s 156 TULRCA, the basic minimum award is £5,000 (€6,159) and the employee may apply (within seven days of the dismissal) for interim relief to preserve his/her employment pending a full hearing. Such an action must be supported by a trade union certificate confirming the existence of apparently reasonable grounds to bring the complaint.

Collective bargaining is carried out at different levels in the United Kingdom. There is no institutionalised system of collective bargaining. Collective bargaining will take place when an employer recognises a trade union for this purpose either voluntarily or under the statutory recognition procedure. It may take place within one sector, at a national level, at a company level or a combination of these. As trade union strength is declining,[20] there is increasing evidence that multiple trade unions will voluntarily come together to negotiate as one with an employer.[21] 16.8% of private sector employees were covered by a collective agreement in 2010, and 64.5% of public sector employees.[22]

[20] Labour Force Survey 2010.

[21] The proportion of union members in workplaces with more than 25 workers fell from 65% in 1980 to 47% in 1990 and 36% in 1998. More recent data indicate a further decline in membership to a low of 26.6% in 2010. Department for Business, Innovation and Skills, *Trade Union Membership 2010*, April 2011 available at: http://www.bis.gov.uk/assets/biscore/employment-matters/docs/t/11-p77-trade-union-membership-2010.pdf. For more information on this and the changing picture of industrial relations in the United Kingdom see G. Pitt, *Employment Law*, 8th edition, Sweet and Maxwell, London, 2011; DTI, *Collective bargaining and workplace performance*, Employment Relations Research Series No. 12, 2001.

[22] Department for Business, Innovation and Skills, Trade Union Membership 2010, April 2011.

As a recent report explains, "union density was highest in professional occupations at 43.7% whilst sales occupations had the lowest at 12.9%."[23]

Although there is no right to collective bargaining as such in the United Kingdom, collective bargaining has traditionally taken place on a voluntary basis as agreed between trade unions and employers. Trade unions and employers can negotiate to work together and in an appropriate format on a voluntary basis.[24] However, there is some legal support to facilitate collective bargaining if trade unions and employers cannot agree on a format. The Employment Relations Act 1999 introduced a new Schedule A1 into TULRCA which provides for a **statutory recognition procedure**. The procedure is extremely detailed but applies only to employers of 21 or more workers. The Agency Workers Regulations 2010 treats agency workers as employed by the employment agency for this purpose. Collective bargaining in the United Kingdom therefore follows either a voluntary model or the statutory recognition procedure.

In order to apply for recognition, trade unions must hold a certificate of independence issued by the Certification Officer. The procedure for application for the certificate – which confirms that a trade union is "not under the domination or control of an employer" – is outlined in TULRCA.[25] Trade unions that do not apply for a certificate of independence ('non-independent trade unions') are not able to take avail of the statutory recognition process. They can only rely on voluntary recognition.[26] The process for statutory recognition under the Schedule is triggered by one or more trade unions identifying a group of workers (a 'bargaining unit') on whose behalf they seek recognition from the employer in order to engage in collective bargaining. Collective bargaining is defined in s 178(1) TULRCA as negotiations relating to a long list of matters including terms and conditions of employment, recruitment and dismissal, and discipline.

If the employer is not willing to engage in collective bargaining at this stage, the trade union may **apply to the CAC** which must initially decide whether the union commands enough support amongst workers in the bargaining unit in order to merit recognition. At least 10% of the workers in the bargaining unit must be union members and a majority of workers in the unit must be in favour of recognition. Only one application can be made per bargaining unit and if a union is already recognised then another trade union cannot make an application. Hence, employers tend to favour trade unions that are supportive of their views and not necessarily representative of the workforce. However, a joint application can be made by one or more trade unions as long as they agree to work together. An application will fail if any of the workers are already covered by a recognition agreement, even if this is with a non-independent trade union. Next, the CAC must decide whether the bargaining unit is appropriate. The CAC should take into account the compatibility of the unit with effective management, existing national and local bargaining arrangements, and the views of the trade unions and the employer. In *R v CAC Ex p. Kwik-Fit (GB) Ltd* (2002) the Court of Appeal confirmed that the CAC had acted correctly in first considering the appropriateness of the bargaining unit proposed by the trade union. It was not for the CAC to decide whether the unit proposed by the employer was better than that of the union. If the unit suggested by the union was appropriate then there was no need to consider the employer's proposal. The Court of Appeal also made clear that it was reluctant to overturn decisions by the CAC as it was composed of experts.

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[23] Department for Business, Innovation and Skills, Trade Union Membership 2010, April 2011.

[24] For an outline of potential recognition agreements see UNISON, *Bargaining for recognition* available at: http://www.unison.org.uk/file/Negotiating%20Recognition%20Agreements.pdf.

[25] Section 5 TULRCA 1992.

[26] For an annually updated list of all independent trade unions see the Annual Report of the Certification Officer available at: http://www.certoffice.org/Publications/Annual-Reports.aspx.

Following a successful identification of the bargaining unit, the **CAC may order automatic recognition of the trade union** for the purposes of collective bargaining, if a majority of workers in the unit are trade union members.

However, the CAC cannot order automatic recognition and should instead **order a ballot** amongst members of the unit to decide on recognition if: (i) it would be in the interests of good industrial relations to hold a ballot; (ii) a significant number of members within the unit inform the CAC that they do not want the union to represent them; or (iii) other evidence leads the CAC to that conclusion. Between June 2000 and March 2010 there were 714 applications to the CAC, of which 213 resulted in recognition agreements. 98 applications were granted without a ballot and ballots took place in 186 cases (of which 71 did not result in recognition).[27] The ballot is conducted by an independent person appointed by the CAC. The employer has a general duty to cooperate and allow the union reasonable access to the workplace to put forward its case for recognition. Guidance is provided in the Secretary of State's Code of Practice on Access and Unfair Practices during Recognition Ballots (2005). Should the employer fail in its duties then the CAC may order recognition without a ballot. The costs for the ballot are split between the employer and the union. A majority of those balloted need to be in favour of recognition and at least 40% of workers in the unit must participate in the ballot. If a majority is achieved, the CAC will declare recognition, which will usually last for three years.

This declaration by the CAC is binding on employers and trade unions and starts a 30 day period during which the parties must agree on a "method of collective bargaining". If they cannot agree then the CAC has the power to impose a method taking into account the Trade Union Recognition (**Method of Collective Bargaining**) Order 2000. This method will be legally binding upon the parties and forces the employer to negotiate pay, working time and holidays. The method outlined in the Order is very detailed and seems to deter parties from failing to reach an agreement. Up until March 2010, the CAC only made an order in 16 cases.

Overall, the CAC ordered recognition in respect of only 32,500 workers between 2000 and 2010; a very small percentage of the working population as a whole.[28] The number of applications for recognition to the CAC has varied with 42 in 2009/2010 and only 28 in 2010/2011.[29] Voluntary collective bargaining left at the total discretion of the parties is therefore still more successful than the statutory recognition procedure. Taking both methods into account, in 2010, just over 30% of workers were covered by a collective agreement. However, there are significant gaps between the public and private sectors with 64.5% of public sector workers and only 16.8% of workers in the private sector being covered by a collective agreement.[30]

There is no **right to strike** as such in the United Kingdom and the default common law position according to general contractual principles[31] is that workers who participate in industrial action are effectively in breach of their employment contract. In addition, the trade union that organises the industrial action may be liable for damages.[32]

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27 G. Pitt, *Employment Law*, 8th edition, Sweet and Maxwell, London, 2011.

28 G. Pitt, *Employment Law*, 8th edition, Sweet and Maxwell, London, 2011. For a more detailed consideration of the statutory recognition procedure, see also G. Gall, 'The First Ten Years of the Third Statutory Union Recognition Procedure in Britain' 2010 *ILJ* 444.

29 CAC Annual Report 2010 – 2011.

30 Labour Force Survey 2010.

31 For an overview see Deakin S. and Morris G., *Labour Law*, Hart, 5th ed., 2009 at chapter 11.

32 *Taff Vale Rly Co v ASRS* [1901] AC 426.

However, provided the trade union who has called the industrial action has followed the correct procedure for balloting members and notifying the employer of their intention to take industrial action outlined in the TULRCA, the latter will provide immunity to the trade union from liability in tort and protection to the work from dismissal.[33] As a result of the strict legal provisions on strikes, the number of strikes in the United Kingdom is far below the European average and industrial action is not an effective tool to force employers to recognise trade unions or to encourage collective bargaining.[34]

2.2. Practical enforcement situation for the freedom of association and the right to collective bargaining in national law

2.2.1. Major difficulties in the enforcement of the freedom of association and the right to collective bargaining

While the TULRCA comprehensively regulates both rights and the dimensions of both rights are covered in the legislation, the **rights are individual rights and not collective rights**. Trade unions are thus not able to bring a claim and ultimately need to identify an individual who is willing to bring a claim.[35]

There is also discontent about the small business exemption for employers who employ fewer than 21 workers and thus are not subject to the statutory recognition procedure. This **threshold excludes a large number of employers** and leads to a loss of rights for the workers employed in these businesses.[36]

Finally, the 40% threshold for a ballot on recognition to be successful has been criticised. If a ballot is called, a majority of those balloted need to be in favour of recognition and at least 40% of workers in the bargaining unit must participate in the ballot. There is a feeling that this requirement goes beyond what is necessary to ensure a democratic vote and means that the **recognition scheme is slightly unbalanced in favour of the employer**.

2.2.2. Positive experiences on the enforcement of the freedom of association and the right to collective bargaining

Overall, the **statutory recognition procedure** has been well received. A review conducted in 2003 by the government concluded that the scheme was working well. This was confirmed in an independent report written in 2003.[37] That report also suggested that the statutory recognition scheme led to an increase in emphasis by trade unions on securing recognition and has contributed to a rise in the coverage of collective bargaining.

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[33] Section 219 TULRCA 1992.

[34] For more information including statistics see R. Hyman, Despite common press perceptions, the number of strikes in the UK is far below the European average, LSE Blog 25/11/2010.

[35] The House of Lords' and House of Commons' Joint Committee on Human Rights recognised this in its deliberations on the Employment Relations Bill in 2003-2004. See Sixth Progress Report, at p. 36ssq available at: http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/102/102.pdf.

[36] For an opinion of the ILO's Committee of Experts on the Application of Conventions and Recommendations in response to a TUC complaint on this matter see Observation (CEACR) – adopted 2010, published 100th ILC Session (2011) available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:5375054311116361::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2322487,102651,United Kingdom,2010.

[37] S. Wood & S. Moore, 'Reviewing the Statutory Union Recognition (ERA 1999)', *Working Paper*, LSE Centre for Economic Performance, 2003.

2.3. Conclusions on the effectiveness of the enforcement of the freedom of association and the right to collective bargaining in the United Kingdom

Overall, the enforcement of the right to freedom of association and collective bargaining works well in the United Kingdom.

The main enforcement mechanism for freedom of association is the employment tribunal but in practice the respect of this right is not an issue in the United Kingdom.

Collective bargaining is enforced either on a voluntary basis as agreed between employers and trade unions, or under the statutory recognition procedure which forces employers to recognise a trade union for the purposes of collective bargaining, provided the union commands enough support amongst the workforce. The voluntary collective procedure seems more successful than the statutory recognition one, especially because this leads to a more conducive atmosphere between trade unions and employers. However, the statutory recognition procedure has been well received and has helped trade unions in securing recognition and raising overall coverage of collective bargaining.

The main difficulty seems to lie in the declining influence of trade unions as a whole (as a result of low membership figures) and in the fact that the statutory recognition procedure is granted as an individual rather than a collective right meaning that trade unions cannot initiate the recognition procedure. The restrictive criteria for invoking the recognition procedure (e.g. the threshold for support amongst the bargaining unit) limit the number of cases initiated. Moreover, industrial action is subject to strict balloting and notification requirements. As a result, the number of strikes in the United Kingdom is far below the European average and industrial action is not an effective tool to force employers to recognise trade unions or to encourage collective bargaining.

It would be desirable if trade unions could directly bring claims to defend these two rights in court. It would also bring more workers under the statutory recognition procedure if the 40% threshold for a successful ballot and the exemption for small employers (employing fewer than 21 workers) were to be removed.

3. AGE ANTIDISCRIMINATION

3.1. Description of the enforcement mechanisms for age antidiscrimination

Claims for age antidiscrimination (whether direct or indirect) are brought at first instance before an **employment tribunal** from where appeals on points of law progress to the EAT and then through the courts system.

The Equality and Human Rights Commission (EHRC) Code of Practice on Employment and the Explanatory Notes to the Equality Act clarify the concept of direct discrimination and also consider **discrimination by association**, i.e. where somebody is treated less favourably based on his/her association with somebody who possesses a protected characteristic.[38]

In order to bring a claim of **direct discrimination**, it is necessary to show that the employer has treated the claimant less favourably than other staff. This requires a real or a hypothetical comparator (s23 Equality Act 2010). Tribunals and courts have exercised discretion as to what should be regarded as an adequate comparator. The burden of proof in establishing unlawful discrimination lies initially with the claimant and shifts to the employer once the claimant has proved, on the balance of probabilities, facts on which a tribunal could conclude the commission of an unlawful act of discrimination.[39]

A different test applies in the case of **indirect discrimination**.[40] An employer may only justify indirect discrimination if it can show "objectively justified grounds" for the imposition of the provision, criterion or practice.[41] This means that the employer must show a real need for the provision, criterion or practice which must be appropriate and necessary for the undertaking. This case law of the CJEU has been translated as the necessity of showing "proportionate means of achieving a legitimate aim" in the Equality Act. The operation of this test was illustrated in two age discrimination cases, both of which concerned enhanced redundancy schemes that rewarded seniority.[42] The EAT considered both schemes' objectives of rewarding loyalty and favouring older workers as legitimate but stressed the need to examine the justification of the terms and conditions of the schemes.

If an employment tribunal finds in favour of a claimant, it has the power under s 124 Equality Act 2010 to **(a) make an order declaring the rights of the parties; (b) require the employer to pay compensation; and (c) make a recommendation** (see above section 3.1). In terms of compensation, the Court of Appeal held in *Essa v Laing Ltd* that all losses flowing directly from the discriminatory act could be recovered.[43] This was widened in *Chagger v Abbey National Plc* where a claimant could recover damages for "stigma loss" to reflect the stigma associated with the discrimination.[44]

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[38] Discrimination by association was recognised by the CJEU in C-303/06 *Coleman v Attridge Law* [2008] All E.R. (EC) 1105 where the claimant was able to claim discrimination by association as she was the main carer for her disabled son.

[39] *Barton v Investec Henderson Crosthwaite Securities* [2003] IRLR 332 and *Igen Ltd v Wong* [2005] IRLR 258.

[40] Indirect discrimination is defined in s19 of the Equality Act 2010. The Government's Explanatory Notes to the Bill for this Act clarifies that indirect discrimination "occurs when a policy which applies in the same way for everybody has an effect which particularly disadvantages people with a protected characteristic. Where a particular group is disadvantaged in this way, a person in that group is indirectly discriminated against if he or she is put at that disadvantage, unless the person applying the policy can justify it."

[41] *Bilka-Kaufhaus v Weber von Hartz* (170/84) [1986] ECR 1607.

[42] *Loxley v BAE Systems* [2008] IRLR 853 and *MacCulloch v ICI* [2008] IRLR 846.

[43] *Essa v Laing Ltd* [2004] IRLR 313.

[44] *Chagger v Abbey National Plc* [2010] IRLR 47.

Following the decision in *Marshall v Southampton & S W Hants AHA (No. 2)*, there is no upper limit to compensation in discrimination cases related to protected characteristics.[45] Finally, a tribunal can make a recommendation for an action which appears to be necessary and practicable for the purposes of reducing the adverse effect of the discrimination complained of. The tribunal can make specific recommendations related to the claimant (such as recommending a promotion) or general recommendations addressed to the employer (such as a change in recruitment practices). However**, there is little evidence in the case law of this power being used effectively**.[46]

The **EHRC** mentioned in section 2.2 promotes awareness raising activities and has the power to launch official inquiries and formal investigations. It can also take an annual limited number of legal cases on behalf of individuals to clarify the state of the law. However, age discrimination only makes up a very small percentage of cases taken up by the EHRC.[47] The future role of the EHRC is under scrutiny as the Government has halved its workforce and budget and has brought forward a review into the effectiveness of the Commission.[48]

3.2. Practical enforcement situation of age antidiscrimination in national law

3.2.1. Major difficulties in the enforcement of age antidiscrimination

A major initial difficulty in the enforcement of age antidiscrimination is the lack of certainty as to the meaning of the provisions relating to age antidiscrimination. It is also difficult to anticipate the **meaning of 'proportionality'**. The CJEU's case law is not clear on this matter and leads to a lack of certainty on the outcome of age discrimination claims.

There is also a complete **lack of regulations** necessary to enforce the provisions in the Equality Act. The government had intended to introduce relevant regulations in April 2012 but this has been pushed back to at least October 2012.[49] However, it is expected that even when these regulations come into force, they will contain **major exceptions** covering goods and financial services.[50] Thus discrimination on grounds of age in the provision of, for example, financial services (such as bank loans), travel insurance and car insurance could continue.

Overall, there is a **lack of awareness** about the existence of a right to age antidiscrimination and how to enforce this right. Age discrimination seems to be more widely accepted than discrimination on grounds of, for example, race or gender.[51]

While age discrimination is often thought of as affecting older people (e.g. the debate surrounding compulsory retirement), **young people** are also subject to discrimination in terms of access to the labour market.

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45 *Marshall v Southampton & S W Hants AHA (No. 2)* [1994] 2 WLR 392.

46 G. Pitt, *Employment Law*, 8th edition, Sweet and Maxwell, London, 2011. It is not entirely clear why courts are reluctant to make such recommendations. This may be part of a wider perception that courts are generally unwilling to tell employers how to run a business and are therefore unlikely to make recommendations as to how to deal with individual employees.

47 For an overview of the statistics see EHRC, *Legal Enforcement - update from the Equality and Human Rights Commission*, April 2010 available at: http://www.equalityhumanrights.com/legal-and-policy/enforcement/.

48 R. Ramesh, 'Equality and Human Rights Commission has workforce halved', *The Guardian,* 15th May 2012.

49 Age UK, *The law on age discrimination*, Factsheet 77.

50 Age UK, Response to the National Review of Age Discrimination in Health and Social Care Call for Evidence, July 2009 and Age Concern, *Tackling Age Discrimination beyond the Workplace.*

51 Age UK, *The law on age discrimination*, Factsheet 77.

The rising youth unemployment in the United Kingdom, which is often considered a result of a lack of qualifications among younger people, is one such example which has yet to be effectively dealt with.[52]

3.2.2. Positive experiences on the enforcement of age antidiscrimination

The introduction of a right to age antidiscrimination through an EU Directive has ended employer practices of using age to get rid of people without having to give reasons.[53] Overall, the **introduction of the right** has led to increasing awareness of age discrimination and its consequences in the workplace.

The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 which **repealed the default retirement age** of 65 as of 1st October 2011 were also a positive development to combat age discrimination.[54]

3.3. Conclusions on the effectiveness of the enforcement of age antidiscrimination in the United Kingdom

Claims for age discrimination are enforced through the court system. Claims are brought in the first instance before an employment tribunal. If a tribunal finds in favour of a claimant, it has the power to (a) make an order declaring the rights of the parties; (b) require the employer to pay compensation; and (c) make a recommendation. The right to age antidiscrimination is also protected by the Equality and Human Rights Commission (EHRC) which promotes awareness raising and can launch investigation and bring cases to courts.

A major initial difficulty in the enforcement of age antidiscrimination is the lack of certainty as to the meaning of the provisions relating to age antidiscrimination and the extent of the exceptions applicable; in particular, the requirement of proportionality in deciding a claim is very vague. Second, a further difficulty is a lack of necessary regulations to enforce the provisions of the Equality Act although the introduction of the regulations to accompany the Equality Act will make it easier to enforce the right to age antidiscrimination. Third, a lack of awareness amongst potential claimants of the existence of the right has to be noted. However, the abolition of the default retirement age stands out as a major positive experience in the enforcement of the right to age antidiscrimination

Overall, more should be done to provide guidance on the application of the proportionality principle in deciding claims and to raise awareness of the right to age antidiscrimination so people can enforce their rights effectively. This involves changing the acceptability of age discrimination across society and limiting the exemptions to equal treatment (as for minimum wages for young people).

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[52] 21.9% of 16-24-year olds were unemployed in January – March 2012. The number of young people out of work has been steadily climbing since 2006. See House of Commons Library, *Youth Unemployment Statistics*, 16/05/2012. For an overview of the Government's approach to the issue see HM Government, *Supporting Youth Employment* (2011) available at: http://www.number10.gov.uk/wp-content/uploads/2011/09/support-youth-employment.pdf.

[53] Second Survey of Employers' Policies, Practices and Preferences relating to age - SEPPP2: DWP Research Report Number 682 and BIS Employment Relations Research Series 110.

[54] Critical Barnard/Deaking 2012. For an overview of stakeholder views on the abolition of the default retirement age see Review of the Default Retirement Age: Summary of the Stakeholder Evidence: DWP Report 675. For a critique of the abolition of the default retirement age see C. Barnard & S. Deakin, 'Abolishing the DRA has the potential to inflict long-term damage to UK Plc' *New Law Journal*, 3rd February 2012.

4. THE RIGHT TO HEALTH AND SAFETY AT WORK

4.1. Description of the enforcement mechanisms for the right to health and safety at work

The sanction for a breach of the duties **under the Health and Safety at Work Act 1974 is criminal prosecution only** (s 33). **Civil liability only arises under the Regulations implementing European Directives**. The enforcement mechanisms for civil and criminal wrongs were examined under section 2.2.2 above as along with the powers of the Health and Safety Executive (HSE) and of the health and safety representative.

The HSE argued for a number of years that penalties for health and safety offences are too low to be an effective deterrent. **More significant fines were eventually introduced (Health and Safety Offences Act 2008)** for use in extreme cases of accidents, usually those leading to fatalities. Courts seem willing to apply meaningful fines to such cases and the threat of a possible custodial sentence for breach of health and safety seems to act as a deterrent. The current maximum penalties for a breach of the duties contained in the Health and Safety at Work Act 1974 are (in a Magistrates' Court) £20,000 (€24,638) and/or 12 months' imprisonment, or (in a Crown Court) an unlimited fine and/or 2 years' imprisonment. There have been five cases of imprisonment since 1996.[55]

In 2010/2011, there were 171 deaths at work, and 115,000 injuries. The number of fatal injuries has been steadily declining although there was a slight increase in numbers of deaths between 2009/2010 and 2010/2011. The number of injuries has been declining year on year since 1996.[56] Overall, the United Kingdom figures for accidents at work and work-related illnesses were lower than the EU-15 average.[57]

In 2010/2011, HSE prosecuted 551 cases of individual breaches of health and safety legislation. Convictions were secured in 517 cases. HSE prosecuted 912 breaches at an offence level in 2010/2011. Convictions were secured in 774 cases. There are no reliable statistics on the number of civil claims for breaches of health and safety regulations.[58]

Employee health and safety representatives (see 2.2 above) have a duty to investigate potential health and safety hazards; to receive and investigate complaints from employees; and to make representations on these matters to the employer and health and safety inspectors. Under the Safety Representatives and Safety Committees Regulations 1977, representatives can carry out inspections of the workplace at least every three months. Employers must also consult health and safety representatives on the introduction of any measure which may affect workplace health and safety, and provide representatives with relevant training.[59]

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55 HSE Prosecutions 2010 – 2011 available at: http://www.hse.gov.uk/statistics/prosecutions.pdf.

56 For up-to-date statistics see http://www.hse.gov.uk/statistics/index.htm.

57 Eurostat 2008 available at: http://www.hse.gov.uk/statistics/tables/index.htm#europeancomparisons.

58 The Law Society of England and Wales's Gazette (2010) reported a 31.8% rise in the number of personal injury claims between 2006 (914 claims) and 2008 (1,205 claims). However, there is no indication how many of these claims related to breaches of health and safety at work legislation. There are also no specific statistics for claims raised in county courts in England and Wales.

59 Health and Safety (Consultation with Employees) Regulations 1996 and Management of Health and Safety at Work Regulations 1999.

4.2. Practical enforcement situation of the right to health and safety at work in national law

4.2.1. Major difficulties in the enforcement of the right to health and safety at work

Criticisms have been levelled at the relatively low numbers of inspections by health and safety inspectors following a decision by the Government to **reduce the number of inspectors and to prevent enforcing bodies from proactively inspecting a large range of businesses**.[60]

To achieve a well-rounded system of health and safety with fewer inspectors, there should be a focus on **making available clear guidance for employers** in order to facilitate compliance.[61]

4.2.2. Positive experiences on the enforcement of the right to health and safety at work

Overall, the enforcement of the right of health and safety at work in the United Kingdom is working well. An independent report presented to Parliament in November 2011 found "there is a view across the board that the existing regulatory requirements are broadly right".[62]

Health and safety inspectors in the past were criticised for not bringing enough prosecutions. The increased use in recent years of enforcement powers contained in ss 21–24 Health and Safety at Work Act 1974 go some way to rectifying this problem by making inspections more effective (rather than more frequent). Under s 21 inspectors can issue an improvement notice with the threat of prosecution of employers falling below the required standard. Moreover, s 22 allows inspectors to serve a prohibition notice on an employer which requires the termination of an activity if there is a threat of serious personal injury. **These enforcement powers are generally regarded as successful and their use has risen over the last three years** even though the number of inspections has not necessarily increased.[63] According to the HSE, 18,290 notices were issued in 2010/2011, an increase of 16% on the previous year.

4.3. Conclusions on the effectiveness of the enforcement of the right to health and safety at work in the United Kingdom

Overall, the health and safety regime in the United Kingdom is working well. Enforcement is split between the courts, the Health and Safety Executive, the employers and the health and safety representatives. The sanction for a breach of the health and safety rules is criminal prosecution with the possibility of a fine or custodial sentence, or civil liability under the regulations which implement European Directives.

The main issue raised as problematic is the decrease in the number of health and safety inspectors.

On the positive side, the Health and Safety Offences Act 2008 introduced more significant fines which courts seem willing to apply and which seem to act as a deterrent. HSE has adopted a comprehensive approach to good health and safety which includes clear guidance and targeted policies at companies which will make up for a lack of inspections.

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60 DWP, Good Health and Safety, Good for Everyone, 21st March 2011.

61 DWP, Good Health and Safety, Good for Everyone, 21st March 2011.

62 R. Löfstedt, Reclaiming health and safety for all: An independent review of health and safety legislation, Cm. 8219, November 2011.

63 See R. Löfstedt, Reclaiming health and safety for all: An independent review of health and safety legislation, Cm. 8219, November 2011 and G. Pitt, *Employment Law*, 8th edition, Sweet and Maxwell, London, 2011.

The increased use of enforcement powers, which permit the issuing of improvement or prohibition notices, also aims at making inspections more effective.

Suggestions for improvement include provision of more resources to ensure more inspections, targeting enforcement action at occupational diseases and injuries and giving greater support to the health and safety representatives in the workplace. Finally, establishing a good health and safety regime overall should include clearer guidance for employers in order to facilitate compliance.

ANNEXES

Annex I: List of stakeholders contacted for the report

Trade Unions

- Trades Union Congress: Freedom of association/collective bargaining; Age antidiscrimination; Health and safety at work.

Workers Association / NGOs

- Age UK: Age antidiscrimination.

Authorities

- Health and Safety Executive: Health and Safety at work.

Practitioners

- Prof. Catherine Barnard: Freedom of association/collective bargaining; Age antidiscrimination.

Annex II: Information sources (legislation, case-law, literature reviewed and statistics)

National Law

- Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011.
- Agency Workers Regulations 2010.
- Equality Act 2010.
- Health and Safety Offences Act 2008.
- Employment Equality (Age) Regulations 2006.
- Government of Wales Acts 1998 and 2006.
- Northern Ireland Acts 1998 and 2006.
- Control of Substances Hazardous to Health Regulations 2002.
- Personal Protective Equipment at Work Regulations 2002.
- Employment Relations Act 1999.
- Management of Health and Safety at Work Regulations 1999.
- Human Rights Act 1998.
- Provision and Use of Work Equipment Regulations 1998.
- Scotland Act 1998.
- Health and Safety (Consultation with Employees) Regulations 1996.
- Health and Safety (Display Screen Equipment) Regulations 1992.
- Manual Handling Operations Regulations 1992.
- Trade Union and Labour Relations (Consolidation) Act 1992.

- Workplace (Health, Safety and Welfare) Regulations 1992.
- High Court and County Courts Jurisdiction Order 1991.
- Health and Safety (First Aid) Regulations 1981.
- Safety Representatives and Safety Committees Regulations 1977.
- Health and Safety at Work Act 1974.
- European Communities Act 1972.

National Case-Law

- *Chagger v Abbey National Plc* [2010] IRLR 47.
- *Loxley v BAE Systems* [2008] IRLR 853.
- *MacCulloch v ICI* [2008] IRLR 846.
- *Igen Ltd v Wong* [2005] IRLR 258.
- *Essa v Laing Ltd* [2004] IRLR 313.
- *Barton v Investec Henderson Crosthwaite Securities* [2003] IRLR 332.
- *R v CAC Ex p. Kwik-Fit (GB) Ltd* [2002] IRLR 395.
- *R v Associated Octel* [1996] 4 All ER 846.
- *Marshall v Southampton & S W Hants AHA (No. 2)* [1994] 2 WLR 392.
- *JH Rayner v Department of Trade and Industry* [1988] 3 All ER.
- *Ford Motor Co Ltd v AUEFW* [1969] 1 WLR 339.

Literature

- R. Ramesh, 'Equality and Human Rights Commission has workforce halved', *The Guardian,* 15th May 2012.
- G. Pitt, *Employment Law*, 8th edition, Sweet and Maxwell, London, 2011.
- R. Hyman, 'Despite common press perceptions, the number of strikes in the UK is far below the European average', LSE Blog 25/11/2010.
- J. Dean, 'Courts report rise in personal injury claims', *Law Society Gazette*, 17th June 2010.
- G. Gall, 'The First Ten Years of the Third Statutory Union Recognition Procedure in Britain' 2010 *ILJ* 444.
- M. Connolly, 'Forced Retirement, Age Discrimination and the *Heyday* Case' (2009) *Industrial Law Journal* 233.
- S. Deakin and G. Morris, *Labour Law*, Hart, 5th ed., 2009.
- S. Wood & S. Moore, 'Reviewing the Statutory Union Recognition (ERA 1999)', *Working Paper*, LSE Centre for Economic Performance, 2003.

National Policy Documents and Guidelines

- House of Commons Library, *Youth Unemployment Statistics*, 16/05/2012.
- Age UK, *The law on age discrimination*, Factsheet 77, April 2012.
- HM Government, *Supporting Youth Employment,* 2011.
- R. Löfstedt, *Reclaiming health and safety for all: An independent review of health and safety legislation*, Cm. 8219, November 2011.
- CAC Annual Report 2010 – 2011.
- HSE Prosecutions 2010 – 2011.
- Department for Business, Innovation and Skills, *Trade Union Membership 2010*, April 2011.
- Second Survey of Employers' Policies, Practices and Preferences relating to age - SEPPP2: DWP Research Report Number 682 July 2010.
- EHRC, *Legal Enforcement - update from the Equality and Human Rights Commission*, April 2010.
- EHRC Code of Practice on Employment, 2010.
- Labour Force Survey 2010.
- Ministry of Justice Tribunals Service, *Employment Tribunal and EAT Statistics 2009 – 2010.*
- BIS Employment Relations Research Series 110, 2010.
- Age UK, Response to the National Review of Age Discrimination in Health, 2009.
- Social Care Call for Evidence, July 2009.
- HSE Enforcement Policy 2009.
- Age Concern, *Tackling Age Discrimination beyond the Workplace*, 2006.
- HSE & TUC, *Your health, your safety: A guide for workers*, 2004.
- House of Lords' and House of Commons' Joint Committee on Human Rights in its deliberations on the Employment Relations Bill in 2003-2004.
- DTI, *Collective bargaining and workplace performance*, Employment Relations Research Series No. 12, 2001.
- Annual Reports of the Certification Officer available at: http://www.certoffice.org/Publications/Annual-Reports.aspx.

NOTES

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